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IN MEMORIAM
G. WALDRON SYNDER

G. Waldron Snyder has manifested substantial accomplishments in law, education, and federal service. He graduated from the Salmon P. Chase College of Law, and put to use this legal training in the public domain with the Internal Revenue Service. His training and ability permitted his ascent into higher echelons of federal service culminating in the position of Regional Commissioner Central Region.

His association with the field of education began with an appointment in the School of Business Administration at East Carolina University where he served with distinction for many years. In 1975 he joined his alma mater as a law professor and taught in the area of taxation until his final retirement. Wally Snyder was also a scholar contributing in a substantial manner to the literature of law and the profession through the publication of numerous articles. In addition he participated in panels of both a national and regional kind and was respected for his professional knowledge in tax related areas.

Professor Snyder has made a significant impact on the legal profession and on his colleagues and students at his alma mater. His sincerity and dedication to the legal profession and to the law school from which he graduated will be inspirational to all who follow in his professional and academic paths.

W. Jack Grosse, Dean
Salmon P. Chase College of Law
FUTURE INTERESTS—PROBLEM OF THE LIFE TENANT WHO LIVES "FOREVER"

Eugene W. Youngs*

Estate planning is a complex operation. The lawyer drafting a will or trust agreement must consider many things, including the tax impact upon particular dispositions, the possible construction the courts may place upon particular language used, the avoidance of the various traps and pitfalls laid for the modern practitioner by medieval judges, as well as the ghastly possibility that certain future interests may not be given effect because they may vest too remotely. In addition to all of these considerations besetting the conscientious estate planner, there is still another problem that may escape the attorney drawing up the plan of distribution as desired by a testator or settlor: the problem of the life beneficiary who, unpredictably, lives an inordinately long time.

Let us suppose the testator's family set-up at the time he is preparing his will includes a daughter and two sons in their twenties, all married but not yet well-established in their respective careers. Our testator-client is a widower, with a maiden sister, Bertha, age sixty-three, for whom he desires to make provision. The testator expresses the desire for a trust that will call for an eventual distribution of the residue of his estate equally among the three children, but he also wants to provide for his sister, Bertha, "so long as she lives." This phrase seems to trigger the reaction that Bertha's problems will be solved by making her a total income beneficiary of the trust residue for the remaining years of her life. The reasoning goes along something like this: After all, Bertha is sixty-three years of age, certainly beyond middle age and presumably beyond reasonable opportunity for marriage, and at age sixty-three, it is thought, she has a life expectancy of six or seven years. (Truly, according to actuarial tables, Bertha, at sixty-three, has a life expectancy of nineteen years and seven months.)¹ Certainly it is understandable that the testator wants to include sister Bertha in his estate plan, but what may not be contemplated is that Bertha may live long beyond a six or seven year span.

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The Berthas of the world have a way of living long beyond their four score and ten, and go on and on, enjoying their seventieth, their eightieth, their ninetieth, and at this writing, they may still be going on, a little deaf, a little blind, a little lame, but with all other vital signs strong. The Bertha we have in mind has survived all childhood diseases, a bout with typhoid fever, infections various and sundry, shipwrecks and the perils of the sea, operations in surgery, and her old body bears the scars and marks of old injuries, burns, and fractures. Like a British dreadnought of old, Bertha has ridden the stormy seas of life safely, and with pride. Each brush with death and disaster seems to make Bertha more invincible and invulnerable. Meanwhile, the remainder persons who presumably are also the principal objects of the testator's bounty are dying off like flies, until Bertha finally succumbs in her ninety-eighth year, when perhaps but one last remainder person, now too old, comes into a share of the inheritance. Perhaps the original, principal remainder persons, the testator's sons and daughter, may have all died leaving children, some of whom may even fail to survive the inexpugnable maiden aunt Bertha.

An estate planner should consider that the Berthas of the world may turn out to be very hardy persons indeed. Obviously, the unfortunate effect of the unexpected longevity of Bertha is that the sons and daughter of the testator are deprived of their rightful share in their father's estate, a result surely not intended by the father whose estate plan was certainly meant to benefit his offspring as well as sister, Bertha.

2. It should be noted that the remainder interests of the testator's children are alienable, but not readily transferable. In the United States, unlike the English experience, there is not a brisk market in the sale of future interests. Particularly is this true where there are survivorship provisions that may result in the divestment of interests. In Bertha's case, supra, what would the remainder interest of the testator's children be worth? What would you as a sound and canny investor of funds be willing to pay today for a possible share in the testator's estate at some unknown time in the future?

3. In our hypothetical case, let us support that the trust created by the testator amounts to $250,000. If provision is made for sister Bertha to take the income from the trust estate for life, and assuming that the trust fund conservatively invested will yield four percent after administrative expenses, Bertha will receive the sum of $10,000 annually from the trust. If Bertha lives into her nineties, she will have drained off in excess of $400,000 from the trust estate before the remainder persons, if indeed they are still on earth, will be entitled to anything from the trust. Thus, if Bertha dies 40 or more years after the death of the testator, assuming that he died shortly after executing our hypothetical will, the testator's children, in their twenties at the time their father's will was drawn, will be in their sixties, if they are alive at all. Because of the provision for Bertha, the two sons of the testator as well as his daughter, are deprived of a share in the father's estate, perhaps at a time when their needs
In *In re Bogart’s Will*, the Surrogate of Kings County, New York had to solve a problem of will construction aggravated by the “unanticipated longevity [of a life beneficiary].” Mary Bogart died in 1911 leaving a will executed in 1906. She left surviving a daughter, Johanna, for whom the mother’s will created a residuary life estate. The will also provided a life estate for Johanna’s husband upon whose death in 1925, the principal sum poured over into Johanna’s life estate. Because of the fact that the life beneficiary, Johanna, lived so long, the court had to resolve the question as to whether the children of testatrix’ brother and sister had to survive the life beneficiary for them to take as remainder persons. So construction problems, not readily apparent if the life beneficiary dies within a reasonable time, will remain in situations such as in *In re Bogart’s Will* where the named remainder persons all predecease the long-living life beneficiary.

The folly of creating a life income provision for a brother with remainders in the brother’s children is shown in the Wisconsin case of *Will of Reynolds*. In the *Reynolds* case, testatrix settled a testamentary trust of the residue of her estate amounting to $106,000 on her brother, Harold Lampert, Sr. for his life, and upon his death the corpus was to be distributed to Harold’s children, if living at the death of their father. Fortunately, Harold Lampert, Sr. saved the day for his children by renouncing the life beneficial interest. The Wisconsin court held that the gifts by way of remainder were accelerated and went to Harold’s children. It is apparent that the father was already well-established in life and needed the income from his sister’s estate far less than his children needed a share in the principal at or near the time of the death of testatrix.

The hardship that may follow in denying a share in the residue for a long time may still exist with the very common distribution by a husband in creating a life interest in his estate for his widow, with gifts over to the testator’s children upon the wife’s death. In

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5. Id. at 116, 308 N.Y.S.2d at 597.
6. 39 Wis. 2d 155, 158 N.W.2d 328 (1968).
7. In this situation it is perhaps the natural feeling of the testator that he does not care how long his children may have to wait to share in the estate. He may say that he hopes that his wife will live on forever. It would appear to be wise legal counsel, however, to point out that if the widow lives on interminably, it may well be that his children will take nothing
another Wisconsin case, *Will of Coleman,* the testator executed his will in 1903 and died in 1925. He left his entire estate in trust with directions to pay the income therefrom to his wife, Genevra, and after her death, ordered a distribution of the estate equally to his sister, Julia, and brothers, Harry and Edward. The testator provided that in the event of the death of the said sister or either of his brothers before the death of his wife, the share that she or he would have taken shall be divided equally between her and his surviving children by right of representation. In 1949 a suit in the nature of a declaratory action was brought to determine the rights under the will of possibly qualifying remainder persons. At that time, Genevra, the testator's widow, was eighty-nine years old, still living twenty-four years after the death of the testator. Testator's brother, Edward, survived the testator but died during the life of the life beneficiary. Edward left four children, three of whom were still living at the time of this litigation. Both Julia and Harry failed to survive the testator. Julia died intestate survived by three children, all of whom survived the testator but had since died without issue, devising their property to various persons. Harry, the testator's other brother, was survived by three children, all of whom survived the testator, but only one of whom is still living. One of Harry's children died intestate survived by issue. Harry's other child died testate leaving his property to his wife and four surviving children.

