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THE HAROLD J. SIEBENTHALER
LECTURE SERIES

The annual Harold J. Siebenthaler Lecture Series was established by the Chase College Foundation in 1978. The purpose of the Lecture Series is to enrich the curriculum of the College of Law by affording it the benefit of the wisdom, scholarship, and learning of eminent persons in various fields of law.

The Lecture Series was named in honor of Harold J. Siebenthaler, a 1914 graduate of the McDonald Institute (the predecessor institution to Salmon P. Chase College of Law). Mr. Siebenthaler was a native Cincinnatian who both garnered and provided support and leadership for the College of Law. Mr. Siebenthaler was a founding partner in the Cincinnati law firm of Frost and Jacobs with whom he was associated throughout his professional career. His leadership of the College of Law included many years of service on the College's Board of Trustees and, until his death in 1988, Mr. Siebenthaler held the position of president emeritus of the Chase College Foundation.

This year's lecture was delivered on February 23, 1990, by Douglas A. Kahn, the Paul G. Kauper Professor of Law, University of Michigan. Professor Kahn earned his baccalaureate degree from the University of North Carolina and his juris doctor degree with honors from George Washington University Law School. Professor Kahn has been Professor of Law at the University of Michigan since 1964, teaching taxation, estate planning, and legal process, and has been the Paul G. Kauper Professor since 1984. He has been visiting professor at Stanford University, Duke University, University of North Carolina, University of Florida, and Fordham University.

Professor Kahn is a member of the American College of Trust and Estate Counsel, the International Academy of Estate and Trust Law, the American College of Tax Counsel, and the Board of Visitors of Fordham University Law School. He is faculty representative to the Big Ten Athletic Conference, and member of the Michigan Board in Control of Intercollegiate Athletics. He has co-authored Corporate Taxation (3rd edition 1989) and Federal Taxation of Gifts, Trusts and Estates and has authored The Federal Income Tax, Basic Corporate Taxation, and numerous articles and book reviews.
THE TWO FACES OF TAX NEUTRALITY: DO THEY INTERACT OR ARE THEY MUTUALLY EXCLUSIVE?

Douglas A. Kahn

The term “tax neutrality” refers to at least two quite different concepts. In its most common usage, tax neutrality refers to tax provisions that conform to an ideal tax system. A tax provision that is consistent with such an ideal system is described as “neutral.” A tax provision that cannot be reconciled with the ideal system is sometimes referred to as a “tax expenditure” item. I will discuss tax expenditures later in this paper.

As one might expect, various persons' visions of an ideal tax system will differ. However, those that refer to tax neutrality in this sense do share a fairly similar concept of what constitutes an ideal tax system.

Virtually all versions of an ideal tax are grounded on the so-called “Haig-Simons definition of income.” That definition is described and explained most thoroughly in a book (Personal Income Taxation) authored by an economist, Henry Simons, a little over 50 years ago. Simons defined “personal income” as the increase in a taxpayer's wealth over a specified period of time (typically a period of a year) plus the market value of the taxpayer's consumption during that period. In his own words, Simons said that income was

the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and the end of the period in question. In other words, it is merely the result obtained by adding consumption during the period to 'wealth' at the end of the period and then subtracting 'wealth' at the beginning.

2. SIMONS, supra note 1, at 50.
By way of illustration, Simons adopts the analogy of treating society as a giant partnership and an individual's income as the sum of his withdrawals (consumption) from the partnership and the change in value of his equity or interest in the partnership.

It is possible to view the Haig-Simons formula as an equation rather than as a definition of income. Income can thus be viewed merely as a surrogate for the accumulation of wealth and the consumption of goods and services, that is, the income tax is determined by a taxpayer's consumption of goods and services and on his accumulation of wealth. As we shall see, even the tax on the accumulation of wealth element is a tax on consumption.

How does the Haig-Simons definition relate to the income tax system currently in place? An expenditure that does not involve the consumption of goods or services results in a reduction of the taxpayer's wealth and so should reduce the taxpayer's tax base. Accordingly, expenditures that do not involve consumption should be allowable as deductions from a taxpayer's gross income. On the other hand, if an expenditure does involve a consumption, it should be taxed to the taxpayer; and so no deduction should be allowed against the taxpayer's gross income. The reduction of the taxpayer's wealth is balanced by the market value of the taxpayer's consumption. Income tax deductions, therefore, can be viewed as the system for taxing consumptions and for not taxing non-consumption expenditures.

Consumption denotes the value of rights exercised in the destruction of economic goods, which include services. It refers to a taxpayer's exhaustion of a portion of society's assets. To the extent that a person uses up society's goods, it is fair to allocate the burdens of the cost of running the government to that person. By denying a deduction for the cost of a consumption, the effect is to tax the consumption itself.

One thesis of this paper is that the Haig-Simons definition of income has been used for purposes which it cannot properly serve. The definition is a useful tool, but it does more harm than good when its evaluative attributes are exaggerated. In seeking to restrict the usefulness of Haig-Simons, I do not wish to minimize the true value that it has as an analytic tool by imposing a structure on the income tax system so that the role that broad
tax principles play in the system becomes comprehensible. In some of the illustrations that I discuss later in this paper, I will attempt to indicate the ways in which the definition is useful as well as some areas in which it provides no analytic assistance. At this point, I will digress briefly to demonstrate how the Haig-Simons approach can help explain why the taxation of earnings from savings is characterized by some commentators as double taxation, which therefore promotes consumption.

Under the Haig-Simons definition of income, the income tax can be seen to be more closely related to a consumption tax than would appear on its face. In essence, it is a tax on present consumption and on the present value of a taxpayer's future consumption. So, if I earn a dollar in Year One and use that dollar to purchase a dollar's worth of entertainment, I will be taxed on the dollar of income; but the income can be seen as merely representing the one dollar of consumption that I had. If I do not spend the dollar and, instead, save it, I am taxed on the present value of the consumption that I can enjoy at some future date when I (or someone else) spend the dollar for a consumption item.

When the dollar is spent at a future date, it will not incur a tax then because it was taxed in the prior year in which it was earned. However, the present value in Year One of a dollar that is to be spent in some future year (for example, Year Four) is less than one dollar. That is, the value in Year One of a person's consumption of a dollar's value in that year is greater than the value in Year One of a person's consumption of a dollar's value in Year Four. The value in Year One will be the amount consumed in Year Four discounted to present value, that is, the present value of a dollar to be used in a future year is the amount in the current year that is needed to produce the amount expended in the future year if invested at a specified rate of interest, typically compounded interest. The amount of discount depends upon the interest rate that is employed and the frequency of compounding, if a compounded rate is used.

Given the need to discount, one might question whether it is fair to tax a dollar saved at its current value when it will not

be used for consumption until some future date. It is fair to do so since the dollar earned in Year One can be invested to produce income, and in Year Four, the taxpayer can expend on consumption not only the original dollar saved but also the income earned thereon between Years One and Four. For example, if the taxpayer expends in Year Four the saved dollar plus the amount earned thereon, the Year One discounted value of the amount expended will equal one dollar if the rate of income earned is equal to the discount rate.

One difficulty with the above analysis is that the income earned on the saved dollar will be subjected to taxation when earned. Since the justification for taxing in Year One the dollar saved in that year is that the present value of the amount that ultimately will be expended on consumption, the tax on that dollar incorporates a tax on the discounted value of one dollar spent in a future year plus a tax on the income earned on the investment of that dollar. Therefore, to tax separately each year's income from the investment of the dollar amounts to double taxation.

Returning to the question of tax neutrality, Simons contended that it is important to apply neutral standards in determining whether to adopt or retain tax provisions in order that the tax levies be fairly allocated. This concept of a fair allocation is often identified as "horizontal and vertical equity." Horizontal equity requires that any two persons having similar income positions should have a similar amount of tax liability. Vertical equity means that persons having disparate income positions should have comparably disparate tax liabilities. Apart from a desire for a just tax system in an absolute sense, the public's willingness to accept a tax system will be severely damaged if the public's perception of the system is that it is unfair, that is, that some persons are not bearing their fair share of the tax burden.5

The late Professor Stanley Surrey embellished the tax neutrality concept and characterized tax provisions that violate the

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5. Neither Simons nor his intellectual progeny discuss whether the more important consideration is the public's perception of fairness or actual fairness. The two do not necessarily go together. A completely proper and fair deduction that is permitted to one small group may be perceived by many others to be improper. Unless the justification for the deduction can be explained to the larger group's satisfaction, the deduction may have to be repealed, even if that causes the small group to be taxed on a disproportionately high income base. The perception of fairness by a substantial portion of taxpayers may be more important than the reality.
concept of neutrality and that benefit some taxpayers as "tax expenditures," that is, a failure to tax someone according to neutral principles was characterized by Surrey as a governmental expenditure which is essentially identical to a direct outlay of governmental funds. While Professor Surrey did not originate the "tax expenditure" concept, he is primarily responsible for its acceptance and popularity. The concept has been widely adopted; for example, the Congressional Budget Act of 1974 (Public Law 93-344) requires that a report on tax expenditures be submitted to the House and Senate Budget Committees and that a list of tax expenditures be included in the Budget of the United States Government.

According to the tax expenditure concept, a preferential treatment provided by the income tax laws to a group of taxpayers is identical to the Government's making a direct payment to that group. Preferential tax treatments, therefore, are listed as governmental expenditures. Preferential treatments include: the allowance of an unwarranted deduction, the failure to include a revenue item in gross income, the granting of a credit, a differential tax rate, or some other tax benefit.

As initially conceived, the principal standard that was employed to identify tax expenditures was the Haig-Simons definition of income, that is, a tax provision that fails to conform to the Haig-Simons ideal tax structure and that benefits a group of taxpayers is deemed to violate the principle of tax neutrality and so constitutes a tax expenditure in the amount of income tax that was not collected because of the preferential tax treatment. However, a Haig-Simons comparison is not the only standard against which a tax provision is measured. If Congress adopts a general principle as part of its tax system and if, for some policy purpose, Congress does not apply that principle uniformly, any departure from the normal principle that benefits certain taxpayers is treated as a tax expenditure. It is not always obvious, however, which tax provision is to be classified as the normal principle and which provision is the exception. In practice, it would seem that the notion of tax neutrality, as measured by an

ideal tax structure, will influence the determination of which tax provisions are the normal ones.

The Tax Expenditure Budgets that are prepared by the Staff of the Joint Committee on Taxation and by the Congressional Budget Office rely on both Haig-Simons neutrality principles and on departures from normal Congressional policies to compile their lists of tax expenditures. Since 1983, the U.S. Office of Management and Budget, in formulating its tax expenditure budget, has purported to rely exclusively on departures from normal Congressional policies. It appears, however, that the tax neutrality concept, as determined by reference to an ideal tax system, has greatly influenced the determination of which provisions depart from normal Congressional policies.

Since the Haig-Simons definition plays such an important part in the formulation of the several tax expenditure budgets, it is worth examining how useful that definition is in determining the appropriateness of a given tax provision. By the way, it is noteworthy that tax expenditure budgets list only expenditures; they make no mention of tax receipts from the taxation of items that would be excluded if a neutral view of income, as determined by Haig-Simons concepts or by reference to "normal" tax policies, were adopted.

Simons himself admitted that "it is not possible, in practice, to define, establish or adhere closely to an ideal tax base." There often are reasons to repudiate or disregard the direction established by an objective definition of income, and "such concessions are often the part of wisdom and sound policy." Also, the proper tax treatment of some items cannot be determined merely by referring to income definitions, that is, the deductibility of expenses that have a business purpose but also provide a personal benefit to the taxpayer. Simons claimed no more than that his definition provides a tool of analysis which, though crude, is useful. To see the limitations of that tool, let us consider the application of the definition to a few selected tax items.

10. Id. at 30-31.
Under the tax law, a donee does not have income from receiving a gift as that term is defined by case law.\(^{11}\) Simons states that there is no justification for excluding gifts from a donee's income since it increases his wealth. Simons does recognize that in certain circumstances it would be administratively difficult to apply an income tax to gifts and in certain other circumstances it would be harsh to tax a gift fully to the donee; but, in general, he believed that gifts should be taxed.\(^{12}\) One example of a gift that it would be difficult to tax is the partaking of a meal at a friend's home. Similarly, it would be difficult to administer a tax on the loan of a car to a friend or a family member for an errand. Another problem would arise in connection with support provided to family members. If the support is a legal obligation of the transferor, would it be proper to treat it as a gift? Even if the transferor is not legally obligated for support (for example, where a parent or grandparent pays the expenses of a college education of a child who is over the age of 18 years and where there is no legal obligation to pay those expenses), it does not appear to be good tax policy to tax the child. In any event, there are reasons for excluding gifts from income even where the gift does not create some special problem such as those noted above.

The funds donated by a donor were previously taxed to the donor when he earned them. Drawing upon the Haig-Simons approach, the taxation of the donor's prior retention of his earnings can be viewed as a tax on the consumption that will be obtained from those funds at some future date. Putting it differently, when a taxpayer is taxed on a dollar of income, he is entitled to a dollar of consumption (without allowing for depletion due to the payment of a tax liability thereon). In what respect do the funds transferred by a donor represent a consumption of goods or services? If it is not a consumption, then the taxation of the donor for a dollar earned by him and the taxation of that dollar as income to the donee when the dollar is transferred to the donee constitutes double taxation. The gift transaction should be contrasted to a taxpayer's purchase of another's services in which event the payment to the employee represents a consumption by the payer; the taxation of the payee on the receipt of the payment does not constitute double taxation since the payer

\(^{11}\) I.R.C. \(\S\) 102 (1986).

\(^{12}\) SIMONS, supra note 1, at 125-147.
has obtained his consumption for the dollar that was previously taxed to him.

Simons apparently would treat the gift of funds to a donee as a consumption by the donor, and so he did not deem a tax on the donee to constitute double taxation. The transfer of funds from a donor to a donee does not, however, exhaust any of society's goods; the exhaustion of a good would seem to be a *sine qua non* for a consumption. An alternative approach, suggested by Professor Wayne Barnett in several unpublished papers, is to treat the transfer to the donee as a commitment by the donor to have the donee expend the funds on the donor's behalf. Thus, the donor is permitted either to use the taxed funds for his own consumption or to obtain a vicarious consumption by having another use the funds. My point is that the choice between these two alternative approaches (Simons' approach which taxes the gift and Barnett's approach which excludes it) is not aided by referring to the Haig-Simons definition. But, Haig-Simons is helpful in focusing the resolution of this issue on questions concerning consumption.

The determination as to the propriety of excluding gifts from income will turn ultimately on one's view as to what taxpayers should be allowed to do with their taxed income. If one believes that it is proper to permit a taxpayer to have someone else use the taxed funds for consumption, then gifts should be excluded. If gifts are not excluded, the donor's capacity to transfer his taxed income to others for their consumption will be impaired since the taxation of the gift as income to the donee will reduce the amount available to the donee. This issue turns on attitudes and values in which Haig-Simons plays no part.

To take another example (and one to which Simons himself refers), consider the deductibility of expenses that assist in the production of income and also satisfy personal needs or benefits. Child care expenses and commuting expenses are two illustrations of this type of expenditure. I will discuss child care expenses later in this paper. Another example is the question of how the tax law should treat expenses incurred in obtaining a professional or trade education. An education can qualify the taxpayer to earn income in a profession or trade, and so the expenses incurred in obtaining that education can be viewed as a business expense or as a capital expenditure that can be depreciated over a period no longer than the taxpayer's life expectancy. On the other hand,
an education also has personal, noneconomic benefits to a taxpayer, that is, it benefits the taxpayer in ways that have no bearing on the production of income. Should a deduction or amortization be permitted for such expenditures or should the personal aspect of the education control so that no deduction will be allowed? The current tax law denies any deduction or amortization for educational expenses incurred in qualifying to enter a new trade or profession. The rationale for that treatment is that the personal aspect of the education is so inextricably entwined with the business aspect that it is not possible to allocate the expense between them. On the other hand, once the taxpayer has entered a trade or profession, his expenses in obtaining an education that maintains or improves his skills are deductible. Yet, the education of a person already engaged in his trade or profession provides no less personal benefit than does an education obtained prior to entering the trade or profession. Haig-Simons provides no insight that would help determine whether the current law's treatment is proper or whether some other approach would be preferable.

One possible rationale for the current treatment of educational expenses is that it is analogous to the replacement depreciation method (sometimes referred to as the "retirement-replacement-betterment accounting method"). Replacement depreciation is a method under which the initial investment in certain assets is capitalized and neither deducted nor amortized. As each item is replaced, a deduction is taken for the cost of the replacement. Restaurants may use that method for the treatment of their chinaware. Similarly, the expenditure for obtaining the education needed to enter a trade or profession is capitalized, and the expenditures incurred after entering the trade or profession, even some that are capital in nature, are currently deducted.

Horizontal and vertical equity concepts, which underlie tax neutrality, are not helpful in determining whether the comparison

15. Treas. Reg. §1.162-5(a), (c) (as amended in 1967).
of income should be made on an individual basis or on the basis of a family unit or whether it should be made on an individual basis for some purposes and on a family unit basis for other purposes. They also are not helpful in defining a family unit. One reason that Haig-Simons does not help resolve the question of the proper treatment of gifts is because it does not address the question of the extent to which several persons should be treated as a single taxable unit for some purposes. Of course, gifts are only one example of tax problems that raise questions involving the choice of a taxable unit.

The current treatment of gifts by the tax law has made the measurement of a taxable unit turn, for certain limited purposes, on the donor's intent in making the transfer. If the transfer proceeds from detached and disinterested generosity of the donor, then the donor and the donee are treated as a single taxable unit for the purpose of permitting the unit one consumption. Also, the donee's gain on the sale or exchange of donated property is determined by using the basis that the donor had in that property with certain adjustments. Thus, for the limited purpose of measuring the donee's gain, the donor and the donee are treated as a single taxable unit.

As I already mentioned, a workable income tax system cannot comply fully with Haig-Simons or with any other version of an ideal income measurement. Practical, administrative considerations will prevent the adoption of such systems. The doctrine of realization and the availability of reporting on the cash receipts and disbursements method do violence to the Haig-Simons definition; and yet (with only a few exceptions such as the treatment of original issue discount) the tax law requires realization and permits cash method reporting. Simons himself concedes that the requirement of realization is a practical necessity.

Another major distortion to Haig-Simons occurs because the tax laws do not tax imputed income, especially imputed income from the use of consumer properties such as a residence, a yacht, an art collection, and similar items. For example, if a taxpayer purchases valuable paintings, he not only escapes taxation on the unrealized appreciation of a painting over the years that he holds

18. SIMONS, supra note 1, at 153.
it, he also escapes taxation on the income he obtains from the paintings by having them available on his wall for his viewing. Once the inclusion of these treatments in the tax system are accepted as necessary (or at least as highly desirable) for policy reasons, then the tax system has so departed from the Haig-Simons ideal that other provisions that fail to conform to Haig-Simons cannot be attacked on neutrality grounds. Indeed, since the tax system does not adhere to Haig-Simons in many substantial respects, the conformance of a single provision to the Haig-Simons model may cause greater inequity than would another approach that disregards Haig-Simons. Before considering some illustrations, we should turn to the second meaning or “face” of tax neutrality to see how that concept relates to the Haig-Simons standard.

Tax neutrality is sometimes used to describe a tax system that does not create a bias that could influence a taxpayer to choose one investment or course of action over another. For example, if the tax on the income from rental realty is less than the tax on the same amount of income from bonds, the tax law will distort the market choice between investing in realty or in bonds. As used in this context, a tax neutral provision is one that permits the choice of investment or action to be made on the basis of market or personal considerations without influence from the tax laws. The question arises whether there is a conflict between seeking this type of neutrality and the Haig-Simons neutrality of a tax system that conforms to an ideal definition of income.

First, note that the imposition of a tax system will influence some market decisions no matter how the system is designed. The system can be designed to be neutral as to certain choices, but there will always be others over which the tax laws exert an influence. Take this example. Fred is engaged in a self-employed business, and his income is taxed at a 50 percent rate (an unrealistic figure under current tax schedules but one that simplifies computations). In effect, the government has become a partner with Fred so that it takes 50 percent of his income and bears 50 percent of his business expenses. In considering whether to incur a business expense, such as an advertising expense, Fred will take into account that he will bear only 50 percent of the cost. His silent partner will bear the other 50 percent. This type of consideration becomes especially weighty if the business expense is one that contains an element of personal benefit to Fred.
Travel and entertainment expenses are examples of such expenses, especially when the trip is to an attractive location. It is true that only 80 percent of the cost of Fred's meals can be deducted, but that limitation only reduces the government's share of Fred's costs. The government nevertheless will bear a portion of the expense of Fred's meals while on travel status, and that will influence Fred's decision whether to undertake the business trip.

As I previously noted, a number of doctrines that contravene Haig-Simons are embraced in the tax system because they are necessary to its orderly administration. The operation of these doctrines often creates a tax bias that skews personal and financial choices. The question can then arise as to whether tax adjustments should be adopted to eliminate that bias. Let us consider several illustrations.

H and W have been engaged in separate businesses for several years before they had a child. W took time off from work to have their child and to care for the infant for the first two months of his life. W now has to decide whether to terminate her job and to stay home and care for her child or to pay for child care and return to her work.

First, let us consider whether the cost of child care should be a deductible expense. The child care expense bears elements of a personal consumption (an expense of having and caring for a child) but also bears elements of a business expense of producing income. W might contend that the child care expense is a necessary expense of freeing her to earn income since she could not work if the child's needs were not met. On the other hand, before the child was born, W was able to earn the same income without incurring child care expenses. The expense can be viewed as a cost of having and caring for a child, which is a personal expenditure. Indeed, even after birth, W does not have to care for the child; she could place the child up for adoption. The child care cost is incurred primarily because W chose to have and to retain the child. Let us assume for purposes of this illustration that my analysis is correct. The expense of having the child cared for is a personal expenditure that cannot be deducted under normal definitions of a business expense and would not be deductible.

under the Haig-Simons approach. Even so, that does not definitively resolve the question of whether the expense should be deductible.

H and W file a joint tax return, and their marginal tax bracket is 50 percent (again, an unrealistic figure). The annual cost of providing child care for the infant will be $5,000. If W stays home and takes care of the child herself, she will provide services valued at $5,000 to the family. Because the tax laws do not tax imputed income, the family will retain $5,000 of income after taxes from W's services.

Instead, W can return to work, earn income of $8,000 before taxes are deducted, and pay $5,000 to provide child care for her infant. Since W's $8,000 will be taxed at a 50 percent rate, she will retain only $4,000 after taxes as compared to the $5,000 that she would retain from providing child care services herself. The failure to tax W's imputed services creates a tax bias in favor of staying home and not retaining her job. In these facts, the tax bias is especially strong since W will net $1,000 less, after taxes, than she must pay for the child care expenses. So, it will cost W $1,000 a year in cash outlay to continue her job instead of staying home. W may nevertheless decide to continue her employment, but the tax bias will make that a more difficult decision.

Even if W could earn $15,000 annually from her job so that she would show a net profit of $2,500 after paying her taxes and child care costs, there would still be a tax bias against her returning to work. The failure to tax the imputed income that W would produce by staying home reduces the financial benefits that W would otherwise have obtained by choosing work over staying home.

Congress could eliminate the tax bias described above. One method of elimination would be to tax W on imputed income from caring for her child, but that course is subject to administrative and practical objections. An alternative approach is to grant W a deduction for the expenses she incurs for child care. If that cost is deductible, there is no tax benefit to either choice that W might make; the choice can be made on the basis of personal and financial consideration unhindered by tax influence.20

20. Current tax law provides a credit for a portion of child care expenses rather than
Note, however, that granting W a deduction for child care expenses will increase another tax bias that exists. The decision whether to have a child will take many factors into account including the cost of caring for the child. Since a parent can provide the service of child care and since the resulting income to the family from receiving the benefit of that service is not taxed, the cost of child care is lower than it would be if the imputed income were taxed. That will influence the decision whether to have a baby. If child care expenses are nondeductible, the tax bias will operate only when one of the spouses intends to stay home and care for the baby. If child care expenses are made deductible, that will expand the circumstances in which there is a tax bias favoring a decision to have a child.

From this scenario, we can see that the existence of a tax bias is not a sufficient justification for granting a tax benefit that removes the bias. The removal of one tax bias will almost certainly create a new bias or expand an existing one as to some other choice. In determining whether to grant a deduction for child care expenses, Congress should determine whether there are social, economic or political reasons to prevent the tax laws from influencing the choice on which the existing bias operates, and Congress should determine whether the resulting creation of a new bias is of less importance than the removal of the bias in question.

Congress also should consider whether there is available some other arrangement that would resolve the problem and whether that other arrangement is preferable. For example, the child care problem might be addressed by having the federal government provide (or encourage others to provide) free child care facilities. That choice raises the question as to the importance of decentralizing the decision for the selection of the type of child care to be employed. Note, however, that the provision of free child care services raises another tax issue, namely, should the recip-

\footnotesize{to allow a deduction. Section 21 of the Internal Revenue Code of 1986. Note that a limited amount of the value of dependent care assistance that an employer provides for an employee may be excluded from the employee’s gross income by § 129 of the Internal Revenue Code of 1986. The credit allowed for child and dependent care expenses and the exclusion of employer provided dependent care assistance are both included as tax expenditure items in the several Tax Expenditure Budgets made available to Congress. See, e.g., Joint Committee on Taxation, Estimates of Federal Tax Expenditures for Fiscal Years 1990-1994 (JCS-4-89) February 25, 1989, p. 16.}
ient of such services be taxed on their value? The decision to grant a tax credit for a limited amount of child care expenses poses a similar problem. The granting of a tax credit is akin to disbursing funds to the parents, and the question then arises whether the amount of credit obtained by a person should be included in that person's gross income and subjected to income taxation.

The Haig-Simons principles are of no help whatsoever in deciding whether to adopt an adjustment that neutralizes one tax bias and opens another. The bias against W's working was created by a necessary departure from the Haig-Simons model (the failure to tax imputed income); there is no reason why there should be a presumption against correcting that bias because the correcting provision would also contravene Haig-Simons principles. Just because the decision to neutralize a tax bias by granting a deduction will rest on economic and social policy considerations, that does not turn the tax benefit obtained from such a deduction into a governmental subsidy.

The "principle" of neutralizing tax influences on choices is not a true principle. Tax influences cannot be eliminated, and therefore they are a necessary cost of having an income tax system. The so-called principle of neutrality is merely a recognition that the cost of such a tax influence is sometimes too great because considerations of economic or social policy dictate that some specific choice should be made on market or personal grounds. The neutralizing of the tax influence on such a choice often will require adopting a provision that does not conform to the Haig-Simons definition of income. In that respect, this type of neutrality can be said to conflict with Haig-Simons neutrality.

Haig-Simons is useful to explain the skeletal framework of an income tax system as pictured in a kind of blueprint. It provides a conceptual structure. Once construction began on the system, however, it became clear that the blueprint was inadequate in many important respects. The final product bears only a slight resemblance to the original plan. The departure from that plan is so extensive that there is no sense in attempting to conform current additions to and modifications of the structure to the original or "ideal" concept.

That is not to say that there are no overarching concepts to the income tax system. Rather, it is to say that the income tax system is much more complex than the structure delineated by
the relatively simple formula that Simons pronounced. The popularity of Haig-Simons may be attributable partly to its simplicity but primarily, as shown below, it is because it serves a useful political purpose in underpinning the tax expenditure concept. The beauty of the tax expenditure concept is that it purports to embody a highly sophisticated view of the tax system when, in fact, it rests on a rather simplistic premise.

Returning to the tax expenditure budget, it rests partly on the notion that there is a normal or neutral tax system and that a provision that departs from that ideal system lacks neutrality and violates equity requirements. The proponents of this budget do not claim that any departure from tax neutrality is wrong, but they maintain that anyone seeking the enactment of such a departure has the burden of proving that there are strong policy considerations to justify the distortion of an ideal system, the same type of policy considerations that should accompany a decision to make a direct expenditure of Government funds. By imposing a heavy burden of persuasion on those seeking to retain or adopt provisions that benefit some taxpayers, the proponents of the tax expenditure concept have gained a political advantage. They have loaded the political dice in their favor since they tend to disapprove of such provisions.

The profit-oriented activities of an individual typically are not isolated from his personal needs and desires. People are not purely income-making machines. It is common, therefore, to find that an individual will have mixed profit and personal motives for making an expenditure. One objection to the tax expenditure budget concept is that it draws a kind of Maginot Line in which the tax provisions that fall on one side of the line are classified as expenditures and the provisions on the other side are considered to be proper. Rather than viewing tax provisions as falling on one side of the line or the other (a sort of “one is either pregnant or not pregnant approach”), it would be more useful to view tax provisions as lying on a spectrum, their place on which depends upon how closely associated the provision is to income measurement. The further removed that a provision lies from income measurement, the greater the policy justification for that provision should be. However, the comparison of different provisions and the policy justifications for them cannot be reduced to some precise or mathematical formula. The fact alone that the
adoption of a tax provision rests on policy considerations should not make that provision suspect. Virtually all tax provisions rest on policy considerations since there are very few items that relate exclusively to income measurement.

Take one last illustration. Jeff pays $100,000 cash to purchase a residence. Thereafter, he lives in the house which continually appreciates in value. Jeff is not taxed on the income he obtains by using the house, and he is not taxed on the house's appreciation so long as he continues to hold the property. While Jeff gets no depreciation deduction for the use of the house (quite properly since he recognizes no income therefrom), he is allowed a deduction for the property taxes imposed on the property.

Jeff has a friend, Mary, who purchases a house for $100,000 at the same time that Jeff acquired his. Mary had $100,000 capital available to put into the house, but she chose instead to borrow $100,000 from a bank at 10 percent interest. Mary chose to borrow the needed funds because she can invest her $100,000 of capital in a partnership and earn a 15 percent return. So each year, Mary will earn $15,000 on the partnership investment of her $100,000 capital, and she will make an interest payment of $10,000 on the loan. However, the income that she earns on her partnership investment is taxable to her. Assuming a 50 percent marginal rate, Mary would retain only $7,500 of the income from her partnership investment after taxes. If the interest payment that Mary must make were not deductible, Mary's earnings from her partnership investment would yield $2,500 less than that interest payment. Mary would probably be better off not to borrow the money and to invest her $100,000 in the purchase of the house. On the other hand, if the interest payment is deductible, Mary can make the interest payment out of her partnership investment income and still have $2,500 left over after taxes. To allow an interest deduction encourages Mary to invest her funds more efficiently in that she can produce a larger rate of return from the partnership investment than she can obtain by using the funds to purchase the house. By granting an interest deduction, the tax law has neutralized the tax consequences of choosing between investing in a residence and borrowing the funds so that capital can be invested elsewhere. The deduction also neutralizes the tax treatment of home purchasers who do not have the capital available to put into their homes and so must borrow
the needed funds. The merits of providing that neutrality depend upon policy considerations that have nought to do with so-called normal definitions of income.

The failure to tax homeowners on the imputed rental value of their homes creates a tax bias in favor of purchasing a home rather than to rent one. That bias is expanded by permitting an interest deduction for those who borrow the purchase price of the home (or some part thereof). Congress perceives the bias for home ownership to be an acceptable cost of obtaining its policy objectives. Indeed, it is likely that the interest deduction was granted in order to create a tax bias against renting and in favor of home ownership. Congress may believe that home ownership fosters social stability and promotes good citizenship. Note that even without an interest deduction, the failure to tax imputed income creates a tax bias against renting, but the adoption of the interest deduction enhances that bias.

Should the interest deduction be classified as a tax expenditure or government subsidy? To the extent that the deduction neutralizes the tax treatment of those who have sufficient capital to invest in a residence and of those who borrow the purchase price, it can be seen as merely negating a market distortion that the tax law introduced. But, to the extent that the deduction induces persons to purchase homes rather than to rent, it can be viewed as a subsidy to home ownership. How should the determination be made as to whether the allowance of the deduction is a subsidy or merely a neutralizer? Should it turn on the subjective purpose of Congress, assuming one can determine some institutional purpose for that body, or should it be determined by the consequences of the provision regardless of the Congressional motive? The difficulty of resolving that issue and the questionable utility of any characterization that might be reached are part of the reasons that a tax expenditure budget is so misleading.

There are numerous types of tax provisions which I have not discussed in this paper. For example, I have not discussed the appropriateness of the personal deductions, such as medical expenses, casualty and theft losses. Those deductions raise the question of whether profit measurement should be the exclusive

21. The deduction for interest on a home mortgage is included in the list of tax expenditure items by all three tax expenditure budgets.
goal of a definition of “income” for tax purposes. Stating it differently, are those items to be treated as consumptions for income tax purposes? For example, if after earning $1,000 for his services, A were to collect that amount in cash from the paymaster, and if immediately after receiving his pay in cash, A were mugged and relieved of the $1,000, should A be treated as having consumed the $1,000 for tax purposes so that A will be taxed on that amount? As to charitable contributions, one question is whether the allowance of a deduction is a subsidy for charitable activities or whether it is a proper recognition that a charitable contribution is not a consumption by the donor and is not a deferred and vicarious consumption by the donor when the charitable donee expends the donated funds. I will leave such issues for a later paper or for others to explore. As to charitable and medical expenses, there already exists an excellent article by Professor William Andrews and a thoughtful reply by Professor Mark Kelman. Haig-Simons is not very useful in determining how to characterize such items.

The inclusion of such personal items in a tax expenditure budget indicates that they are not proper tax allowances because they do not come within the definition of income. That may be so, but that determination rests on a complex analysis of the goals and function of an income tax system, the need for which analysis is obscured by placing the item on a list of non-qualifying provisions. Perhaps the major fault of the tax expenditure budget is that it permits a relatively few people to make these judgments without revealing the basis of their determinations much less exposing to the legislators the nature of their analysis and the values on which their ultimate conclusion rests. It suggests an application of a more mechanical and precise standard than exists.

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COMMENTS

ADMISSIBILITY OF SCIENTIFIC EXPERT TESTIMONY: IS BAD SCIENCE MAKING LAW?

Vicki Christian

I. INTRODUCTION

The subject of admissibility of scientific expert testimony has been extensively analyzed and debated in the last decade. The importance of using a quality legal standard for identifying when a scientific opinion should be admitted into evidence cannot be overstated. Scientific expert opinions typically have major influence with juries, thus impacting on the outcome of litigation.¹ There is also a need for a special rule of admissibility on the judicial level to guide judges in their decisions as to what evidence to receive.² A distinct rule of admissibility will restrain both judge and jury from giving undeserved weight to scientific evidence.³

This article presents the various admissibility standards for scientific testimony applied by the courts. First, the history, criticisms, and benefits of the traditional Frye Rule will be discussed and analyzed.⁴ Second, the viability of the Frye Rule since the enactment of the Federal Rules of Evidence will be debated.⁵ The debate focuses on the Sixth Circuit’s application

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¹. Shelton, The Need for Scientific Data in Chemical Exposure Litigation, 30 FOR THE DEF. 18, 24 (No. 12, 1988).
³. Id. at 93.
⁴. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) (The Frye Rule requires that the basis from which a deduction is made be accepted in the scientific field in which it belongs).
of the *Frye* Rule both traditionally in criminal cases,⁶ and recently in civil litigation,⁷ and discusses why the *Frye* Rule is preferred. Third, the balancing test in Federal Rule of Evidence 403 will be analyzed to determine if this flexible approach should become the standard.⁸ Consideration is also given to commentators' proposals for amending the Federal Rules of Evidence in an attempt to resolve the uncertainties surrounding admissibility of scientific expert testimony.