In an interesting opinion, the Wisconsin court declined to imply a condition of survivorship to secondary legatees unless such qualify as primary legatees due to the death of the parent during the life of the life beneficiary. Again we see the lesson for us all here. If the testator insists upon a life interest in someone, even his wife, with gifts over as in *Will of Coleman,* there should be express language in the will clearly showing the intention as to when survivorship will be determined in answer to the question: Who must survive whom?

For another case in which the longevity of the life tenant wreaked

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8. 253 Wis. 91, 33 N.W.2d 237 (1948).
9. Id.

from the testator's estate, and that it may ultimately be distributed to grandchildren, or great grandchildren. It is necessary to add here parenthetically that like the classical myth of old, one should never wish eternal life to another, unless one prays for eternal youth as well. According to the myth, eternal life without eternal youth, can have disastrous consequences. In Riggsby v. Montgomery, 208 Ky. 524, 271 S.W. 564 (1925), reportedly the wife outlived her dead husband by 40 years.
havoc with an estate plan, consider *Lewis v. Searless*\(^{10}\) wherein the testator died in 1926, and at the time of a declaratory judgment suit to determine the rights of remainder persons, the life tenant, widow of the testator, was ninety-five years of age and still going, forty-four years after the death of her husband.\(^{11}\)

There are some possible alternatives in solving the longevity problem. First, it would appear that there is no good reason why a life trust should be set up for the sister Bertha that will generate substantially more income than has been given her by the testator during his life. It is suggested that if the client has been providing $300 a month for the support of his spinster sister, then a special life income trust can be set up for her benefit in an amount that will generate approximately $3,600 a year. Thus, a special trust can be set up for Bertha's life with a trust res of $90,000 which, if invested at the current rate of return on safe trust investments, say four percent, will realize $3,600 per year or $300 monthly for Bertha's support. In the suppositious case of the life trust for Bertha given above, the original trust of the residue was $250,000, so the testator in his will can, after Bertha's special trust of $90,000, provide for an immediate distribution of the difference between $250,000 and $90,000 among the testator's children in such proportion as the testator may desire. The trust for Bertha can, of course, provide for a distribution of the $90,000 trust res among the testator's children or grandchildren upon the death of Bertha. Such a plan will provide for Bertha in the manner in which she has been accustomed and will not deprive the children of the testator of an immediate distribution of a bulk of the testator's estate.

Another suggested solution is to provide a trust of the entire residue with full income going to Bertha, but limited to a reasonable period, *e.g.*, for seven years\(^{12}\) following the testator's death, "if she shall so long live." Such a provision will not inordinately postpone enjoyment of the principal of the testator's estate until some far-off

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11. The argument can be made that the supposed hardship on remainder persons in delaying and postponing enjoyment until death of a life beneficiary is no greater than if the testator, himself, had lived to a ripe old age. The situation of the long-living testator is different, however. After all, it is his own property that he is enjoying during his own long life. In addition, the testator is in a position, being alive, to make inter vivos gifts of his property to his children and other natural objects of his bounty. It is submitted that this would rarely happen when another, not a parent, is enjoying the estate for life.

date when Bertha may happen to die. The rationale of limiting the time in which Bertha will enjoy the income from the trust for a specific period is to provide support for Bertha comfortably until she may receive other income, as from Social Security.

If the above solutions to the longevity problem have no appeal to the testator, the counselor may desire to suggest an outright generous bequest of money to Bertha, say $25,000, to enable his sister to take some adult training program that may equip her to become a wage earner in a limited way. The purpose of such an outright gift to Bertha is to provide the means by which the testator's sister may learn to support herself but not at the cost of depriving the testator's sons and daughters of the immediate enjoyment of a proper share in their father's estate.

Pragmatically, lifetime provisions of income can, as we have seen, be a menace to estate planning. The longevity of a life beneficiary can operate to deprive close objects of the testator's bounty of their just share in the estate. And many, many years later, there may be declaratory judgment lawsuits required to resolve problems of construction and the requirements of survivorship by those claiming rights as the successors of remainder persons.

As Coke said in another context many years ago: "[T]he life of a man is much favoured in law, but the life of law itself (which protects all in peace and safety) ought to be more favoured." 13

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13. 9 Coke Rep. 18.
I. The Setting

A substantial question of law exists with respect to the procedures to be followed in determining political refugee status pursuant to the 1967 Protocol Relating to the Status of Refugees. This study considers whether Article 33 of the 1951 Convention, as incorporated into the Protocol, is in conflict with the deportation provision of the Immigration and Nationality Act of 1952. An affirmative response could prove to be timely considering the present and potential movement of political refugees across United States borders and the ensuing litigation that might flow therefrom. To the attorney concerned with the practical dimensions of immigration or Constitutional law, the very nature of the hearing accorded a prima facie refugee is determined by the resolution of this issue.

The Protocol incorporates the prior 1951 Convention Relating to the Status of Refugees. Article 1 of the Convention defines as a refugee any person who

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4. Convention, supra note 2. The Protocol was advised and consented to by the United States Senate and acceded to by the United States Government in 1968. The Protocol and Convention are thus the supreme law of the land and are as such fully binding upon administrative agencies and the judiciary as statutes enacted by Congress. See, e.g., Zohering v. Miller, 389 U.S. 429 (1967); Valentine v. United States, 299 U.S. 5, 10 (1936). Furthermore, a self-executing treaty supersedes a prior Congressional enactment if the act is inconsistent with the terms of the treaty. Cook v. United States, 288 U.S. 102, 118 (1933). A later treaty will not repeal an earlier enactment by implication unless the two are absolutely incompatible and the latter one cannot be effectively enforced without conflicting with essential aspects of the earlier. Johnson v. Browne, 205 U.S. 309, 321 (1907).
owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.  

Article 33 of the Convention reads as follows:

No Contracting State shall expel or return ("refouller") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The government officially adopts the position that the United States has fulfilled its obligation with regard to Articles 1 and 33 as incorporated in the Protocol by applying the discretionary procedure enumerated in section 243(h) of the Immigration and Nationality Act, which states:

The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems necessary for such reason.

In his letter of submittal to President Lyndon Johnson, Secretary of State Dean Rusk commented with respect to Article 33:

As stated earlier, foremost among the rights which the Protocol would guarantee to refugees is the prohibition (under Article 33 of the Convention) against their expulsion or return to any country in which their life or freedom would be threatened. This article is comparable to Section 243(h) of the Immigration and Nationality Act . . . and it can be implemented within the administrative discretion provided by existing regulations.

A conclusion which may be derived from Rusk's opinion is that the United States will consider Article 33 claims of refugee status through activation of an existing procedure reserved for all aliens "within" the territory of the United States. The converse of this statement leads to the crux of the problem and underscores the difficulty encountered by the political refugee in flight. Simply put, it is, if the refugee is not "within the United States," but only

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5. Convention, supra note 2, at art. 1, ¶ A(2).
6. Id. at art. 33, ¶ 1.
7. S. EXEC. K., 90th Cong., 2d Sess. at VIII.
9. S. EXEC. K., 90th Cong., 2d Sess. at VIII.
physically present in the territory, then he is not amenable to a Section 243(h) hearing and its attendant provision allowing for an application of the Attorney General's discretionary power. It is to this problem that this article is directed.

The term "within the United States" has been treated by the courts as a word of art having a definite meaning. In *Kaplan v. Tod* the Court dealt with the case of an excluded alien temporarily paroled to a private agency pending deportation. The Court held that the appellant was not "within" the United States in terms of the naturalization statute although her physical presence was undisputed. Mr. Justice Holmes pinpointed the difference as follows:

Naturalization of parents affects minor children "only if dwelling in the United States." The appellant could not lawfully have landed in the United States in view of the express prohibition of the Act of 1910, and until she legally landed could not have dwelt within the United States. Moreover while she was at Ellis Island she was regarded as stopped at the boundary line and kept there unless and until her right to enter should be declared. When her prison bounds were enlarged by committing her to the custody of the Hebrew Society, the nature of her stay within the territory was not changed. She was still in theory of law at the boundary line and had gained no foothold in the United States. She never has been dwelling in the United States within the meaning of the Act.

In *Shaughnessy v. United States ex rel Mezei*, the Court stated through Justice Clark that "aliens who have passed through our gates even illegally, may be expelled only after proceedings con-

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10. 267 U.S. 228 (1925).
11. "Exclusion" signifies the treatment of an alien who has never entered the United States. "Expulsion" signifies the treatment of an alien who has entered the United States. The difference is of considerable importance in that exclusion, unlike expulsion, requires only a minimal compliance with due process requirements. See generally 8 U.S.C. §§ 1182, 1251 (1976); 8 C.F.R. § 242 (1977).
   The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States. See also 8 C.F.R. § 212.5 (1977).
forming to traditional standards of fairness encompassed in due process of law. But an alien on the threshold of initial entry stands on a different footing." In Leng May Ma v. Barber, the Court, in a five to four decision cited Kaplan with approval when it observed that "[f]or over a half century this Court has held that the detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States."17

"Entry" is a word of art. Section 101(a)(13) of the Immigration and Nationality Act reads as follows: "The term 'entry' means any coming of an alien into the United States, from a foreign port or place . . . whether voluntarily or otherwise."20 An alien who seeks "entry" under section 1226 of Title 8, is excludable if he falls within one of the categories enumerated in section 1182 of that title.21 For example, if an alien arrives at a designated port and he is not in possession of entry papers, he is excludable.22 If parole is sought and granted, he remains excludable at the termination of the period of parole. At no time has the alien made an "entry." The alien asylum-seeker in this particular category cannot avail himself of a stay of deportation proceedings under section 243(h) of the Act,

15. Id. at 212 (citations omitted).
17. Id. at 188.
18. The House Committee Report preceding enactment of the bill contained the following paragraph:

Section 101(a)(13) defines the term "entry." Frequent reference is made to the term "entry" in the immigration laws, and many consequences relating to the entry and departure of aliens flow from its use, but the term is not precisely defined in the present law. Normally an entry occurs when the alien crosses the border of the United States and makes a physical entrance, and the question of whether an entry has been made is susceptible of a precise determination.

H.R. REP. No. 1365, 82d Cong., 2d Sess. 32, reprinted in [1952] U.S. CODE CONG. & AD. NEWS 1653, 1683 (emphasis added). If the intent of the legislature was to seek a precise definition of the word "entry," that intent has not been realized. Cases analyzed herein will demonstrate the exclusive quality of the concept. Perhaps most relevant to the immediate analysis is the fact that various courts, including the Supreme Court, have construed "entry" to mean something more than physical entrance into the territory. See Leng May Ma v. Barber, 357 U.S. 185 (1958); United States ex rel. Brancato v. Lehmann, 239 F.2d 663 (6th Cir. 1956).

20. Id.
for he is not "within" the territory of the United States; he is merely physically present.

Significantly, however, if the alien manages to deceive the Immigration Service authorities at the port of entry by the use of false papers, and "slips by," then, for all intents and purposes, he has engineered an "entry" and he is then "within" the territory of the United States.\(^{24}\) The paradox is self-evident. In effect, he who manages to gain "entry" by less than legal methods is rewarded. He is "within." Although deportable as an illegal entrant, the alien in this category is legally entitled to demand a stay of deportation hearing under section 243(h) of the Act. His counterpart, "pleading at the gate," but not "within" is less fortunate. He is subject to exclusion proceedings, perfunctory though they may be. The Supreme Court in *Leng May Ma v. Barber*,\(^ {25}\) appeared to sanction this distinction and stated that:

> [O]ur immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . , and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely "on the threshold of initial entry."\(^ {26}\)

Our immediate concern is not with the alien who *has* effected "entry." A larger net is cast. It shall be maintained that the United States, a signatory to the Protocol Relating to the Status of Refugees, is legally bound to respect the Article 33 claim of an alien who is physically present in the territory of the United States regardless of the fact that he has not effected "entry," and is therefore not "within" the territory. The ultimate conclusion that this study shall seek to reach is that section 243(h) of the Act, (including an application of the Attorney General's discretionary powers) must be available to the Article 33 claimant physically present but not "within." Ultimately it is conceivable that an amendment to section 243(h)

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> Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—

> (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry.


26. *Id.* at 187.
will be required in order to excise the proviso that the alien must be "within" the territory.

It is conceded that even if an alien were permitted to remain physically present in the United States for many years as a refugee, pursuant to Article 33 of the Protocol, his presence here would not constitute an "entry" within the immigration statutes. Thus no rights of "entry" (such as eligibility for permanent residence) would accrue to this category of alien as would inure to those who, for example, enter as visitors, or even to those who surreptitiously effect "entry." In other words, political refugees under Article 33 are physically present but not "within." The Protocol Relating to the Status of Refugees is silent on the subject of permanent admission of refugees.27

The dictates of Article 33 raise neither a challenge to the power to exclude nor the exclusion procedures which need to be followed. Article 33 does not govern "entry," but removal. An order of exclusion for any reason enumerated under section 1182 of Title 8 is not questionable under Article 33. In the final analysis, however, an execution of an exclusion order must be withheld until it can be safely effected in accordance with Article 33. This position, as previously noted, takes into account the fact that determinations of refugee status are made pursuant to an overriding treaty separate from and independent of the immigration statutes, and subsequent thereto.

In *Immigration and Naturalization Service v. Stanisic,*28 the Court stated in a footnote that "it is premature to consider whether and under what circumstances, an order of deportation might contravene the Protocol."29 Article 33 in effect attaches upon physical

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29. *Id.* at 80 n.22. "Deportation" signifies the transfer of an alien, excluded or expelled, from this United States to a foreign territory.
penetration of the territory and does not require an “entry.” In spirit of the Stanisic opinion, it shall be suggested that circumstances do exist wherein the Protocol is contravened by an existing immigration statute.30

II. THE ISSUE: WHETHER ARTICLE 33 TAKES EFFECT PRIOR TO FORMAL RECOGNITION OF REFUGEE STATUS BY THE CONTRACTING STATE

Article 33 is silent as to when it attaches and has effect. It merely states that “[n]o Contracting State shall expel or return (“refouller”) a refugee in any manner whatsoever. . . .”31 The United States’ response to the issue posed is in the negative. In a letter to one of the authors from the Director of the Office of Refugee and Immigration Affairs, United States Department of State, the following position was stated:

In essence Article 33 must depend upon Article 1—the determination of refugee status. Before Article 33 becomes applicable, a determination must be made by competent authority that the alien is a refugee. If an alien is determined to be a refugee, the United States is bound by Article 33 not to return a refugee. . . . The final decision of refugee status is made by the Immigration Service usually with a State Department recommendation.32

The logic of this position leads to the conclusion that during the hiatus prior to a final determination of refugee status, the alien, or prima facie refugee,33 lacks the protection afforded by Article 33. Significantly, it would appear that if the individual were not “within” the territory in the sense that he had not made an “entry” under section 1101 of Title 8,34 but has merely physically penetrated the territory of the United States, he would fail to realize the advantage of a section 243(h) stay of deportation hearing. The position maintained by the United States Government can be refuted by a fair reading and interpretation of Article 33 of the Protocol.35