II. THE HISTORICAL *FRYE* RULE

The leading case on the admissibility of scientific expert testimony is *Frye v. United States*.⁹ In *Frye*, the defendant offered expert testimony regarding the results of a systolic blood pressure deception test, similar to the modern-day lie detector test. The trial court denied admission of the results into evidence, and the defendant appealed.¹⁰ In affirming the trial court's judgment, the United States Court of Appeals for the District of Columbia Circuit, developed what has become known as the *Frye* Rule or the *Frye* general acceptance standard:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.¹¹

The court then concluded that the systolic blood pressure test was inadmissible because the test had not gained standing and scientific recognition among physiological and psychological authorities.¹²

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⁸. See United States v. Downing, 753 F.2d 1224, 1237 (3d Cir. 1985).
⁹. 293 F. 1013 (D.C. Cir. 1923).
¹⁰. Id. at 1013-14.
¹¹. Id. at 1014.
¹². Id.
The Frye opinion itself is not particularly impressive; it consists of only two pages, including headnotes, and is easy to read. The rule it announced, however, gradually became the accepted legal test for the admissibility of novel scientific evidence in both state and federal courts.\textsuperscript{13}

In 1973, fifty years after Frye, the United States Court of Appeals for the Ninth Circuit, developed a four-part test for determining the admissibility of scientific expert testimony in United States v. Amaral.\textsuperscript{14} The court in Amaral recognized that the Frye Rule reduces the risk that scientific testimony will confuse, mislead, or prejudice the jury.\textsuperscript{15} It therefore included the Frye Rule as one of the elements in its four part test for determining the admissibility of scientific testimony.\textsuperscript{16} This four part test, adopted and applied in both criminal and civil cases,\textsuperscript{17}

\textsuperscript{14} 488 F.2d 1148 (9th Cir. 1973). Defendant was on trial for the robbery of a national bank and sought to introduce evidence regarding the credibility of eyewitness identification. Id. at 1150. The proffered testimony was intended to show the effect of stress on perception and the unreliability of eyewitness identification. Id. at 1153. The trial court excluded the testimony because it was based on a subject within the full understanding of the average man. Id.
\textsuperscript{15} Id. at 1152.
\textsuperscript{16} Id.
\textsuperscript{17} See Novak v. United States, 865 F.2d 718 (6th Cir. 1989) (The court reversed the judgment of the lower court because the expert testimony about the direct connection between the flu shot and decedent’s fatal dermatomyositis was not generally accepted by the medical community); Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir. 1988) (The district court’s award of damages for the plaintiffs’ immune systems’ impairments, allegedly caused by defendant’s actions, was reversed because the lower court improperly admitted and relied on expert testimony based on clinical ecology which is not a generally accepted explanatory theory, and which does not meet the required four-part test for admissibility); United States v. Kozinski, 821 F.2d 1186 (6th Cir. 1987) (The defendants’ convictions of willfully holding two people in involuntary servitude were reversed and remanded because the prosecutor failed to prove that the expert’s theory, that defendant exerted psychological pressure on the workers resulting in their involuntary servitude, was scientifically recognized); United States v. Christophe, 833 F.2d 1296, 1300 (9th Cir. 1987) (The lower court’s exclusion of expert testimony on eyewitness identification was proper because the testimony did not meet the Amaral four-part test); United States v. Distler, 671 F.2d 954 (6th Cir. 1981) (The defendant’s conviction for violating the Federal Water Pollution and Control Act was affirmed after finding the expert testimony on gas chromatograph analysis met the four factor test); United States v. Brady, 595 F.2d 359, 362 (6th Cir. 1979) (The Amaral test was used to analyze whether the lower court was correct in admitting expert testimony which identified the hair found on one of the victims as belonging to the defendant); United States v. Brown, 557 F.2d 541 (6th Cir. 1977) (Defendant’s conviction for bombing a planned parenthood clinic was reversed...
requires: (1) the witness be a qualified expert; (2) the witness testify about a subject not within the full understanding of the average person; (3) the testimony must conform to a generally accepted explanatory theory; and (4) the probative value of the testimony must outweigh its prejudicial effect.\textsuperscript{18}

The \textit{Frye} Rule has been highly criticized despite its wide use. One court held that it would be better to admit the scientific testimony in the same way as other expert testimony and let its weight be attacked by cross-examination and refutation.\textsuperscript{19} This theory is rebutted by the argument that "when the witness advocating the latest 'scientific' evidence looks and talks like Dr. Marcus Welby, that judicial admonition foretells an adverse verdict grounded on little science and lots of sympathy."\textsuperscript{20}

Other criticisms of \textit{Frye} include claims that it deprives courts of relevant evidence, it is difficult to apply and that the standard for what constitutes general acceptance remains an issue.\textsuperscript{21} Supporters of the \textit{Frye} Rule, however, argue that although it is conservative, the test ensures novel evidence is trustworthy and places the responsibility for making the reliability decision on the experts and away from the courts.\textsuperscript{22}

\section*{III. EFFECT OF THE FEDERAL RULES OF EVIDENCE ON ADMISSIBILITY STANDARDS}

The viability of the \textit{Frye} Rule has been questioned and debated since the enactment of the Federal Rules of Evidence in 1975.

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\textsuperscript{18} United States v. Amaral, 488 F.2d 1148, 1153 (9th Cir. 1973).

\textsuperscript{19} United States v. Bailer, 519 F.2d 463, 466 (4th Cir.), cert. denied, 423 U.S. 1019 (1975). Defendant was convicted of telephoning bomb threats and he appealed the trial court's admission of expert testimony identifying his voice by spectrographic analysis. The Court of Appeals affirmed the judgment after finding adequate safeguards were present to protect against a prejudiced verdict. \textit{Id.} at 466-67.


\textsuperscript{22} Rossi, \textit{Modern Evidence and the Expert Witness}, 12 \textit{Litigation} 18, 20 (No. 1, 1985).
A. Relevant Federal Rules of Evidence

Federal Rule of Evidence 702 governs the chief criteria in determining whether expert testimony is admissible: whether it will help the trier of fact.23 The trial court will find the testimony helpful if the subject is not wholly within ordinary experience, some training is needed to understand the evidence or if the state of existing knowledge is such that the expert's opinion is not speculative.24 Under Rule 702, before an expert can testify, the judge must be convinced he is competent to testify on the subject by having special knowledge, skill, experience, training or education.25 Generally, all that is required, is that the expert have knowledge of the subject which enables him to aid the trier of fact.26 Rule 702 has generally been interpreted liberally toward admitting proffered evidence where there is a doubt as to its helpfulness or the expert's qualifications.27

After determining admissibility under Rule 702, the court must next determine if the basis of the expert testimony is that which experts in the field would rely on as governed by Federal Rule of Evidence 703.28 Rule 703 requires courts to examine the reliability of expert sources. This examination of reasonable reliance requires at least that "the expert base his or her opinion on sufficient factual data, not rely on hearsay deemed unreliable by other experts in the field, and assert conclusions with sufficient

24. Id. at 782.
28. Rule 703 of the Federal Rules of Evidence provides:
The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to [the expert] at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
Fed. R. Evid. 703.
certainty to be useful given applicable burdens of proof."29 Even if the trial judge finds the proffered testimony admissible under Rule 702 and Rule 703, he may still exclude it, under Rule 403, if he finds that its probative value would be outweighed by the danger of its prejudicial effect.30

B. Affect of the Federal Rules of Evidence's Silence About the Frye Rule

The issue of the Frye Rule is not mentioned in Federal Rule of Evidence 702 or in the Advisory Committee's Notes.31 Rule 702 only requires that the testimony "assist the trier of fact to understand the evidence or to determine a fact in issue."32 The silence of the Frye Rule in the Federal Rules of Evidence has resulted in great controversy.33

A number of federal courts have implied that the silence of the Frye Rule in the Federal Rules of Evidence indicates its abandonment of the Frye general acceptance standard.34 Many of these courts now assess the admissibility of novel scientific testimony by balancing the reliability of the evidence against the likelihood that the introduction of the testimony will in some way overwhelm or mislead the jury.35

30. Minton, supra note 23, at 784. Rule 403 of the Federal Rules of Evidence provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.
32. See supra note 23, Rule 702.
35. United States v. Downing, 753 F.2d 1224, 1237 (3d Cir. 1985) (The court specifically rejected the Frye test. The court vacated the defendant's conviction and remanded the case to determine if the defendant's proffered expert testimony on the reliability of eyewitness identification should have been admitted by using the balancing analysis the court describes therein); See also United States v. Williams, 583 F.2d 1194, 1198 (2d Cir. 1978) (Defendant's conviction of federal narcotics law violations was affirmed after the
In *United States v. Williams*, the United States Court of Appeals for the Second Circuit, affirmed the district court's decision to admit a spectrographic voice analysis, identifying defendant's voice as that being on a tape relating to the alleged crime. In determining whether to admit the evidence, the court first found the evidence probative and material on the basis it would establish that the defendant's voice was used in relation to the alleged crime. Next, the court determined the evidence was reliable by evaluating several reliability factors: potential rate of error, existence and maintenance of standards, care and concern with which the scientific technique was used and whether it tends to lend itself to abuse, and the presence of failsafe characteristics. After determining the reliability of the evidence, the court weighed it against the danger that the evidence could confuse or mislead the jury. The court recognized that an objection to evidence, on the grounds that it may mislead or confuse the jury because of its "aura of mystic infallibility", may be maintained whenever experts testify on the basis of scientific analysis. The court found, however, this concern has less force when the science involves steps easily comprehended and evaluated by the jury. This is the case with spectrographic voice analysis since the jury can examine the spectrograms, match for themselves the patterns of the two voices, hear the tapes, and court used the balancing test analysis to determine that the expert testimony on spectrographic analysis was properly admitted; United States v. Baller, 519 F.2d 463 (4th Cir.), *cert. denied*, 423 U.S. 1019 (1975) (Defendant's conviction of telephoning bomb threats was affirmed based on a finding that the expert testimony identifying defendant's voice by spectrographic analysis was admissible because it did not prejudice or mislead the jury). 36, 583 F.2d 1194 (2d. Cir. 1978), *cert. denied*, 439 U.S. 1117 (1979). Defendants were convicted on federal narcotics law violations and Williams appealed the admission of spectrographic voice analysis as identification evidence. *Id.* at 1196. The United States Court of Appeals affirmed the judgment on a finding that the record demonstrated that virtually all the safeguards were employed. *Id.* at 1200. 37, 40. *Id.* at 1201. 38, 41. *Id.* at 1196. 39, *Id.* at 1198-99. Other factors used to determine reliability have included: (1) the "novelty" of the new technique, its relationship to established scientific techniques and analysis; (2) existence of specialized literature dealing with the technique; qualifications of the expert witness; and (3) the non-judicial uses to which scientific techniques are put. United States v. Downing, 753 F.2d 1224, 1238-39 (3d Cir. 1985). 42. *Id.*
otherwise evaluate the evidence. Furthermore, the court was secure in admitting the testimony because the normal safeguards of challenging the credibility and reliability of both the expert and the scientific technique was available through cross-examination and through the testimony of opposing experts.

On the contrary, other federal courts have implied the silence in the Federal Rules of Evidence regarding the Frye Rule as indicating acceptance. Since the Federal Rules of Evidence do not claim to be an all inclusive statement of evidentiary precedent, and with Frye being considered the majority view at the time the rules were enacted, proponents view the general acceptance test as remaining intact.

The Frye Rule has generally been applied, along with the other elements of Amaral's four-part test, in determining admissibility of scientific testimony in criminal cases. The court stated in United States v. Green that the test for admissibility expounded in Federal Rule of Evidence 702 was deficient when applied to criminal cases and thus adopted Amaral's test for use in criminal appeals.

The United States Court of Appeals for the Sixth Circuit, in its decision of United States v. Brown, reversed the trial court's admission of ion microscopic analysis, also known as hair analysis, on the basis that it did not conform to a generally accepted explanatory theory. The court applied the Frye Rule, along with Amaral's other factors, despite its recognition of a trend in the

43. Id.
44. Id. at 1200. See also United States v. Bailer, 519 F.2d 463 (4th Cir.), cert. denied, 423 U.S. 1019 (1975). United States Court of Appeals affirmed the trial court's admission of scientifically questionable evidence because it found adequate safeguards had been employed to protect the defendant from a prejudicial verdict. Id. at 466-67.
47. 488 F.2d 1148, 1153 (9th Cir. 1973).
49. 548 F.2d 1261 (6th Cir. 1977).
50. See supra note 23, Rule 702.
51. Green, 548 F.2d at 1268.
federal courts toward the admission of expert testimony in reliance on Federal Rule of Evidence 702. The court applied the Frye Rule because it feared that the danger of expert testimony being admitted without a proper foundation would tend to confuse or mislead the jury, thus defeating the defendant's right to a fair trial. The Sixth Circuit, along with other jurisdictions, continues to apply the Frye Rule in other criminal cases.

In 1988, the Sixth Circuit applied the Frye Rule in determining whether to admit scientific expert testimony in a civil case, Sterling v. Velsicol Chemical Corporation. Sterling established the Sixth Circuit's view that in order to meet the admissibility standard under Federal Rule of Evidence 702, the four-part Amaral test must be met.

In Sterling, the defendant appealed the judgment awarding damages to the plaintiffs, for their alleged immune systems' impairments, on the grounds that the judgment was based on scientific testimony regarding clinical ecology. Evidence presented showed that clinical ecology was rejected by leading professional societies in the allergy and immunology medical community including both the American Academy of Allergy and Immunology and the California Medical Association. Both of these professional organizations have "rejected clinical ecology as an unproven methodology lacking any scientific basis in either

53. Id. at 556. See supra note 23, Rule 702.
54. Brown, 557 F.2d at 556.
55. See United States v. Distler, 671 F.2d 954 (6th Cir. 1981) (Defendant's conviction for violating the Federal Water Pollution and Control Act was upheld because gas chromatograph analysis was generally accepted in its scientific field); United States v. Brady, 595 F.2d 359 (6th Cir. 1979) (Expert's testimony did not expressly state that the microscopic hair analysis was generally accepted in the scientific community. The error fell short, however, of what is required for a reversal absent an objection).
56. 855 F.2d 1188 (6th Cir. 1988). Defendant used its 242 acres of rural land as a landfill and dumped 300,000 55-gallon steel drums containing ultrahazardous liquid chemical waste into it. The trial court found that defendant's use of the landfill contaminated the local water supply and was the proximate cause of plaintiffs' injuries. One of the arguments on appeal was that the trial court improperly admitted testimony purporting to show Velsicol's chemicals harmed the plaintiffs' immune systems because the expert's opinion was based on clinical ecology, which is not a generally accepted explanatory theory. Id. at 1192-94.
57. Id. at 1208.
58. Id. at 1207-08. Clinical ecology is based on a belief that exposure to certain factors including anxiety, radiation, certain chemicals, and some household substances can cause dysregulation of the immune system. Id. at 1208.
59. Id. at 1208.
fact or theory."\(^{60}\) Few medical associations have endorsed either the methodology or the results of the clinical ecology experiments.\(^{61}\) The court concluded the plaintiffs' experts' opinions were insufficient because they lacked the requisite clinical tests and a widely accepted medical basis for their conclusions. The court held that the plaintiffs failed to sustain their burden of proof for proving that Velsicol Chemical Corporation's contamination of the ground water caused damage to the plaintiffs' immune systems.\(^{62}\)

The Sixth Circuit again applied the Frye element of the Amaral test in the civil case of Novak v. United States.\(^{63}\) In Novak, the court found that the trial court erred in admitting the plaintiff's expert testimony relating the causation of the plaintiff's husband's fatal dermatomyositis to the swine flu vaccine he received.\(^{64}\) The court based its decision on one of its earlier holdings: \(^{65}\) "Since our decision in United States v. Green, ... we have required that in order for the testimony of experts to be admissible under Federal Rule of Evidence 702, it must conform to a 'generally accepted explanatory theory' [which is] accepted or recognized by the relevant scientific or medical community."\(^{66}\)

In Novak, the plaintiff's experts conceded that they could not assert with any degree of medical certainty or medical community support what actually caused dermatomyositis.\(^{67}\) The theory advanced by the plaintiff was a claim that the swine flu vaccine was the direct cause of the decedent's fatal dermatomyositis.\(^{68}\) Because this theory is neither "widely accepted" nor "generally accepted" in the medical community, the Court of Appeals found

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60. Id.
61. Id.
62. Id. at 1209.
63. 865 F.2d 718 (6th Cir. 1989). Plaintiff sued the United States claiming that her husband died as a result of a swine flu vaccine which was administered under the Swine Flu Act. Id. at 719. The United States District Court entered judgment for the plaintiff and the United States appealed.
64. Id. at 722. Dermatomyositis is a disease "thought to affect the body's auto-immune system causing it to destroy muscle and/or skin tissue," but its origin is unknown. Id. at 720.
65. United States v. Green, 548 F.2d 1261 (6th Cir. 1977). United States Court of Appeals reversed the trial court's judgment on a finding that it erred in admitting certain expert testimony because the four-part Amaral test was not met. Id. at 1208.
67. Id. at 723.
68. Id.
the theories to be merely conjectural; therefore, the trial court erred in admitting them. 69

IV. THE BALANCING TEST V. THE FRYE GENERAL ACCEPTANCE RULE – OR IS SOMETHING ELSE BETTER?

A. The Balancing Test

Many courts have adopted the more flexible approach to the admissibility of scientific expert testimony, the balancing test, which merely requires that the reliability of the technique used outweigh its prejudicial effect, as stated in Federal Rule of Evidence 403. 70 Proponents of the more liberal view argue that the Frye Rule does not adequately respond to our rapidly changing technology because of its conservatism and inflexibility. 71 The theory underlying the balancing rule is that "[u]nless an exaggerated popular opinion of the accuracy of a particular technique makes its use prejudicial or likely to mislead the jury, it is better to admit relevant scientific evidence in the same manner as other expert testimony and allow its weight to be attacked by cross-examination . . . ." 72

Other commentators, however, have persuasively argued that if a scientist is required to demonstrate the validity of a new or unproven theory by a certain amount of proof, the legal standard should require at least that same standard of proof. 73 Modern scientists cannot always distinguish between natural and unnatural causes, thus in our search for an effective legal system

69. Id. at 725. See also Kubs v. United States, 537 F. Supp. 560 (E.D. Wis. 1982).
73. Shelton, The Need For Scientific Data in Chemical Exposure Litigation, 30 FOR THE DEF. 18, 19 (No. 12, 1988).
"[t]hat which science cannot accomplish ... should not be permitted in the courtroom based on expediency."74

Opponents of the balancing rule also fear verdicts will be rendered on the basis of emotion instead of evidence.75 Richardson v. Richardson-Merrell, Inc., is a perfect example of a jury rendering a clearly erroneous verdict based on unsubstantiated expert testimony.76 In Richardson, Mrs. Richardson, on her doctor's prescription, took Bendectin during her pregnancy77 to reduce morning sickness.78 Mrs. Richardson gave birth to a baby girl, Carita, with severe limb reduction defects.79 At trial, plaintiffs presented Dr. Alan K. Drone's, Richardson's main witness on causation, “expert” opinion that "'to a reasonable degree of medical certainty,' Bendectin was not only 'capable' of causing birth defects in humans, but that it had, in fact, caused those limb defects with which Carita Richardson had been born."80 The district court found it relevant that Dr. Drone had not performed his own studies, nor had he published his criticisms of other studies, yet he testified in contradiction to all the experts who had completed extensive studies and published their results in the last twenty years since Bendectin has been questioned.81

In response to Dr. Drone’s testimony, the defense offered the expert testimony of Dr. Raymond Seltser82 who testified to and reviewed the scientific literature on Bendectin.83 This evidence demonstrated nearly universal scientific consensus that Bendectin does not increase the risk of congenital limb malformations.84

Despite the defense’s overwhelming evidence negating causation, when the district court submitted the issue of causation to

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74. Id.
77. Mrs. Richardson, then age 38, took two Bendectin tablets at night and one in the morning from about the 24th through the 56th day of post-conception, known as the period of organogenesis—the time during which a baby’s limbs form in utero. Id. at 824.
78. Id.
79. Id.
80. Id. at 826.
81. Id.
82. Id.
83. Id. The trial court noted that literature is the ultimate authority and most respected collection of knowledge to the scientist. The Bendectin literature failed to show that Bendectin is a teratogen to a scientifically acceptable degree of accuracy. Id.
84. Id. at 826-27.
the jury, the jury found Bendectin was a substance capable of causing birth defects and was the proximate cause of Carita's birth defects. The district court then granted, and the Court of Appeals affirmed, a judgment notwithstanding the verdict, in favor of Richardson-Merrell, Inc., because based on the evidence no reasonable jury could find Bendectin caused Carita's birth defects.8 Even though the court rectified the error of the jury, the admission of Dr. Drone's unfounded opinion resulted in the announcement of a groundless verdict which creates negative public views of our legal system when a judgment notwithstanding the verdict is warranted and granted. This case illustrates the need for courts to exercise greater control when admitting expert testimony.

Other criticisms of the balancing test, supporting the view that it is not a satisfactory means for determining admissibility of scientific expert testimony, include the argument that it does not ensure rebuttal experts will be available since no requirement of general acceptance is present. The lack of experts familiar with the proffered technique results in inadequate protection of the opposing party. Cross-examination will probably be ineffective without a knowledgeable expert educating opposing counsel on the underlying scientific theories.

The balancing test also shifts the burden of proving admissibility onto the opponent by requiring him to prove the tendency of the evidence to mislead, prejudice, or confuse the jury. Frye, on the other hand, allows the opponent to wait until the proponent of the evidence proves general acceptance before he is required to come forward with rebutting experts.

Lastly, commentators dispute the argument that the balancing test is easier to apply than Frye. They assert the same problems exist in both rules: dealing with procedural problems and defining the standards for measuring evidence. The criticism of the balancing test demonstrates its flaws which fail to ensure that

85. Id. at 825.
86. Id.
87. Minton, supra note 23, at 784-85.
88. Id. at 785.
89. Id.
90. Id.
91. Id. at 786.
the use of the test will result in well-reasoned and substantiated judgments.

B. The Frye General Acceptance Rule

Although a growing number of state and federal courts are rejecting the Frye Rule, a majority of federal courts still apply it. Proponents of Frye argue it is an assurance that scientific expert testimony presented to the jury is reliable by giving those most qualified in the scientific methodology the responsibility for assessing its general validity. Under the Frye Rule, the proponent of the evidence must show that the basis of the testimony has gained general acceptance in its field.

Commentators have suggested the Frye Rule ensures rebuttal experts are available to opponents of the evidence, thus providing an opportunity, if the evidence is admitted, for the opponent to critically examine the expert opinion’s validity. The principle justification for the Rule, however, is that it shields the courts from unreliable scientific evidence. One commentator succinctly expressed his fear of what can occur by an abandonment of Frye: “While a certain amount of error must be tolerated in a legal system composed of fallible human beings, erroneous legal judgments founded on erroneous scientific theories will ultimately erode the respect and obedience necessary for the legal system to function.” A judge had a similar opinion when an attorney suggested loosening the Frye standard, “Counsel ‘suggested that the Frye test should be abolished, implying that expert opinion on scientific tests should be admissible in every case, if one of the parties found an expert who said the test was reliable. We believe that such a rule would produce utter chaos and [result in] injustice ...’”

Commentators criticize Frye claiming that it deprives courts of relevant evidence because it does not react to the rapid technological and scientific growth of our nation. In rebuttal to

92. Giannelli, supra note 21, at 196.
93. Id. at 191.
95. Giannelli, supra note 21, at 191.
97. Id. (quoting State v. Washington, 229 Kan. 47, 622 P.2d 986, 991 (1981)).
98. Moenssens, supra note 13, at 561.
this argument, it is reasonable to speculate that since the new scientific methodology did not produce a sufficient amount of proof to satisfy other experts in its own field, it should not be deemed a sufficient foundation for a legal decision. Commentators also criticize Frye as being too vague. They question how to determine the field where the underlying technique belongs, what type of evidence the rule covers, and what constitutes general acceptance.

Courts have asserted that what is important in the underlying basis of all expert testimony is its ability to take the guesswork and speculation out of the proffered testimony. This the Frye Rule accomplishes.

C. Would a New Standard Better Regulate the Admissibility of Expert Testimony?

The goal in seeking a distinct rule on the admissibility of scientific testimony is to find a rule promoting the admission of only reliable evidence grounded in a proven scientific theory. Many proposals have been published which claim to resolve the problems relating to the admissibility of scientific evidence standards. In 1986, the National Conference of Lawyers and Scientists sponsored a symposium on the admissibility of scientific evidence and invited four renowned law professors to draft proposals which would resolve the uncertainties surrounding the present standards.

First, Professor Fredrick I. Lederer proposed the Federal Rule of Evidence 702 be amended to add the word "reliable" so as to read:

99. Shelton, supra note 1, at 19.
100. Giannelli, supra note 21, at 192-93.
101. Shelton, supra note 1, at 24.
103. The National Conference of Lawyers and Scientists is a joint entity of the American Bar Association and the American Association for the Advancement of Science. Its objectives are to improve communications between the professions, encourage cooperation in dealing with problems needing the attention of both, and to ensure the sound use of science and technology by courts and legislatures. Symposium on Science and Rules of Evidence, 99 F.R.D. 188 (1983).
105. Professor Fredrick I. Lederer is a Professor of Law at Marshall-Wythe School of Law, College of William and Mary in Williamsburg, Virginia.
If reliable scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.\(^{106}\)

Professor Lederer's proposal is the same as the proposal being reviewed by the Supreme Court of Virginia.\(^{107}\) He argues that his amendment provides an attempt to create a reliability requirement of expert testimony that is more demanding than the balancing test, but easier to apply than Frye.\(^{108}\) The amendment requires the evidence be both logically relevant and implicitly reliable for the specific purpose offered. The proposed rule, as recognized by Professor Lederer, however, has not defined a standard by which it should be used and governed. Thus, as Judge Spaeth\(^{109}\) concluded after considering the proposal, it leaves Rule 702 essentially unchanged and hence is unnecessary.

Next, Professor Margaret A. Berger\(^{110}\) proposes adding a second sentence to Federal Rule of Evidence which would read:

> When the witness seeks to testify about a scientific principle or technique that has not previously been accorded judicial recognition, the testimony shall be admitted if the court determines that its probative value outweighs the dangers specified in Rule 403.\(^{111}\)

Professor Berger purports that this addition would have three consequences. First, it requires judges to engage in a balancing test when determining whether to admit expert testimony; thus, ending the dispute over whether Frye survived the enactment of the Federal Rules of Evidence.\(^{112}\) Second, the balancing test ensures that no other restrictions will be applied in addition to

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107. Id. at 85.
108. Id. at 86.
109. Judge Edmund B. Spaeth, Jr., is a retired President Judge of the Superior Court of Pennsylvania. He was invited to review each of the proposals submitted in the symposium and comment on each proposal's effectiveness in resolving the uncertainties surrounding the current admissibility standards for scientific testimony. Spaeth, Proposed Amendments to the Federal Rules on Admissibility of Scientific Evidence: A Judge's Perspective, 115 F.R.D. 112 (1987).
110. Professor Margaret A. Berger is an Associate Dean and Professor of Law at the Brooklyn Law School in Brooklyn, New York.
112. Id.
the "helpfulness" standard already mandated by Rule 702.113 Lastly, the amendment changes the burden of proving whether or not the balancing test has been met on the proponent instead of the opponent as expressed in Rule 403.114

Judge Spaeth also considered Professor Berger's proposal as unnecessary because it was a redundancy of Rules 402 and 403.115 He also criticized her failure to provide guidance as to how a judge should strike the balance between probative value and prejudice.116 Consequently, her proposal failed to make a difference in the issue of admissibility.

Substantially unique from the aforementioned, Professor Paul C. Giannelli117 proposes that Rule 702 be amended by adding a notice clause118 which requires the proponent of the evidence to provide the opponent with an opportunity to adequately contest admission by obtaining his own experts and conducting his own test.119 The reason for the proposal is that "... [t]his sort of [scientific] evidence is practically impossible for the adversary to test or rebut ... without an advance opportunity to examine it closely."120 Although Professor Giannelli recognizes the notice requirement will not guarantee an adequate record on which to base admissibility decisions, he believes, and Judge Spaeth agrees, that this is the first step in providing such a record.121

The last symposium proposal is that of Professor James C. Starrs122 who proposes adding to Rule 702 the following sentence:

In the case of expert testimony based upon a scientific theory or technique, the court shall find that the theory or technique in

113. Id.
114. Id. at 89-90.
115. Spaeth, supra note 109, at 115.
116. Id.
117. Professor Paul C. Giannelli is a Professor of Law at Case Western Reserve University in Cleveland, Ohio.
118. Professor Giannelli would add the following sentence to Rule 702: "Expert testimony is not admissible unless the proponent gives the adverse party sufficient advance written notice of intent to use such evidence, including the nature of the expected testimony, the test used, and the qualifications of the person who will testify." Giannelli, Scientific Evidence: A Proposed Amendment to Rule 702, 115 F.R.D. 102 (1987).
119. Id. at 103.
120. Id.
121. Id. at 104.
122. Professor James E. Starrs is a Professor of Law and Forensic Sciences at the National Law Center, George Washington University, in Washington, D.C.
question is scientifically valid for the purposes for which it is tendered.\textsuperscript{123}

Professor Starrs argues that while Rule 702 requires the judge to ensure the expert is qualified to testify on a subject, it says nothing about qualifying the theory on which his opinion is founded.\textsuperscript{124} Thus, his proposal would require that the expert use a qualified method.\textsuperscript{125} He chose the word “valid” because it is the word used by forensic scientists and because the better “\textit{Frye}-motivated” decisions speak of “valid scientific determination.”\textsuperscript{126}

The proposal contemplates scientific validity as the conclusion to be made by the courts based upon other experts’ testimony. Furthermore, the proposed rule recognizes that scientific validity of evidence for one purpose does not render it valid for another. In conclusion, the proposal requires that in addition to qualifying the expert, the theory and technique upon which his opinion is based shall be qualified and determined “scientifically valid” for the purpose intended.\textsuperscript{127} Judge Spaeth ultimately found Professor Starrs’ proposal deficient because it left no guideline for the judge when determining whether evidence is scientifically valid, but instead left it to the trial judge’s discretion.\textsuperscript{128} This proposal incorporates a general acceptance standard in disguise. No other standard would ensure that courtroom decisions, based on expert testimony, were the result of soundly-reasoned legal decision-making.

The final proposal discussed herein appears to be the most logical; it refines the \textit{Frye} Rule by incorporating the Federal Rules of Evidence. The first of the proposed refinements is that general acceptance should be found when preponderance of the scientists in a particular field accept the basis of the proffered testimony.\textsuperscript{129} The preponderance standard is in accord with the standard generally used under Rule 104(a) in determining preliminary questions of admissibility.\textsuperscript{130} This refinement will ensure that rebuttal witnesses will be available and also places the burden

\textsuperscript{124} Id. at 93.
\textsuperscript{125} Id. at 94.
\textsuperscript{126} Id. at 99.
\textsuperscript{127} Id. at 92-94.
\textsuperscript{128} Spaeth, supra note 115.
\textsuperscript{129} Minton, supra note 23, at 787.
\textsuperscript{130} Id. at 787.
of proving admissibility, that the preponderance of scientists accept the basis of the testimony, on the proponent of the evidence. 131

The second refinement would require the field of experts that generally accept the basis of the testimony be determined by Rule 702. Rule 702 would require the experts, who are determining whether the proffered scientific technique is generally accepted in the field, to have knowledge, skill, experience, training or education in that particular scientific field before they can participate in the determination of whether the basis is generally accepted. 132 Considering the opinions of both practitioners and theoreticians, the court will gain a better understanding of the real value of the proffered testimony and not a one-sided inflated view. 133

Thirdly, it seems most practical to incorporate the guidelines of Rule 703. 134 Specifically, only the factual basis of the expert testimony would be required to be the type on which other experts would rely, and the technique would be used under conditions similar to those which other experts would use. 135 This refinement will not only ensure experts familiar with the underlying basis are available to refute the proffered experts conclusions, but will ensure the technique was used in a manner which yields reliable results. 136

Finally, the trial judge should balance the probative value of the scientific testimony against its prejudicial affect under Rule 403. 137 This standard was adopted in the widely used Amaral four-part test. 138 The Amaral test recognized the following as reasons for excluding relevant expert testimony: (1) if it would cause undue delay; (2) if it would create a substantial danger of prejudicing, confusing or misleading the jury; and (3) if it created a unfair or harmful surprise to the opposing party. 139 The incor-

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131. Id. at 787-88.
132. Id. at 788. See supra note 28, Rule 703.
133. Minton, supra note 23, at 788.
134. Id. See supra note 28, Rule 703.
136. Id.
137. Id. See supra note 30, Rule 403.
139. Id. at 1152.
poration of Rule 403 will ensure that the evidence is reliable and helpful to the trier of fact.\textsuperscript{140}

If the court adopts this new refined \textit{Frye} Rule, it will permit the liberal admission of reliable scientific evidence and yet still protect against the dangers of unreliable evidence.\textsuperscript{141}

V. CONCLUSION

The strict scrutiny of scientific expert testimony is the only realistic conclusion for ensuring that legal decisions based on such opinions, are well reasoned and the judgments substantiated. The more liberal admissibility tests require the jury to determine what weight to give the expert testimony after the judge has decided that its probative value outweighs its prejudicial effect. This method often results in a jury rendering a verdict on emotion utilizing guesswork and speculation. This approach also permits a jury to give greater weight to a scientific theory than it has received in its own scientific field.

The best approach would be a limit on the liberal admission of scientific testimony. The \textit{Frye} Rule shields the courts from unreliable scientific evidence by requiring that a new scientific theory produce a sufficient amount of proof to satisfy experts in its own field before the theory is deemed sufficient to influence the outcome of litigation. Therefore, the pendulum should swing back toward the strict scrutiny of \textit{Frye}.\textsuperscript{142} In the alternative, the above proposals should be scrutinized by the courts and the legislatures in order to gain control over expert testimony.