31. Convention, supra note 2, at art. 33, ¶ 1.
32. Letter from the Director of the Office of Refugee and Immigration Affairs, U.S. Dep’t of State, to Ian Mackler (July 16, 1975).
33. For the purposes of this analysis a prima facie refugee is one who has not been formally recognized by a contracting state to be a bona fide refugee.
35. See Leng May Ma v. Barber, 357 U.S. 185 (1958).
Paul Weis drew attention to the immediacy of Article 33's applicability by saying that "[u]nder the Convention, the principle applies in any event to persons who have penetrated into the territory of the contracting state whether their presence is legal or not."36

An opposition argument could be developed to the effect that Weis' interpretation simply means that an individual's presence as well as his "entry" might have been perfectly legal and therefore in accord with the relevant immigration regulations, but his presence might have subsequently become illegal, that is, an overstay. A conclusion could then be drawn by the opposition that the requirement of initial "entry" was mandatory. If subsequent illegal action requiring deportation proceedings occur, the alien could invoke Article 33's provisions and require a stay of deportation hearing.37

If this were an accurate interpretation of Weis' position, the opposition could indeed find agreement with Weis. This interpretation, however, is inaccurate. Weis' statement does not limit Article 33's scope to those individuals whose presence in the territory is illegal. He stipulated that illegal entrants38 are protected as well. He stated:

37. In Ken Kam Lin v. Rinaldi, 361 F. Supp. 177 (D.N.J. 1973), aff'd, 493 F.2d 1229 (3d Cir.), cert. denied, 419 U.S. 874 (1974), the court refused to concede the applicability of Article 33 once an alien loses his lawful status under Article 32. Article 32 of the convention reads: "The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order." Convention, supra note 2, at art. 32, ¶ 1. The Rinaldi court stated: "It is patently clear, that if the plaintiffs are not lawfully in the United States, they take nothing from the terms of the treaty." 361 F. Supp. at 183.

One might state with confidence that this court failed to perceive the availability of Article 33 in such a situation. Article 33 is to be distinguished from Article 32, which guarantees to refugees "lawfully" within the country that they shall not be expelled at all, even to another country, which would not persecute them. Article 33 makes no reference to persons "lawfully" in the territory. The scope of Article 33 is narrower, of course; it prevents the return of a refugee to a country of persecution. In Chim Ming v. Marks, 505 F.2d 1170 (2d Cir. 1974) the court stated:

Under paragraph 1 of Article 33 of the Convention, moreover, there need be no concern that the United States would return a refugee unlawfully here to a country where the refugee would be persecuted. This saving clause, so to speak, is further supported by the express terms of 243(h) of the Act. . . .
505 F.2d at 1172.

This note is intended to support the example given in the text. It does not in and of itself further or detract from the central contention of this analysis which is to the effect that Article 33 attaches to an alien upon penetration of the territory even though the alien is not "within" the territory. The two cases noted herein dealt with situations in which the alien had effected "entry" and was therefore "within" the territory of the United States.
38. Article 31 of the Convention reads:

The Contracting State shall not impose penalties, on account of their illegal entry or
IMMIGRATION OF POLITICAL REFUGEES

It would seem that the principles that bona fide refugees should not be returned or expelled to a country where their life or freedom would be threatened for political, religious or racial reasons, is indeed widely, if not universally recognized today. It applies equally to persons whose residence in the territory has been authorized, and to illegal entrants. 39

The Immigration and Nationality Act includes a category of aliens who have entered illegally. 40 Based upon what appears to be a similar use of the term “entry,” the opposition could argue that it agrees with Weis in that Article 33 attaches once "entry" has been achieved and the alien is "within" the territory. The alien could be deported for illegal entry, so the opposition could state, but would first have recourse to a section 243(h) stay of deportation hearing. The key to the gate, an opposition point of view would emphasize, is "entry.”

The opposition argument is erroneous. There is a subtle but important distinction to be drawn between Weis' and the opposition's position in the use of the concept of "entry." In United States ex rel Brancato v. Lehmann, 41 the court stated,

> It is clear from the decisions that the word “entry” in the statute means more than the technical physical act of coming into the geographical territory of the United States. This Court pointed out in Thack v. Zurbrick, that the statutory entry was not completed by that technical entry which occurs when the international line is crossed. 42

In Weis' conceptualization, an alien need only physically penetrate the geographical territory to effect an entry and be accorded the presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Convention, supra note 2, at art. 31, ¶ 1.

40. (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who

   (2) entered the United States without inspection or at any time or place other than as designated by the Attorney General.

41. 239 F.2d 663 (6th Cir. 1956).
42. Id. at 665 (citation omitted).
protection of Article 33. In effect, if an alien penetrates territorial waters or reaches a port of entry, he is physically present and has “entered” according to Weis. This appears to be a far broader use of the term “entry” than is in force in the immigration statutes.

Simply stated, in the view of the courts, as well as in the Immigration and Nationality Act, physical presence is not equated with “entry.” It would follow, therefore, that if there is no entry, then the prima facie refugee is “not within,” and therefore, not protected by Article 33.

Not so, according to Weis! Atle Grahl-Madsen finds agreement, and directs attention to the binding provisions of the Protocol Relating to the Status of Refugees. In his view, the concept of “entry” means a crossing of the frontier line and stepping into the territory. He emphasizes that “the one important thing is to cross the frontier line.” Referring explicitly to Article 33 of the Protocol, Grahl-Madsen stated that “[o]nce a refugee has set foot in a country of refuge, being a Party to the Convention Relating to the Status of the Refugees of July 28, 1951 . . . he is protected by the provisions of Article 33 of that Convention.” Grahl-Madsen appears to reach beyond Weis, categorically drawing the distinction between the concepts of physical presence and “within” the territory. His view is illuminating:

If a refugee is physically within the United States, it will most certainly contravene Article 33 of the Refugee Convention, and thereby the Protocol, to return him to a country of persecution, on the simple ground that he is not “within” the United States in the sense of the Immigration and Nationality Act. In view of the fact that—according to Article VI(2) of the United States Constitution—duly made treaties constitute the supreme law of the land, on an equal footing with acts of Congress; the accession of the United States to the Refugee Protocol . . . may well spell the end of a long and unfortunate practice, at least with respect to refugees covered by the Protocol.

In order to further advance the argument that physical penetration of the territory in and of itself must activate Article 33's mandatory protection, this analysis will focus on a specific situation—the case of an asylum-seeker who has physically penetrated the terri-

44. Id. at 233.
45. Id. at 435.
46. Id. at 130.
torial waters of the United States and is rescued from them. There is a rational basis for the selection of this model. Entrance into the territorial waters will in all likelihood occur prior to an inspection by agents of the Immigration and Naturalization Service. Two arguments are avoided. First, the opposition cannot say that the asylum-seeker who penetrates territorial waters has effected "entry" by clandestinely crossing a border at an unauthorized location. Neither may the opposition argue that the asylum-seeker gained "entry" by deceiving a border guard in any manner.

In this situation therefore, if Article 33 of the Protocol attaches upon the asylum-seeker's entrance into territorial waters of the United States, it will do so owing to a physical penetration and not an "entry." It would then follow that Article 33's protection must be granted regardless of the fact that the alien is not "within" the territory.

This analysis reaches beyond an attempt to demonstrate that Article 33 (and, therefore section 243(h) of the Act) protects prima facie refugees located within territorial waters. The number of refugees found in such a predicament is small. However, if these refugees are afforded lawful protection, then similar coverage must be extended to those prima facie refugees who declare themselves as such at airports, seaports, or territorial border points. In response to a query from one of the authors as to whether Article 33 attaches to an asylum-seeker found within territorial waters, a representative from the Office of the United Nations High Commissioner for Refugees in Geneva, Switzerland wrote, in an unofficial capacity that

[legal opinion actually favours the view that a State may treat the territorial sea as forming part of its territory. According to the law of the United States, the territorial sea has always been within the boundary of the United States in the same category as ports, bays, and dry land. If the above mentioned approach is accepted, Article 33 of the 1951 Convention is applicable in territorial waters.]

Professor L.F.E. Goldie is of the view that Article 33 affords, at minimum, provisional protection to a prima facie refugee seeking asylum within the territorial waters of the United States. His research focused upon the Kudirka affair of 1971. Kudirka, a Lith-

Uranian national, later discovered to be an American citizen, attempted to gain asylum by jumping from the Russian vessel Sovetskaya Litva. He was picked up by the United States Coast Guard cutter Vigilant. The unfortunate sailor was, however, returned to the Russian ship. The entire incident occurred within the United States' territorial waters. Professor Goldie stated as follows:

Article 33 of the Convention provides at least the starting point of an international law obligation binding on a receiving state. It requires that whatever else the receiving state does with him, if it is satisfied as to the status of the refugee, it will not expel or return him to any territories where his life or freedom would be threatened. . . .

He responded critically to a then current Naval regulation which stated that the right of asylum for political refugees had no foundation in international law, and even in territorial waters, officers should refuse requests for asylum "except when required by the interests of humanity in extreme or exceptional cases." Professor Goldie evidently was not impressed with the significance of the exception to the regulation, and viewed the obligation to provide asylum in territorial waters as a legal duty, carrying more weight than a vague humanitarian gesture. In an indirect reference to Article 33, he stated that:

While the Naval Regulations may be the naval officer's bible, they are subordinate regulations which are void if contrary to the "supreme law of the land," namely the Constitution, treaties, and statutes of the United States. Clearly, since Naval Regulation 0621 is contrary to the United Nations Treaty on Refugees to which the United States has been a party since December 1968, it is now invalid as it stands.

The views set forth by Goldie in 1971 are undoubtedly persuasive. They are not, unfortunately, the views of the courts of the United States. His position, one might reflect, is what ought to be and not what is. In spite of the fact that the Protocol Relating to the Status of Refugees was the law of the land in 1971, the United States Government has never publicly conceded its application to an asylum-seeker who was not "within" the territory following "entry."

The situation changed dramatically in 1972 when the United States Department of State promulgated Public Notice 351 in the

50. Id. at 36 (footnotes omitted).
51. Id. at 37.
52. Id.
The notice lends support to the belief that the United States Government was willing to concede Article 33's immediate applicability to the prima facie refugee rescued in the territorial waters of the United States. A careful scrutiny of the Public Notice is instructive. Explicit reference is not made to Article 33. Nevertheless, a subheading entitled "Background" states that a primary consideration in the United States' asylum policy is the Protocol Relating to the Status of Refugees. The "Background" statement refers to the Protocol "and its explicit prohibition against the forcible return of refugees to conditions of persecution." This is, it appears, a direct reference to the wording of Article 33 of the Protocol. The "Background" statement further notes the binding nature of the Protocol when it states that "[a]s a party to the Protocol, the United States has an international treaty obligation for its implementation within areas subject to [its] jurisdiction."

The Public Notice is important because through it, official recognition is accorded to Article 33's binding character prior to "entry." In effect, the United States Government is posing a challenge to itself as follows: Section 243(h) of the Act stipulates the requirement that the alien must be "within" the territory. Included in the legislative history of the Protocol is communication from the Secretary to the President that Article 33's mandatory provisions can be satisfied by the invocation of Section 243(h) of the Act; Public Notice 351, however, openly recognizes the availability of an Article 33 claim to a prima facie refugee who has not made "entry" and is not "within" the territory. While Article 33 limits its applicability to refugees, an asylum-seeker is a refugee at the time of his physical penetration into the territory.

The recognition process serves to formalize what is perhaps already reality. The very life of a prima facie refugee is jeopardized if he is not protected by the provisions of Article 33 immediately upon physical penetration of the territory. If the prima facie refugee is not protected, his life is at risk.

54. Id.
55. Id.
56. Id. The territorial waters of the United States must be included among areas subject to its jurisdiction. "The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea." Convention on the Territorial Sea and the Contiguous Zone, opened for signature Apr. 29, 1958, 15 U.S.T. 1607, 1607, T.I.A.S. No. 5639, 516 U.N.T.S. 205, 205.
57. See note 9 supra and accompanying text.
protected by the contracting state in such a manner, there is ample
time, following the formal determination, to deport the alien if
indeed he does not prove to be a bona fide refugee.

Grahl-Madsen's work is invaluable in this particular area and
merits lengthy quotation. It states as follows:

The question has sometimes arisen, whether the recognition of a
person as a Convention "refugee" is a constitutive or merely a decla-
ratory act.

In our opinion there cannot be much doubt as to what is the correct
answer to this question. The absence of rules of procedure, as well as
the wording of Article I of the Convention suggests that the entitle-
ment to the benefits of the Convention is not dependent on any par-
ticular act of recognition. As soon as a person satisfies the criteria set
forth in Article I he is ipso facto entitled to the benefits in question.
This means that a formal act of recognition has only declaratory, not
constitutive, effect. This opinion has been confirmed by a number of decisions. Thus
in its advisory opinion the French Commission des Recours expressed the view that the person concerned should be considered a
refugee since his arrival in France, and not only since the date when
he was recognized as a refugee by the Director of OFPRA.

and:

A person becomes a refugee at the moment when he leaves his home
country for fear of being persecuted or, alternatively, at the moment
when he declares himself a refugee sur place. It follows, that
neither the date of recognition or the date of application for recogni-
tion is relevant. The answer to our crossing the frontier or sur place,
is the decisive one, at least as a general rule.

Doctor Grahl-Madsen weaves this interpretation into the concept of
non-refoulment (Article 33) when he states:

58. Professor Goldie's analysis apparently envisioned a two-step process for the Article 33
claimant rescued in territorial waters: An official will be authorized to grant ex parte provi-
sional asylum to the asylum-seeker in territorial waters. This will be "followed by a hearing
before executive officials in whom would be vested the power of determining finally whether
the defector or refugee may remain permanently under the protection of the United States
or not. Goldie, supra note 49, at 38. It must be questioned why Professor Goldie did not refer
to Section 243(h) of the Act considering the fact that the legislative history of the Protocol
notes that this section of the Immigration and Nationality Act parallels Article 33, and that
a claim to the latter can be satisfied by an application of the former.
60. Id. at 157 (citations omitted).
61. Id. at 158.
The enjoyment of certain benefits to be accorded under the Convention is clearly dependent on recognition of the person as a refugee. But other benefits must be available to prima facie refugees pending determination of their bona fide refugee character.

This applies to the benefits to be accorded to refugees by virtue of the provisions of Article 31(1) and (2) and above all to the benefits due to refugees under Articles 32 and 33, restricting expulsion of refugees in general as well as forcible return to a country where they are threatened with persecution.

These provisions are meant to protect the person entitled to invoke them throughout their life as refugees, and in particular the prohibition of forcible return to a country of persecution could be easily rendered meaningless if it could only be invoked upon the formal recognition of the person concerned as a refugee.

From the moment an asylum-seeker prima facie refugee sets foot on the territory of a State Party to the Refugee Convention, he must be able to invoke, provisionally, the benefits of Article 32 and 33, which means that he cannot be expelled or returned ('refoule') except in accordance with the provisions of those articles, so long as it has not been definitely decided that he is not entitled to recognition as a Convention refugee (or as a refugee in the sense of the Protocol of 31 January 1967).