\textsuperscript{140} Minton, supra note 23, at 789-90.
\textsuperscript{141} Id. at 790.
\textsuperscript{142} Gass, supra note 20.
AN AUTOPSY OF THE MEDICARE CATASTROPHIC COVERAGE ACT OF 1988

David Carter

I. INTRODUCTION

In response to the President's request to develop a plan to address catastrophic medical expenses of Americans, the Secretary of Health and Human Services distinguished three separate aspects of the problem: (1) catastrophic acute care costs for the Medicare population; (2) long-term care costs for the Medicare population; and, (3) catastrophic costs for the non-Medicare population.1 Congress made the decision to tackle the catastrophic acute care costs for the Medicare population before taking on the much more complex and expensive long-term care problem.2

The original proposal as recommended by Otis R. Bowen, Director of Health and Human Services, was a Medicare expansion that would have required a maximum out-of-pocket expenditure for hospital expenses of $2,000, financed by a simple pay-as-you-go increase premium for doctor's fees.3 The congressional committees to which the proposal was referred — the Ways and Means (House), and Energy and Commerce (House), and the Finance (Senate) — greatly expanded the program while maintaining its basic theme.4 On July 1, 1988, President Reagan signed

2. The Congressional Budget Office [hereinafter CBO] estimated the benefits paid out under the Catastrophic Coverage Act would amount to approximately $30 billion over the next five years. CBO, August 1, 1988, Table B-2, at 32. The Health Care Financing Administration (HFCA) has estimated that the Medicare Long-Term Home Care Catastrophic Protection Act (sponsored by Florida Rep. Claude Pepper) would cost $23.3 billion a year by 1993. Playing Pepper, Wall St. J., June 8, 1988 at 24, col. 1.
4. A Good Health Bill, Wash. Post, May 27, 1988, at A18, col. 1. The basic concept of maintaining a cap on what a Medicare recipient would have to pay was retained. Under the pre-existing Medicare program, no such cap existed. The concept of having the Medicare recipients themselves pay for the increased benefits was left intact. Previously, the Medicare program was financed out of payroll taxes and out of the general treasury.
the Medicare Catastrophic Coverage Act of 1988 (MCCA). Only eighteen months later, the Senate gave in to House demands to de-codify the MCCA. Seldom, if ever, has a new program fallen apart so quickly. Why did the support for the Act take such a back flip? Mandatory participation, coupled with a general perception of the program's expense exceeding its cost, were only part of the MCCA's shortcomings. The cost of the additional benefits provided by the Act were to be borne by an already overtaxed segment of the population — the elderly. Although Congress purposefully chose to attack the catastrophic health care cost, many thought the MCCA was enacted to cure the long-term care crisis. When the senior citizens found out otherwise, they revolted.

The problems the MCCA intended to address will not go away. Therefore, it is essential that the program's faults be analyzed and possible alternatives be developed and implemented. Numerous alternatives have already surfaced, including: (1) making the program voluntary; (2) developing new tax incentives for private insurance carriers; (3) allowing IRA type savings accounts; and (4) implementing cost containment measures. Ironically, the future effect of the Medicare Catastrophic Coverage Act is likely to be "catastrophic." Critically needed social programs may be delayed, while Congress tries to develop a politically satisfying method to fund their costs.

This article will begin with an analysis of the benefits provided by MCCA, then discuss the Act's shortcomings and possible alternative solutions. The article will conclude with a prediction of the impact of the MCCA's repeal on the implementation of future health care programs.

II. ADDITIONAL BENEFITS PROVIDED BY THE ACT

The MCCA did not disturb the eligibility requirements of Medicare. Basically, those over sixty-five who are entitled to

7. On October 4, 1989, 360 members of the House voted to repeal the Medicare Catastrophic Coverage Act of 1988 as opposed to the 66 members who wished to preserve various aspects of the Act. Contrasting these numbers with the House vote in June, 1988 approving the Bill on a 328-72 vote, indicates no more than 300 members changed their mind. Evans, House Kills Catastrophic Care; Finance Committee Sends Tax Package to Full Senate, 45 TAX NOTES 133 (Oct. 9, 1989).
Social Security or Railroad Retirement Benefits may participate.9 The program continues to be divided into Part A (hospital insurance) and Part B (basic medical insurance).

A. MCCA — Part A

1. Hospital Benefits

Beginning January 1, 1989, under the MCCA, a Medicare enrollee would have paid a deductible of $560.10 The plan would have covered the entire 365 days of the year.11 Prior to the MCCA, Medicare covered hospital stays up to ninety days per “spell of illness,” plus up to sixty lifetime reserve days.12 Elimination of the “spell of illness” concept was one of the most notable changes.

The “spell of illness” concept created two problems for beneficiaries: first, the patient was responsible for paying the inpatient deductible for each spell of illness (the 1988 deductible is $540, up from $520 in 1987); second, the pre-MCCA Medicare rules permit a beneficiary to collect for any number of separate spells of illness but required a period of 60 days to elapse between covered spells of illness. Unfortunately, human physiology cannot be regulated so that sick old people enjoy two months of good health between illnesses.13

2. Skilled Nursing Home Care

The new program paid for 150 days of care per year with patients paying $25.50 a day for the first eight days (without requiring previous hospitalization).14 Under existing Medicare coverage, 100 days of post-hospital care is paid, with the patient paying $67.50 per day for days 21-100 in each spell of illness.15

3. Home Health Care

MCCA enrollees were eligible for up to thirty-eight consecutive days of care, seven days a week.16 This represented a significant

11. Id.
12. Id.
15. Id.
16. Id.
improvement over the previous requirement of intermittent home care lasting no more than five days a week, up to three consecutive weeks.\textsuperscript{17}

4. Hospice

The MCCA eliminated the 210-day lifetime limit, previously allowed under Medicare.\textsuperscript{18}

\textbf{B. MCCA - Part B}

1. Doctor's Visits

The MCCA limited the patient's payments to $1,370.\textsuperscript{19} This cap was to be adjusted annually to maintain the number of enrollees affected at 7 percent.\textsuperscript{20} Prior to the MCCA, Medicare paid 80 percent of customary and reasonable charges after a $75 annual deductible.\textsuperscript{21}

2. Respite Care and Mammography

The new program paid up to eighty hours a year for the in-home care of the chronically dependent patient, and covered 80 percent of the actual charges (limited to $50) for mammograms.\textsuperscript{22} Under previous Medicare coverage, no similar benefit existed.

3. Prescription Drugs

The MCCA would have paid 50 percent of the prescription drug cost in 1991, and 80 percent in 1993.\textsuperscript{23} The coverage is subject to a deductible ($600 in 1991) that will be adjusted each year in order to maintain a constant percentage of enrollees affected.\textsuperscript{24} Again, no similar benefit existed before.

\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} Id. at 3, 4.
\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} Id. at 4.
\textsuperscript{23} Id.
\textsuperscript{24} Id. at 5.
C. MCCA — Other Provisions

1. Transfer of Assets Provision

The MCCA significantly altered the Medicaid transfer of assets provision. Transfer of assets penalties were limited to nursing facility type services. The MCCA limited the transfer of the institutionalized spouse's home to certain individuals including a community spouse, or to a blind or disabled child.

2. Protection of Community Spouse

The MCCA required each state to set a protected income level beginning at 122% of the poverty level of two people, limited to a cap of $1,500 a month. The income of the community spouse is deemed unavailable to the institutionalized spouse. However, all of the couple's resources are available excluding the protected allowance of the greater of $12,000 or one half the total assets up to $60,000.


The MCCA required each state, through its Medicare plan, to pay the premium, deductible, and co-insurances of Medicare enrollees with incomes at or below 85 percent of the federal poverty level.


26. Id.


28. MCCA, supra note 5 at § 303(d). Like the transfer of asset provisions discussed earlier, the protection of the community spouse regulations are important when determining the eligibility for assistance.

29. Id. at § 303(a)(1)(B).

30. Id.

31. Id. at § 301. The MCCA caps the health care costs to be incurred by many Medicare participants who also receive Medicaid. Thus, the federally funded Medicare program will cover expenses previously covered by the part federally-funded, part state-funded Medicare program. The states are required to use this savings to pay the deductibles, premiums, and co-payments of the elderly poor.
III. FINANCING MECHANISM

A. Basic Scheme

The MCCA was an attempt to halt the New Deal entitlement approach, dispelling the idea that all of society must pay for a program which may benefit only a certain segment. It required those who benefited to pay its costs. According to Congressman Bill Gradison (R., Ohio), a co-author of the bill, various financing schemes were reviewed. "Noting that Medicare benefits are heavily subsidized, that elderly incomes have risen faster and that elderly poverty has dropped faster and further than that of the non-elderly, Congress decided that those who receive the new benefits should pay for them, and that more well-to-do seniors would pay more."32 In developing the financing mechanism, four basic principles were followed as enumerated in the legislative history: (1) funding mechanism must cover the program costs; (2) cost of the program should be charged to those who receive the benefits; (3) the majority of the cost should be recovered based on the ability to pay income tax model; and (4) the mechanism should not require an individual to file a tax return who otherwise would not be required to do so.33

The original proposal as drafted by the administration was a simple additional flat premium.34 This reggressively financed scheme gave way to a much more progressive mechanism. The MCCA was financed by an additional fixed monthly premium of $4 per month starting in 1989, which would have gradually increased to $10.20 per month in 1993.35 In addition to the premium, a 15% income surtax (tax on liability) would be assessed to those with at least $150 of income tax liability.36 The surtax is limited to $800 in 1989, $850 in 1990, $900 in 1991, $950 in 1992, and $1,050 in 1993.37 The maximum surtax is double these amounts for married couples.38

34. A Debt Expansion of Medicare, supra note 3.
35. CBO, Aug. 1, 1988, at 8.
36. Id.
37. Id.
38. Id.
B. A Tax or a User Fee

President Bush's campaign promise not to raise taxes has significantly increased the debate over whether various "revenue raisers" could be classified as a tax. President Carter's Chairman of the Council of Economic Advisers, Charles L. Schultze, has said, "[n]either a user fee properly defined nor any other charge for a specific good or service is a tax."39 A 1941 Revenue Ruling40 defined a tax as "an enforced contribution, exacted pursuant to legislative authority in the exercise of the taxing power, and imposed and collected for the purpose of raising revenue to be used by public or governmental purposes, and not as a payment for some special privilege granted or service rendered."41 The question must be asked whether catastrophic health care for the Medicare population is "a specific good or service" or "some special privilege granted." Alternatively, might it be classified as a public good? In order to finance a public good, a tax must be utilized.42

A public good has two characteristics: (1) jointness in supply; and (2) impossibility of exclusion.43 "Jointness in supply means that consumption by one person does not diminish or otherwise affect consumption by others. Impossibility of exclusion means that once the good is supplied, no one can be prevented from consuming it."44 Catastrophic health care does not fit within these constraints. Neither does the original Medicare program, existing before MCCA. Because the program benefits a particular segment of the population, yet is available to all who eventually become members of that segment, it is more in the nature of a semi-public good. The financing mechanism for the Medicare program, pre-MCCA, was a payroll tax, a premium charge for those enrollees who elected to participate in the Part B coverage, and contributions from the general fund.45

41. Id. (emphasis added).
42. Hoerner, supra note 39 at 379.
44. Id. at n.45.
45. Prior to 1966 Congress relied entirely on payroll taxes. Then medical and hospital insurance was added to the OASDI (Old Age and Survivors Disability Insurance). In
Therefore, the program used both a tax and a user fee to fund its cost (perhaps, this is related to the fact that the program is more of a semi-public good). The MCCA continued with this dual financing concept. However, its unique feature is that instead of using a payroll tax, it made use of a selective surtax. This surtax would have been paid only by those who were eligible for Part A of Medicare (Hospital Insurance). Further, the surtax was designed so that not only would those who benefited be the ones who paid, but also, they would pay based on their "ability-to-pay." President Bush endorsed this financing mechanism, claiming it did not violate his no-tax pledge. Several aides in Congress thought this innovative approach might set a precedent for the funding of future social programs. However, the funding mechanism contained numerous shortcomings which would eventually contribute to the repeal of the entire program.

IV. THE PROGRAM'S SHORTCOMINGS

A. User Fee Elements

In order to have a true user fee it must include: (1) a voluntary fee, not a compulsory one; (2) benefits flowing to one individual, not to society at large; and (3) benefits to an individual that are greater than the price charged. As described above, the surtax element of the financing mechanism is of a mandatory nature, requiring all those eligible for Part A benefits with a tax liability in addition to the payroll taxes, the general fund provided assistance for those not insured. Medical insurance became available for a voluntary fee of $3.00. The fee has risen over the years ($17.90 a month as of Jan. 1, 1987). J. PECHMAN, FEDERAL TAX POLICY 228 (5th ed. 1987).

Medicare eligibility people are made up of three groups: (1) those 65 years of age or older who are eligible for Social Security or whose spouse is eligible for Social Security (having applied for benefits, even though spouse has attained the age of 65 years old); (2) those who have received Social Security disability benefits for more than 24 months; and, (3) government employees who have paid only the Hospital Insurance portion of the FICA tax. Bierman, New Tax Surcharge Supplements Medicare Premiums, 70 J. TAX'N 284, May, 1989.

The ability to pay principle requires people with equal capacity to pay the same (horizontal equity), and people with greater ability to pay more (vertical equity). R. MUSGRAVE & P. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 232 (4th ed. 1984).


Hoerner, supra note 39, at 380.
Liability for the $4 monthly premium could be avoided only by disenrolling form Part B coverage. However, this disenrollment would not affect the surtax. The original Senate bill was based on a voluntary additional Part B premium only. The enrollees could either stay enrolled in Part B and pay the additional amount or could opt-out of Part B entirely. Many of the complaints directed toward the implementation of the MCCA focused on the mandatory element of the surtax. According to the Congressional Budget Office, all Medicare enrollees received a substantial subsidy, which would continue after the MCCA went into effect (although diminished). Therefore, one would have predicted that the enrollees would have voluntarily stayed in the program.

The second characteristic of a user fee, as noted above, is that the benefit should flow to the individual, not to society at large. Clearly, a very strong argument could be made that society would have benefited from the MCCA. Society benefits from a healthy, elderly generation. Society benefits from the fact that assets of the elderly are not totally wiped out as a result of a catastrophic illness. The younger generation, likely to receive the remaining assets from the estate of the elderly, have a vested interest in catastrophic health-care protection of the elderly. To continue with this reasoning, if the MCCA benefits segments of the population other than the elderly, then its costs should be distributed over a much broader base.

As previously discussed, the MCCA would have benefited the poor by requiring the states to pay their premiums, deductibles, and co-payments. Thus, the MCCA was more than an insurance program, it included elements of a welfare program. While 37 percent of the new Medicare costs would have been covered by the additional fixed monthly premium, 63 percent of its costs were to be financed via the new income-related supplemental premium, with an estimated 5 percent of the participants paying

50. CBO, Aug. 1, 1988, at 8.
51. Id.
52. A Debt Expansion of Medicare, supra, note 3.
54. See House Members Introduce Bill to Repeal Catastrophic Care Surtax, Tax’n, Budget and Acctg. (BNA) DER No. 74, at G-4, 5 (Apr. 19, 1989).
55. CBO, Aug. 1, 1988, at iii (Summary).
56. See supra note 31.
the maximum fee. Not only was the tax to be paid by the elderly segment, it was designed so that the upper level elderly taxpayers would pay the lion's share. According to the Institute for Research on the Economics of Taxation, the MCCA was not an insurance program but a redistribution device in disguise, shifting the burden of paying the Medicare costs of the poor onto the higher-income elderly.

Also, it was estimated that the MCCA would run a surplus of over $4.2 billion for the first five fiscal years. Through the working mechanics of the Graham-Rudman requirements, this surplus would have lowered projected deficits and permitted other expenditure programs to be free from cuts. The other programs left intact, because of the financing mechanism of the MCCA, would have benefited numerous segments other than the Medicare population.

The third characteristic of a user fee is that the benefit to the individual must be greater than the price charged. The bill was supported by congressional leaders such as Representative Dan Rostenkowski (D., Ill.), Chairman of the House Ways and Means Committee, and Senator Lloyd Bentsen (D., Tx.), Chairman of the Senate Finance Committee. Rostenkowski said, "the benefits are worth the cost," and Bentsen noted, "it is the best buy in town." Congressman Bill Gradison (R., Ohio), the bill's co-sponsor, stated that Medicare would continue to be a bargain, even for those who would pay the maximum supplemental premium.

57. CBO, Aug. 1, 1988, at 7, 8.
58. See supra note 47. A recent article citing the Congressional Joint Committee on Taxation stated the income surtax will be paid by approximately 35.6 percent of the enrollees. Bacon, Battle by Elderly Over Health Insurance Act May Bode Ill for Future Long-Term Care Efforts, Wall St. J., May 9, 1989, at A-22, col. 1.
60. CBO, Aug. 1, 1988, Table B-1, at 31.
61. Ironically, the surplus effect of the MCCA was one of the few threads of reasoning which kept the bill from falling even sooner than it did. Drew, Letters From Washington, New Yorker, Aug. 28, 1989, at 81, 88. See also Another Tax Cut in the House, Wash. Post, Oct. 3, 1989, at A-24, col. 1.
63. Id.
64. According to Mr. Gradison, the monthly Part B premium payment under pre-MCCA coverage recouped only 25 percent of its costs. The remaining expenses were paid out of the general revenues. Gradison, supra note 32. See also A Catastrophic Act? It
However, the Institute for Research on the Economics of Taxation has calculated the expected benefits to be less than the cost for those who pay only the premium (not considering any surtax). But these calculations ignore the previously discussed subsidization existing under the current Medicare program. A cost/benefit analysis would yield a different result depending upon the perspective one takes. From the viewpoint of the elderly taxpayer, the MCCA may have been a "good deal," yet it was less of a "good deal" than they previously enjoyed. Their focus was on the additional benefits being less than the required payments, as opposed to the "net benefit" of the Medicare plan after implementation of the MCCA. Because the additional benefits were less than the required payments, the proposed "user fee" was unacceptable.

B. Income Tax Elements

While selecting the ability-to-pay model in developing the financing mechanism for the MCCA, Congress may have looked at the wrong parameters for measurement — pre-tax income versus after-tax income. Prior to the enactment of the MCCA, the elderly were a very heavily taxed segment of the population. Their top marginal rate on some income may be as high as 42 percent because of the way Social Security benefits are taxed. Considering the 15 percent surtax the effective rate could become 48.3 percent (42 percent plus 42 percent of the 15 percent).

Depends, Wall St. J., Jan. 3, 1989, at A-10, col. 3 (Mr. Myers notes that the upper income level enrollees of Medicare will not have any "net loss." However, he states, "These people will not be convinced that they are not being inequitably treated when a bonanza they had for a long time is partially taken away.").

65. The Insurance Value of Medicare Catastrophic Benefits, supra note 59 at 6. In 1989 the premium was to have been $48 (12 months at $4 each) as compared to the expected benefit of $46.57.

66. See supra note 64.

67. See Mitchell, Tax Compliance, 15 Mem. St. U.L. Rev. 127, 138 (1985) for a general discussion of how willingness to pay varies proportionately with the interdependence between paying the tax (user fee) and receiving the benefit.


70. Tax Planning for the Elderly, J. Tax'n, Mar. 1984, at 191. It has been reported that a 71-year-old former newspaper has filed suit to challenge the constitutionality of the MCCA, arguing that it arbitrarily imposes a higher income tax on the elderly. Catastrophic Care Law Alarms Seniors, supra note 62.
Another parameter that might have been incorrectly reviewed is the wealth of the elderly segment, and their position of liquidity. In a recent article, Roger Feldman, director of a Health Care Financing Administration-funded research center, proposed the addition of a "means test" to the "age test" for Medicare eligibility.\textsuperscript{71} He noted that in 1984, the median net worth for older households (sixty-five to seventy-four years old) was $60,226, higher than any other age group except those fifty-five to sixty-four years of age.\textsuperscript{72} In a reply to this article, it was pointed out that nearly half the net worth of the elderly was in the form of real estate.\textsuperscript{73} Although there are hundreds of billions of dollars in real estate owned by the elderly, there is a failure in the marketplace which does not allow cash to be generated from its ownership.\textsuperscript{74} A lack of liquidity creates a substantial problem when it comes time for the elderly to make their tax payments.

A final tax consideration which may not have been considered was the inability of many elderly taxpayers to properly plan for the increase. Taxpayers with income generated from investments would be able to shift the funds into tax-exempt or tax-deferred instruments.\textsuperscript{75} However, these taxpayers may have had to subject themselves to large penalties for early withdrawal. Those taxpayers with Social Security benefits or pension distributions as their income source were without options. Also, the high income taxpayers may not have been able to lower their taxable income below the level at which the surtax is capped ($52,400 for couples and $27,600 for single filers in 1989).\textsuperscript{76}

The funding scheme was not the only problem with the MCCA. The program's failure to address long-term nursing home care, and the duplicate coverage provided by private Medigap policies also contributed to its repeal.

\textbf{C. Failure to Address Long Term Nursing Home Care}

As noted in the introduction, the MCCA was to address the catastrophic care costs for the Medicare population, and not the

\textsuperscript{71} Feldman, \textit{Add a Means Test to the Age Test}, Wall St. J., Jan. 3, 1989, at A-10, col. 3.
\textsuperscript{72} Id.
\textsuperscript{74} Weinroche, \textit{Liberating Home Equity of the Elderly Benefits All}, Wall St. J., Dec. 8, 1988, at A-14, col. 3.
\textsuperscript{76} Id.
long term care costs for the elderly. However, to many, catastrophic care costs are the long term care costs. The terms are synonymous. Congressman Thomas A. Luken (D., Ohio) stated that the cruelest deception in this misnamed "catastrophic health care bill," was that it was never meant to address the plight of those Medicare recipients and their spouses who were most susceptible to real economic catastrophes — specifically identifying the 1.5 million Americans in nursing homes. 77

Although the MCCA was miscommunicated to many elderly, who thought the plan included long term health care coverage, 78 one should not forget Congress purposefully chose to attack the catastrophic health care cost first, because its price tag was substantially lower. 79 Also, the MCCA did provide some protection to the spouse of the institutionalized elderly person, as well as expanding the coverage for skilled nursing facilities, home health care, and hospice care.

Many enrollees complained that the mandatory premiums forced them to pay for insurance coverage they did not want or need, making it less likely that they would have the resources to pay for what they really wanted — long term care protection. 80

D. Duplicate Coverage

It was estimated that about 72 percent of Medicare enrollees had supplementary benefits in addition to Medicare, provided by Medigap Insurance policies. 81 According to the Institute on the Economics of Taxation, the MCCA would have duplicated about two-thirds of the coverage of these private Medigap policies. 82 The MCCA required these insurance carriers to notify their policyholders of the duplicate coverage and rebate the corresponding cost. 83 Unfortunately, this rebate would have reduced

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79. See supra note 2.
80. See Here's the Joker in the Catastrophic-Care Package, N.Y. Times, Sept. 29, 1989, at 34, col. 3.
81. CBO, Aug. 1, 1988, at 12.
82. The Insurance Value of Medicare Catastrophic Benefits, supra note 59, at 19.
83. Id. Also, for any duplicated coverage provided by employer sponsored retiree Medicare plans, the MCCA maintenance-of-effort provisions would have required the employer to provide additional benefits or to refund to the employee the dollar value of the duplicated coverage. Melbinger & O'Donnell, The Medicare Catastrophic Coverage Act of 1988 and Its Impact on Employer-Sponsored Retiree Medical Plans, 14 EMPL. REL. L.J. 399, 405 (Winter, 1988).
the proposed price increases in these Medigap policies rather than lowering the actual cash outlay. These proposed price increases were absorbed into the net cost of the MCCA and the private Medigap policies. Therefore, to the average elderly taxpayer, uninformed of these price increases, their insurance cost increased only because of the enactment of the MCCA.

In summary, there were numerous shortcomings of the MCCA which were not present in the existing Medicare program. Participation was mandatory; whereas, under the current program many of the benefits and their corresponding costs are voluntary. Taxpayers perceived the additional benefits offered by the new program to be less than their costs. This perception, coupled with the mandatory surtax, became a double edged sword. Like the existing program, the benefits of the MCCA would have accrued to many. Yet, the costs of the additional benefits provided by the MCCA would have been borne by the elderly; whereas, the existing program spreads its cost over a much broader tax base by using a payroll tax. Because the new program was improperly communicated, there was insufficient time for the elderly to properly plan for the additional tax. Also, the new program duplicated pre-existing coverage which had already been purchased by many through private Medigap policies. However, as noted in the beginning of this article, the MCCA was to be the first step toward solving the catastrophic medical care costs crisis in America; therefore, it is important that possible alternatives be examined.

V. POSSIBLE ALTERNATIVES

A. Voluntary Program

Various alternative solutions for the catastrophic care of the elderly were discussed prior to the MCCA's enactment and during the debates preceding its repeal. One such alternative was making the insurance voluntary. As previously discussed, the original Senate bill was based on just such a scheme.

Ironically, this same approach was discussed by Senator Lloyd Bentsen (D., Tx.), Chairman of the Senate Finance Committee,
and President Bush's officials in their attempts to keep the bill from being repealed only one year later. Through all of the political wrangling, the proposal was never accepted. As pointed out above, in discussions about the need for the benefits of user fees to exceed their cost, presumably most of the eligible elderly would have elected to stay in the program. If not, the government, and consequently the taxpayers, would have benefited from the savings. "Pay-as-you-go, user financed social programs have a greater chance of passage if they are designed so that all potential beneficiaries have more to gain by voluntarily participating than by opting out."86

B. Private Insurance

The argument has been made that programs financed through true user fees are "ripe for privatization." However, the private Medigap policies in existence prior to the enactment of the MCCA were not getting the job done. The policies were confusing and expensive.88 In discussing the market failure to provide adequate private insurance for long term care, Graville and Taylor (Congressional Research Service) listed several possible reasons. They believe that individuals with higher risks are the ones most likely to purchase the insurance, and the younger individuals do not recognize their future need for long term care now, when the price of the coverage would be affordable. To them the event is remote in time and its cost uncertain. From the insurer's perspective, the fact that insurance lowers the price of the good to the insuree creates a greater demand than the company anticipated. They add that the government's commitment to assist is minimal, discouraging individuals from purchasing private insurance.89

86. What Killed Catastrophic Insurance, supra note 53 (emphasis added).
87. Hoerner, supra note 39, at 380.
88. Bangor Daily News, July 28, 1987 (1987 Editorials on File, Catastrophic Illness at 879). The article also stated that nearly two-thirds of the policies offered benefits which were below the minimum governmental standards.
90. Id. at 220.
91. Id.
92. Id. at 221.
93. Id.
Perhaps the government should focus on aiding insurance companies in developing health care programs for the elderly, instead of trying to compete against them. New tax incentives could be developed for the private sector to encourage such efforts. The government programs could be limited to providing aid to those elderly who could not afford the insurance. This assistance could come in the form of prepaid vouchers payable to the private insurance companies.

In addition to providing assistance to private insurance companies, the government could encourage employers to offer catastrophic coverage or to expand preexisting insurance. The MCCA required only that the employers who previously provided coverage offer additional benefits or offer refunds to replace duplicated coverage.

C. Cost-Containment Measures

The long-term answer to America's health care crisis for the elderly may be in cost-containment measures. Recently, Congress addressed the issue by developing a plan that would: (1) reduce Medicare payments for high-tech diagnostic procedures; (2) diminish incentives for performing unnecessary and expensive surgery; and (3) limit the amount a doctor may charge Medicare enrollees. Another cost containment measure which has been discussed is the use of prepaid services to Health Maintenance Organizations. New York City has experimented with this concept.

D. IRA Health-Type Savings Accounts

Peter J. Ferrara, an associate professor of law at George Mason University, has proposed an intriguing idea about creating an IRA type savings account. Ferrara argues that our country has
reached the limits of the welfare state. He supports the approach taken by the Health Care Savings Account Bill sponsored by Congressman French Slaughter (R., Va.). The bill permits an employee and employer to contribute to a savings account and receive a 60 percent income tax credit. The employee would be required to pay higher Medicare deductibles, but would be permitted to purchase insurance to cover the expenses with the funds in the account.

E. Other Alternatives

Perhaps the MCCA offered too many benefits too quickly. A Wall Street Journal article compared the passage of the MCCA with the plant in the "Little Shop of Horrors." In this movie, a small plant (the original administrative proposal) turns into a man-eating monster the size of a car (the bill after Congress added numerous extra benefits). Maybe it would have been a more prudent approach to offer one or two benefits at a time. This approach would allow Congress time to digest the cost of the benefits a little at a time, rather than expose the entire Medicare program to possible bankruptcy.

Other obvious alternatives to finance catastrophic health care would include increasing co-payments and medical deductibles, removing the current ceiling on payroll taxes, taxing Medicare payments, and removing the surtax and decreasing the benefits.

VI. FUTURE EFFECTS

Poor communication and misunderstanding were characteristics of the MCCA implementation. Congress thought it was passing a bill that was supported by the very group which would have had to pay its costs — the elderly. The MCCA was supported by the American Association of Retired Persons, a very strong

100. Id.
101. Id.
lobbying organization for the elderly.105 However, the elderly revolted.106

The lesson to be learned is that Congress should be cognizant of the fact that special-interest lobbies, and even certain members of Congress, may have lost touch with the “grass roots sentiment in the rest of the country.”107

It is probably too much to hope that members of Congress have learned a few political and practical lessons from this fiasco. But maybe they will be more wary of passing new entitlement programs without the clear approval of those who will have to pay for them. Maybe they will remember how difficult it is to repeal bad legislation and not be so hasty to vote for bills with misleading, over-promising titles. Maybe they will keep in mind what one woman wrote to her congressman, “[j]ust because we’re old doesn’t mean we’re stupid,” and give up the long effort to sell them snake oil.108

The repeal of the MCCA will likely have a negative effect on future attempts to develop programs for catastrophic and long-term health care costs of the elderly.109 In lieu of President Bush’s opposition to increased “taxes,” monies for new programs will have to be drawn from existing programs. Competition for funds will be fierce. Representative Fortney Stark (D., Ca.), a co-sponsor of the MCCA, stated that he could not imagine a long-term care bill without the seniors contributing significantly toward its costs, and could not see many members of the House or Senate backing anything requiring seniors to pay more on top of the unpopular cost for catastrophic illness coverage.110 Unfortunately, other critically needed social programs may be delayed, while Congress tries to develop yet another “revenue enhancement measure” to fund its cost.

105. Id.
110. Bacon, supra note 58.
VII. CONCLUSION

The Medicare Catastrophic Coverage Act of 1988 was to be the first step toward solving the catastrophic medical expenses of many Americans. The bill offered many new benefits to the elderly and included a very creative financing mechanism. Unfortunately, the program had numerous shortcomings. However, there are various alternatives which should be further evaluated.

A voluntary program would eliminate many of the taxpayers' complaints, including duplicated coverage, excessive costs, and the imposition of an unfair tax burden. In the meantime, tax incentives should be developed to aid private insurance companies to develop the critically needed health care programs for the elderly. IRA Health-Type Savings Accounts should be allowed to encourage individuals to plan ahead for the excessive health care needs of their senior years.

Whatever alternative solution is chosen, better communications must be developed between Congress and the American people. Congress must look beyond the special-interest lobbying groups to determine what the “people” need and, just as important, what they are willing to pay for. Hopefully, we have learned many lessons from this short-lived and controversial legislation.
THE COST OF KILLING CRIMINALS

Alan F. Blakley

I. INTRODUCTION

The death penalty imposes enormous costs on society. Justice Marshall believed that if the American people were fully informed of the purposes of and liabilities from the death penalty, they would reject it out of hand. The American people, he thought, would favor life imprisonment without parole, were they better informed.

This article is not intended to reduce human life to dollars and cents. As Justice Brennan has observed, the death penalty itself, treats "members of the human race as nonhumans, as objects to be toyed with and discarded ... even the vilest criminal remains a human being possessed of common human dignity." Human beings should not be reduced to mere economic considerations. But even if they are reduced to such dollars and cents, the death penalty is absurd.

Capital cases require greater amounts of due process than other criminal cases. Absurd costs arise from these requirements and the distinctive nature of capital punishment.

[Death is a different kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action.]

The Court has held that the time, energy and money invested in

1. While many people talk about the costs, few have attempted to quantify them. It seems to be "common knowledge" that the death penalty costs more than life imprisonment, but few people can say why. Only one scholarly article exists concerning this topic, Comment, The Cost of Taking a Life: Dollars and Sense of the Death Penalty, 18 U. CAL. DAVIS L. REV. 1221 (1985) (hereinafter Dollars and Sense).
3. Id. at 233.
ascertaining the truth is well-spent if it makes the difference between life and death. Courts should be particularly sensitive to assure that every safeguard has been observed.

The fact that death is such an extreme and different sanction requires super due process. The Gregg v. Georgia series of cases provides certain elements that are required for death penalty cases. Bifurcated proceedings, juries involved in sentencing, and an automatic appeal to the state supreme court have become necessities. Furthermore, the appeal to the state supreme court must not be simply a rubber stamp. That court must determine whether there was actual prejudice to the defendant; whether the evidence supports the jury’s findings; and, whether the sentencing was disproportionate to sentences imposed in other, similar trials. Furthermore, mandatory death penalty statutes are never allowed.

Review of the actual trial should be conducted much more thoroughly than the review of any other kind of trial because death is different. All of the Court’s death penalty cases revolve around this theme. Each justice, no matter what result is preferred, admonishes the nation’s judiciary to be scrupulous in observing the rights of the accused in capital cases.

II. A TALE OF TWO MURDERS

A review of two recent cases provides a foundation for the analysis of super due process. The cases are very different, yet both defendants have been involved in the death process for many years.

6. Id. at 360.
10. Id.
11. Id. at 198.
12. Id.
14. See, for instance, Justice Rehnquist’s dissent in Woodson, 428 U.S. at 323. Even though he would uphold the mandatory death penalty of North Carolina, he agrees that death is different and these cases should be treated differently from other criminal cases.
Brian Keith Moore laid in wait in the parking lot of an A & P store in Louisville on the morning of August 10, 1979. He was 21 years old at the time and had been drinking. Virgil Harris, the 77-year-old proprietor of an ice cream shop in Louisville, had a custom of going to that A & P every morning to buy bananas for his business. Neither person knew the other. When Harris exited the A & P that day, Moore brandished a handgun, forcing Harris into his own car.

They drove a short distance. Moore ordered Harris out of the car and pushed him down an embankment at the side of the road. Moore shot at him, but missed. Intent on eliminating the only known witness to his abduction and robbery, Moore descended the embankment and executed Harris by shooting him in the head four times—one wound was a contact wound. Moore climbed back to the car and returned to his neighborhood, continuing with his day’s drinking and drug use as if nothing had happened.

The Commonwealth of Kentucky indicted Moore for the murder on August 15, 1979. He was tried by a jury, convicted and sentenced to death. Moore appealed and raised thirty assignments of error. The Kentucky Supreme Court, on direct appeal, reversed the conviction and remanded for a new trial. The reversal was based on two errors. First, the court found plain error when the trial court allowed the prosecutor to use a pending criminal charge to impeach a defense witness. Second, the prosecutor’s closing argument was held to be prejudicial in that he referred to evidence the court had ruled inadmissible.

15. The facts of the crime are compiled from the facts included in Moore v. Commonwealth, 634 S.W.2d 426, 429 (Ky. 1982) [hereinafter Moore I] and Moore v. Commonwealth, 771 S.W.2d 34, 36 (Ky. 1988) [hereinafter Moore II]. These findings of fact will be assumed to be the true events of August 10, 1979, since neither the prosecution nor the defense has seriously contested them.