... The provisions of Article 33 and the fact that refugees may rely on these provisions from the moment they enter a country of refuge, without having to await formal recognition of their refugee character, are what set the status of refugees apart from the status of any other aliens in the territory of a Contracting State.\textsuperscript{62}

In the previously referred to letter from the Office of the United Nations High Commissioner for Refugees, Geneva, Switzerland, a significant statement was tendered:

A refugee has no substantive rights under Article 33. There is only a negative obligation on the State Party to the 1951 Convention not to expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened for the reasons mentioned in this Article. Rights such as the right to seek employment, to reside in a country of asylum on a permanent basis, are normally granted when he is recognized as a refugee under Article 1 of the 1951 Convention.\textsuperscript{63}

An interpretation of this statement supports this study. Accord-

\textsuperscript{62} Id.

\textsuperscript{63} Letter from Mr. J. Terlin, supra note 48 (the opinions expressed in this communication are those of Mr. Terlin and do not represent the official viewpoint of the organization).
ing to the first and third sentences, various substantive rights are not offered the prima facie refugee, i.e., the refugee not yet formally recognized under Article 1. Nevertheless, read within this context, the second sentence indicates that prior to the formal recognition of the refugee, he must be protected by virtue of Article 33.

III. CONCLUSION

In summary, this study has noted that section 243(h) of the Immigration and Nationality Act of 1952\(^4\) authorizes the Attorney General to exercise his discretion when deciding not to deport an alien to any country in which, in his opinion, the alien might be subject to political persecution. The essential proviso to the section, however, is that the alien is required to be “within” the territory. The concept of “within” is to be read narrowly. It does not include the alien physically present in the territory who has failed to effect an “entry.” This article challenges the existing state of affairs. It has attempted to demonstrate that Article 33 of the Convention as incorporated in the Protocol Relating to the Status of Refugees, which admittedly activates section 243(h), is applicable to prima facie refugees physically present, but not “within” the territory of the United States. The conclusion to be drawn is that an Article 33 claimant must be privileged to invoke section 243(h) in spite of the fact that he is not “within” the territory.

Had Alexis de Tocqueville disembarked in New York harbor a century after he did, he undoubtedly would have read with approval\(^5\) the words of Emma Lazarus on the pedestal of the Statue of Liberty: “Give me your tired, your poor, your huddled masses yearning to breathe free.” One ponders however, what form Tocqueville’s reaction would have taken had he also been privy to an exercise of John F. Kennedy’s caustic wit following the President’s recital of this famous passage. Kennedy remarked that:

Under present law it would be appropriate to add: as long as they came from Northern Europe, are not too tired or too poor or slightly

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\(^5\) Tocqueville identified a key ingredient of the American democratic formula: “It may be said that... on leaving the mother country the emigrants had, in general, no notion of superiority over one another. The happy and powerful do not go into exile, and there are no surer guarantees of equality among men than poverty and misfortune.” 1 A. TOCQUEVILLE, DEMOCRACY IN AMERICA 34 (2d ed. Cambridge 1863) (1st ed. London 1835).
ill, never stole a loaf of bread, never joined any questionable organization and can document their activities for the past two years. Kennedy juxtaposed principle against reality, drawing a distinction between the rhetoric of idealists and the practice of the guardians and administrators of the Immigration and Nationality Act.

This technical study focuses upon another divide, that the principles postulated by Article 33 are different from those of the Immigration and Nationality Act. The reader should be cautioned however, lest he lose sight of the humanitarian precepts underlying the conflict. In the final analysis, we are dealing with human lives. Ask whether the exclusion of a class of asylum-seekers physically present but not “within” is in the spirit of section 243(h) of the Act? We think not! An often repeated admonishment is found in Holy Trinity Church v. United States, where it is stated that “a thing may be within the letter of the statute, and yet not within the statute, because not within its spirit, nor within the intention of the makers.”

In Leng May Ma v. Barber, Justice Douglas, in his dissenting opinion recognized the validity of this rule. He stated that he “would not read the law narrowly to make it the duty of our officials to send this alien . . . to what may be persecution or death. Technicalities need not enmesh us. The spirit of the law provides the true guide.”

President Lyndon Johnson, in his letter of transmittal to the Senate recommending the advice and consent of that body to the Protocol, stated that,

Foremost among the humanitarian rights which the Protocol provides is the prohibition against expulsion or return of refugees to any country in which they would face persecution.

It is decidedly in the interest of the United States to promote this United Nations effort to broaden the extension of asylum and status for those fleeing persecution. Given the American heritage of concern for the homeless and persecuted, and our traditional role of leader-
ship in promoting assistance for refugees, accession by the United States to the Protocol would lend conspicuous support to the effort of the United Nations toward attaining the Protocol's objectives everywhere.72

Upon legal as well as humanitarian principles, and taking into consideration the purpose of Article 33, Section 243(h) of the Immigration and Nationality Act of 1952 must be amended so as to excise the term "within" from the section or to reframe its definition so as to include asylum-seekers who are physically present but who have not effected "entry." Even though the Protocol Relating to the Status of Refugees is not the law of the land, Congress must undertake such action. In lieu of a direct assault upon section 243(h)'s wooden logic, Congress must address itself to other solutions so as to guarantee full justice to Article 33 claimants physically present in the territory. The Constitution requires no less. By so doing, a brave vision will become a reality!

72. S. EXEC. K., 90th Cong., 2d Sess. at III. When the Protocol was being considered by the Senate Committee on Foreign Relations, there was a degree of apprehension that the Protocol would effect major changes upon the Immigration and Nationality Act of 1952.

Senator Sparkman: "I want to make certain of this: Is it absolutely clear that nothing in this Protocol, first requires the United States to admit new categories or numbers of aliens?"

Mr. Dawson (State Dep't representative): "That is absolutely clear."

Senator Sparkman: "And no requirement of new categories or numbers of aliens?"

Mr. Dawson: "That is correct, sir."


This study has clearly defined the limits of Article 33. Article 33 does not bind the contracting state to admit a refugee, but to withhold exclusion until it can be effected in accordance with the Protocol. Thus, it would appear that the Committee's apprehension was directed toward the effects of Article 32.
HOSPITAL RESPONSIBILITY FOR BASIC CARE PROVIDED BY MEDICAL STAFF MEMBERS: "AM I MY BROTHER'S KEEPER?"

William M. Copeland*

Case law and other developments over the past two decades have placed a new burden on hospitals: the hospital, as a corporate entity, has the ultimate responsibility for the quality of medical care provided in the institution. Such has not always been the case. Until a few years ago, the hospital was considered simply a "workshop" for the physician. There was no duty on the part of the hospital to evaluate the quality of care given; in fact, those who suggested it should be done were dismissed as being eccentric. Consider the following statement by Codman, an early advocate of hospital quality assurance:

I am called eccentric for saying in public:
That Hospitals, if they wish to be sure of improvement,
Must find out what their results are.
Must analyze their results, to find their strong and weak points.
Must compare their results with those of other hospitals.
Must care for what cases they can care for well, and avoid attempting to care for cases which they are not qualified to care for well . . . .
Must assign the cases to members of the Staff (for treatment) for better reasons than seniority, the calendar, or temporary convenience

... Must welcome publicity not only for their successes, but for their errors, so that the Public may give them their help when it is needed. Must promote members of the Staff on a basis which gives due consideration to what they can and do accomplish for their patients. Such opinions will not be eccentric a few years hence.¹

History has indeed verified Codman's statement that to require hospitals to evaluate the quality of medical care given in their facilities is not eccentric. In fact, the relationship between the hospital, its medical staff, and the community has changed dramatically during the last twenty years. It is now well accepted that the hospi-

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¹ C. Jacobs, T. Christoffel, & N. Dixon, Measuring The Quality of Patient Care: The Rationale for Outcome Audit 24 (1976) (quoting E. Codman, A Study in Hospital Efficiency 137 (1916)).
nal has the final responsibility for the quality of care provided within its facilities. However, this statement is misleading if one concludes that the hospital is liable for all acts of malpractice by a physician practicing therein. Actually, the hospital management must take reasonable steps

1) to select a competent medical staff,
2) to ensure that the individual physician on its staff performs only procedures for which he is qualified, and
3) to implement certain quality control measures to ascertain that only qualified practitioners remain on the staff and that quality care is provided in the institution.