16. Moore I, 634 S.W.2d at 429.
17. Id.
18. Id. at 430.
19. Id. at 438.
20. Id. at 435.
21. Id. at 437. It is instructive that of the thirty assignments of error, only nine were worthy of any discussion in the court’s opinion. Of those nine, only two were capable of sustaining a reversal. When a trial lasts for more than three weeks, as this one did, can a trial judge reasonably be expected to notice that some of the crimes that a witness is impeached about were pending and not prior convictions? Or, can the process really turn on a prosecutor’s comment that he wished the jury could have heard the entire tape? This is not to countenance either error but to attempt to put them into perspective.
Moore received a new trial in October 1984.22 The trial once again lasted three weeks and, once again, resulted in both a guilty verdict and the death sentence.23 This trial was conducted five years and two months after Harris' death. This time, Moore only found twenty-six errors to raise on appeal.24

The majority opinion of the Kentucky Supreme Court, on this second direct appeal, upheld the conviction, finding none of the errors significant enough to justify retrial.25 The right to counsel received the most detailed treatment by the majority. The trial judge had called a lunch recess during Moore’s direct examination. Moore was instructed not to discuss his testimony with anyone, including his own counsel, during the break.26 The majority noticed that this restriction was brief.27 They chose to apply the Fourth Circuit’s interpretation of right to counsel from Geders v. United States as announced in Perry v. Leeke.28 The Kentucky court found that where the restriction was brief, the defendant would have to show actual prejudice from the restriction of his right.29 They considered Moore’s situation in the light of an actual prejudice standard30 and found that the error was harmless.31

Kevin Stanford and one of his friends robbed a gasoline station in Louisville on January 7, 1981.32 Baerbel Poore was the attendant on duty. During and after the robbery, Stanford repeatedly raped and sodomized her. She was taken a short distance away where she was shot twice, once in the face and once in the head.
Stanford said that he had to kill her because she knew him and would have been able to identify him. Stanford was 17 years old at the time.

Stanford was transferred from juvenile court to district court in October 1981, and tried with his co-defendant, David Buchanan, in August 1982. Buchanan was allowed to have the death penalty specification removed without objection of the prosecution. Both were found guilty by a jury in a joint trial and Buchanan was sentenced to life imprisonment while Stanford received the death penalty.

The court does not count the number of errors that Stanford assigned to the trial, unlike the more analytic approach of Moore II. Stanford did raise a great number of errors. He claimed that jury selection did not conform to the proper standards; that he should have been given a trial separate from Buchanan; that his co-defendant's confession unduly prejudiced his trial; and, that one of his mitigation witnesses was improperly excluded. A number of other assignments of error did not receive any attention from the court. The Kentucky Supreme Court upheld Stanford's conviction and sentence.

The United States Supreme Court granted certiorari and addressed only one issue—whether a person under the age of 18 could be sentenced to death. No other issue was considered and the Court held that sentencing a 17-year-old to death did not constitute cruel and unusual punishment. Stanford, unlike Moore, has only received one trial so far. However, Stanford's case has already been heard once by the United States Supreme Court.

33. Id. at 788.
34. Id. at 783.
35. Id. at 784.
36. Id.
37. Id.
38. Id.
39. Id.
40. Id. at 787.
41. Id.
42. Id. at 789.
43. See, for instance, Id. at 790, 791, 792, where the court briefly explains several more assignments of error.
45. Id. at 2976.
III. THE ECONOMICS OF SUPER DUE PROCESS

A. Moore II and Stanford to Date

*Moore II* adopted the Fourth Circuit's *Perry v. Leeke*\(^{46}\) rule: absent a showing of actual prejudice, there would be no reversal of a conviction for a brief denial of right to counsel during a recess. One of the Fourth Circuit's reasons for adopting this rule is the cost of retrial.\(^{47}\) *Perry* was sentenced to life imprisonment on his first trial and the Fourth Circuit wanted to avoid another lengthy trial.

This reasoning must have appealed to the justices of the Kentucky Supreme Court in *Moore II*. Having already been tried twice for murder and having already received the death penalty both times, it must have seemed absurd to the justices to try him again when his guilt was so obvious and his depravity so pronounced.

The court in *Stanford* made a few attempts to cut the cost of capital litigation. Even though the jurors were sequestered and individual *voir dire* was conducted,\(^{48}\) the defense and prosecution were required to submit lists of questions to be asked by the court. Very few of the questions were actually asked. The Kentucky Supreme Court understood the reluctance to ask all the proffered questions, "it could easily have taken several weeks to complete the individual voir dire."\(^{49}\) The court also understood why the Commonwealth would not wish to try Buchanan and Stanford separately. One factor for joint trials is cost.\(^{50}\) The cost motive was not as obvious in *Stanford*, but it was present.

States began trying to mitigate the excessive cost of death penalty cases following *Furman v. Georgia*\(^{51}\) and the addition of super due process for such cases. North Carolina\(^{52}\) and Louisiana\(^{53}\) attempted to temper the costs by mandating the death penalty

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\(^{46}\) Perry v. Leeke, 832 F.2d 837 (4th Cir. 1987).

\(^{47}\) Id. at 843.

\(^{48}\) Stanford, 734 S.W.2d at 785.

\(^{49}\) Id. at 786, note 4.

\(^{50}\) Id. at 787, note 5. The court held that if Stanford could force separate trials here, co-defendants charged with different degrees of culpability could never be tried together.

\(^{51}\) 408 U.S. 238 (1972).


for certain offenses. This was not allowed.\textsuperscript{54} Kentucky has attempted to mitigate some of the costs in \textit{Stanford} and \textit{Moore II}.

Organizations advising capital defendants, however, encourage attorneys to try every imaginable tactic to slow down the process, to find mitigating factors, to procure expert witnesses, and to investigate the defendant and the crime.\textsuperscript{55} Because the attorney and the defendant are fighting for life, the defense tries every conceivable method to prolong the defendant's life. They file motions that have only a glimmer of hope of success.\textsuperscript{56} Almost every defendant requests a jury trial\textsuperscript{57} in the hopes that at least one juror will wish to acquit or, perhaps, spare his life at sentencing.

The cost of the death penalty process begins long before trial, however. The investigation done by the police and the prosecutors must be more thorough than in non-capital cases.\textsuperscript{58} The prosecution is aware that the capital defendant will try every imaginable defense, including alibis, mental incapacity and lack of specific intent. They must anticipate these defenses as well as the string of experts likely to be introduced into the trial by the defense.\textsuperscript{59}

Plea bargaining is the lubricant of current criminal procedure. The courts remain less cluttered because the prosecutor and the defense normally make an arrangement for a guilty plea based on dismissing other charges, reducing the charge, or requesting a less severe sentence. The very nature of a capital case requires

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\item \textsuperscript{55} Many different agencies and organizations publish manuals for the defense of those being tried in death penalty cases. One leading organization is the Southern Poverty Law Center. Their pamphlets suggest a variety of tactics for the defense lawyer. As an example, see, McLaughlin, \textit{The Better Defense: A Team Guide for Defendants and Lawyers in Death Penalty Cases} (1983). It is published by the Southern Poverty Law Center and is available by writing to them at 400 Washington Avenue, Montgomery, Alabama 36104. They also have other, equally valuable, aids available.
\item \textsuperscript{57} As predicted by Justice Marshall in \textit{Furman v. Georgia}, 408 U.S. 238, 357 (1972) (Marshall, J. concurring).
\item \textsuperscript{58} \textit{Capital Losses}, supra note 56, at 10, note 28. \textit{See also, Dollars and Sense}, supra note 1, at 1254.
\item \textsuperscript{59} \textit{Dollars and Sense}, supra note 1, at 1246.
\end{itemize}
intransigence on the part of the prosecutor.\textsuperscript{60} Once the prosecutor decides to seek the death penalty, there is no incentive for the defendant to plead guilty. If he did, he would forfeit one opportunity to avoid death—the guilt phase. Defendants plead guilty in 85 percent to 90 percent of all criminal cases, including murder cases.\textsuperscript{61} However, a defendant is ten times as likely to seek a trial when the prosecutor seeks the death penalty.\textsuperscript{62}

Motion practice\textsuperscript{63} is much more extensive in capital cases than in non-capital cases. The normal criminal case that goes to trial includes an average of five to seven motions while a capital case normally includes between ten and twenty-five.\textsuperscript{64} The amount of attorney time in preparing motions for the defense and in responding to them for the prosecution is increased because of the complexity of capital motions. Not only does the defense seek to discover and suppress, the defendant also seeks to change the case from a capital to a non-capital case at every opportunity. During the pretrial stage, constitutional challenges include direct attacks on the death penalty itself.\textsuperscript{65} These challenges are much more intricate than regular pretrial motions. They require greater attorney and court time in preparation and resolution. "Although expensive, the exhaustive filing of motions is necessary to provide the defendant with the constitutional rights of super due process."\textsuperscript{66}

Investigation costs also skyrocket in capital cases. Not only must the prosecution investigate, but the defense must explore two separate issues—guilt or innocence of the defendant\textsuperscript{67} as well as preparing for the penalty phase by discovering mitigating

\begin{itemize}
\item \textsuperscript{60} Id. at 1247.
\item \textsuperscript{61} Nakell, The Cost of the Death Penalty, 14 CRIM. L. BULL. 69, 71 (1978). There is no reason to believe that this statistic has changed since 1978.
\item \textsuperscript{62} Id.
\item \textsuperscript{63} See, for instance, Dollars and Sense, supra note 1, at 1249-1250. She includes the following motions generally made in capital cases: change of venue; challenging the aggravating factors; individual \textit{voir dire}; sequestration of jurors during \textit{voir dire}; requesting funds for investigators, expert witnesses and psychiatrists.
\item \textsuperscript{64} Capital Losses, supra note 56, at 12.
\item \textsuperscript{65} Dollars and Sense, supra note 1, at 1248.
\item \textsuperscript{66} Id. at 1250.
\item \textsuperscript{67} Capital Losses, supra note 56, at 14. The case of Johnny Ross, sentenced to death at age 16 in Louisiana, is used by the authors as an example. A relatively simple investigation would have shown that Ross could not have committed the crime. The investigation, however, did not take place until Ross filed for \textit{habeas corpus} relief in federal courts. The authors show that an investigation must begin anew with each new level of appeal just in case.
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factors from the defendant's life. Since the defense must investigate as many as forty years of a defendant's life in seeking mitigating factors, a special investigator must be found to begin searching early. Many capital defendants do not present themselves as easy subjects for finding mitigating circumstances in their lives. The process is time consuming and difficult.

A capital case would not be a capital case without as many experts as possible. The United States Constitution requires that the Commonwealth pay for certain experts. Kentucky provides that the court may appoint experts and "determine the reasonable compensation of such witness and direct ... payment." The parade of experts begins with psychiatrists and those directly examining the defendant for competence to stand trial and for the insanity defense. Medical examiners, polygraph experts, experts providing data regarding race bias and death penalty bias of potential jurors, other forensic scientists, crime scene reconstructionists and criminalists report fees ranging from $500 to $1000 a day for their services. A defense attorney who does not use as many experts as possible may be leaving his client without a possible defense or mitigating circumstance that could spare his life.

Almost every capital defendant is poor. Between 1930 and 1967, virtually every person executed was poor. The taxpayers invariably pay the defense costs. Kentucky, by statute, limits the amount of money paid to an appointed attorney to $1000. However, even if the attorney actually collects only $1000 from the Commonwealth, he is still investing hundreds of hours in

68. Dollars and Sense, supra note 1, at 1251.
69. The Alabama Prison Project, Trial for Life (1988). Available from the Southern Poverty Law Center, see supra note 55. They suggest recruiting a "mitigation assistant" who will recruit and coordinate volunteers to interview every imaginable person with whom the defendant has had any positive relationship at all.
70. Ake v. Oklahoma, 470 U.S. 68 (1985) (If mental state of the defendant is raised by either side, the state must provide competent psychiatric evaluations).
72. Dollars and Sense, supra note 1, at 1253.
73. Capital Losses, supra note 56, at 15.
74. Id.
75. See supra note 67.
76. Greenberg and Himmelstein, Varieties of Attack on the Death Penalty, 15 Crime & Delinq. 112, 114 (1969). There is no reason to believe this has changed or ever will.
78. See Capital Losses, supra note 56, at 18, note 48. As a low estimate, they predict
the capital case. The Commonwealth may not pay directly for this time, but the people still pay for it in lost taxes\textsuperscript{79} and lost attorney productivity.\textsuperscript{80} Furthermore, the attorney may incur thousands of dollars in out-of-pocket expenses\textsuperscript{81} for which he will never be directly reimbursed: such things as office supplies, telephone calls, depositions and scientific analyses of evidence. Estimates of attorney's fees and expenses alone for each capital case range from $102,000 to $700,000.\textsuperscript{82}

Jury selection consumes much more time and money in capital cases than in non-capital cases. As in Stanford, the jurors may be sequestered during \textit{voir dire}\textsuperscript{83} and may be examined individually.\textsuperscript{84} Not only does the defense try to identify bias against the defendant, they must also attempt to find the jurors least favorable to the death penalty still able to pass the prosecution's challenge for cause.\textsuperscript{85} The Southern Poverty Law Center recommends always using individual \textit{voir dire},\textsuperscript{86} recruiting a jury selection team,\textsuperscript{87} and relying on extensive direct and rehabilitative questioning of jurors.\textsuperscript{88}

The beginning of the trial only begins the cost in a capital case. Because the Supreme Court has virtually mandated a bi-

\begin{itemize}
\item an average of 120 trial hours, 125 hours of motion work and 344 hours of lawyer preparation.
\item If the attorney earns $1,000 for 589 hours work (see note 78 \textit{supra}) the Commonwealth is losing taxes on $57,900 (assuming the attorney could bill someone at $100 per hour if he were working on another case instead) for each capital trial.
\item An attorney will spend an inordinate amount of time away from his other clients during the preparation and trial of a capital case.
\item See, \textit{Dollars and Sense}, \textit{supra} note 1, at 1261-1262. New Jersey budgeted $102,000 for each case in 1983; one Maryland firm estimated attorneys' fees for one case at $156,462; Ohio estimated the 1981 death penalty statute would cost the public defenders $1,500,000 annually; and, in Oregon, the per case estimate is $700,000.
\item \textit{Dollars and Sense}, \textit{supra} note 1, at 1249.
\item Id. at 1255.
\item The test is set out in Witherspoon v. Illinois, 391 U.S. 510 (1968). The \textit{Witherspoon} test is whether the juror is able to conform to the instructions of the court concerning the sentencing phase.
\item Southern Poverty Law Center, \textit{Speak the Truth: A Lawyer's Guide to Voir Dire in the Capital Case} 7 (1983). To obtain a copy, see note 55 \textit{supra}.
\item Id. at 8. The team should at least consist of a jury selection psychologist who can concentrate his attention on prospective juror's answers in light of his experience with death penalty juries.
\item Id. at 11.
\end{itemize}
furcated proceeding as part of super due process\textsuperscript{89} in death penalty cases, each capital trial is really two trials—a guilt phase and a penalty phase. The cost of courtroom time and use is very difficult to measure.\textsuperscript{90} One estimate, for a recent Texas capital trial, counting only courtroom time, employees' time and jury costs, was $300,000.\textsuperscript{91} The cost of operating a courtroom in California has been estimated at $2,186 each day.\textsuperscript{92} Most capital cases take an average of 30 days, about three times as long as non-capital cases,\textsuperscript{93} for a cost of $65,580\textsuperscript{94} for the courtroom alone.

After the jury returns a guilty verdict, hears all the additional witnesses for the sentencing phase and returns a death sentence, the process has just begun. There are at least ten levels of appeal available for the condemned person.\textsuperscript{95} Each of these is likely to be as complicated as Moore I's thirty assignments of error, Moore II's twenty-six assignments of error or Stanford's uncounted, but numerous, assignments of error.

A person sentenced to death in Kentucky receives an automatic, direct appeal to the Kentucky Supreme Court.\textsuperscript{96} The defense cost alone for such an appeal has been estimated at $80,000 in New York state.\textsuperscript{97} The estimate in California, for defense cost, is $60,000.\textsuperscript{98} These estimates do not include expenses for travel, photocopying or investigation.\textsuperscript{99} The attorney general will likely spend at least as much on his side. Without adding court costs—the salaries of the justices and their aides—the total for a direct appeal is between $120,000 and $160,000 per case. Furthermore, the court's costs are far from negligible. The Eleventh Circuit Court of Appeals, deep in the death penalty belt, in Atlanta,

\begin{itemize}
\item \textsuperscript{89} See, for instance, Gregg v. Georgia, 428 U.S. 153 (1976).
\item \textsuperscript{90} Capital Losses, supra note 56, at 18.
\item \textsuperscript{91} Id.
\item \textsuperscript{92} Dollars and Sense, supra note 1, at 1258, note 177.
\item \textsuperscript{93} Id. at 1258.
\item \textsuperscript{94} Id. at 1258, note 177.
\item \textsuperscript{95} (1) Direct appeal to the Kentucky Supreme Court; (2) writ of certiorari to the United States Supreme Court; (3) Ky. Rule Crim. Proc. 11.42 collateral attack in Kentucky trial court; (4) appeal to court of appeals; (5) writ of certiorari to the Kentucky Supreme Court; (6) writ of certiorari to the United States Supreme Court; (7) writ of \textit{habeas corpus} in the federal district court; (8) appeal to the United States Court of Appeals; (9) petition for rehearing; (10) writ of certiorari to the United States Supreme Court.
\item \textsuperscript{97} Capital Losses, supra note 56, at 20.
\item \textsuperscript{98} Dollars and Sense, supra note 1, at 1263.
\item \textsuperscript{99} Capital Losses, supra note 56, at 20.
\end{itemize}
reports that over 30 percent of its docket is tied up in death penalty litigation.\(^\text{100}\) State supreme courts invest even larger portions of time, money and personnel because many state cases need not make it to the federal courts of appeals. Neither Moore I nor Moore II have progressed to that point.

Stanford's first appeal to the Kentucky Supreme Court was unsuccessful, so he sought certiorari from the United States Supreme Court. His writ was granted leading to a very expensive process. An attorney can spend as much as 46 percent of his work year\(^\text{101}\) preparing the legal research, investigation, writing the petition, writing briefs and making oral arguments. The writing of the petition itself may take as many as fifty hours to prepare.\(^\text{102}\) The New York Defenders Association estimates the cost to both sides of a writ of certiorari to total $170,000.\(^\text{103}\) This, once again, does not include the costs to the Court itself.

\textbf{B. More Cost to Come!}

Should all of this process fail to win the defendant a reversal, he may mount a collateral attack. The costs of collateral attack in Kentucky courts are very similar to those on direct appeal to the Kentucky Supreme Court. Even if he fails to win a new trial, he may move for federal habeas corpus relief.\(^\text{104}\) The Sixth Circuit has a policy of providing counsel to all indigent habeas petitioners who file non-frivolous claims.\(^\text{105}\) The Sixth Circuit pays $8,000 to the appointed counsel.\(^\text{106}\) The cost to counsel is significantly higher than this, though. Because appointed attorneys are new to the case, they are required to do a great deal of preparation and actual investigation— even investigation of the facts. The attorney general will spend as much time and energy on the case at the habeas level as at other levels—he certainly does not wish to lose at such a late stage. And, the court will incur costs itself—if nothing more than staff salaries and court time.

The convicted person is confined somewhere while all of this process occurs. This place must be much more secure and much

\begin{footnotes}
\footnote{100. Washington Post, February 28, 1988, p. C-5.}
\footnote{101. \textit{Capital Losses}, supra note 56, at 20.}
\footnote{102. \textit{Dollars and Sense}, supra note 1, at 1264, note 225.}
\footnote{103. \textit{Capital Losses}, supra note 56, at 22.}
\footnote{104. 28 U.S.C. § 2254 (1982).}
\footnote{105. Dayan, supra note 81, at 27.}
\footnote{106. \textit{Id.} at 28.}
\end{footnotes}
different from normal jail or prison areas. During the 1986 legislative session in Alaska, the Department of Corrections estimated that if the legislature passed a bill to reinstate the death penalty, the state would need to expand the budget by $2,000,000 to establish a death row.107 New York estimates that it costs $30,000 per year per inmate on death row while only $15,000 to house a non-capital inmate for the same year.108 These are after sentencing estimates that do not include the additional costs during the pretrial and presentence phases of detention.

IV. THE NEXT SET OF APPEALS

Brian Keith Moore and Kevin Stanford will seek relief in the federal courts once they have exhausted their state remedies.109 Since the composition of the Kentucky Supreme Court has not changed since Moore II and Stanford, it is unlikely that their collateral attacks in the Kentucky courts will be successful. This will leave them with habeas corpus relief110 in the federal courts.

Moore will file for habeas corpus in one of the district courts in Kentucky.111 The Sixth Circuit has decided a right to counsel case remarkably similar to Moore II.112

The Sixth Amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."113 A trial court’s order for the defendant to refrain from speaking with his attorney during a recess during the pendency of his testimony was addressed by the Supreme Court in Geders v. United States.114

Geders took the witness stand in his own defense. His direct testimony ended on Tuesday afternoon. The court instructed Geders’ attorney not to talk with Geders over this recess period.115 The Court, without considering any prejudice to Geders,

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108. Capital Losses, supra note 56, at 23.
111. Moore, who was tried in Louisville and is being held at Eddyville, can choose either the eastern district of Kentucky (Eddyville) or the western district (Louisville).
112. United States v. Bryant, 545 F.2d 1035 (6th Cir. 1976).
113. U.S. CONST. amend. VI. See also KY. CONST. § 11.
115. Id. at 82.
held that his order violated his Sixth Amendment right to counsel.\textsuperscript{116} A sequestration order affects a defendant in a way much different from its affect on other witnesses. Many other ways exist to insure that attorneys do not violate the ethical norms of improper coaching.\textsuperscript{117} "The role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with trial process without a lawyer's guidance."\textsuperscript{118} The Court never considered prejudice to Geders by the order.\textsuperscript{119}

The Sixth Circuit, in \textit{Bryant v. United States},\textsuperscript{120} had occasion to address facts substantially identical to those of \textit{Moore II}. Co-defendants Bryant and Alexander were on trial for bank robbery. The death penalty was \textit{not} involved in their cases. Alexander was testifying in her own behalf when the lunch hour arrived. She was instructed not to communicate during the one-hour noon recess with her attorney concerning her testimony. No reason was given by the trial court for this order, just as no reason was given in Moore's second trial. Counsel objected based on the Sixth Amendment.

The Sixth Circuit, in \textit{Bryant}, specifically held that "\textit{Geders} holding does apply to an hour-long luncheon recess when a party on trial would ordinarily be entitled to consult with an attorney."\textsuperscript{121} This one error, in a non-death penalty case, was sufficient to gain a new trial for Alexander. The standard that the Sixth Circuit set for Kentucky federal courts to follow is the same, \textit{per se} reversal rule followed by every circuit except the Fourth. "In the absence of extraordinary circumstances ... it is an abuse of discretion and a violation of the right of a defendant to assistance of counsel for a trial court to direct that the defendant have no communication with his counsel during a criminal trial."\textsuperscript{122}

The court need not look to actual prejudice. Instead the \textit{per se} reversal rule can only be avoided by the prosecution's advancing

\textsuperscript{116} Id. at 91.
\textsuperscript{117} Id. at 88.
\textsuperscript{118} Id.
\textsuperscript{119} See especially, Marshall's concurring opinion that a defendant need not make a preliminary showing of prejudice, \textit{Geders}, 425 U.S. at 92 (Marshall, J. concurring). It is difficult to conceive of circumstances extraordinary enough to justify a ban on communication between defendant and attorney in Marshall's opinion.
\textsuperscript{120} The facts of the case are set out at \textit{Bryant}, 545 F.2d 1035, 1036 (6th Cir. 1976).
\textsuperscript{121} Id.
\textsuperscript{122} Id.
some extraordinary circumstances in the trial requiring the ban. The short Bryant opinion included little rationale. However, the District of Columbia Circuit, in Mudd v. United States,123 gave abundant reasons for an identical holding. An attorney and a criminal defendant always have legitimate matters to discuss. They might wish to discuss the defendant’s direct examination or upcoming cross-examination during the pendency of his testimony. The attorney may need to warn the defendant against mentioning incriminating or exculpating excluded evidence; or, he could warn the defendant about questions on cross-examination that would lead to waiver of the defendant’s right against self-incrimination.124 Furthermore, a per se reversal rule best serves a defendant’s right to counsel. Any other rule requires the court to invade the attorney-client privilege to determine prejudice. The court would need to inquire into the content of the intended attorney-client discussion—what they were prevented from discussing or what elements of the defense they intended to address.125

Bryant126 was an armed robbery case. Mudd127 was a receiving stolen property case. Neither involved the death penalty. The Sixth Circuit could not fashion a more strict rule than the per se reversal rule. They will at least enforce as strict a rule as in Bryant for Moore II, because death is different. Therefore, Moore’s second conviction will certainly be overturned by either a Kentucky federal district court or by the Sixth Circuit. Moore III will begin more than ten years after the death of Virgil Harris. There will be another trial. It will probably last as long as the previous two trials. Both Moore and the Commonwealth will be expected to resurrect evidence now well over ten years old. The trial judge will be expected to preside, virtually error-free, over a lengthy trial with more arcane evidence and less reliable witnesses.

Three outcomes are possible following another trial. Moore could be acquitted, in which case a murderer will be freed. Or,

124. Mudd, 798 F.2d at 1512.
125. Id. at 1513. See also Moore II, 771 S.W.2d at 42 (Stephens, C.J. dissenting).
126. United States v. Bryant, 545 F.2d 1035 (6th Cir. 1976).
Moore will receive a prison sentence and all the death penalty litigation will have gained the Commonwealth nought. Or, Moore will, for the third time, be sentenced to death. If Moore receives the death penalty, another string of appeals will follow. Keith Stanford does not have a good chance of receiving a reversal of his conviction or his sentence. The errors raised in his appeal to the Kentucky Supreme Court\(^{128}\) do not as clearly require reversal as Moore’s Sixth Amendment claim. But, even though none of his contentions merit a great deal of consideration, he will still be able to progress through all ten levels of appeal, increasing with each level the cost of putting him to death.

V. THE TOTAL COST OF KILLING

The total cost of Brian Keith Moore’s judicial career to this point, since he executed Virgil Harris, lies between $1,192,000 and $3,112,000.\(^{129}\) And, the case is far from resolved. Moore has only progressed through one of the ten levels of appeal thus far. Each level raises the cost substantially; a cost that is already astounding.

The total cost of Kevin Stanford’s judicial career since he raped, sodomized and murdered Baerbel Poore is between $981,000 and $1,941,000.\(^ {130}\) Stanford has only progressed through two of

\(^{128}\) See especially, Stanford, 734 S.W.2d at 783-87.

\(^{129}\) These two figures are derived from the economic information included in the previous section. New York estimates that each jury trial would cost $176,000 and New Jersey estimates $102,000. These are the highest and lowest estimates. New Jersey estimates the cost of prosecution at $306,000 and New York at $845,000. Court room time ranges from $65,000 for California to $300,000 for New York. Moore’s two jury trials have cost between a low of two times $102,000 plus $306,000 plus $65,000 for a total of $946,000 and a high of two times $176,000 plus $845,000 plus $300,000 for a total of $2,642,000. There have been two direct appeals to the Kentucky Supreme Court. In California, such an appeal costs between $48,000 and $60,000. In New York each appeal costs $80,000 for each side, or a total of $160,000. Therefore, appeal costs range from a low estimate of $96,000 to a high of $320,000. Furthermore, Moore has been housed on death row for ten years, so far, at an additional cost of $15,000 each year for a total of $150,000. These totals give the cost range thus far of $1,192,000 by adding all the low estimates to $3,112,000 by adding all the high estimates.

\(^{130}\) Stanford has been on death row for two years less than Moore, so $30,000 is deducted. Also, Stanford only received one jury trial as opposed to Moore’s two, the low figure must be reduced by $473,000 and the high figure by $1,321,000. Stanford has gone to the Kentucky Supreme Court only once, the figures are reduced by $48,000 and $160,000, respectively. However, Stanford has gone to the United States Supreme Court, so the cost is increased by $340,000. These adjustments lead to the totals given.
the ten levels of appeal. And, he will take as many appeals as he is allowed whether or not they are likely to be successful.

Considering a yearly cost of incarceration per inmate of $15,000, provided the inmate is not on death row, had Moore been sentenced to life without parole at the age of twenty-one (when he was, in fact, sentenced the first time) and if he were to live to the age of 70, the Commonwealth would spend only $735,000 on his incarceration. Stanford’s incarceration costs, age 17 until age 70, would total $795,000. These are less than the most conservative estimates of the cost of their trials and appeals thus far. They might both have pled guilty had the death penalty not been threatened, thus saving the Commonwealth the cost of any trial.

When Moore receives his third trial, the trial costs will be even higher than those estimated above. Ten years have already passed since the crime. Witnesses are no longer easily available. Physical evidence needs to be recreated or restored. And, if, after another three week trial, Moore is convicted again and again sentenced to death, there is a great likelihood that the judge will have made at least one mistake causing a reversal for a fourth trial. Judges are not accustomed to the stringent requirements of super due process—they miss some of the close calls.

Suppose, however, that the next judge presides over Moore’s trial without reversible error of any kind. There will still be the cost of another trial and as many as ten appeals before the conviction finally is beyond judicial challenge. If the third trial of Moore is perfect, the Commonwealth will spend between $1,426,000 and $4,242,000 in addition to what has already been spent for the purpose of getting Moore convicted, sentenced to death and through all ten levels of appeal. This, added to the cost thus far, brings the total to between $2,618,000 and $7,354,000.

Stanford will probably not receive another trial—his case on appeal is not very strong. If he only exhausts his judicial process, the total cost for him will rise to between $1,365,000 and

131. Capital Losses, supra note 56, at 23.
132. Between $946,000 and $2,642,000.
133. At costs of between $48,000 and $160,000 per appeal, added to the trial cost in note 132.
$3,221,000\textsuperscript{134} as he progresses through the next eight levels of appeals. These numbers do not include the additional costs of keeping both Stanford and Moore on death row for the additional time.

The story would still not be over, however. They can begin to seek executive remedies once all their judicial appeals are finished. Executive clemency is available. Applying for clemency can be a time consuming and expensive process. While they await word on executive clemency, they can file for an execution hearing,\textsuperscript{135} another executive, administrative remedy. The Commonwealth does not wish to execute those who are not competent. By filing petitions, either themselves or through counsel, Moore and Stanford trigger an administrative proceeding to determine if they are capable of being executed.\textsuperscript{136} If found incompetent, another hearing follows at a later date to determine if competency has returned.\textsuperscript{137} If the administrative hearing determines that they are competent to be executed, they may directly appeal that determination to the Kentucky Supreme Court,\textsuperscript{138} beginning another costly process. If they allege constitutional errors in the administrative proceeding, they will be able to get back into federal court. And on and on.

VI. CONCLUSION

The cost to the Commonwealth of killing Kevin Stanford and Brian Keith Moore has already reached staggering heights. And, the cases are not unusually expensive. In addition, neither case is near its end. It is not likely to become less costly in the future. Defense attorneys are constantly developing new strategies and methods in death penalty litigation. Does society really wish to kill killers so badly that it will spend the amounts of money and time necessary to do so?

\textsuperscript{134} Stanford's costs will be between $48,000 for each of the eight remaining appeals, or, $384,000, and $160,000 each, or, $1,280,000 added to the amounts previously computed.


\textsuperscript{136} He may be represented by counsel, § 6; motions are allowed, § 11; there will be a prehearing conference, § 14; discovery is allowed, §§ 15-16; reporter's fees are paid by the state, § 18; witnesses and evidence may be introduced, § 3(3).


\textsuperscript{138} 501 Ky. Admin. Regs. 8:010, § 3(2) (1989).
Justice Marshall believed that the American people would not favor the death penalty if they knew more about it. Part of the knowledge they need is information about costs.

The American people are largely unaware of the information critical to a judgment on the morality of the death penalty, and, if they were better informed they would consider it shocking, unjust and unacceptable. The American people know little about the death penalty, and the opinions of an informed public would differ significantly from those of a public unaware of the consequences and effects of the death penalty.

If moral considerations and the humane aspects of abolishing the death penalty are not sufficient, the cost alone should be enough to lead the informed public to reject the death penalty. Public opinion has already begun to shift toward alternatives to capital punishment where such alternatives are clearly understood.

The death penalty has outlasted its utility. For more than moral reasons, it is time to abolish this costly, irreversible anachronism before the Commonwealth reaches bankruptcy.

140. The National Coalition to Abolish the Death Penalty polled people in Florida, Nebraska and Georgia. Each person was asked whether life imprisonment without parole where the offender worked to pay restitution to the victim's family would be preferable to the death penalty. In Florida, 53 percent chose this as an alternative to the death penalty; in Nebraska, 58 percent; and, in Georgia, 52 percent. The statistics are not overwhelming but it does appear that people are willing to consider alternatives when presented with such information. An interesting item in the survey was the inclusion of the reference to the economic well-being of the victim's family. No mention was made, however, of the cost to society of capital litigation. The entire study can be obtained from National Coalition to Abolish the Death Penalty, 1419 V Street NW, Washington, D.C. 20009, (202) 797-7090.
NOTES

DEATH'S FORECLOSURE: CAPITAL PUNISHMENT OF 16- AND 17-YEAR-OLDS UNDER STANFORD V. KENTUCKY

Nancy A. Inskeep

It is beyond argument that American law would not permit capital punishment for a very young child, say the three-year-old toddler who shoots mommy to death with daddy's handgun. It is also settled that American law does permit capital punishment for adults, say the thirty-year-old who shoots his mother to death with his father's handgun. The only issue, then, is the age at which to draw the line between these two polar positions.

I. INTRODUCTION

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Legal minds agree that the amendment's final clause prohibits "barbaric punishments," as well as disproportionate and excessive penalties. Yet, the exact scope of the clause, as well as the parameters delineating what are "cruel and unusual" punishments, was deliberately undefined by the Framers.

The issue of whether capital punishment falls within the "cruel and unusual" parameters has been widely debated in Kentucky and other jurisdictions. The only concept consistently acknowledg-

2. U.S. CONST. amend. VIII. The Eighth Amendment was made applicable to the states through the 14th Amendment in Robinson v. California, 370 U.S. 660 (1962).
4. See infra notes 86-89 and accompanying text.
edged throughout the years has been that the constitutionality of capital punishment must not offend "the dignity of man."7 Therefore, in defining the constitutionality of capital punishment in relation to the Eighth Amendment, courts and legislatures have been guided by what they deem to be "evolving standards of decency that mark the progress of a maturing society."

Furman v. Georgia was the first Supreme Court case to present a fundamental claim that the death penalty always violated the "cruel and unusual" punishments clause, but its widely fragmented opinion did not resolve the issue.9 In 1975, Gregg v. Georgia clearly held that the death penalty did not "invariably violate the Constitution."10 One year later, Coker v. Georgia11 became the first modern decision to apply a substantive analysis involving the disproportion of the death penalty to the alleged offense, rather than invalidating the death sentence on procedural or administrative grounds.12 In 1981, Eddings v. Oklahoma13 raised the issue of a minor's age as a mitigating factor to a death penalty sentence, but the decision stopped "far short of suggesting that there is any constitutional proscription against imposition of the death penalty on a person who was under age 18 when the murder was committed."14 Finally in 1988, Thompson v. Oklahoma concluded that the Eighth and 14th Amendments prohibited capital punishment sentences for persons who were 15 years of age or younger at the time of their offenses, but left open the status of 16 and 17-year-olds.15 Thus after Thompson, the only question remaining was: Are 16 and 17-year-olds exempt from capital punishment as a unique class of minors requiring constitutional protection? In 1989, the Supreme Court answered this

8. Id. at 101 (Warren, C.J., dissenting).
9. 408 U.S. 238 (1972). Four Justices found capital punishment to be per se constitutional, two found it per se unconstitutional, and three left the questions open depending upon the particular state statute and circumstances of the crimes.
10. 428 U.S. at 169.
12. Radin, supra note 6, at 990-91.
14. Id. at 128 (Burger, C.J., dissenting).
question in *Stanford v. Kentucky* by determining that contemporary American standards do not oppose capital punishment for 16 and 17-year-old offenders.\(^6\)

*Stanford v. Kentucky* combined the murder cases of 17-year-old Kevin Stanford\(^7\) and 16-year-old Heath Wilkins.\(^8\) Justice Scalia wrote the plurality opinion, which failed to find either a historical or modern societal consensus against the capital punishment of persons found guilty of committing murder at the age of 16 or 17 years.\(^9\) Hence, the death penalties received by Stanford and Wilkins for their respective crimes did not offend the United States Constitution.\(^10\) By committing their respective crimes, these murderers violated the standard whereby society did not see any hope of their rehabilitation. When society, through the voices of its judges and juries, recognizes that a convicted murderer will never value the life of his victim or comprehend the irreparable harm done, it will not expend any more resources trying to socialize this person into its fold.

II. BACKGROUND

A. *Stanford v. Kentucky*

On the evening of January 7, 1981, 17-year-old Kevin Stanford repeatedly raped and sodomized Baerbel Poore during and after his robbery of a gasoline station where she was employed as an attendant.\(^21\) After the robbery, Baerbel Poore was driven to an isolated area, where she was shot at point-blank range in the face and then fatally in the back of the head.\(^22\) Baerbel Poore was 20 years old and the mother of an 11-month-old child.\(^23\) The robbery's proceeds consisted of roughly 300 cartons of cigarettes, two gallons of gas, and a small amount of cash.\(^24\)

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20. Id.
22. Id. at 783, aff'd, 109 S. Ct. 2969, 2972-73 (1989).
23. Id. at 790, aff'd, 109 S. Ct. 2969 (1989).
24. Id. at 783, aff'd, 109 S. Ct. 2969, 2972 (1989).
The police found Stanford and his two partners by using an informant found to be selling cigarettes. One of the partners identified Stanford as the “triggerman and perpetrator of the crimes.” Stanford was arrested and transferred to an adult court following a waiver hearing which determined that the best interests of both the community and Stanford would be served “under the ordinary laws governing crime.” Stanford was a repeat offender who had been in Kentucky’s juvenile system since the age of 10 for such offenses as arson, burglary, sexual assault, theft, and assault.

The physical evidence against Stanford was strong. It included Stanford’s fingerprints on the car containing the body of Baerbel Poore, as well as his pubic hairs found on various parts of her body. Additionally, several days after being advised of his rights, Stanford initiated a conversation with a detention center corrections officer. In this conversation, Stanford admitted shooting Baerbel Poore because she was his neighbor and had recognized him, even though while planning the robbery he had thought of beating her and threatening to kill her if she talked. Stanford was found guilty of murder, first-degree sodomy, first-degree robbery, and receiving stolen property of over $100. He was sentenced to death and 45 years in prison.

B. Wilkins v. Missouri

In mid-July, 1985, 16-year-old Heath Wilkins and three others began to plan the robbery of Linda’s Liquors or an alternate location. During two weeks of planning, Wilkins told the others that he would kill anyone behind the counter in order to eliminate any witnesses. Wilkins’ girlfriend tried to dissuade him from his plan to commit murder. Wilkins would not listen and sharpened his narrow-blade “butterfly” knife in preparation for the crime.

On the evening of July 27, the four individuals went to the North Kansas City Hospital. Leaving two companions at the

25. Id. at 783-84, aff’d, 109 S. Ct. 2969 (1989).
26. Id. at 784, aff’d, 109 S. Ct. 2969, 2973 (1989).
27. Id. at 789, 791-92, aff’d, 109 S. Ct. 2969, 2973 (1989).
29. Id. at 789, aff’d, 109 S. Ct. 2969, 2973 (1989).
30. Id. at 783, aff’d, 109 S. Ct. 2969, 2973 (1989).
31. Id.
32. Wilkins, 736 S.W.2d at 411, 417, aff’d, 109 S. Ct. 2969, 2973 (1989).
hospital to secure taxis, Wilkins and his accomplice crossed through a woods to Linda's Liquors and Deli. They carried a bag to hold any stolen items. As they watched the store until it was free of customers, Wilkins and his accomplice took a towel from the bag and wiped the mud from their shoes. They did not want to leave any footprints. Leaving the bag outside in order to avoid suspicion, Wilkins and his accomplice entered the store where Nancy Allen was working alone at the counter. Nancy Allen was a 26-year-old mother of two who owned and operated the store with her husband. As planned, the accomplice asked to use the restroom, located behind the sandwich counter. Wilkins asked for a sandwich. He asked for extra lettuce in order to maneuver Nancy Allen in front of the restroom door, whereupon the accomplice rushed out and grabbed her. Wilkins then moved behind the counter and stabbed Nancy Allen in the back, later claiming to be aiming a fatal wound to her kidneys.  

As Nancy Allen lay spread eagle on the floor, the accomplice tried and failed to open the cash register. He asked Wilkins what to do, but Nancy Allen replied with instructions causing Wilkins to stab her three times in the chest, twice piercing her heart. As she continued to plead for her life, Wilkins stabbed Nancy Allen four more times in the neck, opening her carotid artery. As their victim lay bleeding to death, Wilkins and his accomplice gathered liquor, cigarettes, rolling papers, and roughly $450 in cash and checks, and then left the store. The pair returned to the hospital, where they paired up with the other two accomplices in separate taxis to the Greyhound Bus Station. At the station, they changed clothes and paired a third time before going to a lake hangout, where they threw the coin tray and murder weapon into the lake and burned the checks.  

Street talk led the police to Wilkins and his companions. Wilkins gave a very incriminating statement and was charged with first-degree murder, armed criminal action, and unlawful use of a weapon. He was then certified as an adult and entered a plea of not guilty by reason of mental disease. However once
he was found competent to stand trial, Wilkins refused counsel and entered a plea of guilty.\(^{39}\) After many entreaties from the bench for Wilkins to invoke his right to counsel, the court accepted his guilty plea, as well as Wilkins' and the prosecutor's requests for the death penalty, for Wilkins "feared" life imprisonment.\(^{40}\) With a history of arson, burglary, thefts, suicide attempts, attempted poisoning of his mother, and drug abuse, the court sentenced Wilkins to death, plus five years for the concealed weapons charge.\(^{41}\) The court then asked the State Public Defender to enter the case as amicus curiae and appeal any arguments.\(^{42}\)

### III. THE SUPREME COURT'S DECISION

When Eighth Amendment cases first began to be analyzed, the Supreme Court applied the review methods that were utilized in Due Process and Equal Protection claims. These methods, when applied to the problem of defining cruel and unusual punishments, led to a wide range of judicial writings that reflected polarized opinions regarding the constitutionality of the death penalty. The reason for the inconsistency is simple, for the "difficulty ... is that no one 'test' seems to fit all types of cases that can arise under the clause."\(^{43}\)

Those opposing the death penalty have long felt that it is a punishment which is a "total denial of the wrongdoer's dignity and worth."\(^{44}\) The "fact that the community demands the murderer's life in return for the evil he has done cannot sustain the death penalty ..." in relation to the Eighth Amendment.\(^{45}\) Quite simply, two wrongs will never make a right. However, the faction supporting the death penalty recognizes it as a necessary sanction serving several purposes. Where the crime itself is "cruel and unusual" in its brutality and callousness, the sanction of capital punishment has not been found to be cruel and unusual:

Punishment is the way in which society expresses its denunciation of wrong doing; and, in order to maintain respect for the law, it

\(^{39}\) Id. at 413-14, aff'd, 109 S. Ct. 2969, 2973-74 (1989).
\(^{40}\) Id. at 414, aff'd, 109 S. Ct. 2969 (1989).
\(^{41}\) Id. at 420 n.7, aff'd, 109 S. Ct. 2969, 2974 (1989).
\(^{42}\) Id. at 411, aff'd, 109 S. Ct. 2969, 2974 (1989).
\(^{43}\) Radin, supra note 6, at 1010-11.
\(^{44}\) Gregg, 428 U.S. at 241 (Marshall, J., dissenting).
\(^{45}\) Id. at 240 (Marshall, J., dissenting).
is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive and nothing else.... The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not.46

The Supreme Court's decision in Stanford v. Kentucky reflects this polarity of opinion. Justice Scalia, writing for Chief Justice Rehnquist and Justices White and Kennedy, viewed the question as: Are 16 and 17-year-olds excluded from capital punishment sentencing? The question itself accepted that the death penalty was not cruel and unusual punishment and immediately asked if this narrow age group was exempt. Hence, the petitioners needed to argue that society would exempt them from capital punishment based upon objective contemporary standards of decency.47

At the opposite end of the issue were Justices Brennan, Marshall, Blackmun, and Stevens. Justice Brennan, a longtime opponent of the death penalty,48 phrased the question as: Is it cruel and unusual punishment to sentence 16 and 17-year-olds to the death penalty under the Eighth Amendment? The question did not presume the constitutionality of the death penalty. Thus, a full Eighth Amendment analysis was required utilizing a review of both objective and subjective contemporary standards of decency.49

In the middle stood Justice O'Connor, who recognized that Justice Scalia's opinion was correct, but incomplete. Justice Scalia had focused upon the main objective contemporary standards, ignoring the fact that contemporary standards evolve with society and that many factors outside of the ones he mentioned influence this society. Additionally, Justice O'Connor could not accept the proposition that subjective contemporary standards

46. Gregg, 428 U.S. at 184 (citing Lord Justice Denning, Royal Commission on Capital Punishment, Minutes of Evidence, Dec. 1, 1949, p. 207 (1950)).
do not play a role in an analysis of the Eighth Amendment, such as proportional assessments of the defendant's blameworthiness in relation to his crime. However, since Justice O'Connor concurred in the plurality's judgment, she did not write in great detail. Thus, the objective standards were acknowledged as being the primary indicia of defining the Eighth Amendment.

A. Objective Contemporary Standards

The determination of a modern society's contemporary standards regarding a given sanction requires one to "look to objective indicia that reflect the public attitude." Public perceptions are not conclusive of one overall viewpoint, but they do provide a foundation upon which to build one's arguments. First, one may look to society's history, as well as judicial and legislative precedents. These findings lead to a review of current federal and state legislation. Then, the implementation of this legislation by juries and prosecutors is reviewed. In addition, the role of the judiciary is evaluated. Finally, public, professional, and international opinions can be analyzed and synthesized to influence future legislation. This new legislation renders the current statutes obsolete, thus closing the cycle of how a society's standards of decency evolve over time. Throughout this evolutionary process, the role of objective contemporary standards becomes increasingly important in defining the Eighth Amendment.
process, the Supreme Court is attempting to find a “moral consensus” of belief.\textsuperscript{59}

Justice Scalia gave great deference to the legislature, for it represented “society’s elected representatives.” Of the 36 states permitting capital punishment, 21 allowed for the imposition of the death penalty upon 16-year-old offenders, while 24 allowed the death penalty for 17-year-olds. These numbers failed to establish a “national consensus” sufficient to persuade the Court that the capital punishment of 16 and 17-year-olds was cruel and unusual punishment.\textsuperscript{60} Previous precedents established larger majorities to reflect a national consensus, such as in \textit{Coker v. Georgia} where this state was the only jurisdiction to allow the death penalty as a sanction for the rape of an adult.\textsuperscript{61}

In contrast, Justice Brennan’s dissent believed that this analysis of legislation would only protect the “political majorities.”\textsuperscript{62} He viewed the numbers from an opposing side, whereby 14 states and the District of Columbia forbid capital punishment.\textsuperscript{63} Therefore, 30 jurisdictions would not impose capital punishment upon 16-year-olds, while 27 would not allow the death penalty for 17-year-olds.

Thus, when the population of the legislature included all 50 states and the District of Columbia, the dissenting opinion “won” according to Justice Scalia’s logic. How was this possible? The dissent relied on the interpretation of 18 states that have death-penalty statutes with no designated minimum age limit. Justice Scalia took these at face value in that there was no minimum age in these states,\textsuperscript{64} while Justice Brennan stated that he would not assume “a legislature that has never specifically considered the issue has made a conscious moral choice to permit the execution of juveniles.”\textsuperscript{65} To Justice Scalia, this argument of

\textsuperscript{59} Stanford, 109 S. Ct. at 2981 (O’Connor, J., concurring); Radin, supra note 6, at 992.
\textsuperscript{60} Stanford, 109 S. Ct. at 2975-76. The text of Justice Scalia’s opinion mentions 37 capital punishment states. \textit{Id.} at 2975. However, his footnote recognizes 14 non-capital punishment states, which would leave 36 capital punishment states. \textit{Id.} at 2795 n.2. This number of 36 is recognized by the dissent (\textit{Id.} at 2982-83 (Brennan, J., dissenting)) and the Kentucky Attorney General (See Smith, \textit{Death Penalty for Teens}, A.B.A.J., June 1989, at 43) and shall be recognized in this article.
\textsuperscript{61} Stanford, 109 S. Ct. at 2976.
\textsuperscript{62} \textit{Id.} at 2987 (Brennan, J., dissenting).
\textsuperscript{63} \textit{Id.} at 2982-83 (Brennan, J., dissenting).
\textsuperscript{64} \textit{Id.} at 2975 n.2.
\textsuperscript{65} \textit{Id.} at 2983 (Brennan, J., dissenting) (stating that constitutional accuracy demands more than judicial assumptions).
numbers was irrelevant, for the death penalty has been settled as constitutional and the only question was "not whether capital punishment is thought to be desirable but whether persons under 18 are thought to be specially exempt from it."\textsuperscript{66}

Therefore, Justice Scalia considered only objective indicia of the "modern American society as a whole," which neatly and quickly eliminated any consideration of international opinion.\textsuperscript{67} Federal legislation, specifically recent drug legislation that limited capital punishment to offenders 18 or over, was narrowly construed as pertaining to particular drug-related crimes.\textsuperscript{68} It did not embody a federal trend against the capital punishment of minors.\textsuperscript{69} Additionally, other state and federal legislation designed to protect juveniles as a unique class because of their immaturity was irrelevant.\textsuperscript{70}

By focusing on the issue relating to 16 and 17-year-olds, Justice Scalia found that two previous cases amply protected these minors.\textsuperscript{71} First, \textit{Lockett v. Ohio} determined the need for individualized capital punishment analysis.\textsuperscript{72} Second, \textit{Eddings v. Oklahoma} allowed youthfulness of age and associated character traits to be considered as mitigating factors in sentencing.\textsuperscript{73} Moreover, juvenile transfer statutes and waiver procedures provided further individualized consideration of a juvenile's "maturity and moral responsibility."\textsuperscript{74} Not surprisingly, Justice Brennan took great exception to Justice Scalia's view of this protection. Believing that valid evidence of "[l]egislative determination distinguishing juveniles from adults abounds," Justice Brennan cited juvenile restrictions regarding driving, voting, marriage, and the purchasing of items like cigarettes and pornography as proof of

\textsuperscript{66}. Id. at 2975 n.2.
\textsuperscript{67}. Id. at 2974-75. See also Id. at 2985-86 (Brennan, J., dissenting).
\textsuperscript{68}. Id. at 2976 (referring to The Anti-Drug Abuse Act of 1988, Pub.L. 100-690, 102 Stat. 4390 § 7001(b)).
\textsuperscript{69}. Id.
\textsuperscript{70}. Id. at 2977-78.
\textsuperscript{71}. Id.
\textsuperscript{73}. Eddings, 455 U.S. at 104.
\textsuperscript{74}. Id. at 2978. See also the articles regarding the transfer of juveniles to adult courts, Ailts, supra note 15, at 770 n.84; Maynes, \textit{The Death Penalty for Juveniles - A Constitutional Alternative}, 7 J. Juv. L. 54-57, 66 (1983); Menard, supra note 15, at 954-69; Streib, \textit{From Gault to Fare and Smith: The Decline in Supreme Court Reliance of Delinquency Theory}, 7 Pepperdine L. Rev. 801 (1980); Vanore, supra note 50, at 782.
society's recognition of minors as a unique class requiring constitutional protection.75

As for the other objective indicators, Justice Scalia considered them as inferior to that of the legislatures for various reasons. Juries, in their application of the law, demonstrated a reluctance to impose the death penalty, particularly with youthful offenders.76 While Justice Brennan found this factor to be highly relevant,77 Justice Scalia found that "it is not only possible but overwhelmingly probable that the very considerations which induce petitioners and their supporters to believe that death should never be imposed on offenders under 18 cause prosecutors and juries to believe that it should rarely be imposed."78

Additionally, the plurality believed that subjective opinions of the Justices should play no role in one's evaluation.79 Such an analysis would turn judges into "philosopher-kings."80 However, Justice Brennan found "Justice S[calia]'s positivist approach to the definition of citizens' rights ..." as allowing the masses to determine what was constitutional.81 The Framers distrusted the powers of the majorities and created the judiciary to oversee the balance and protection of individual rights.82

Finally, other indicia of public opinion polls and professional associations provided an "uncertain foundation" upon which one could rest constitutional law.83 As with international opinion, Justice Scalia refused to consider the petitioners' arguments as demonstrative of a national consensus. However, the dissent presented an impressive list of associations and experts that had fully considered the question of capital punishment for 16 and 17-year-olds and decided against its constitutionality.84

76. Stanford, 109 S. Ct. at 2977.
77. Id. at 2973-74.
78. Id. at 2977.
79. Id. at 2975.
80. Id. at 2980.
81. Id. at 2986-87 (Brennan, J., dissenting).
82. Id.
83. Id. at 2979.
84. Id. at 2985 (Brennan, J., dissenting).
B. Subjective Contemporary Standards

Justice Scalia also rejected the petitioners' subjective contemporary standards arguments that capital punishment of 16 and 17-year-olds "fails to serve the legitimate goals of penology." By failing to find a national consensus exempting the 16 and 17-year-old age group, the plurality would not allow for the opening of an Eighth Amendment disproportion argument. It also rejected the dissent's contentions, and to an extent Justice O'Connor's concurring opinion, that the Court should enter a full analysis of the penological goals of retribution and deterrence, and upon finding these goals lacking, use judicial discretion to eradicate any disproportion. The plurality refused to reopen an old wound and discuss whether the death penalty was morally right or wrong. Gregg settled that capital punishment was not cruel and unusual and was, therefore, constitutional.

IV. THE ROLE OF NUMBERS AND STATISTICAL ANALYSES

It is impossible to evaluate any capital punishment inquiry without encountering a plethora of numbers, percentages, and statistical analyses. The Brennan dissent pointed to the rarity of juvenile executions, which totaled 281 of an estimated 15,000 legal executions from 1642 to 1986. Such rarity of number has
previously led to findings of capricious and arbitrary capital punishment sentencing.95 The infrequency of a number has raised the question of whether the sentences were freakish, which often brought forth Eighth Amendment inquiries into the sentences' unusualness.96

The Supreme Court has been reluctant to place too much reliance on the statistical proof offered in evidence during capital cases.97 There is an inherent danger in quantifying an issue that is so inseparable from qualitative factors, such as the crime's circumstances, the offender's actions, and the victim's pain and suffering before death. Capital sentencing is fundamentally different from other questions, such as jury selection or discrimination claims. It is impossible to quantify all of the variables in a capital punishment case.98

Thus, the Supreme Court recognizes that quantitative data can overshadow individual differences and result in "a false consistency."99 The Court will therefore look to the facts of that specific case in order to determine an individual's penalty or review his previous judicial treatment:

The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases.... There is no perfect procedure for deciding in which cases governmental authority should be used to impose death.... When the choice is between life and death, the risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.100

V. CONCLUSION

Murder is said to be a "depravity of the mind" that is committed by only a minority of individuals.101 The question of how

95. See Thompson, 108 S. Ct. at 2687; McCleskey, 481 U.S. at 279; Tison, 481 U.S. at 137; Edmund, 458 U.S. at 782; Coker, 433 U.S. at 584; Gregg, 428 U.S. at 153; Furman v. Georgia, 408 U.S. 238 (1972). McCleskey yields one of the most extensive statistical analysis of a capital punishment claim. See also Jones, McCleskey v. Kemp: The Supreme Court Pulls the Switch on Future Judicial Challenges to the Death Penalty, 22 J. Marshall L. Rev. 215 (1988).
96. Furman, 408 U.S. at 310, 318 (Stewart and White, JJ., concurring opinions).
97. Id. See also McCleskey, 481 U.S. at 279. The Supreme Court of Kentucky rejected a statistical claim by Stanford arguing that black youths were twice as likely to receive grand jury referrals to adult court than white youths. Stanford, 434 S.W.2d at 791, aff'd, 109 S. Ct. 2696 (1989).
99. Eddings, 455 U.S. at 112.
100. Lockett, 488 U.S. at 605.
101. Id. at 201.
a society deals with those individuals is an extremely difficult one. In cases involving habitual criminals where their crimes escalate in terms of disruption and danger to society, the Supreme Court has recognized that the punishments must also escalate in response to those crimes. 102

The issue is even more difficult when the perpetrators are 16 and 17-year-olds with backgrounds and histories that do not ideally fit into the American interpretation of what is a normal environment for growth and development. 103 Yet, no matter how one views the case histories, those histories can explain only part of the individuals’ actions, not excuse them. 104 In an orderly society, everyone is ultimately responsible for his own actions.

Stanford v. Kentucky does not involve cases of bored juveniles who were caught cutting school or smoking joints. It involved two unique cases of well planned robberies and killings that resulted in two painful and terrifying deaths. In both cases, the victims’ “worth” to their killers equaled some cigarettes, some cash, and some miscellaneous merchandise. In its plurality opinion, the Supreme Court once again recognized its duty to “bite the bullet” and pass on a painful capital decision. 105

The unfortunate backgrounds of Kevin Stanford and Heath Wilkins cannot offset the aggravated brutality of their crimes. Both Stanford and Wilkins had access to the juvenile treatment facilities in their respective states. 106 Stanford even demanded that he had a further constitutional right to professional help since he was “amenable to treatment.” 107 Yet, how “amenable” could Stanford have been when he threatened to blow another youth’s “brains out ‘just like the girl’ ” at the juvenile detention center while awaiting the waiver hearing? 108 Furthermore, Stanford bragged about how he had raped and sodomized Baerbel Poore before he shot “the bitch.” 109 The Supreme Court of Ken-

101. Id. at 201.
102. Coker, 433 U.S. at 609. See also Solem, 463 U.S. at 317 (Burger, C.J., dissenting).
103. See Stanford, 109 S. Ct. at 2969. See also Stanford, 734 S.W.2d at 781, aff’d, 109 S. Ct. 2969 (1989); Wilkins, 736 S.W.2d at 409, aff’d, 109 S. Ct. 2969, 2973 (1989).
104. Eddings, 455 U.S. at 125 (Burger, C.J., dissenting).
106. Stanford, 734 S.W.2d at 791-92, aff’d, 109 S. Ct. 2969 (1989); Wilkins, 736 S.W.2d at 420, 422, aff’d, 109 S. Ct. 2969, 2973 (1989).
108. Id. at 787 n.6, aff’d, 109 S. Ct. 2969 (1989).
tucky appropriately held that Stanford “already had all the treatment the Commonwealth can provide.”¹¹⁰ To put Stanford in yet another juvenile facility would mean that “he would again be free to murder or otherwise harm as he pleased.”¹¹¹

Using the juvenile system, society gave Stanford and Wilkins the opportunity to change. Granted, the system is not perfect, but the key word is “opportunity.” Stanford and Wilkins declined to make any changes and continued to commit crimes that escalated in terms of violence and social harm.

A chronological age cannot excuse or hide the facts of these two unique cases. The issue is as basic as right and wrong or good and bad. Stanford and Wilkins conscientiously made their own choices and received the consequences of those decisions accordingly. The death penalty sentences show that society had given Stanford and Wilkins all of the financial, social, and emotional resources that it intended to give. Any further resources would be better utilized by aiding the families of Baerbel Poore and Nancy Allen. Society's sympathies and support should be with the victims of crime, not its perpetrators.

According to contemporary standards, the death penalty “fits” as a sanction to aggravated murder. In a future society, it may not. As long as the courts provide an individualized analysis of the offender’s crime and circumstances as required by the Constitution, capital punishment will be a possible sanction for an offender who commits aggravated murder, even if he is only 16 or 17 years old.

¹¹⁰. Id. at 792, aff'd, 109 S. Ct. 2969 (1989).
¹¹¹. Id.
THE RESTORATION OF COMPROMISE: COMMUNITY FOR CREATIVE NON-VIOLENCE V. REID

Earl K. Messer

I. INTRODUCTION

Every year authors create tremendous amounts of copyrightable material "for hire." From lace designs to textbooks, from architectural plans to sculptures, myriads of creators produce works that someone else has paid them to produce. The party who owns the copyright to these works is the one who possesses the right to market them, and is thus the one who stands to profit from their successful exploitation. Therefore, an important question arises: Who gets copyright, the person who creates a work or the party who hires him?

According to the Copyright Act of 1976 (the 1976 Act)1 "[c]opyright in a work . . . vests initially in the author or authors of the work."2 On its face, this provision seems to state that copyright goes to the person who creates the work. However, the 1976 Act also states that "[i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author."3 Thus, if a work is "made for hire," copyright goes to the employer; if not, it goes to the creator.4

Furthermore, when a work is not made for hire, the creator retains an inalienable right to terminate a transfer of copyright

4. See 1 M. Nimmer, Nimmer On Copyright, § 5.03[A], at 5-10 (1985) on the significance of an employer being designated as the author of a work made for hire. "[I]nsofar as the copyrightability of a work turns on the nationality or domicile of its author, it is the employer's nationality or domicile that will be determinative. Similarly, the disabilities of the manufacturing clause are applicable only to authors who are nationals and domiciliaries of the United States, which in this context refers to the nationality and domicile of the employer. Furthermore, no copyright may be claimed in a work written for hire relationship if the employer is the United States government. Finally, the duration of copyright and of grants of copyright may be affected if the work was created in a for hire relationship." Id. (footnotes omitted).
thirty-five years after the transfer is made, with a resulting reversion of copyright to the creator. The creator does not retain such rights when the work is made for hire. Since the 1976 Act prohibits the assignment of termination and reversion interests, the only way an employer can guarantee that he will not have to renegotiate the copyright of a successful work thirty-five years down the road is to make certain that the creation is a work made for hire.

Thus, substantial rights depend on whether a creation is a work made for hire. Unfortunately, the meaning of “work made for hire” has been the subject of much dispute. Section 101 of the 1976 Act defines it in this manner:

(1) a work prepared by an employee within the scope of his or her employment; or
(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

This definition depends on the meanings of the terms “employee,” “scope of employment,” and “specially ordered or commissioned.” These terms are not defined in the statute. Thus, the courts which have had to construe this provision have looked elsewhere for their definitions.

At the time that the 1976 Act was enacted, a large body of case law interpreting the “works made for hire” provision of the Copyright Act of 1909 (the 1909 Act) already existed. Under the judicial interpretation of that Act, the works of both regular employees and of independent contractors were considered made for hire. The question courts faced after the passage of the new act was the extent to which this old case law was preserved.

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9. See supra note 4, § 5.03[B][1] at 5-12.
10. See infra notes 22-34 and accompanying text.
12. See infra notes 35-39 and accompanying text.
under the new statute. Specifically, were the works of independent contractors works made for hire?

Appellate courts split in answering this question. The Second Circuit applied 1909 Act precedent, while the Fifth, Ninth, and D.C. Circuits did not. Furthermore, the Fifth and D.C. Circuit courts explicitly used agency law principles to distinguish between employees and independent contractors. They considered the works of employees to be works made for hire by operation of § 101(1), while holding that works of independent contractors could not be works made for hire unless they were among the nine enumerated works listed in § 101(2).

When Community for Creative Non-Violence v. Reid reached the Supreme Court, the Court unanimously resolved this split in the appellate courts, rejecting the application of 1909 Act case law. The Court also adopted an agency law standard for distinguishing between the employees of § 101(1) of the 1976 Act and the independent contractors of § 101(2).

The purpose of this note is to analyze the Supreme Court's decision. To do that effectively, the decision's complex legal background must be examined in detail. First, 1909 Act precedent respecting works made for hire will be examined to show the following: (1) courts used agency law principles to distinguish between the works of employees and the works of non-employees; (2) prior to 1966, courts did not apply the works made for hire provision to independent contractors; and, (3) only after 1966 did courts bring the works of independent contractors within the category of works made for hire. Second, the legislative history of the 1976 Act will be examined to show that the framers of the statute: (1) forged the works made for hire provision before

13. See, e.g., Aldon Accessories Ltd. v. Spiegel, Inc., 738 F.2d 548 (2d Cir. 1984); Easter Seal Soc'y for Crippled Children and Adults of La., Inc. v. Playboy Enters., 815 F.2d 323, 325, 326 (5th Cir. 1987); and Dumas v. Gommerman, 865 F.2d 1093 (9th Cir. 1989).
14. See Aldon Accessories Ltd. v. Spiegel, Inc., 738 F.2d 548 (2d Cir. 1984), and infra note 108 for cases following Aldon Accessories.
15. See, e.g., Easter Seal Soc'y for Crippled Children and Adults of La., Inc. v. Playboy Enters., 815 F.2d 323 (5th Cir. 1987); Dumas v. Gommerman, 865 F.2d 1093 (9th Cir. 1989); and, Community for Creative Non-Violence v. Reid, 846 F.2d 1485 (D.C. Cir. 1988).
16. See Easter Seal Soc'y, 815 F.2d at 337; Reid, 846 F.2d at 1494.
17. See Easter Seal Soc'y, 815 F.2d at 335; Reid, 846 F.2d at 1494.
19. Id. at 2177.
20. Id. at 2178.
1966, that is, before the change in 1909 Act precedent; (2) intended to codify the agency law approach to the works of employees; and, (3) intended the works of independent contractors to be considered works made for hire only to the extent permitted in § 101(2). Third, 1976 Act case law will be discussed to show that: (1) the Second Circuit misconstrued the 1976 Act by holding that the works of independent contractors could be works made for hire under § 101(1); (2) the error of the Second Circuit was in applying 1909 Act precedent which had developed after 1966; and, (3) other circuit courts were divided in attacking and supporting the position taken by the Second Circuit. Finally, Community for Creative Non-Violence v. Reid will be analyzed to show: (1) that the Supreme Court restored the meaning to the works made for hire provision intended by the framers of the 1976 Act; and, (2) that the agency standard which the Court adopted is so ambiguous that it will lead to problems in the future.

II. CASE LAW UNDER THE 1909 ACT

Two separate strands of case law developed after the passage of the 1909 Act. One focused on employees and the Act's works made for hire provision, and the other focused on independent contractors with no mention whatsoever of the 1909 Act or works made for hire.

A. Employees

The 1909 Act simply provided that "the word 'author' shall include an employer in the case of works made for hire." Without a statutory definition of employer or works made for hire, the courts developed their own definitions and tests. First, courts used factors similar to those emphasized in agency law to determine whether or not the creator of a given work was an employee. Second, the courts then imposed the agency law

21. For a succinct summary, see Easter Seal Soc'y for Crippled Children and Adults of La., Inc. v. Playboy Enters., 815 F.2d 323, 325-26 (5th Cir. 1987).
23. See, e.g., Tobani v. Carl Fischer, Inc., 98 F.2d 57 (2d Cir. 1938) (creator held to be employee where contract described him as such, he was paid a weekly salary, and the type of composition he turned out was specified by the hiring party); Von Tilzer v. Jerry
requirement that the work had to be created within the regular course of employment. By the mid-1960s courts explicitly used an agency law test to determine the existence of employer/employee relationships in copyright cases. The key element of this test was “the right of the employer ‘to direct and supervise the manner in which the [creator] performs his work.’” This test was applied by means of a detailed factual analysis that is essential in agency law.

B. Independent Contractors Pre-1966

Before 1966, that is, prior to the decision in Brattleboro Publishing Co. v. Winmill Publishing Corp., courts applied different

Vogel Music Co., 53 F. Supp. 191 (S.D.N.Y. 1943) (creator held to be employee where he worked regularly from “nine to five,” on the hiring party’s premises, at a fixed salary); Fred Fisher Music Co. v. Leo Feist, 55 F. Supp. 359 (S.D.N.Y. 1944) (creator held to be employee where he wrote songs exclusively for the hiring party, he received a regular salary as an advance against royalties, and was also hired onto the regular professional staff for other matters).

24. See, e.g., Brown v. Molie Co., 20 F. Supp. 135, 136 (S.D.N.Y. 1937) (lyrics written by employee “as part of the duties under his employment” held to be work made for hire); Von Tilzer v. Jerry Vogel Music Co., 53 F. Supp. 191, 193 (S.D.N.Y. 1943) (lyrics written by songwriter “for his employer in the course of his employment” held to be work made for hire); Fred Fisher Music Co. v. Leo Feist, 55 F. Supp. 359 (S.D.N.Y. 1944) (songs written by songwriter in the regular course of his employment held to be work made for hire); Sawyer v. Crowell Publishing Co., 142 F.2d 497, 498 (2d Cir. 1944) (map prepared by government employee in the “course of official duties” held to be work made for hire); Shapiro Bernstein & Co. v. Jerry Vogel Music Co., 115 F. Supp. 754, 757 (S.D.N.Y. 1953) (lyrics written by songwriter “as a special job assignment, outside the line of his regular duties” held not to be work made for hire); and Public Affairs Assocs. v. Rickover, 284 F.2d 262, 269 (D.C. Cir. 1960) (an admiral’s speeches which were not “called for by his official duties or explanations as guides for official action” held not to be work made for hire).

25. Donaldson Publishing Co. v. Bregman, Vocco & Conn, Inc., 375 F.2d 639, 643 (2d Cir. 1967) (quoting Nimmer, Copyright, § 62.31 (1964)). See also Restatement (Second) of Agency § 220(1). “A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control.” Id.

26. See Restatement (Second) of Agency § 220(2). See also the detailed factual analyses emphasizing factors used in agency law in two later cases: Olympia Press v. Lancer Books, Inc., 267 F. Supp. 920 (S.D.N.Y. 1967) (translator who did his work other than on the putative employer’s business premises, where the putative employer exercised no control over the text, and where payment was for the final finished product, held not to be an employee) and Donaldson Publishing Co. v. Bergman, Vocco & Conn, Inc., 375 F.2d 639 (2d Cir. 1967) (where (1) writer was paid regularly as an advance on royalties, (2) writer repaid the amount drawn in excess of his royalties, (3) the royalties made up less than half of his remuneration from the putative employer, and, (4) writer engaged in outside writing activities which brought him substantial income, court held writer was not an employee).