The focus of this paper is on the legal basis for these requirements and the mechanisms available to the hospital management to carry them out. To obtain a true perspective of the basis of the current law and the reluctance of the medical community to participate in "peer review," one must have an appreciation of the historical relationship between the hospital and the physician. Further, to see this relationship in the proper context, one must analyze the roles both play under the new "corporate responsibility doctrine."

Traditionally, hospitals have provided the physician a place to care for his patients. While this is still true in the purest sense, there have been some drastic changes in the concept of what a hospital does and what its responsibilities are as an institution. From its very inception to the middle part of the twentieth century, a hospital was simply a "workshop" for the physician. It was not, even to the slightest degree, responsible for the medical care provided by the members of its medical staff not in its employ. Judge Cardozo, in 1914, addressed the problem as follows:

The wrong was not that of the hospital; it was that of physicians, who were not the defendant's servants, but were pursuing an independent calling, a profession sanctioned by a solemn oath, and safeguarded by stringent penalties. If, in serving their patient, they violated her commands, the responsibility is not the [hospital's]; it is theirs.2

The hospital's responsibility to its patients was limited to administrative liability for its ministerial acts, such as referring emergency room patients only to competent physicians and making reasonable efforts to ensure the competence of its employees. There was no duty to supervise the performance of nonemployee members of the medi-

HOSPITAL RESPONSIBILITY

The theory was that since only physicians could practice medicine, which by its very nature requires a high degree of specialization in skills and an ability to exercise discretion, the hospital management was inherently incapable of exercising effective control over the medical care provided by the physician who operated as an independent contractor when utilizing its facilities. The professional medical process was considered entirely in the hands of the individual treating physician.

The courts went to great lengths to differentiate between the two kinds of negligence: administrative and medical. The New York Court of Appeals, in overruling its prior holdings, discussed its own attempts to interpret the distinction between these terms:

The difficulty of differentiating between the "medical" and the "administrative" in this context, highlighted as it is by the disagreement of the judges below, is thus brought into sharp focus.

That difficulty has long plagued the courts and, indeed, as consideration of a few illustrative cases reveals, a consistent and clearly defined distinction between the terms has proved to be highly elusive. Placing an improperly capped hot water bottle on a patient's body is administrative, while keeping a hot water bottle too long on a patient's body is medical. Administering blood, by means of a transfusion, to the wrong patient is administrative, while administering the wrong blood to the right patient is medical. Employing an improperly sterilized needle for a hypodermic injection is administrative, while improperly administering a hypodermic injection is medical. Failing to place sideboards on a bed after a nurse decided that they were necessary is administrative, while failing to decide that sideboards should be used when the need does exist is medical.

The court concluded, "From distinctions such as these there is to be deduced neither guiding principle nor clear delineation of policy; they cannot help but cause confusion, cannot help but create doubt..."

7. Id. (citations omitted).
and uncertainty." 8

Even where the hospital was held responsible for the injury to a patient because of a failure to perform competently its administrative responsibilities, most escaped liability through the doctrine of charitable immunity. 9 This doctrine was first declared in this country in 1876 and served to provide total immunity from liability for charitable institutions. 10 It was, in fact, the judicial compromise between this doctrine and respondeat superior that caused the administrative/medical dichotomy. 11

It is little wonder that professional management of hospitals was almost nonexistent; the situation led one commentator to conclude:

The governance of the American hospital has always been elusive, amorphous, and confusing. Bewildered students of management have been able to find no theories to fit the apparently headless enterprise and have dismissed the situation as an enigma . . . . The hospital was originally conceived as an agency devoted to doing good rather than well. It was little more than a home away from home for the sick poor. The physicians didn't need the hospital in the beginning and the hospital didn't need management. 12

Peter Rogatz, M.D., a former senior vice president of Blue Cross and Blue Shield of Greater New York, states it very succinctly in this manner:

[H]ospital trustees were supposed to mind their own business. They weren't supposed to worry about what doctors did or how they did it. [T]rustees aren't doctors, the reasoning went, so let the doctors alone and let them take care of patients. 13

While it is true that each hospital had an organization called its medical staff, this staff was usually loosely organized and was said to be self-governing. Except in the most extreme circumstances, the hospital's governing body adopted a noninterference policy toward professional standards and toward medical staff affairs. 14 And then,

8. Id.
in 1965, the hospital's world changed drastically: the Illinois Supreme Court decided *Darling v. Charleston Community Memorial Hospital*,15 and the United States Congress enacted Medicare.16

**The New Institutional Responsibility**

In *Darling*, an eighteen year old college student broke his leg while playing in a football game. He was taken to the emergency room at Charleston Community Memorial Hospital where he was treated by the doctor on emergency call. The leg was placed in traction and a plaster cast applied. The patient was admitted to Charleston Hospital and remained there for a total of fourteen days. During this period the patient frequently complained of severe pain; there was a stench in the room described by one witness as the worst he had smelled since World War II; blood and other seepage were observed by nurses and others.18 Despite this, the hospital did not request a consultation from another physician as was required by the state regulations,19 the accrediting standards,20 and the hospital's medical staff bylaws.21 At the end of the fourteen days, the patient was transferred to a St. Louis hospital and placed under the care of an orthopedic surgeon. Interference with blood circulation caused by the tight cast made amputation of the leg necessary.22

Charleston Community Memorial was a forty-six bed hospital and a member of the American Hospital Association. It was accredited by the Joint Commission on Accreditation of Hospitals and licensed by the state of Illinois. No licensed physicians, residents, or interns were employed by the hospital.23

The physician who applied the cast and was responsible for the course of treatment at Charleston Hospital was a fifty-eight year old general practitioner. He had graduated from medical school thirty-three years earlier and had not treated a fracture in three years. He

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17. See note 15 supra.
19. *Id.* at 280, 200 N.E.2d at 164.
20. *Id.*
21. *Id.* at 283, 200 N.E.2d at 165.
22. *Id.* at 273-74, 200 N.E.2d at 157.
23. *Id.*
admitted at the trial that he had done nothing to update his knowledge of fractures since his graduation from medical school.  

The Supreme Court of Illinois found that it need not analyze all the issues submitted to the jury; two of them would support a finding of negligence on the part of the hospital. These were that [the hospital had failed] to have a sufficient number of trained nurses for bedside care of the patients at all times capable of recognizing the progressive gangrenous condition of the patient's right leg, and of bringing the same to the attention of the hospital administration and to the medical staff so that adequate consultation could have been secured and such conditions rectified; . . . [and failed] to require consultation with or examination by members of the hospital surgical staff skilled in such treatment; or to review the treatment rendered to the plaintiff and to require consultants to be called in as needed.

The court went on to discuss its holding and stated that the hospital had a duty to provide an adequate nursing staff capable of recognizing the dangerous condition of the patient and informing the attending physician of such condition, and, if the physician fails to act, to notify hospital management "so that appropriate action might be taken." As to the hospital's failure to review the attending physician's work or to require consultation, there was sufficient evidence before the jury to find such failure was negligence.