27. 369 F.2d 565 (2d Cir. 1966).
copyright principles to independent contractors than they did to employees. Before then, courts did not apply the works made for hire provision of the 1909 Act to independent contractors. The law respecting the ownership of copyright in independent contractor/employer relationships developed independently of the 1909 Act on the basis of precedent established before its passage.

In the case of works commissioned to independent contractors, pre-Brattleboro case law generally held that if the parties to the contract mutually intended the employer to own the copyright, then the court would enforce that employer's ownership right; otherwise the creator retained copyright. Only the creator of the work was considered the author, indicating that the courts

28. See Easter Seal Soc'y for Crippled Children and Adults of La., Inc. v. Playboy Enters., 815 F.2d 323, 326 (5th Cir. 1987) ("[T]he Second Circuit explicitly merged the Yardley rule [respecting independent contractors] into the 'work for hire' doctrine for the first time [in the Brattleboro decision].") (footnote omitted).

Further support for this argument is found in the legislative history of the 1976 Act. In the early 1960s, when most of the work on the Act was done, various parties commented on the existing state of the law. "The courts . . . have not generally regarded commissioned works as 'made for hire.'" Also, the courts held "that an employee owns the right in a work created on his own initiative outside the scope of his employment." House Comm. on the Judiciary, 87th Cong., 1st Sess., Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 86 (Comm. Print 1961). "The cases . . . hold that 'employment for hire' exists where there is the relationship of 'master and servant,' that is, where the person receives compensation and is subject to control and regulation by the person for whom he performs the work." House Comm. on the Judiciary, 88th Cong., 2d Sess., Copyright Law Revision Part 3: Preliminary Draft and Discussion and Comments 274 (Comm. Print 1964) (comments of Mr. Tannenbaum).

Cf. Varmer, Works Made for Hire and On Commission, in Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, Study No. 13, 86th Cong., 2d Sess. 130 (Comm. Print 1960), where Varmer states that the works made for hire provision of the 1909 Act as construed by the courts referred "only to works made by salaried employees in the regular course of their employment."

29. Many of the early photograph cases based their holding on a 19th-century British case, Pollard v. Photographic Co., 40 Ch. Div. 345 (1888). See also, Varmer, supra note 28, at 130, where Varmer states that "[t]he cases which have settled problems of copyright ownership in works made on commission have generally involved portrait or group photographs. Certain principles were developed for this type of work long before the 1909 Act."

30. See W. H. Anderson Co. v. Baldwin Law Publishing Co., 27 F.2d 82, 88 (6th Cir. 1928) ("the intent of the parties as to which of them shall have the right to copyright is decisive"), and Hartfield v. Herzfeld, 60 F.2d 599, 600 (S.D.N.Y. 1932) (who gets copyright "depends on the mutual intention of the parties at the time of the contract").
did not interpret commissioned works as works made for hire.\textsuperscript{31}

However, two lines of cases developed concerning commissioned photographs and commissioned works of an artistic nature which formed a limited exception to this rule. In these cases courts held that in the absence of an agreement otherwise, copyright would be presumed to vest in the party commissioning the work and not in the independent contractor.\textsuperscript{32} The courts in these cases used the so-called "instance and expense" test to differentiate between independent contractors and those who stood in no employment relation whatsoever to the putative employer.\textsuperscript{33} A party was considered to be an independent contractor only if the work was done at the instance and at the expense of someone other than himself. Thus, a rule of limited application developed which had nothing to do with works made for hire. An employer was presumed to have copyright (1) in the absence of evidence of contrary intent of the parties, (2) if the work was a photograph or of an artistic nature, and (3) if the work was shown to be a commissioned work by application of the instance and expense test.\textsuperscript{34}

\textsuperscript{31} See cases cited supra notes 30 and 42.

\textsuperscript{32} For photograph cases, see Press Publishing Co. v. Falk, 59 F. 324 (S.D.N.Y. 1894); Moore v. Rugg, 44 Minn. 28, 46 N.W. 141 (1890); Douglas v. Stokes, 149 S.W. 849 (Ky. 1912); Lumiere v. Pathe Exch., Inc., 275 F. 428 (2d Cir. 1921); Lumiere v. Robertson-Cole Distrib. Corp., 280 F. 550 (2d Cir. 1922); Avedon v. Exstein, 141 F. Supp. 278 (S.D.N.Y. 1956); and Holmes v. Underwood & Underwood, Inc., 225 App. Div. 360 (N.Y. 1929).


\textsuperscript{34} See also, Varmer, supra note 28, at 142, which says that "[n]o reported decisions have been found involving commissioned works other than photographs and works of art, and it appears uncertain whether the same rule would apply to such other works." (footnote omitted).

\textsuperscript{33} The earliest use of this kind of test appears to have been in Lumiere v. Robertson-Cole Distrib. Corp., 280 F. 550, 553 (2d Cir. 1922).

\textsuperscript{34} See generally the cases cited supra note 32. In cases where there was neither a photograph nor a work of an artistic nature, the courts did not presume that copyright passed to the employer. See W. H. Anderson Co. v. Baldwin Law Publishing Co., 27 F.2d 82 (6th Cir. 1928) (index created on commission held not to pass copyright to hiring party); Hartfield v. Herzfeld, 60 F.2d 599, 600 (S.D.N.Y. 1932) (code book created on commission held not to pass copyright to hiring party); and Uproar Co. v. National Broadcasting Co., 81 F.2d 373 (1st Cir. 1936) (comedy routine for radio ads created on commission held not to pass copyright to hiring party).
C. Independent Contractors Post-1966

In the case of Brattleboro Publishing Co. v. Winmill Publishing Corp., this rule, which had applied only to two types of independent contractors, was given much broader range. In Brattleboro, the Second Circuit held that where ads had been prepared by a newspaper for a business, the business which commissioned the creation of those ads possessed the copyright.\(^\text{35}\) Since the ads were works of an artistic nature, this decision seems consistent with prior case law. However, the Brattleboro court suggested a new rationale upon which to base its presumption that copyright went to the commissioning party. "[W]henever an employee's work is produced at the instance and expense of his employer . . . the employer has been presumed to have the copyright."\(^\text{36}\)

What formerly had been a test for the existence of an independent contractor relationship was now being used to determine whether one was an employee. By application of the instance and expense test, independent contractors became "copyright employees" subject to the works made for hire doctrine.\(^\text{37}\) Consequently, after the Brattleboro decision, courts increasingly used the instance and expense test to determine whether any commissioned work was a work made for hire.\(^\text{38}\)

\(^{35}\) 369 F.2d 565, 566 (2d Cir. 1966).

\(^{36}\) Id. at 567.

\(^{37}\) However, there is ambiguity in the court's holding. Notwithstanding its invocation of the works made for hire rule, the court did not state explicitly that the ads at issue in that case were works made for hire. Nor did the court state that the business/commissioner was the author of the ads. Instead, the holding is based nominally on the earlier non-"works for hire," independent contractor case, Yardley v. Houghton Mifflin Co., 108 F.2d 28 (2d Cir. 1939).

Nonetheless, later courts used this decision as precedent to make virtually all works of independent contractors into works made for hire.


Nonetheless, courts did not abandon the "right to control" agency law test, even though that test had developed to determine the existence of an independent contractor/employer relationship. Typically, adoption of the instance and expense test for the purpose of determining whether a work was made for hire, meant the agency law right to control.
By 1976, the year the new copyright act was passed, all works of both employees and independent contractors were presumed to be works made for hire unless there was evidence that the parties intended otherwise.39

III. LEGISLATIVE HISTORY OF THE 1976 ACT

A. General Background

The formulation of the Copyright Act of 1976 was quite different from most Congressional legislation.40 "[M]ost of the statutory language was not drafted by members of Congress or their staffs. . . . Instead, the language evolved through a process of negotiation among authors, publishers, and other parties with economic interests in the property rights the statute defines."41 For a period of over twenty years, under Congress’ aegis, interested parties hammered out tough compromises in specific language which, to a great extent, was enacted verbatim in 1976.42 This unique legislative history suggests that the most sensible way to understand the 1976 Act is to determine its meaning to those who forged its language.43

See, e.g., Murray v. Gelderman, 566 F.2d 1307 (5th Cir. 1978), and Roth v. Pritikin, 710 F.2d 934 (2d Cir. 1983). In neither of these cases was there a detailed factual analysis of the relationship between the two parties to determine whether or not an employment relationship existed on the basis of the employer’s right to control the manner in which the work was done. Instead, once the courts determined that the work had been created at the instance and expense of the hiring party they considered it a work made for hire and made the “right to control” test into a “right to control the product” test. The latter test will always be met in the case of a commissioned work since the commissioning party always retains the right to reject a product not in conformity with the contract.

39. Easter Seal Soc’y for Crippled Children and Adults of La., Inc. v. Playboy Enters., 815 F.2d 323, 327 (5th Cir. 1987).
41. Id. at 861 (footnote omitted).
42. Id. at 867-68.
43. See id. at 862 where Litman states that “[t]he legislative materials disclose a process of continuing negotiations among various industry representatives, designed and supervised by Congress and the Copyright Office and aimed at forging a modern copyright statute from a negotiated consensus. During more than twenty years of negotiations, the substantive content of the statute emerged as a series of interrelated and dependent compromises among industries with differing interests in copyright. The record demonstrates that members of Congress chose to enact compromises whose wisdom they doubted because of their belief that, in this area of law, the solution of compromise was the best solution.”
B. The Works Made for Hire Provision

One of the key compromises in the 1976 Act concerned works made for hire. In 1963, in light of what was perceived to be the present state of the law, the Register of Copyright recommended the following definition of works made for hire: "a work prepared by an employee within the scope of the duties of his employment, but not including a work made on special order or commission." This appears to be a codification of the agency law approach of pre-Brattleboro 1909 Act precedent concerning the works of employees.

This provision by itself did not purport to effect any change in the existing rights of the hiring and the hired parties. However, due to a change in another section of the statute, this provision was of immense importance to publishers. Under the judicial interpretation of the 1909 Act, an author's expectation of a renewal copyright term was assignable. Thus, the fact that a commissioned work was not a work made for hire made little difference to publishers since they could obtain both the present copyright term and the creator's interest in a renewal term at the time of the signing of the original contract.

In contrast, it was proposed in the new act that the author would retain an inalienable right to terminate any grant of copyright made during the initial term, with a consequent reversion of copyright to that author. Such a provision would not apply to works made for hire. Thus, under the proposed statute, the only way the publisher could obtain renewal rights at the time of contracting for the work was if the work was created by an employee within the scope of his or her employment, that is,
if it was considered a work made for hire. Since commissioned works were being excluded explicitly from the category of works made for hire, the publishers stood to lose important rights which they had possessed under prior law.

Under such circumstances, representatives of the publishing industry protested vigorously the portion of the new definition of works made for hire which excluded commissioned works.50 They claimed that allowing the authors of commissioned works to terminate copyright after the first term would be especially unfair in collective works.51

As a result, the framers of the 1964 Revision Bill adopted a definition of works made for hire suggested by the American Book Publishing Council.52 "A 'work made for hire' is a work prepared by an employee within the scope of his employment, or a work prepared on special order or commission if the parties expressly agree in writing that it shall be considered a work made for hire."53

Representatives of authors reacted strongly to this provision, claiming that it would reduce virtually all commissioned works to works made for hire. They argued that because the writing required to make a commissioned work into a work made for hire was no protection for the author due to a weak bargaining position, the author would be forced to sign a contract with the provision or fail to be published. The result would be forfeiture of the author's termination and reversionary rights.54

50. Copyright Law Revision Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 66 (Comm. Print 1965) ("The last phrase of this definition was strongly opposed by book publishers, among others... ").

51. House Comm. on the Judiciary, 88th Cong., 2d Sess., Copyright Law Revision Part 3: Preliminary Draft and Discussion and Comments 258, 259 (Comm. Print 1964) (comments). See also Copyright Law Revision Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 67 (Comm. Print 1965) where the Register of Copyright summed up the sentiments of the publishers: "it would be unfair in these cases to allow authors to terminate assignments of rights under section 203."


54. This entire argument is a summary of a letter from Irwin Karp, Counsel for the Authors League of America, Inc., to the Register of Copyright. House Comm. on the
Representatives of both sides in this conflict came to a compromise which was incorporated into the 1965 Revision Bill, and eventually, with minor additions, was enacted in the 1976 Act. All interested parties supported the compromise.\(^55\)

The legislative history indicates that the framers of this compromise intended to codify judge-made agency law in part (1) of the definition of works made for hire. That part of the definition changed very little after its initial formulation as an expression of existing case law.\(^56\) However, the new statute differs in part (2) of the definition, in that specially commissioned works can become works made for hire if (1) they are within the specific list of nine categories and, (2) there is a writing expressly stating that the work is "for hire."\(^57\) This provision represents a change from prior law. It is best understood as a change in the treatment of commissioned works for the purpose of reinstating the protection publishers possessed under earlier law against an author's termination and reversionary rights. The only difference now was that the protection was limited to nine specific types of works.

Between 1965, the year of the compromise, and 1976, the year the statute was actually enacted, case law under the 1909 Act regarding the works made for hire provision changed markedly. The change is not mentioned in the legislative history. It seems that Congress was primarily interested in enacting the compromises which had been long and hard in the making, refusing to reconsider them. That the interpretation of the 1909 Act changed subsequently does not change the intention of the framers of the statute. Those intentions are clear only in light of the pre-\textit{Brattleboro}, pre-1966, case law and not under the shadow of post-\textit{Brattleboro}, post-1966, case law.


\(^{56}\) Compare the recommended definition of the Register of Copyright in 1963, "A work prepared by an employee within the scope of the duties of his employment," with the 1976 Act, "a work prepared by an employee within the scope of his or her employment." House Comm. on the Judiciary, 88th Cong., 2d Sess., Copyright Law Revision Part 3: Preliminary Draft and Discussion and Comments 15 n.11 (Comm. Print 1964) and 17 U.S.C. § 101(1).

\(^{57}\) 17 U.S.C. § 101(2).
IV. CASE LAW UNDER THE 1976 ACT

The earliest cases decided under the 1976 Act which construed the new works made for hire provision seem to interpret the statute as it appears on its face. Unfortunately, such a straightforward interpretation did not last long.

A. The Aldon Accessories Decision

In 1984, the Second Circuit decided the case of Aldon Accessories Ltd. v. Spiegel, Inc., which appeared to revive post-Brattleboro 1909 Act case law. Aldon Accessories has been criticized repeatedly.

The Aldon Accessories court stated that the legislative history of the 1976 Act gave no indication whatsoever that Congress intended to dispense with the works made for hire case law developed under the 1909 Act. The test under that Act, which the court believed was still valid under the 1976 Act, was stated to be "if an employer supervised and directed the work, an employer-employee relationship could be found even though the employee was not a regular or formal employee." Only in the case of independent contractors whose work was not sufficiently supervised or directed would it be necessary to be within part

58. See, e.g., Meltzer v. Zoller, 520 F. Supp. 847 (D.N.J. 1981) (commissioned architectural plans held not to be a work made for hire because there was no written agreement and such plans were not within the statutory list of nine categories); Aitken, Hazen, Hoffman, Miller, P.C., v. Empire Const. Co., 542 F. Supp. 252 (D. Neb. 1982) (common law agency factors applied to find that architect was not an employee); BPI Sys., Inc. v. Leith, 532 F. Supp. 208 (W.D. Tex. 1981) (party commissioned to create computer programs held not to be an employee using an agency law test); Town of Clarkstown v. Reeder, 566 F. Supp. 137 (S.D.N.Y. 1983) (volunteer writer of manual held to be an employee by an agency law analysis, although court did state that the employer had the "power to supervise and control the work product," which may indicate a slipping away from the agency law test of controlling the manner in which the work is done to a test where control of the final product is sufficient).

59. 738 F.2d 548 (2d Cir. 1984).


61. 738 F.2d at 552.

62. Id. This looks like a conflation of the weakened right to control the product test developed in the post-Brattleboro cases, with a new "actual control test."
(2) of the definition of work made for hire under the 1976 Act.\textsuperscript{63} Independent contractors who were actually supervised would be employees under § 101(1) and therefore their commissioned creations would be works made for hire without meeting the requirements of § 101(2).

Because the great majority of copyright decisions are made by the Second Circuit, its decisions carry much weight.\textsuperscript{64} Thus, many courts in other circuits thereafter applied the \textit{Aldon Accessories} "actual control test."\textsuperscript{65}

\textbf{B. The Easter Seal Society Decision}

In \textit{Easter Seal Society for Crippled Children and Adults of Louisiana, Inc. v. Playboy Enterprises}, the Fifth Circuit rejected the Second Circuit's interpretation of the 1976 Act.\textsuperscript{66} Instead, the Fifth Circuit held that in order to find that a party is an employee for "works for hire" purposes, agency law principles must be applied.\textsuperscript{67} In addition, the court stated that the only independent contractors who could be brought within the works made for hire provision were those who created works within the nine enumerated categories and who signed a written agreement expressly stating that the creation was a work made for hire.\textsuperscript{68} The court's primary reasons for its holding were: (1) this is what the statute seems to state on its face, and (2) the phrase "scope of employment" as used in the statute "is virtually a term of art in agency law."\textsuperscript{69}

\textbf{C. The Dumas Decision}

In \textit{Dumas v. Gommerman},\textsuperscript{70} the Ninth Circuit grappled with the new works made for hire provision. After a thorough exam-
ination of the legislative history of the 1976 Act, the Dumas court, like the Easter Seal Society court before it, rejected the Aldon Accessories compromise. Instead, the court held that the term “employee,” in the works made for hire provision, meant a salaried employee.

While the court was in basic agreement with the analysis given in Easter Seal Society, it was disturbed by the Fifth Circuit’s adoption of agency law principles to distinguish between the copyright employees and independent contractors. The Dumas court attacked this position on several grounds.

First, the court disputed that the term “scope of employment... suggests congressional intent to incorporate agency doctrine.” The court suggested instead that this phrase was meant merely to prevent works done “outside of that employee’s job” from being brought within the works made for hire provision.

Second, the court stated that agency law as codified in the Restatement of Agency does not “provide a ‘good fit’ in the copyright context.”

While broad, generalized definitions of terms such as ‘employee’ may be desirable in common law situations or statutory schemes applying to a wide variety of situations, often unforseeable, it must be remembered that the Copyright Act applies to a relatively narrow class of persons and situations. The drafters recognized this and intended the definition to be tailored to the realities of the copyright marketplace. Agency law principles, because they apply so broadly, do not provide the clarity required by the Act.

Third, the court stated that “the content of the pre-legislative dialogue and the context in which it occurred indicate that by using the term ‘employee’ the parties meant to limit works made

71. Id. at 1102-03, i.e., the Ninth Circuit rejected the actual supervision and control test.
72. Id. at 1105. However, even though the court adopted this as a “bright line test,” it also said that certain other factors could be considered when the “relationship is ambiguous.” Id. This appears very close to an agency law analysis, although the court stated that its test was distinguishable because it de-emphasized the “right to control test.” Id. at 1104.
73. Id. at 1104. See also supra note 67 and accompanying text.
74. Id. at 1104 n.16.
75. Id.
76. Id. at 1104 n.18.
77. Id. at 1104-05 n.18.
for hire under this branch of the definition to works created by a salaried worker in a long-term position." 78

V. COMMUNITY FOR CREATIVE NON-VIOLENCE V. REID

A. Discussion of the Supreme Court's Reasoning

The Supreme Court of the United States unanimously affirmed the judgment of the D.C. Circuit Court, which had held that the sculptor Reid was an independent contractor, and that the sculpture he created was not a work made for hire. 79 The Court supported its affirmation of the lower court’s decision on the basis of three broad arguments. First, the language of the statute itself indicates that Congress intended there to be separate treatment of employees and independent contractors on the basis of agency law principles. 80 Second, the legislative history of the 1976 Act indicates that the framers of the works made for hire provision intended the very same separate treatment on the basis of agency law principles. 81 Third, adoption of the Aldon Accessories actual control test would undermine the paramount congressional purpose in revising copyright law, that is, of "enhancing predictability and certainty of copyright ownership." 82

1. The Language of the Statute

The Court noted as a "starting point" that the statute does not define the terms "employee" or "scope of employment." 83 In the past, when the Court was faced with interpreting a statute in which the term "employee" was used but not defined, the Court "concluded that Congress intended to describe the conventional master-servant relationship as understood by common law agency doctrine." 84 The Court found further support for this position in the fact that the statute used the term "scope of employment . . . , a widely used term of art in agency law." 85

78. Id. at 1101 (quoting Litman, supra note 40, at 890).
80. Id. at 2172-74.
81. Id. at 2174-77.
82. Id. at 2177-78.
83. Id. at 2172.
84. Id.
85. Id.
According to the Court, neither a “right to control the product” test nor an “actual control” test are consistent with the language of the statute. The right to control the product test improperly focuses on the relationship between the hiring party and the product being created, while the statute focuses on the relationship between the hired and the hiring parties. Furthermore, § (2) of the works made for hire definition would be redundant under the right to control the product test. Since the right to control the product exists “by definition” in all specially commissioned works, all works which could become works made for hire by written agreement under § (2) would already be works made for hire by operation of § (1).

The Court dismissed the actual control test with less argument, noting first that it “fares only marginally better when measured against the language and structure of § 101.” Second, the Court agreed with the Fifth Circuit’s assessment that “[t]here is simply no way to milk the ‘actual control’ test of Aldon Accessories from the language of the statute.”

2. Legislative History

After summarizing relevant portions of the legislative history of the 1976 Act, the Court stated its significance.

First, the enactment of the 1965 compromise with only minor modifications demonstrates that Congress intended to provide two mutually exclusive ways for works to acquire work for hire status: one for employees and the other for independent contractors. Second, the legislative history underscores the clear import of the statutory language: only enumerated categories of commissioned works may be accorded work for hire status. The hiring party’s right to control the product simply is not determinative.

The argument against this position is that if Congress had intended to jettison case law under the 1909 Act which defined employees, it would have noted such a major change in the

86. Id. at 2173-74.
87. Id. at 2173.
88. Id.
89. Id.
90. Id. at 2174 (quoting Easter Seal Soc’y for Crippled Children and Adults of La., Inc. v. Playboy Enters., 815 F.2d 323, 334 (5th Cir. 1987)).
92. Id. at 2176-77.
legislative history. In response, the Court stated that congressional silence ordinarily “is just that — silence.” More pointedly, the Court noted that the 1965 compromise which was later enacted into law was complete before the post-Brattleboro line of cases “for the first time applied the work for hire doctrine to commissioned works.” Thus, “Congress certainly could not have ‘jettisoned’ a line of cases that had not yet been decided.”

3. Congressional Policy

The Court stated that the application of the actual control test would lead to uncertainty and unpredictability in determining ownership of copyright, a result inimical to Congress’ “paramount goal in revising the 1976 Act of enhancing predictability and certainty of copyright ownership.” A test of actual control implies that the parties might not know whether the creator of a work was an employee until late in the relationship or even until the relationship was over. Thus, an employer might find himself the “author” of a work made for hire, or, worse yet, might make himself the “author” of a work made for hire by making sure he actually exercises direction and supervision in a situation where he did not bargain for authorship rights.

B. Analysis

1. Introduction

The thrust of the Supreme Court’s decision in Community for Creative Non-Violence v. Reid is to establish a definitive test for the existence of an employer/employee relationship for purposes of the works made for hire provision of the 1976 Act. The Court renounced post-Brattleboro case law which had made the works of independent contractors into works made for hire, by rejecting specifically the Aldon Accessories actual control test and the

93. Id. at 2177. See also Aldon Accessories Ltd. v. Spiegel, Inc., 738 F.2d 548, 552 (2d Cir. 1984).
96. Id.
97. Id.
98. Id. at 2178.
99. Id.
earlier formulated right to control the product test. Furthermore, the Court adopted a common law agency test, indicating that in the past the Court had used the Restatement of Agency for guidance concerning the factors to be considered in determining whether an employment relationship exists.101

2. Renunciation of Aldon Accessories

The Court clearly held that works created on special commission cannot be considered works made for hire under § 101(1).102 The term "employee" as used in that portion of the statute completely excludes independent contractors, by agency law definition. Commissioned works can become works made for hire if and only if the conditions in § 101(2) are met.103

This treatment of the works of independent contractors constitutes a rejection of case law which had developed under the 1909 Act. Commissioned works such as photographs, works of an artistic nature, advertisements, architectural plans, rings, lace, lyrics, or books will no longer be considered works made for hire, as all of them had been under the 1909 Act, unless they can be placed into one of the nine enumerated categories in § 101(2).

In Community for Creative Non-Violence v. Reid, the Court took a major step towards giving effect to the compromise worked out by the industry representatives who forged the 1976 Act. The framers of the works made for hire provision did not intend the term employee as used in § 101(1) to include independent contractors.104 With respect to the works made for hire provision, the authors' groups wanted to protect authors' termination and reversionary rights. The more works included in the works made for hire definition, the less authors could exercise those rights. Advocating a contrary position, industry representatives sought to include more works, especially collective ones, in this new definition.

The 1965 compromise, embodied in the statute, allows commissioned works in nine special categories to be made into works made for hire by express agreement. This gives industry repre-

100. Id. at 2178.
101. Id. at 2178-79.
102. Id.
103. Id. at 2179-80.
104. See infra notes 40-57 and accompanying text.
sentatives protection in the area of collective works. At the same time, by limiting the types of commissioned works which can be made into works made for hire, authors' groups receive protection in the form of retaining termination and reversionary rights in all commissioned works other than those within the specified list of nine.

The *Aldon Accessories* decision threatened to destroy this carefully crafted compromise by adopting the expanded notion of works made for hire as it had evolved in post-*Brattleboro* 1909 Act case law. By its decision in *Community for Creative Non-Violence v. Reid*, the Supreme Court has effectively restored the compromise forged by the industry representatives.

3. The Common Law Agency Standard

The Supreme Court not only renounced 1909 Act case law concerning independent contractors, it also adopted general common law agency principles as the standard by which courts must distinguish between employees and independent contractors for purposes of § 101(1). Yet, to use the singular term "standard" here is misleading. Application of agency law principles necessitates consideration of a number of factors and a determination of whether the weight of those factors indicates that the hired party is an employee or an independent contractor.

In its application of agency law, the Supreme Court stated that it first considered "the hiring party's right to control the manner and means by which the product is accomplished." The Court then recited a non-exhaustive list of twelve other factors which are relevant in determining employment relationships — no one of which was said to be determinative. For guidance in this matter, the Court cited the Restatement of Agency and thirteen cases in which there was a federal statute without a definition of the term employee and in which the various factors listed by the Court were applied.

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105. See infra notes 59-65 and accompanying text.
107. See Restatement (Second) of Agency § 220.
109. Id. at 2178-79.
110. Id.
The question for the future, which the Supreme Court did not answer, is how should these factors be applied in a copyright context? First, the Court gives no definitive list of factors which a lower court should consider under any given set of circumstances, thus leaving open the possibility for the use of additional factors which might either expand or contract the meaning of the term "employee." Second, the balancing of the factors is a subjective process. It leaves much room for tailoring agency law principles in such a manner as to create uncertainty concerning the meaning of the term "employee." Such uncertainty hinders effective business planning by creators and employers due to continuing inability to predict whether the creator will be able to exercise rights of termination and reversion.

This lack of certainty was not alleviated by the guidance the Court offered in the form of prior agency law cases. In three of the cases, the courts specifically stated that they rejected the common law of agency for purposes of determining employment relationships under the statute they were applying. Two of those courts instead explicitly held that the definition of "employee" depended on the purpose of the legislation. By emphasizing the purpose of the statute, agency law was not lost but

111. Id. at 2179. When listing the 12 factors the Court said "[a]mong other factors relevant to this inquiry are . . . .", indicating that other factors not listed might be relevant. Id. See also RESTATEMENT (SECOND) OF AGENCY § 220(2).


113. See, e.g., United States v. Silk, 331 U.S. 704, 713 (1947) (Court stated that the rejection of the use of an agency law test in NLRB v. Hearst Publications in favor of a test based on the purpose of the statute was the rule to be followed in the instant Social Security Act case); Darden v. Nationwide Mut. Ins. Co., 796 F.2d 701, 706 (4th Cir. 1986) ("[T]he common law test for the relationship of master and servant is not the appropriate standard for application here [for purposes of the Employee Retirement Income Security Act]"); and Dumas v. Gommerman, 865 F.2d 1093, 1104 (9th Cir. 1989) ("[T]he Restatement of Agency [does not] provide a 'good fit' in the copyright context").

See also Bartels v. Birmingham, 332 U.S. 126, 130 (1947) (The Court approvingly paraphrased the holding in Silk, stating that "[l]iability for employment taxes under the Social Security Act was not to be determined solely by the idea of control which an alleged employer may or could exercise over the details of the service rendered to his business by the worker or workers.")

114. See Silk, 331 U.S. at 712 ("[T]erms 'employment' and 'employee,' are to be construed to accomplish the purposes of the legislation."); and Darden, 796 F.2d at 706 ("In interpreting statutory language so as to define the class of persons protected by the statute [i.e., employees], a court must take as its 'primary consideration' whether the inclusion of the disputed category of persons would effectuate the 'declared policy and purpose' of the statute.") (quoting Silk, 337 U.S. at 713).
instead was molded to suit the purposes of the statute to which it was being applied. Since agency law criteria for determining employment relationships are so fact-specific, the range of hired individuals falling within the ambit of the term "employee" easily can be broadened or narrowed.

The Court gave additional grounds for tinkering with the definition of employee by stating that part of its rationale for rejecting the actual control test was that such a test would undermine Congress' paramount goal in revising copyright law. Thus, the test adopted by the Court for the existence of an employment relationship rests at least in part on the purpose of the copyright statute. Such reasoning arguably could be used to broaden or narrow the sweep of the definition of employee in a way neither the Supreme Court nor the framers of the statute intended.

Although the other cases cited by the Court involve detailed agency law analyses, they leave an important question unanswered. Will the same balance be struck in copyright cases as in the cases arising under other federal statutes? If courts answer yes, they are faced with substantial precedent which states that the definition of employee varies depending on the statute being applied. If courts answer no, then the cases cited by the Supreme Court seem to have no value as guidance.

There is another oddity in the Court's guidance for the future. Aside from the Dumas case, which applied a different standard than the Supreme Court was applying, no other copyright case was cited. Much more useful would have been guidance based on copyright case law in which the courts used agency law to determine employment relationships in a copyright context. The Court could have looked to pre-Brattleboro precedent respecting

116. On the basis of this type of reasoning one could argue that something like the Dumas holding — that an employee for copyright purposes is only a salaried employee — is proper because it furthers the congressional purpose of enhancing the predictability of the ownership of copyright.
works made for hire along with other copyright/agency law analyses done in the post-Brattleboro era. The benefit would have been a body of law applying agency law principles in a copyright context.

Ironically, it seems that the Supreme Court has accomplished by court decision what the Register of Copyright tried to avoid when framing the statute, that is, forcing those who make copyright decisions to "deal with cases involving 'master and servant' . . . in a rather foreign context." The Supreme Court has given its imprimatur to search "foreign" non-copyright agency law cases for favorable precedent to support arguments in the unique and highly specialized area of copyright.

VI. CONCLUSION

The Supreme Court has accomplished two laudable goals in Community for Creative Non-Violence v. Reid. First, and most important, the Court restored the carefully negotiated compromise of 1965 between industry representatives and authors. Second, the Court brought more certainty and predictability to the works made for hire area of copyright law by rejecting the manipulable actual control test. Nonetheless, the Court has left behind a considerable area of uncertainty in the application of agency law factors. This shortcoming may foster litigation in the future, which the Court could have prevented.

118. See cases cited supra notes 23, 24, and 26.


120. House Comm. on the Judiciary, 88th Cong., 2d Sess., Copyright Law Revision Part 3: Preliminary Draft and Discussion and Comments 275 (Comm. Print 1964) (Comments of Mr. Kamenstein, the Register of Copyright).
UNIVERSITY OF LOUISVILLE V. O'BANNON:
RETROACTIVE APPLICATION OF BOARD OF CLAIMS ACT AMENDMENTS

Bryan Reynolds

I. INTRODUCTION

University of Louisville v. O'Bannon¹ and its companion case, Gould v. O'Bannon² arise from similar attempts to apply Kentucky Revised Statutes Annotated (KRS) § 44.073,³ which restricts claims against state employees to proceedings before the Board of Claims, to claims that were pending when KRS § 44.073⁴ was passed. The Kentucky Supreme Court rejected these attempts, refusing to apply the amendments to the Board of Claims Act retroactively, based on the statutory mandate of KRS § 446.080(3)⁵ that no statute shall be applied retroactively absent express legislative intent.

The court used a substantive/procedural retroactivity test, a confusing method that gives few clear answers. It is the purpose of this note to suggest a more practical test to determine whether statutes or amendments can be applied to claims pending when the legislative acts become law.

II. FACTUAL DEVELOPMENT

Both University of Louisville and Gould involve medical malpractice suits that commenced prior to July 15, 1986, the date that KRS §§ 44.072 and 44.073 became effective. In University of Louisville v. O'Bannon, the suit was commenced by Archie Hall and his wife Elina against Humana of Virginia, Humana, Inc., University of Louisville Hospital, Inc., University of Louisville, and John R. Johnson, M.D.⁶ Mr. Hall received, allegedly, negli-

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¹. 770 S.W.2d 215 (Ky. 1989).
². 770 S.W.2d 220 (Ky. 1989).
³. KY. REV. STAT. ANN. § 44.073 (Baldwin 1989).
⁴. Id.
⁵. KY. REV. STAT. ANN. § 446.080(3) (Baldwin 1989).
⁶. University of Louisville, 770 S.W.2d at 216.
gent medical treatment for a puncture wound in his left foot and claimed that an improperly administered antibiotic left him with a permanent ringing in his ears.7

The University of Louisville and Dr. Johnson, of its medical facility, both moved for dismissal on grounds of sovereign immunity, and the court of appeals refused to prohibit the trial.8

Similarly, Gould v. O'Bannon involved three doctors who were members of an anesthesiology team who, the plaintiff alleged, negligently inserted a needle for a catheter which caused cardiac arrest and ultimately the patient’s death.9 The three physicians were employees of the University of Louisville, and argued that the Jefferson Circuit Court lacked jurisdiction over them and the subject matter of this suit on grounds of sovereign immunity.10

As in University of Louisville v. O'Bannon, an appeal was perfected to the Kentucky Supreme Court on this issue.11 The principal issue in both cases is whether the circuit court can continue to exercise jurisdiction over these causes of action after passage of KRS § 44.073(12), which provides in part that no action for damages may be maintained against the Commonwealth or its agents except in the Board of Claims.

III. SOVEREIGN IMMUNITY

Any discussion of sovereign immunity in Kentucky must begin with an examination of Section 231 of the constitution, which empowers the general assembly to define or extend the provisions for suit against the state.12 Acting pursuant to this section, the Kentucky legislature passed the Board of Claims Act in 1946.13 The Board of Claims Act created a board to investigate, hear proof, and to compensate persons for damages sustained as a result of negligence on the part of the Commonwealth or its agents.14

7. Id.
8. Id.
9. Gould, 770 S.W.2d at 221.
10. Id.
11. Id.
12. Ky. Const. § 231. The General Assembly, may by law, direct in what manner and in which courts suits may be brought against the Commonwealth.
Prior to passage of the Board of Claims Act, a party injured by the negligence of a state agent could only gain redress by asking the general assembly, which only met every two years, to pass a resolution granting the injured party permission to sue.\textsuperscript{15} Generally, the odds were against a particular claimant.\textsuperscript{16}

The Board of Claims Act originally was intended to provide an avenue for redress for those injured as a result of negligence in construction, maintenance, and policing of highways by the Department of Highways.\textsuperscript{17} However, jurisdiction of the Board was extended in 1950 to claims which arose out of "negligence on the part of the Commonwealth, any of its departments or agencies, or any of its agencies or employees while acting within the scope of their employment."\textsuperscript{18}

Another example of waiver of governmental immunity by the Kentucky legislature involves the "University of Kentucky Medical Center Malpractice Insurance Act."\textsuperscript{19} Originally, the Kentucky Court of Appeals in Frederick v. University of Kentucky Medical Center refused to imply a waiver of sovereign immunity in KRS §§ 164.939-944.\textsuperscript{20}

However, in Dunlap v. University of Kentucky Student Health Services Clinic,\textsuperscript{21} the supreme court overruled Frederick and stated that the statute is a "partial waiver of governmental immunity for the hospital to the extent that this insurance fund has been provided for by statute."\textsuperscript{22}

IV. CHANGES GIVING RISE TO THIS LITIGATION

Soon after the supreme court decision in Dunlap, the malpractice claim involved in University of Louisville v. O'Bannon was

\textsuperscript{15} Richardson, Kentucky Board of Claims, 35 Ky. L.J. 295, 297 (1947).
\textsuperscript{16} Id. 185 resolutions were introduced at the 1946 session of the General Assembly. Of these, approximately 150 would have authorized suits against various state agencies, and only 16 became law.
\textsuperscript{17} Id. at 295.
\textsuperscript{18} O'Berst, The Board of Claims Act of 1950, 39 Ky. L.J. 35, 38 (1950), (quoting Ky. Rev. Stat. § 44.070(1)).
\textsuperscript{20} Frederick v. University of Ky. Medical Center, 596 S.W.2d 30 (Ky. App. 1979), overruled 716 S.W.2d 221 (Ky. 1986). The court would not interpret the statutory language of KRS § 164.939 to indicate a legislative intent to waive immunity.
\textsuperscript{21} 716 S.W.2d 219 (Ky. 1986).
\textsuperscript{22} Id. at 222.
brought.²³ On July 15, 1986, the Kentucky Board of Claims Act was amended, possibly in response to *Dunlap.*²⁴ **KRS § 44.072(8)** was added to provide that no action for negligence could be brought in any court against any agency of the Commonwealth and **KRS § 44.073(12)** provided that no action for damages may be maintained.²⁵ In addition, **KRS Chapter 164** was amended to expressly state that state institutions of higher learning are entitled to the protection of sovereign immunity.²⁶

In the intervening period between *Dunlap* and the effective date of the amendments, medical malpractice suits could be brought in state courts against the University of Kentucky and the University of Louisville and their agents. After passage of **KRS § 44.073,** Dr. Johnson and the University of Louisville both moved to dismiss the actions as to them, pleading sovereign immunity.²⁷

Likewise, in **Gould v. O'Bannon,** which was also pending when **KRS § 44.073** was passed, the three doctors made a similar motion to dismiss, also on grounds of sovereign immunity.²⁸ In both cases, the parties relied on **KRS § 44.073(12),** which gives primary and exclusive jurisdiction to the Board of Claims to hear and decide actions for damages against the Commonwealth and its agents.²⁹ The parties claimed that use of the word “maintain” in **KRS § 44.073(12)** meant that the new legislation was intended to apply to pending cases on the date the amendment became effective.³⁰

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²³ University of Louisville v. O'Bannon, 770 S.W.2d 216 (Ky. 1989). This claim was filed March 4, 1986, five days after the decision in *Dunlap.*
²⁴ Kestler v. Transit Auth. of N. Ky., 758 S.W.2d 38, 42 (Ky. 1988) (Vance, J., dissenting).
²⁵ University of Louisville, 770 S.W.2d at 216.
²⁶ Id.
²⁷ Id.
²⁸ Gould, 770 S.W.2d at 221.
²⁹ Ky. REV. STAT. ANN. § 44.073(12) (Baldwin 1989);
Except as otherwise specifically set forth by statute and in reference to subsection (11) of this section, no action for damages may be maintained in any court or forum against the Commonwealth, any of its cabinets, departments, bureaus or agencies or any of its officers, agents, or employees while acting within their official capacity and scope of their employment by the Commonwealth or any of its cabinets, departments, bureaus or agencies.
Id.
³⁰ Gould, 770 S.W.2d at 221; University of Louisville, 770 S.W.2d at 216.
In addition, the individual parties in both suits attempted to extend the doctrine of sovereign immunity to protect themselves from suit.31

V. RETROACTIVE APPLICATION OF STATUTES

A law will be considered to have been applied retroactively when it takes away or impairs vested rights acquired under existing laws, or when it creates a new obligation or attaches a new disability in respect to transactions already past.32 The Kentucky Rules of Statutory Construction state that a statute can have no retroactive application unless it is expressly specified in the statute.33 However, retroactive application of a statute applies only to vested rights acquired prior to its enactment.34

In addition, a party has no vested right in a particular procedural remedy.35 Consequently, statutes relating to remedies or modes of procedure, but which do not create new or extinguish vested rights, are allowed to apply to claims pending when the statute becomes effective.36

Generally, Kentucky courts use the substantive/procedural distinction to determine whether or not to apply a statute retroactively. Traditionally, law which creates, defines, or regulates rights is termed substantive law,37 and because a law which creates rights cannot apply retroactively, substantive statutes can only have prospective application. However, remedial or procedural statutes, or statutes relating to remedies or modes of procedure, which do not take away vested rights, but only operate in furtherance of the remedy or confirmation of the right, are allowed to apply to pending claims38 and are not considered to apply retroactively in violation of KRS § 446.080(3).39

It appears that in determining whether or not to apply a statute retroactively, the court will first determine whether

31. Gould, 770 S.W.2d at 221; University of Louisville, 770 S.W.2d at 216.
32. 73 AM. JUR. 2D Statutes § 354 (1974).
33. Ky. REV. STAT. ANN. § 446.080(3) (Baldwin 1989).
34. Commonwealth v. Reneer, 734 S.W.2d 794, 798 (Ky. 1987).
35. Dean v. Gregory, 318 S.W.2d 549, 552 (Ky. 1958).
36. 73 AM. JUR. 2D Statutes § 354 (1974).
38. 73 AM. JUR. 2D Statutes § 354 (1974).
39. See Murphy v. Commonwealth, 652 S.W.2d 69 (Ky. 1983); Reneer, 734 S.W.2d 794. In Reneer, the court expressly stated that applying KRS § 532.055 to pending trials does not violate KRS § 446.080(3).
retroactive application will create, extinguish or change a vested right. If so, the statute will be declared substantive. If not, the statute will be declared remedial or procedural.

A. Procedural vs. Substantive Legislation

To illustrate the confusion and difficulty in attempting to define this difference between substantive and procedural law, a survey of decisions examining different statutory changes is necessary. The Kentucky Court of Appeals addressed a purely substantive law in the retroactive context in *O'Donoghue v. Akin*.

In October 1865, John Brent Akin shot the husband of Mary Ann O'Donoghue with a pistol. Mrs. O'Donoghue brought an action against Akin on January 18, 1866. On January 12, 1866, an act was passed by the Kentucky legislature entitled "An Act to Prevent the Careless or Wanton or Malicious Use of Deadly Weapons." The court stated:

The statute of 1866 was enacted since the imputed homicide, and cannot retroact so as to make the appellee civilly responsible for an act which, when done, he was not liable to any action for damages.... On this sound and self-evident principle the Constitution forbids ex post facto enactments for making acts criminal which were not so when done, and all enactments retroacting on contracts so as to impair their obligation. And although retrospective legislation, neither ex post facto nor impairing the obligation of contracts, may be constitutional, as when it regulates remedies for existing rights and wrongs, or aids or confirms rights — yet consistently with the spirit of the constitution, personal or proprietary rights cannot be injuriously affected by such legislation.

Although the court does not explicitly discuss substantive law, *O'Donoghue* presents substantive law in its purest

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40. 63 Ky. 478 (1866).
41. Id.
42. Id.
43. Id. An earlier act (2 Rev. Stat. 509 (1865)) was held unconstitutional that was entitled "An Act to Prevent Selling and Using Certain Weapons." Because the Act related to more than one subject, it was held in derogation of the Kentucky Constitution, which stated "no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title." Ky. Const. § 51. The first two sections of the Act applied exclusively to selling or using weapons, and the third section embraced killing in any other way, including ways with weapons not specified in the title. *O'Donoghue*, 63 Ky. at 479.
44. Id. at 479, 480.
form. Substantive law is basically that which creates, defines, and regulates rights.\textsuperscript{45}

Stated simply, the statute examined in \textit{O'Donoghue} created a civil cause of action for killing with a pistol. The law was not allowed to apply to shooting incidents that occurred prior to its effective date.

\textit{Commonwealth v. Reneer},\textsuperscript{46} decided 121 years after \textit{O'Donoghue}, provides an excellent example of a procedural statute in the retroactive context. The Truth in Sentencing Act\textsuperscript{47} became effective after Reneer allegedly committed acts for which he was indicted,\textsuperscript{48} but prior to his trial.\textsuperscript{49} The Act provides for bifurcated trials in felony cases, dealing with the procedure to be followed in trial and sentencing.\textsuperscript{50} Holding that applying the Act to Reneer's trial did not give the Act retroactive effect, the court stated:

The act deals with procedures at trial. The procedure at trial is governed by the rules of procedure which exist at the time of the trial, not at the time of commission of the offense. No one has a vested right in the modes of procedure, and the state, upon grounds of public policy, may regulate them at leisure.\textsuperscript{51}

Although the above cases provide clear examples of procedural and substantive legislation, the dividing line between the two is not precise. A good example of the difficulty of the distinction involves statutes of limitation. Statutes of limitation apparently defy strict categorization as either substantive or procedural law.\textsuperscript{52}

\textsuperscript{45} BLACK'S LAW DICTIONARY 745 (5th ed. Abridged 1979). Substantive law is "[t]hat part of law which creates duties, rights and obligations, while 'procedural or remedial law' prescribes methods of enforcement of rights or obtaining redress."

\textsuperscript{46} 734 S.W.2d 794 (Ky. 1987).

\textsuperscript{47} KY. REV. STAT. ANN. § 532.055 (Baldwin 1989).

\textsuperscript{48} Reneer was indicted for first degree sodomy and as a first degree felony offender. 734 S.W.2d at 795.

\textsuperscript{49} 734 S.W.2d at 796.

\textsuperscript{50} The court stated that "[t]he statute does not add or remove any element necessary to convict of any crime, and it does not increase or lower the penalty that can be imposed upon conviction." \textit{Id.}

\textsuperscript{51} \textit{Id.} at 798. It is interesting that the court puts emphasis on procedure at trial. This suggests that there may be some difference in the analysis of pre-trial procedures, such as notice and discovery rules.

\textsuperscript{52} Boothe v. Special Fund, 668 S.W.2d 66 (Ky. App. 1984), overruled 721 S.W.2d 710 (Ky. 1986).
Boothe v. Special Fund involved the repeal of KRS § 342.186, which governed notice requirements involving the workers’ compensation statute of limitations of KRS § 342.185. KRS § 342.186 had the effect of extending the statute of limitations indefinitely, but only for thirty days after the claimant received notice, once the two year period had passed.

The interdependence of KRS §§ 342.185 and 342.186 caused the court to treat the repeal of KRS § 342.186 as one would treat the repeal of a statute of limitations. Whether a statute of limitation is called substantive or procedural, Kentucky courts have consistently recognized the legislature’s ability to change existing statutes of limitation and to make these changes applicable to existing causes of action. In effect, the courts treat changes in statutes of limitation as mere procedural changes which do not affect rights. However, the court also pointed out that if KRS § 342.186 was determined to be substantive in Boothe, its repeal would have no effect on the appellant’s case because the substantive law in effect at the time of the injury controls in workers’ compensation cases.

KRS § 342.186 was reexamined in McGregor v. Pip Johnson Construction Co. and Boothe was overruled. However, the court’s reason for overruling Boothe provides an interesting illustration, that of a procedural statute which affects vested rights. The court in McGregor held that KRS § 342.186 did more than simply extend the statute of limitations. Because the statute also entitled a workers’ compensation claimant to receive personal notice

53. Id. at 67. The claimant in Boothe filed his claim with the Workers’ Compensation Board on September 11, 1980. His former employer used the statute of limitations as a defense, because the claimant’s injury occurred in February of 1976. However, because the employer never gave notice of the statute of limitations, KRS § 342.186 would extend the statute of limitations indefinitely. Unfortunately for the claimant, KRS 342.186 was repealed two months prior to his application.

54. Id.
55. Id.
56. Id.
57. See, e.g., Peach v. 21 Brands Distillery, 580 S.W.2d 235 (Ky. App. 1979). The court said the employer’s duty to notify a claimant is more a part of the remedy or procedure than the creation of a new right.

58. Id. at 236.
59. 721 S.W.2d 708 (Ky. 1986).
60. Id. at 710.
to call his attention to the fact that his claim might be barred by limitations.\textsuperscript{61} the court held that the statute could not apply retroactively.\textsuperscript{62} However, the court clearly stated that absent the notice provision, the \textit{Boothe} decision would be valid law.\textsuperscript{63}

\textit{Rye v. Conkwright}\textsuperscript{64} is another example of application of a remedial or procedural statute to pending litigation. \textit{Rye} concerns an amendment to KRS \$ 342.320, which controls the maximum recoverable attorney's fee in workers' compensation cases.\textsuperscript{65} Prior to this amendment, Kentucky Statute \$ 4942 permitted a maximum fee of 15 percent on the first \$1,000 and 10 percent on the balance of the amount recovered.\textsuperscript{66}

As amended, KRS \$ 342.320 permitted the allowance of a fee in an amount equal to 20 percent of the amount recovered.\textsuperscript{67} Rye suffered total and permanent disability on July 26, 1954, filed his claim on July 20, 1956, and the award was made on May 7, 1957.\textsuperscript{68} The amendment became effective on August 1, 1956, eleven days after Rye filed his claim.\textsuperscript{69} The fee awarded, \$954.30, was based on the earlier statute.\textsuperscript{70} The appellants requested a fee of \$1,808.60, based on the amended statute.\textsuperscript{71} Finding for the appellant, the court stated:

The determination of the amount of the attorney fee is not a substantive matter but is done pursuant to the contractual liability

\textsuperscript{61} \textit{Id}.  
\textsuperscript{62} \textit{Id}.  
\textsuperscript{63} \textit{Id}.  

If KRS 342.186 did no more than create an indefinite extension of the statute of limitations, and its repeal did no more than restore the original statute of limitations, then the decision of \textit{Boothe v. Special Fund} would be valid, but KRS 342.186 required that the movant be notified of the expiration date of the statute of limitations. This entitlement to notice is not simply a matter of procedure, but is a substantive right created by KRS 342.186.\ldots Movant's right to notice was a statutory requirement at the time of his injury and cannot be taken away from him retroactively by the repeal of KRS 342.186.

\textit{Id}.  
\textsuperscript{64} 311 S.W.2d 796 (Ky. 1958).  
\textsuperscript{65} \textit{Id}. at 797.  
\textsuperscript{66} \textit{Id}.  
\textsuperscript{67} \textit{Id}.  
\textsuperscript{68} \textit{Id}.  
\textsuperscript{69} \textit{Id}.  
\textsuperscript{70} \textit{Id}.  
\textsuperscript{71} \textit{Id}.  
to pay a fee for services rendered. The reasonableness of the fee can be determined only at the conclusion of the services. At that time, the liability has already been established and the determination of amount is for the purpose of discharging that liability. The 1956 statute change concerning the amount is accordingly remedial or procedural.\textsuperscript{72}

This result must be contrasted with \textit{Beth-Elkhorn v. Thomas},\textsuperscript{73} which stated that an increase in the maximum award allowable to claimants is a change in the substantive liability as opposed to a change in the remedial procedure.\textsuperscript{74}

In \textit{Central Kentucky Production Credit Association v. Smith},\textsuperscript{75} the court allowed a statute which provided for allowance of attorney’s fees in certain contract situations to apply to a note and mortgage which contained provisions allowing attorney’s fees even though the note and mortgage were delivered prior to the effective date of the statute.\textsuperscript{76} The court was of the opinion that KRS § 453.250 was remedial in nature and thus the controlling date for the application of the statute is the date of judgment and not the date of execution of the instrument.\textsuperscript{77} The court stated, “[A] remedy has been enlarged by legislative enactment, and we have no alternative save to enforce the clear intent of the legislature.”\textsuperscript{78}

\textbf{B. Vested Rights}

Instead of using a substantive/procedural test to determine whether a statute would apply retroactively, some courts apply a vested rights analysis.\textsuperscript{79} This type of analysis shifts attention

\textsuperscript{72} Id. at 797, 798.
\textsuperscript{73} 404 S.W.2d 16 (Ky. 1966), overruled on other grounds, 464 S.W.2d 286 (Ky. 1971).
\textsuperscript{74} Id. at 18. In \textit{Beth-Elkhorn}, the Workers’ Compensation Board had awarded compensation to James Thomas at the rate of $38.00 per week. The statute in effect at the date of last exposure (date of injury) allowed compensation of $32.00 per week. The court relied on \textit{Collier v. Hope Coal Co.}, 269 S.W.2d 278 (Ky. 1954) and \textit{Thomas v. Crummies Creek Coal Co.}, 297 Ky. 210, 179 S.W.2d 882 (1944). In \textit{Collier}, the court enunciated a rule that dependents are not entitled to an award in accordance with an amended statute if the amendment affects the substantial liability of the employer. \textit{Id.} at 279. The court stated that increasing the amount allowable to surviving dependents, although in theory affecting the remedy rather than the basis for relief, undoubtedly affects the substantial liability of the employer.
\textsuperscript{75} 633 S.W.2d 64 (Ky. 1982).
\textsuperscript{76} Id. at 65. The act in question was KRS § 453.250, which became effective July 15, 1980.
\textsuperscript{77} Id.
\textsuperscript{78} Id. at 66.
\textsuperscript{79} 2 SUTHERLAND, \textit{STATUTORY CONSTRUCTION} § 41.05 (C. Sands 4th Ed. 1986). \textit{See also},
to the question of whether a particular right is vested.\textsuperscript{60} Generally, Kentucky courts have held that judicial rights of a litigant are vested and that the legislative body may not arbitrarily, or without due process, terminate or impair these rights.\textsuperscript{61} In \textit{Green River Health Department v. Wigginton},\textsuperscript{62} the court stated:

A right of action may be vested, and if so, is property in the same sense in which tangible things are property and is equally protected against arbitrary interference, and whether it springs from contract or tort or from principles of common law, the legislature may not take it away.\textsuperscript{63}

However, the court in \textit{Commonwealth v. Reneer}\textsuperscript{64} stated that "no one has a vested right in modes of procedure, and the state, upon grounds of public policy, may regulate them at pleasure."\textsuperscript{65} This indicates that rules of procedure are not vested judicial rights. Similarly, in \textit{Louisville Shopping Center v. City of St. Matthews},\textsuperscript{66} the court stated that "in order to be vested (in the constitutional sense) [a right] must be more than a mere expectation of future benefits or an interest founded upon an anticipated continuance of existing general laws."\textsuperscript{67} In \textit{Louisville Shopping}, the court distinguished those rights that are a legislative privilege from vested rights.\textsuperscript{68}

If the legislature, or the court, should attempt to interfere with constitutionally vested rights of the litigant, a due process challenge would follow. Because a due process challenge would serve as a check, a more equitable test for retroactivity would be whether the application in a particular case would interfere with the due process rights of a litigant. In \textit{Shaw v. Seward},\textsuperscript{69} the Kentucky Court of Appeals explained the procedural due process analysis of \textit{Matthews v. Eldridge}:\textsuperscript{70}

The evaluation of due process issues ... requires the analysis of three elements: the private interests at stake; the risk that the
challenged procedures will lead to erroneous results and the probable value of suggested procedures in preventing erroneous result; and the government interests effected.91

Using this approach, if the court determined that application of new legislation to pending litigation would not impair the due process rights of a litigant, there could be no retroactive application, and thus, no violation of KRS § 446.080(3). Discussion of procedural versus substantive legislation could be ignored, and the court could more equitably examine the interests of the parties.

VI. THE MAJORITY OPINION

In opinions written by Justice Wintersheimer, the court refused to apply KRS § 44.073(12) retroactively to provide the defense of sovereign immunity to Dr. Johnson and the University of Louisville in University of Louisville v. O’Bannon,92 and the three doctors in Gould v. O’Bannon.93

In both cases, the decisions of the court of appeals were affirmed and the matters were remanded to the circuit courts to proceed with trial.94 In addition to refusing to apply KRS § 44.073 retroactively, the court also refused to extend the doctrine of sovereign immunity to protect the doctors as employees of the university,95 although this issue was not raised in University of Louisville v. O’Bannon.96

The court held that because KRS § 44.073 contained no express intent that it be applied retroactively, it could not be applied retroactively, citing KRS § 44.073(14).97 The court stated that

91. 689 S.W.2d at 39.
92. 770 S.W.2d 215, 217.
93. 770 S.W.2d 220, 222.
94. University of Louisville, 770 S.W.2d at 218; Gould, 770 S.W.2d at 222.
95. University of Louisville, 770 S.W.2d at 217; Gould, 770 S.W.2d at 222.
96. 770 S.W.2d at 219 (Vance, J., dissenting). Justice Vance points out that this issue was decided correctly, but not raised in this case. He stated, "Ordinarily, courts do not declare statutes unconstitutional if there is another basis for disposition of the case. It is surprising to me that this court would declare the statute unconstitutional insofar as extends immunity to state employees when that issue was not even raised, nor was it decided by the trial court." Id.
97. University of Louisville, 770 S.W.2d at 216. KRS § 44.073(14) states that:

The filing of an action in court or in any other forum or the purchase of liability insurance of the establishment or a fund of self insurance by the Commonwealth,
unless the legislative intent is clear from the statute, the presumption is for prospective application. In addition, the court indicated that reduction of the jurisdiction of the court would result if the plaintiff's claim was restricted to the Board of Claims.

Discussing jurisdiction, the court indicated that, when applied to pending cases, reduction of jurisdiction of the court should result when it can be demonstrated that the legislative body so intended. The court recognized the right that Constitution § 231 gives the General Assembly to define or extend the provisions for suit against the Commonwealth. The court indicates that any exercise of this right by the General Assembly is a substantive and not a procedural matter, implying that any change or extension in the law of sovereign immunity will affect or impair vested rights if applied to a pending case.

The appellants argued that use of the word "maintain" in KRS § 44.073 indicates that the legislature intended that cases pending against state agencies must not be allowed to continue, except

its cabinets, departments, bureaus, or agencies or its agents, officers or employees thereof for a government related purpose or duty shall not be construed as a waiver of sovereign immunity or any other immunity or privilege thereby held. Except as specifically set forth by statute, no counterclaim, set off, recoupment, cross-claim, or other form of avoidance of the claim for damages may be asserted by any person when suit is brought against said person by the Commonwealth or any of its cabinets, departments, bureaus or agencies thereof.

KY. REV. STAT. ANN. § 44.073(14) (Baldwin 1989).

98. University of Louisville, 770 S.W.2d at 216, citing Roberts v. Hickman County Fiscal Court, 481 S.W.2d 279 (Ky. 1972); Shaw v. Seward, 689 S.W.2d 37 (Ky. App. 1985); and Everman v. Miller, 597 S.W.2d 153 (Ky. App. 1979).

99. 770 S.W.2d at 216.

100. Id. The opinion then states that the interpretation of KRS § 44.073(12) as a reduction of the jurisdiction of the court applicable to pending cases would be contrary to the intent of the legislature. It is unclear where this intention of the legislature is expressed.

101. Id.

102. Id.

[A]ny changes in the law or extension of sovereign immunity is a substantive and not a procedural matter. The General Assembly can by appropriate statute vitiates the interpretations of the statutory law made by this Court but, unless expressly provided, it can do so only in a prospective or future sense or in futuro as distinguished from retroactively or in an ex post facto manner.

Id.

103. Yet, it is clear that simple procedural changes can be made in the statute itself, and that no one has a vested right in modes of procedure. Commonwealth v. Reneer, 734 S.W.2d 794, 798 (Ky. 1987).
in the Board of Claims. The court refutes this argument by noting the context “maintain” is used in KRS §§ 44.073(8), (11), and (12) means essentially the same as brought or begun, pointing out that the use of the word “maintain” in a statute relating to the existence of a cause of action may mean “to commence” or “to continue.”

The court then explains that subsections (11)-(13) are to be considered part of a package when considering the meaning of the word “maintain” in KRS § 44.073(12). The court indicates that because these subsections deal with the preservation of sovereign immunity, they are to be considered collectively a substantive application, and that KRS § 44.073(12) has no independent procedural effect. The court next notes that subsection 8 of KRS § 44.073 has procedural rather than substantive application. However, because subsection 8 refers only to bringing suits, and not the maintenance of a suit, the court states that the General Assembly must not have intended procedural impact upon suits already in progress.

The appellants cited Smallwood v. Gallardo as precedent for retroactive application of a statute, but the court refuted this argument by noting that the statute and its interpretation in Smallwood did not affect or impair the vested rights of the petitioners, unlike the fate the plaintiffs would suffer in the case at bar. The vested right the court is referring to is the right

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104. University of Louisville, 770 S.W.2d at 216.
105. Id. at 217. KRS § 44.073(8) states that no action for negligence may be brought in any court or forum other than the Board of Claims against the Commonwealth or its agents. KRS § 44.073(11) states that “[e]xcept as otherwise provided by [this chapter], nothing contained herein shall be construed to be a waiver of sovereign immunity or any other immunity or privilege maintained by the Commonwealth...” KRS § 44.073(12) states that “no action for damages may be maintained in any court or forum against the Commonwealth... or its agents...”
106. University of Louisville, 770 S.W.2d at 217.
107. Id.
108. Id.
109. Id. The court also states that it is questionable whether the General Assembly could terminate substantive rights, “such as an existing cause of action under prior statutes and case law interpreting those statutes.” Here the court is referring to substantive rights in modes of procedure. For example, KRS § 44.073(8) has procedural application if it refers to bringing suits, but if it also referred to the maintenance of a suit, it would have substantive application, because it would then terminate an existing cause of action.
110. 275 U.S. 56 (1927).
111. 770 S.W.2d at 217.
to maintain the action outside the jurisdiction of the Board of Claims and its damage limit.\textsuperscript{112}

Finally, the court points out that the Kentucky Constitution forbids extending KRS § 44.073 to apply to Dr. Johnson individually.\textsuperscript{113}

\section*{VII. THE DISSENT}

Justice Vance dissented by a separate opinion, and was joined by Justice Gant. Justice Vance points out that there is a distinct difference between bringing a suit and maintaining a suit.\textsuperscript{114} He would give independent procedural significance to KRS § 44.073(12) by interpreting it to preclude even the maintenance of a suit after the effective date of the statute.\textsuperscript{115} Further, Justice Vance states "[t]he prohibition against maintenance of the action is not retroactive application of the act; it is prospective only and prohibits only the further continuation of the action."\textsuperscript{116}

The dissent also points out that the appellees did not raise the issue of whether Dr. Johnson could avail himself personally of sovereign immunity.\textsuperscript{117} However, Justice Vance does agree that this attempt at the extension of the statute to provide an individual with governmental immunity would not pass constitutional muster.\textsuperscript{118}

\section*{VIII. ANALYSIS}

It is apparent from the decision in \textit{Louisville v. O'Bannon} that the court will be hesitant to apply legislative amendments to

\begin{footnotesize}
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\item[\textsuperscript{112}.] The plaintiff would be limited to a recovery of $50,000, the limit that applied prior to July 15, 1986. After this date, the limit was raised to $100,000. \textit{Ky. Rev. Stat. Ann.} § 44.070(5) (Baldwin 1989).
\item[\textsuperscript{113}.] 770 S.W.2d at 217.
\item[\textsuperscript{114}.] 770 S.W.2d at 219.
\item[\textsuperscript{115}.] "Whatever waiver of immunity was given by KRS 164.939-944, it was clearly and expressly withdrawn by KRS 44.073(11) and (12) even to the extent of prohibiting, after the effective date of the act, the further maintenance of an action commenced before the effective date of the act." \textit{Id.}
\item[\textsuperscript{116}.] \textit{Id.} Here it appears that Justice Vance is interpreting retroactive application differently than the majority. Evidently, Justice Vance feels either that (1) the legislature clearly intended a procedural impact upon "vested" rights or (2) that the plaintiffs had no vested rights to bring their action in this manner. \textit{Id.}
\item[\textsuperscript{117}.] \textit{Id.} "It is surprising to me that this court would declare the statute unconstitutional insofar as it extends immunity to state employees when that issue was not even raised, nor was it decided by the trial court."
\item[\textsuperscript{118}.] \textit{Id.}
\end{itemize}
\end{footnotesize}
existing causes of action, unless it is clear that application in this manner will not impair vested rights. It is interesting to note that the court will allow retroactive application of a statute of limitations, which may, in some instances, terminate a cause of action.\textsuperscript{119}

In addition, the court has allowed retroactive application of a statute which raised the maximum amount an attorney could recover in workers' compensation cases.\textsuperscript{120} The court there noted that "[t]he value of an attorney's services cannot be determined until the termination of the services. At that point, the liability has already been established and the determination of amount is for the purpose of discharging that liability."\textsuperscript{121} These holdings must be contrasted with the holding in \textit{Louisville v. O'Bannon}. Although the court in \textit{Boothe} would allow retroactive application of a statute to effectively terminate a cause of action,\textsuperscript{122} the court in \textit{Louisville v. O'Bannon} would not allow a cause of action to be limited by restricting jurisdiction over that claim to the Board of Claims.\textsuperscript{123}

The court indicated that the plaintiff's vested rights would be substantially limited by restricting jurisdiction to the Board of Claims and its damage limitation. This seemingly contradicts what the court said in \textit{Rye v. Conkwright}. At the time for assessment of damages, liability has already been established. Consequently, to quote \textit{Rye}, "the determination of amount is for the purpose of discharging the liability."\textsuperscript{124} Thus, any limitation on recoverable damages is only remedial or procedural.\textsuperscript{125} On the strength of \textit{Gould} and \textit{University of Louisville v. O'Bannon}, in addition to two earlier decisions, \textit{Kestler v. Transit Authority of Northern Kentucky},\textsuperscript{126} and \textit{Green River Health Department v. Wigginton},\textsuperscript{127} it appears that the court will not allow the application of an amendment to the Board of Claims Act to cases pending

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\item \textsuperscript{119} Boothe v. Special Fund, 668 S.W.2d 66 (Ky. App. 1984), \textit{overruled} 721 S.W.2d 710 (Ky. 1986).
\item \textsuperscript{120} Rye v. Conkwright, 311 S.W.2d 796 (Ky. 1958).
\item \textsuperscript{121} \textit{Id.} at 797-98.
\item \textsuperscript{122} 668 S.W.2d 66, \textit{overruled} 721 S.W.2d 710 (Ky. 1986).
\item \textsuperscript{123} 770 S.W.2d at 217.
\item \textsuperscript{124} 311 S.W.2d at 798.
\item \textsuperscript{125} This follows the reasoning in \textit{Rye}. Any damage limitation relates only to the remedy, not to the substantive liability of the defendant.
\item \textsuperscript{126} 758 S.W.2d 38 (Ky. 1988).
\item \textsuperscript{127} 764 S.W.2d 475 (Ky. 1989).
\end{itemize}
when the amendment becomes effective. Even if the legislation clearly indicates that its purpose is to restrict a particular application, and a reasonable interpretation of the statute would allow application to pending cases, the court is unlikely to allow this interpretation.128

Certainly, a reasonable argument exists that use of the word “maintain” in KRS § 44.073(12) indicates a legislative intent that this amendment apply to pending cases.129 It is unclear whether the court will allow the procedural or remedial exception to retroactive application to apply to changes in the Board of Claims Act. The court states that any changes in the law or extension of sovereign immunity is a substantive and not a procedural matter.130 This seems to imply that any change in the Board of Claims Act will automatically affect vested rights and will not be allowed to apply to cases pending when the changes become effective. This would include changes in damage limitation, which, following Rye v. Conkwright,131 clearly only affects the remedy, and not the substantive liability of the defendant.132 Additionally, even though “no one has a vested right in modes of procedure,”133 even minor procedural changes would not be allowed to apply to pending cases absent express legislative intent.

Finally, because it is “highly debatable whether the General Assembly could, if it wishes, terminate substantive rights, such as an existing cause of action under prior statutes and case law interpreting these statutes,”134 the court may likely disallow any attempt at application of amendments to the Board of Claims Act to pending cases even if there is express legislative intent to that effect.

Applying a vested rights analysis to these issues may have produced a different result. The two major impacts that would occur if jurisdiction over the pending claims was transferred to the Board of Claims would be 1) transfer from a jury trial to an administrative proceeding, and 2) the damage limitation. Because the two are inextricably intertwined, the analysis should consider both together.

130. 770 S.W.2d at 217.
131. 311 S.W.2d 796.
132. Id. at 798.
133. Commonwealth v. Reneer, 734 S.W.2d 794, 798 (Ky. 1987).
134. 770 S.W.2d at 217.
The private interests at stake are clearly apparent. The plaintiff has an obvious economic interest in keeping the matter in state court, outside the jurisdiction of the Board. The Board is limited in the amount it can award to $100,000. However, it must be considered as well that, even before the Board of Claims, the plaintiff does not have a right to recover $100,000. Because liability has not been established, the interest the plaintiff has in a particular damage limit is, at best, a mere expectancy. It is obvious that, even in a jury trial, the plaintiff could be awarded less than $100,000 after liability has been established. In addition, the plaintiffs have an interest in having their claim heard before a jury, as opposed to an administrative board, under the general perception that a jury is more likely to return a favorable verdict.

The next element to be considered is the chance that the challenged procedures, in this case the transfer of the case to the Board of Claims, will lead to erroneous results, and the probable value of suggested procedures in preventing erroneous results. Two questions must be considered in this instance: 1) does trial before an administrative board have a greater risk of leading to an erroneous determination of liability, and 2) will trial before an administrative board lead to an erroneous damage award, after liability has been established.

The answer to both questions must be in the negative. Because the appeals process is still in place, trial before an administrative board does not have a greater risk of producing erroneous results in determining liability. Additionally, limiting recoverable damages after liability has been established, while it may in some instances seem unfair, is not erroneous.

Obviously, the government has an equally strong financial interest in limiting recovery to the Board of Claims. In any litigation, the financial interests of the parties will offset one another. In addition, the government has an interest in protecting sovereign immunity, which was the basis for passing KRS § 44.072 and KRS § 44.073.135 The government's interest in limiting any recovery is more tangible than the interest of the plaintiff in the expectancy of a higher recovery. Finally, the words of the supreme court in *Louisville Shopping Center v. City of St. Matthews*136 should be considered in light of this discussion: "A

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136. 635 S.W.2d 307 (Ky. 1982).
right, in order to be vested (in the constitutional sense) must be more than a mere expectancy or an interest founded upon an anticipated continuance of existing law."\textsuperscript{137}

Because the plaintiffs' right to receive a greater amount than the $100,000 damage limit is, at best, a mere expectancy, and because trial before the Board of Claims is no more likely to lead to an erroneous result than trial by jury, the plaintiffs' right in keeping the trial in state court is not the sort of vested right that should be free from legislative interference. Consequently, application of this amendment to the Board of Claims Act to the plaintiffs' cause of action should not be considered retroactive application in violation of KRS § 446.080(3).

The reasoning in \textit{University of Louisville v. O'Bannon} was subsequently applied in \textit{Koching v. International Armament Corp.}\textsuperscript{138} \textit{Koching} involved House Bill 551, enacted in July of 1988, which included KRS § 411.182, the comparative negligence statute.\textsuperscript{139} In conclusory language, the court refused to apply the statute to the pending claim, but conveniently avoided any distinction between substantive and procedural legislation.\textsuperscript{140}

\textbf{IX. CONCLUSION}

The window that was created by the court in \textit{Dunlap v. University of Kentucky Health Services Clinic}\textsuperscript{141} was slammed shut by the General Assembly through amendments to the Board of Claims Act. Even though the legislature clearly intended that the waiver of sovereign immunity allowed in \textit{Dunlap} would not continue, and a reasonable interpretation of the amending statute would apply the amendment to pending cases, the court would not allow retroactive application absent express legislative direction. \textit{University of Louisville v. O'Bannon} and \textit{Gould v. O'Bannon} further solidify the Kentucky Supreme Court's refusal to apply

\textsuperscript{137} \textit{Id}. at 310.
\textsuperscript{138} 772 S.W.2d 634 (Ky. 1989).
\textsuperscript{139} \textit{Id}.
\textsuperscript{140} \textit{Id}. at 636. After reciting holdings of recent cases concerning attempted retroactive application, the court stated: "In each of the above cases, this court determined that the application of the statute in a case based upon an event which occurred before the enactment of the statute constituted a retroactive application of the statute and was not permissible." \textit{Id}. The court appeared to avoid any attempt at defining the comparative negligence legislation as substantive or procedural.
\textsuperscript{141} 716 S.W.2d 219 (Ky. 1986).
legislative amendments to the Board of Claims Act to cases pending when the amendments become effective. The court will be reluctant to apply the common law rule stating that changes that affect only the remedy or procedure can be applied to pending cases. Because trying to draw a distinction between substance and procedure is fraught with difficulty, the court should abandon this determination and focus initially on the particular rights of the litigants in question. A simple due process balancing of the individual and governmental interests at stake would lead to more equitable results.
MALLARD V. UNITED STATES DISTRICT COURT: ARE THE WORDS "REQUEST" AND "APPOINT" SYNONYMOUS TERMS?

Amy Brann Cobb

I. INTRODUCTION

On May 1, 1989, the United States Supreme Court decided the controversial case of Mallard v. United States District Court.\(^1\) In its 5-4 decision,\(^2\) the Court held that 28 U.S.C. § 1915(d), which provides that federal courts may "request" an attorney to represent any person claiming in forma pauperis status, does not authorize a federal court to require an unwilling attorney to represent an indigent litigant in a federal civil case.\(^3\) Contrary to the hopes and expectations of many legal scholars and practitioners, the Court expressly refused to consider whether the federal courts possess inherent authority to require lawyers to serve indigent litigants.\(^4\)

This note will examine the Mallard decision and the legal and ethical problems and ramifications that the decision may raise. In addition, it will explore some of the historical and political factors which make this case and decision so controversial. The note will begin by examining the background of the Mallard decision in terms of in forma pauperis proceedings in general, the right to counsel in civil proceedings, and how the courts have previously interpreted the use of the word "request" as it relates to the appointment of counsel in proceedings pursuant to 28 U.S.C. § 1915(d). The note will then discuss the Mallard decision by relating the facts of the case to the Court's reasoning. Finally, the case will be analyzed in terms of the modern controversies over whether courts possess inherent authority to require law-

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2. Id. at 1816. Justice Brennan delivered the opinion in which Justices Rehnquist, White, and Scalia joined. Justice Kennedy wrote a concurring opinion. Justice Stevens wrote the dissent in which Justices Marshall, Blackmun, and O'Connor joined.
3. Id. at 1823.
4. Id.
yers to serve and the recent proposals for mandatory pro bono service.

II. BACKGROUND

A. In Forma Pauperis Proceedings Generally

Mallard was "requested" to serve, and refused to do so, by inmates who had made an application to proceed in forma pauperis in their § 1983 action against prison officials. 5 28 U.S.C. § 1915 provides for in forma pauperis proceedings, and reads as follows:

§ 1915 Proceedings In Forma Pauperis

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes an affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) In any civil or criminal case the court may, upon the filing of a like affidavit, direct that the expense of printing the record on appeal, if such printing is required by the appellate court, be paid by the United States, and the same shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

(e) Judgment may be rendered for costs at the conclusion of the

5. Id. at 1817.
suit or the action as in other cases, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.6

This statute authorizes the federal courts to permit individuals who are “unable to pay” various fees, costs, or bonds normally required of litigants, or who are “unable to pay” for the services of an attorney, to commence or defend civil or criminal actions in forma pauperis.7 The purpose of this statute is to provide access to the federal courts for those persons economically unable to invoke their protection, and to insure that the courts and their officers afford to such persons the same services as are afforded to those who are able to pay.8

The process of implementing the federal in forma pauperis statute begins when a poor litigant, either plaintiff or defendant, files a motion with an attached affidavit of poverty.9 This motion and affidavit may be made at any stage of a proceeding,10 and must generally be made by the applicant himself.11 The affidavit must show: (1) the applicant’s inability to pay fees and costs, or to give security therefor; (2) a statement of the nature of the action, defense, or appeal; and (3) a statement of the applicant’s belief that he is entitled to redress.12

Leave to proceed in forma pauperis is totally discretionary with the court.13 The nature of the cause of action is a legitimate factor in a court’s consideration of how to employ its discretion when an application is made.14 In fact, at least one court has stated that in civil cases involving poor litigants seeking monetary recovery, in forma pauperis status should be granted sparingly, that is, granted only in “exceptional or extraordinary” cases.15 A “sparing” exercise of discretion has also been advocated

9. Catz & Guyer, supra note 7, at 661.
11. Id. at § 230.
12. Id. at § 229.
13. Id. at § 222.
14. Id.
in cases involving applications by prisoners when an inmate seeks to hold prison personnel liable for pecuniary damages\(^\text{16}\) (as was the case in \textit{Mallard}).

\subsection*{B. The "Right" To Counsel In Civil Proceedings}

Generally, there is no constitutional right to counsel in civil proceedings.\(^\text{17}\) The pre-eminent generalization that emerges from Supreme Court precedent is that an indigent's right to appointed counsel has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation.\(^\text{18}\) As the litigant's interest in physical liberty diminishes, so does his right to appointed counsel.\(^\text{19}\) Still, federal courts do possess the statutory power to request an attorney to take a civil case pursuant to 28 U.S.C. \S\ 1915.\(^\text{20}\) This power is discretionary, but it is an abuse of discretion to decline to make a request where the case of an indigent plaintiff presents exceptional circumstances.\(^\text{21}\) Only when the denial of counsel results in "fundamental unfairness impinging on due process rights," will a denial of counsel be overturned.\(^\text{22}\)

\subsection*{C. "Request" vs. "Appointment" of Counsel in In Forma Pauperis Proceedings}

The question of whether use of the word "request" in 28 U.S.C. \S\ 1915(d) is synonymous with the word "appoint" has existed virtually from the statute's date of passage in 1892.\(^\text{23}\) Even one of the earliest precedents, \textit{Whelan v. Manhattan Railway Co.},\(^\text{24}\) states no clear position on whether the statute's use of the word "request" was really meant to give courts the power to make mandatory appointments. In the \textit{Whelan} case, the Court seemed to contradict itself on the appointment issue. First, it seemed to lean toward mandatory appointment when it ruled that when an

\begin{flushleft}
\text{\footnotesize 16. 32 AM. JUR. 2D Federal Practice and Procedure \S 228 (1982).}
\text{\footnotesize 18. \textit{Id.} at 25, reh'g denied, 453 U.S. 927 (1981).}
\text{\footnotesize 19. \textit{Id.} at 26, reh'g denied, 453 U.S. 927 (1981).}
\text{\footnotesize 20. Whisenant v. Yuam, 739 F.2d 160, 163 (4th Cir. 1984).}
\text{\footnotesize 21. \textit{Id.}}
\text{\footnotesize 22. Caruth v. Pinkney, 683 F.2d 1044, 1048 (7th Cir. 1982), cert. denied, 459 U.S. 1214 (1983) (citing La Clair v. United States, 374 F.2d 486, 489 (7th Cir. 1967)).}
\text{\footnotesize 24. Whelan v. Manhattan Railway Co., 86 F. 219 (Cir. Ct. S.D.N.Y. 1898).}
\end{flushleft}
indigent has a valid claim "[a]n attorney is to be provided for him by the court, who will prosecute his cause of action without stipulating for some compensation."\textsuperscript{25} However, the Court also seemed to recognize a lawyer’s right to withdraw if those terms are not acceptable\textsuperscript{26}: "[I]f the attorney . . . is willing to continue the litigation on those terms, he will be assigned to represent plaintiff; if not, the court will find some other attorney to prosecute her case."\textsuperscript{27}

This confusion as to the meaning of the word "request" in 28 U.S.C. § 1915(d) existed until the time Mallard was decided. In referring to the Statute, many courts used the terms "request" and "appoint" interchangeably.\textsuperscript{28} The circuits could not agree on the meaning of "request," and in some cases the decisions within a circuit seemed to go both ways.\textsuperscript{29}

In fact, the main reason the Court granted certiorari to the Mallard case was to resolve a conflict among the courts of appeals over whether § 1915(d) authorizes compulsory assignments of attorneys in civil cases.\textsuperscript{30} The Ninth Circuit’s 1986 ruling in United States v. 30.64 Acres of Land\textsuperscript{31} held that 28 U.S.C. § 1915(d) does not authorize compulsory appointment of counsel to service.\textsuperscript{32} Similarly, the Sixth Circuit case Reid v. Charney\textsuperscript{33} noted that, in contrast to a criminal proceeding in which the court has a duty to "assign" counsel, a court in a civil case has the statutory power only to "request."\textsuperscript{34} Other circuits, however, have held that 28 U.S.C. § 1915(d) permits mandatory appointments in federal civil cases. The leading case for this proposition is the Eighth Circuit’s decision in Peterson v. Nadler.\textsuperscript{35} This court held that 28 U.S.C. § 1915(d) gives express authority to appoint counsel in civil cases.\textsuperscript{36} The Eighth Circuit said that federal courts possess the statutory power to make an appointment if the plaintiff meets

\textsuperscript{25} Id. at 220.
\textsuperscript{26} Montague, supra note 23, at 56.
\textsuperscript{27} Whelan, 86 F. at 221.
\textsuperscript{28} Montague, supra note 23, at 56.
\textsuperscript{29} Id.
\textsuperscript{30} Mallard, 109 S. Ct. at 1817.
\textsuperscript{31} United States v. 30.64 Acres of Land, 795 F.2d 796 (9th Cir. 1986).
\textsuperscript{32} Id. at 801.
\textsuperscript{33} Reid v. Charney, 235 F.2d 47 (6th Cir. 1956).
\textsuperscript{34} Id.
\textsuperscript{35} Peterson v. Nadler, 452 F.2d 754 (8th Cir. 1971).
\textsuperscript{36} Id. at 757.
the requirements for in forma pauperis status.\textsuperscript{37} \textit{Whisenant v. Yuam}\textsuperscript{38} a Fourth Circuit case, also held that 28 U.S.C. § 1915(d) authorizes a federal court to appoint counsel in a civil case.\textsuperscript{39}

As stated previously, the circuits have not always been consistent on the issue.\textsuperscript{40} The Seventh Circuit's \textit{Caruth v. Pinkney}\textsuperscript{41} is a prime example of this inconsistency. In \textit{Caruth}, the Seventh Circuit held that under 28 U.S.C. § 1915(d), a court has only the authority to "request" an attorney to represent an indigent, not to require him to do so.\textsuperscript{42} Two months later, however, a different Seventh Circuit panel seemed to take an opposing view in \textit{McKeever v. Israel}.\textsuperscript{43} This panel held that "the vast weight of authority in this Circuit and elsewhere demonstrates that the power of a court to provide counsel under § 1915(d) is commonly referred to as the power to 'appoint'."\textsuperscript{44} It is not surprising that both of these cases ended up in both Mallard's and the opposition's briefs.\textsuperscript{45}

As the preceding discussion illustrates, the conflicts among and within the Circuits put attorneys and prospective clients in a difficult position when requests to take cases pursuant to 28 U.S.C. § 1915(d) are made. An attorney's geographical location determines whether or not he has the right to decline such a request, and also determines whether an in forma pauperis plaintiff or defendant can obtain an attorney.

III. \textit{MALLARD V. UNITED STATES DISTRICT COURT}

\hspace{1cm} \textbf{A. Facts}

Mallard was admitted to practice before the District Court for the Southern District of Iowa in January 1987, and entered his first appearance the following month.\textsuperscript{46} In June 1987, he was

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Whisenant v. Yuam, 739 F.2d 160 (4th Cir. 1984).
\item Id. at 163.
\item Mallard, 109 S. Ct. at 1817. See also Montague, supra note 23, at 56.
\item Caruth v. Pinkney, 683 F.2d 1044 (7th Cir. 1982), cert. denied, 459 U.S. 1214 (1983).
\item Id. at 1049, cert. denied, 459 U.S. 1214 (1983).
\item McKeever v. Israel, 689 F.2d 1315 (7th Cir. 1982).
\item Id. at 1319.
\item Montague, supra note 23, at 55-56.
\item Mallard, 109 S. Ct. at 1817.
\end{enumerate}
\end{footnotesize}
selected to represent two current inmates and one former inmate of the Iowa State Penitentiary who had requested counsel under 28 U.S.C. § 1915(d) for a civil rights complaint pursuant to 42 U.S.C. § 1983 against several prison guards and officials. This complaint alleged that prison guards and administrators had filed false disciplinary reports against the inmates, mistreated them physically, and endangered their lives by exposing them as informants. After reviewing the case file, Mallard filed a motion with the District Court to withdraw from the case. In his motion, he stated that he had no familiarity with the legal issues presented in the case, that he lacked experience in deposing and cross-examining witnesses, and that he would willingly volunteer his services in an area in which he possessed some expertise, such as bankruptcy and securities law. The local Volunteer Lawyers Project opposed his motion, claiming that he was competent, that he had an ethical duty to do whatever was necessary to try the case, and that permitting an exception to the rule of assignment would create a dangerous precedent. Mallard's motion was denied.

Mallard then appealed to the District Court. Although he reiterated his unfamiliarity with § 1983 actions, he also contended that he should be permitted to withdraw, not because of his inexperience in interpreting the statute and its case law, but because he was not a litigator by training or temperament. Forcing him to represent indigent inmates in a complex action requiring depositions and discovery, cross-examination of witnesses, and other trial skills, Mallard asserted, would compel him to violate his ethical obligation to take only those cases he could handle competently. It would further exceed the Court's authority under § 1915(d).

47. Id.
48. Id.
49. Id.
50. Id.
51. Id.
52. Id.
53. Id.
54. Id.
Upholding the magistrate's ruling, the district court pronounced Mallard competent, based on the quality of the brief in support of his motion to withdraw, and despite his very slight acquaintance with trial litigation. The Court also held that § 1915(d) empowers federal courts to make compulsory appointments in civil actions.

Mallard then sought a writ of mandamus from the Court of Appeals for the Eighth Circuit to compel the District Court to allow him to withdraw from the case. The Court of Appeals denied Mallard's petition without an opinion. Mallard then sought review from the Supreme Court, which granted certiorari in October to resolve a conflict among the courts of appeals over whether § 1915(d) authorizes compulsory assignments of attorneys in civil cases. The Supreme Court reversed the prior decisions and held that § 1915(d) does not authorize compulsory assignments of attorneys in civil cases, and that Mallard discharged his burden of proving that he was entitled to a writ of mandamus.

B. The Court's Reasoning

The Court began its analysis by interpreting 28 U.S.C. § 1915(d). They said that the interpretation of a statute must begin with the statute's language and that the operative term requiring analysis in this case was "request". "The Court may request an attorney to represent" an indigent litigant. The Court stated that the meaning of the term was plain. When someone requests that another do something, he/she is merely expressing a desire that he do it and generally that person cannot be

57. Id.
58. Id.
59. Id.
60. Id.
61. Id.
62. Id.
63. Id. at 1823.
64. Id. at 1822.
65. Id. at 1816. Justice Brennan delivered the opinion in which Chief Justice Rehnquist and Justices White, Scalia, and Kennedy joined.
66. Id. at 1818.
67. Id.
68. Id. (quoting 28 U.S.C. § 1915(d) (1982)).
69. Mallard, 109 S. Ct. at 1818.
disciplined or sanctioned if he declines. 70 The Court also looked at synonyms of the word "request" and found that "require" and "demand" are not interchangeable with "request." 71 Further, the Court held that Congress intended "request" to bear its ordinary meaning because that meaning was precatory when Congress enacted 28 U.S.C. § 1915(d) in 1892. 72

The Court relied heavily on the fact that Congress knew how to require service when it deemed that compulsory service was appropriate. 73 The Court found that Congress did not intend § 1915(d) to license compulsory appointments of counsel when that Section is contrasted with § 1915(c). 74 Where § 1915(d) merely empowers a court to "request" an attorney to represent a litigant in an in forma pauperis proceeding, § 1915(c), adopted at the same time, treats court officers and witnesses differently: "The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases." 75 The Court held that the decision of Congress to allow federal courts to "request" attorneys to represent impoverished litigants, rather than command, as in the case of court officers and witnesses, demonstrates the intent of Congress to authorize mandatory appointments of counsel. 76

The Court also looked to state statutes governing in forma pauperis proceedings that were in existence at the time 28 U.S.C. § 1915(d) was passed. 77 In the late 19th century, at least twelve states had statutes permitting courts to assign counsel to represent indigent litigants. 78 The Court held that Congress was aware of this because the Report of the House Judiciary Committee stated that § 1915(d) was designed to enable persons unable to afford legal representation to avail themselves of the courts as "[m]any humane and enlightened States" with similar laws allowed them to do. 79 None of these statutes provided that

70. Id.
71. Id.
72. Id.
73. Id.
74. Id.
75. Id.
76. Mallard, 109 S. Ct. at 1818.
77. Id.
78. Id. at 1818-19.
79. Id. at 1819 (referring to H. R. Rep. No. 1079, 52nd Cong., 1st Sess., 2 (1892)).
a court could merely “request” an attorney to serve. Instead, they all provided that a court could “assign” or “appoint” counsel. The Court held that since the state statutes after which 28 U.S.C. § 1915(d) was modelled used the term “appoint,” Congress would have used that term if compulsory appointments were intended. The Court said that Congress’ choice of the term “request” evinced a desire to permit attorneys to decline representation of indigent litigants if in their view their personal, professional, or ethical concerns requires them to do so.

The Court then looked to similar federal statutes. The only federal statute that preceded 28 U.S.C. § 1915(d) provided for appointment. This Act stated “the court before whom such person shall be tried, . . . shall . . . immediately, upon his request . . . assign to such person such counsel . . . as such person shall desire. . . .” The Court stated that since the word “assign” was already part of federal usage, Congress’ decision to use the word “request” again displayed a reluctance to require attorneys to serve. Further, every federal statute still in force that was passed after 1892 and that authorizes a court to provide counsel uses the terms “assign” or “appoint.” This, the Court held, suggested that the use in § 1915(d) of the word “request” as opposed to “assign” or “appoint” was meant to signify that § 1915(d) did not authorize compulsory appointments.

In response to the assertion of the respondent that construing 28 U.S.C. § 1915(d) to not allow compulsory appointments would render it “a nullity,” the Court said the statute played a useful role. It informs lawyers that court “requests” to provide legal assistance are appropriate “requests” and should not be ignored or disregarded in the mistaken belief that they are improper.

80. Mallard, 109 S. Ct. at 1819.
81. Id.
82. Id.
83. Id.
84. Id. at 1820.
85. Id.
86. Id. (quoting Act of April 30, 1790, ch. 9, § 29, 1 Stat. 118, presently codified as amended at 28 U.S.C. § 3005 (emphasis added)).
87. Mallard, 109 S. Ct. at 1820.
88. Id. at 1821.
89. Id.
90. Id.
The Court further said that § 1915(d) may be read to legitimize a court's request to represent a poor litigant and therefore to confront a lawyer with an important ethical decision.\textsuperscript{92}

The Court then moved on to an analysis of Mallard's entitlement to a writ of mandamus.\textsuperscript{93} The preliminary requirements to a writ of mandamus are: 1) The petitioner must "... demonstrate a 'clear abuse of discretion'"\textsuperscript{94} or "conduct amounting to 'usurpation of the judicial power',"\textsuperscript{95} and 2) the petitioner must show that he lacks "... adequate alternative means to obtain the relief ..." he seeks.\textsuperscript{96} Mallard met both of these requirements.\textsuperscript{97}

First, they held that the District Court acted beyond its jurisdiction in that § 1915(d) does not authorize coercive appointments of counsel.\textsuperscript{98} Additionally, Mallard had no alternative remedy available to him.\textsuperscript{99}

The Court concluded its opinion by emphasizing that the decision was a limited one.\textsuperscript{100} The Court said that it did not mean to question or denigrate a lawyer's ethical obligation to assist those who are too poor to afford counsel, or to suggest that "requests" made pursuant to § 1915(d) may be lightly declined.\textsuperscript{101}

On the contrary, the Court emphasized, we are living in a time where the need for services among the poor is growing and public funding has not kept pace such that the lawyer's ethical obligation to volunteer his time and skills pro bono publico is manifest.\textsuperscript{102}

In his concurring opinion, Justice Kennedy, the swing vote, reemphasized that the decision was a limited one.\textsuperscript{103} He stated that the decision spoke only to the interpretation of a statute and not to the professional responsibility of the lawyer.\textsuperscript{104} A lawyer's status as an officer of the court creates certain obliga-

\textsuperscript{92} Id.
\textsuperscript{93} Id. at 1822.
\textsuperscript{94} Id. (citing Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 383 (1953)).
\textsuperscript{95} Id. (citing DeBeers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217 (1945)).
\textsuperscript{96} Id. (citing Kerr v. United States District Court, 426 U.S. 394, 403 (1976)).
\textsuperscript{97} Id.
\textsuperscript{98} Id.
\textsuperscript{99} Id.
\textsuperscript{100} Id.
\textsuperscript{101} Id. at 1822-23.
\textsuperscript{102} Id. at 1823.
\textsuperscript{103} Id.
\textsuperscript{104} Id.
tions. One of these obligations, Justice Kennedy wrote, is to accept a court's "request" to represent the indigent.

The dissenters argued that this case involves much more than the statutory meaning of the word "request." Instead, they argued, the issue is whether a lawyer may seek mandamus relief from a court's "request" simply because he would rather do something else with his time. Although the dissenters recognized that there may be situations in which a lawyer may properly decline representation (i.e. conflict of interest, engagement in another trial, lack of qualifications, etc.), they stated that this case did not represent any of those situations.

The dissenters also argued that a lawyer's duty to provide professional assistance is part of the tradition of the Bar, and that courts have the power to require a lawyer to render assistance to the indigent. To support this interpretation, the dissent also looked to the legislative history of 28 U.S.C. § 1915(d). They pointed to the fact that the statute was introduced in the House of Representatives and Senate as an Act empowering courts to "assign" counsel for poor persons and that the Act used the terms "assign" and "request" interchangeably. The dissent also relied on the fact that Mallard considered it appropriate to ask the Magistrate to allow him to "withdraw" as evidence of his recognition of some duty to accept the appointment unless there was a valid excuse for declining it. In conclusion, the dissenters argued that "... the word 'request' means 'respectfully command'" and if that was not Congress' intention, then the Statute is meaningless.

IV. ANALYSIS

While the Court made an agreeable decision, it has taken the easy way out. The question of whether federal courts possess

105. Id.
106. Id.
107. Id. Justice Stevens wrote the dissent in which Justices Marshall, Blackmun, and O'Connor joined.
108. Id.
109. Id.
110. Id. at 1823-24.
111. Id. at 1824.
112. Id. at 1825.
113. Id. at 1825-26. (referring to 23 Cong. Rec. 5199, 6264 (1892)).
114. Id. at 1826.
115. Id.
inherent authority to require lawyers to serve has been a major issue in the legal field since the passage of 28 U.S.C. § 1915(d) in 1892. Few lawyers deny that they have an ethical obligation to assist the needs of the indigent; however, many deny vigorously that courts have the inherent power to require them to render assistance to the indigent. The Mallard Court expressly declined to resolve this issue, and instead limited its decision to a lesson in semantics, ignoring the constitutional and philosophical issues surrounding the recent and growing proposals for a mandatory pro bono service obligation. The entire opinion of the Court centered on the meanings of "request" and "appoint," and whether the terms are synonymous and interchangeable. This limitation does not necessarily render the opinion of the Court "bad" or "poorly reasoned"; quite the contrary, the reasoning in this case was actually quite understandable. What this limitation does do, however, is answer a more narrow question than many practitioners and scholars had hoped would be answered in the resolution of this case.

118. Mallard, 109 S. Ct. at 1823.
119. Torres & Stansky, supra note 117, at 1015-16 (stating that constitutional objections to a mandatory pro bono obligation are premised on the theories that requiring lawyers to provide free legal services mandates involuntary servitude in violation of the Thirteenth Amendment, and that the taking of a lawyer's services without compensation is the equivalent of imposing a non-legislative "tax," which violates due process and denies equal protection of the laws under the Fifth and Fourteenth Amendments).
120. Many philosophical arguments have been made against a mandatory pro bono obligation. One of these is that the poor lack everything, not just legal services. This argument says that forcing attorneys to provide legal services will not solve the problem and will create resentment among attorneys since parallel requirements are not placed on other professionals to contribute their services. Spencer, supra note 117, at 500. Another argument is that if an unwilling attorney is forced to serve, he is surely less likely than a volunteer to turn in the kind of performance that will enhance the general reputation of the Bar. Shapiro, supra note 117 at 26.
Many had hoped that the Supreme Court would use the Mallard decision to shed light on issues involving society's obligation to provide access to the Courts for all citizens, and the Bar's ethical duty to insure that access.\textsuperscript{123} In fact, many thought that the Court might express an opinion on whether pro bono work should be mandated.\textsuperscript{124} These people are likely to be disappointed with the Mallard decision because the Court expressed no opinion as to mandatory pro bono service and said very little about the ethical obligations of the Bar. The Court did, however, recognize that a lawyer has an ethical obligation to assist those who are too poor to afford counsel and that for this reason a "request" made pursuant to 28 U.S.C. § 1915(d) should not be lightly declined.\textsuperscript{125} The Court further recognized that we are living in a time in which the need for legal services among the poor is growing while public funding is not keeping pace, and thus a lawyer's ethical obligation to volunteer her time and skills pro bono publico is manifest.\textsuperscript{126} Consequently an ethical obligation does exist, but pro bono service on the part of the attorney should be voluntary, not compulsory.

There can be little doubt that some commentators will criticize this opinion as creating an excuse for attorneys to decline "requests" for pro bono representation, therefore leaving many indigent plaintiffs without representation in a forum to resolve their disputes. This criticism, however, should not be unique to the Mallard case. In fact, the Court's opinion was consistent with its previous holding that there is no constitutional right to counsel in civil cases.\textsuperscript{127} This recognizes that the best constitutional requirements for civil actions differ significantly from those for criminal actions in which courts may appoint counsel.\textsuperscript{128} 28 U.S.C. § 1915 still allows judges to waive court costs and fees for civil and criminal defendants who cannot afford them and also allows judges to "request" an attorney to represent a person claiming in forma pauperis status.\textsuperscript{129} However, judges are by no means

\begin{align*}
\text{123.} & \text{ Montague, supra note 23, at 54.} \\
\text{124.} & \text{ Stewart, supra note 124, at 44.} \\
\text{125.} & \text{ Mallard, 109 S. Ct. at 1822-23.} \\
\text{126.} & \text{ Id. at 1823.} \\
\text{127.} & \text{ Lassiter v. Department of Social Services, 452 U.S. 18, 25-27, reh'g denied 453 U.S. 927 (1981).} \\
\text{128.} & \text{ United States v. 30.64 Acres of Land, 795 F.2d 796, 801 (1986).} \\
\text{129.} & \text{ 28 U.S.C. § 1915 (1982).} 
\end{align*}
MANDATORY PRO BONO

required to provide benefits under § 1915. This decision will not keep most indigents out of court because mandatory appointment powers are expressly granted elsewhere in the Code. As examples: 18 U.S.C. § 3006A provides for court appointed attorneys for indigent defendants in all criminal and habeus corpus actions; 25 U.S.C. § 1912 provides for appointments in all Indian child custody proceedings; 42 U.S.C. § 1971 provides for appointment in all voting rights cases; 42 U.S.C. § 3413 provides for appointment in all commitment proceedings of narcotics addicts; and 42 U.S.C. § 2000e(5)(f)(1) provides for appointment in Title VII cases. Further, the lack of court power to make mandatory appointments under § 1915(d) also does not necessarily reduce the availability of counsel to indigent civil litigants. Just because one attorney declines a "request" does not mean another will not accept it in recognition of the historically accepted ethical obligation to represent litigants unable to pay for such assistance. If a court determines that a case has sufficient merit and a litigant sufficient need to justify uncompensated representation by counsel, there is little doubt that individual members of the Bar will respect a court's decision and provide the needed services. A refusal will, in reality, rarely occur. But, when it does, as in Mallard, another member of the Bar will undoubtedly volunteer his or her services.

The Mallard case also illustrates one of the major dilemmas facing lawyers today. What is a lawyer to do when two of his ethical obligations conflict? For example, Mallard was caught between one ethical obligation to provide professional services at no fee or at a reduced fee to persons of limited means, and

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130. Montague, supra note 23, at 54.
131. 30.64 Acres of Land, 795 F.2d at 803.
137. United States v. 30.64 Acres of Land, 795 F.2d 796, 803 (1986).
138. Id. See also, Shapiro, supra note 117 at 21.
139. 30.64 Acres of Land, 795 F.2d 796, 803 (1986).
a second obligation to provide competent representation to all clients.¹⁴² Mallard felt he was incompetent to handle the representation based on his lack of litigation experience.¹⁴³ The Court’s ruling that courts may only “request” and may not mandate an attorney to represent a person claiming in forma pauperis status under 28 U.S.C. § 1915(d) will give attorneys a meaningful option to weigh their conflicting ethical obligations and determine which is the most important to follow under the unique facts of each particular case. In the long run, this may improve the quality of legal assistance the indigent receives. If a lawyer is required to provide service, he must provide that service whether he is competent or not, and if he is incompetent, the indigent will not receive quality legal assistance. On the other hand, if he has a choice and feels he is incompetent, another lawyer will be “requested” to serve the indigent. Assuming competency, the result will be better legal assistance for the particular indigent.

The opinions of the majority and dissenters are really not in conflict. Both feel that when a “request” is made it should be accepted unless there is a compelling reason for refusal. This is apparent in both the majority’s statement that a “request” pursuant to 28 U.S.C. § 1915(d) should not be lightly declined,¹⁴⁴ and in the dissenters’ statement that there may be situations where a lawyer may properly decline representation.¹⁴⁵ What the majority and the dissenters really disagree about is the adequacy of Mallard’s excuse.¹⁴⁶ Thus, there really is not a clear line separating the two views.

Finally, the decision in Mallard really should not come as a surprise. As stated previously, the Supreme Court has already decided that there is no constitutional right to counsel in civil actions.¹⁴⁷ The right to appointed counsel is recognized to exist only when the litigant may lose his physical liberty if he loses the litigation.¹⁴⁸ The inmates here were bringing an action for

¹⁴² Mallard, 109 S. Ct. at 1817.
¹⁴⁴ Mallard, 109 S. Ct. at 1822-23.
¹⁴⁵ Id. at 1823.
¹⁴⁶ Id.
¹⁴⁸ Id. at 25, reh’g denied 453 U.S. 927 (1981).
Mandatory Pro Bono

V. CONCLUSION

There can be no doubt that the Court’s decision that 28 U.S.C. § 1915(d) does not authorize compulsory appointments is significant. If interpreted broadly, it could totally change the complexion of pro bono publico service in federal civil cases in the United States. The ultimate effect of this decision rests solely in the hands of the federal courts and the attorneys “requested” pursuant to § 1915(d) to represent indigent litigants in federal civil cases. In the unlikely event that attorneys treat the Mallard decision as “opening the door” for declining inconvenient “requests” based on frivolous reasons and the courts allow it, the decision will undoubtedly have an effect on the number of poor persons who receive legal assistance through pro bono programs. On the other hand, in the more likely event that courts follow a literal interpretation and attorneys take their “requests” and their ethical obligations seriously, only declining a “request” in cases in which they are incompetent, or have a conflict of interest, indigent people will not only continue to receive pro bono service, but could, in fact, receive more willing and competent service.

Eventually, the Supreme Court will have to address the question of whether federal courts possess inherent authority to require lawyers to serve indigent litigants. If the make-up of the Court remains the same when this question arises, it appears

150. 32 AM. JUR. 2D Federal Practice and Procedure § 228 (1982).
151. Id.
152. Mallard, 109 S. Ct. at 1823.
that the decision will be that the courts lack this authority. Only the four dissenters seem to feel that the federal courts have this power. The five justices in the majority, including the swing vote, Justice Kennedy, recognize only an ethical obligation to provide services pro bono publico. In any event, the case raising this question will be closely followed, debated by many attorneys, and may be quite controversial, as was Mallard.

153. Mallard, 109 S. Ct. at 1824 (stating "... a court's power to require a lawyer to render assistance to the indigent is firmly rooted in the authority to define the terms and conditions upon which members are admitted to the Bar, and to exercise those powers necessary to protect the functioning of its own processes.").

154. Id. at 1823 (stating "... in a time when the need for legal services among the poor is growing and public funding ... has not kept pace, lawyers' ethical obligation to volunteer their time and skills pro bono publico is manifest ... § 1915(d) does not authorize coercive appointments of counsel.").