Against the background of governing board policies of noninterference and virtual medical staff independence, the Darling case was something of an anomaly. Not only did it change the relationship between the hospital and its medical staff, but it placed on the hospital direct liability for the care provided the patient under the so-called "corporate responsibility doctrine." The holding of the case, however, is often misinterpreted by health industry officials to suggest that a hospital may be vicariously liable for the negligence of a member of its medical staff, just as an employer is responsible for the acts of his employees. Actually, the thrust of the case is limited to the narrow holding that hospital management has the responsibility, in consultation with the organized medical staff, to

24. Id. at 294-95, 200 N.E.2d at 170.
25. 33 Ill. 2d at 333, 211 N.E.2d at 258 (emphasis added).
26. Id.
27. Id.
establish policies and procedures and to monitor the quality of medical practice within the institution so as to give reasonable assurance that physicians granted clinical privileges to practice within the institution are competent and are not likely to commit malpractice or cause injury to the patient.\footnote{29. Hedgepeth, The Darling Case in Perspective and a New Court Speaks 25 TRUSTEE 1 (Aug. 1972).}


\footnote{31. Horty, Institutional Liability, ACTION KIT FOR HOSPITAL LAW D7-1 (1974).}

\footnote{32. Note, Independent Duty of a Hospital to Prevent Physician’s Malpractice, 15 ARIZ. L. REV. 953, 960 (1973).}

\footnote{33. 33 Ill. 2d at 333, 211 N.E.2d at 258.}

\footnote{34. Id. (emphasis added).}
important, it recognizes that a hospital’s responsibility invades the area of medical care provided by the physician. Thus, the hospital must become more directly involved with patient care.35

Two years after Darling, the Supreme Court of Washington decided Pederson v. Dumouchel.36 In this case the plaintiff was injured in an automobile accident and suffered a fractured jaw. After examination, the attending physician admitted the patient to the hospital and called in a dentist to reduce the fracture. Anesthetic was administered by a nurse, in the employ of the hospital, without a medical doctor present in the operating room. The attending physician had left the hospital prior to commencement of the surgery. After surgery, while he was in the recovery room, the patient suffered convulsive seizures. The attending physician could not be located and no medical doctor was available in the hospital at this time. In time, a surgeon was located who examined the patient, found him unconscious and experiencing convulsive seizures. Concluding he was suffering from brain injury, the surgeon contacted a neurosurgeon and immediately transferred the patient to a larger hospital in a nearby city.37 Two other key factors had a direct bearing upon the final holding in this case. First, the nurse who administered the anesthetic was a narcotic user and alcoholic who was committed to a state hospital within two months of the surgery. At the trial she had a bare minimum of independent recollection of what transpired during the surgery.38 Second, and more important, the hospital had a rule stating that for patients requiring dental service, a member of the medical staff would co-admit and be responsible for the patient’s medical care.39 As stated by the court, “the attending physician did not assume the responsibility ‘for the patient’s medical care’ while in surgery.”40

After some discussion about hospitals, as well as medical and dental practitioners, being members of national organizations and subject to accreditation (with the implication that hospitals are subject to nationwide standards), the court held “it is negligence as

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36. 72 Wash. 2d 73, 431 P.2d 973 (1967).
37. Id. at 75, 431 P.2d at 975-76.
38. Id. at 75, 431 P.2d at 976.
39. Id. at 80, 431 P.2d at 978.
40. Id.
a matter of law for a hospital to permit a surgical operation upon a patient under general anesthetic without the presence and supervision of a medical doctor in the operating room in the absence of extraordinary and emergent circumstances.\textsuperscript{41} Again, as in Darling, we find that the hospital is charged with the independent duty to ensure that the patient is not injured through the failure of the hospital to supervise its medical staff members. This duty to properly supervise includes the duty to select only competent physicians and to review and monitor their performance to insure that only competent physicians remain on the staff. We shall presently review each of these duties in some detail but first let us review two cases that delineate them.

In Joiner v. Mitchell County Hospital Authority,\textsuperscript{42} plaintiff brought her husband to the defendant hospital's emergency room complaining of chest pain. He was examined by the staff physician on emergency call, told the condition was not serious, given a prescription and sent home. The pain worsened and plaintiff started back to the hospital but the husband died enroute.\textsuperscript{43} The plaintiff sued both the hospital and the physician contending that the hospital negligently allowed the physician privileges by failing to make an investigation into his background to ascertain his competence. The hospital contended that the physician was licensed by the state and it did not undertake to direct him in his treatment of the patient. Further, the hospital contended that since selection of staff candidates for admission to the staff is left to existing staff members, it could not be held liable for negligent selection.\textsuperscript{44}

The court was unimpressed by these arguments by the hospital; it held that the members of the staff to whom the screening process was delegated were agents of the hospital. Therefore, it was responsible for any default or negligence in selecting staff members.\textsuperscript{45}

\textsuperscript{41} Id. It is interesting to note that the court, without specifically so stating, by its reference to the accreditation process brought in as the standard of care the standard of the national accrediting body, the Joint Commission on Accreditation of Hospitals (JCAH). Medical Staff Standard I requires \textit{inter alia}: "A physician member of the medical staff must be responsible for the care of any medical problem that may be present, or that may arise, during the hospitalization of dental patients." \textit{Joint Commission on Accreditation of Hospitals, Accreditation Manual for Hospitals} 104, 107 (1976).


\textsuperscript{43} Id. at 1, 186 S.E.2d at 308.

\textsuperscript{44} Id.

\textsuperscript{45} Id.
Turning to the contention that the physician was licensed by the state, the court said that this does not overcome the averments that the hospital was negligent in failing to ascertain the doctor's competence should it later appear by evidence that he was an incompetent or unskilled physician. In affirming the opinion of the appeals court, the Supreme Court of Georgia commented as follows:

[P]laintiff does not seek to hold the hospital liable under the doctrine of respondeat superior or principal and agent, but upon the doctrine of independent negligence in permitting the alleged negligent physician to practice his profession in the hospital, when his incompetency is known. Such negligence is comparable to that of the owner of a motor vehicle permitting an incompetent, inexperienced, or reckless driver to operate such motor vehicle.

The court goes on to say that the hospital has authority to limit or completely bar his practice if he is incompetent, unqualified, inexperienced or reckless. Delegation to the staff of authority to screen applicants does not relieve the hospital of its responsibility, since, as pointed out by the court of appeals, such members are agents. If the hospital knew of the incompetency of the physician, or if from information in its possession should have known, then the hospital cannot be said to have “acted in good faith and with reasonable care” in permitting staff membership of the incompetent. In other words, if the hospital actually knows, or through its committees and/or staff members has constructive knowledge, and it does not act to protect the patient from the incompetent physician, it will be held liable. And this duty does not end once the physician has been selected; it is a continuing process of review and monitoring as the following case shows.

In Purcell and Tucson General Hospital v. Zimbleman, the institutional responsibility theory is taken one step further. A surgeon, during an exploratory operation, found a lesion and had a pathologist come into the operating room to look at the tissue. The pathologist, without performing a frozen section, said it looked like cancer and the surgeon performed a “pull through” operation. Subsequently, it was determined the patient had diverticulitis, not cancer. As a result of the operation, the patient suffered from a loss

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46. Id. at 3, 186 S.E.2d at 309.
47. 229 Ga. at 141-42, 189 S.E.2d at 414.
48. Id.
50. 500 P.2d at 339.
of sexual function, loss of a kidney, a permanent colostomy and urinary problems. There was expert opinion that a "pull through" operation was not designed for the type of disease treated. According to the experts, the treatment should have been an anterior resection. In addition, there was testimony from two former patients who had developed complications as the result of operations by the surgeon for the same condition and who had sued the surgeon and the hospital. Evidence of two other suits against the surgeon was also admitted. All suits occurred prior to the instant case.

The hospital was accredited by the American Osteopathic Association, the counterpart of the JCAH for Osteopathic hospitals. That association's accreditation requirements mandate that the "governing body [of the hospital] must have the ultimate responsibility for the quality of patient care rendered in the hospital." Pursuant to the association's requirements, a medical staff was created at the hospital and its bylaws approved by the governing body. These bylaws state in substance that the board has the responsibility to select a competent professional staff and has a moral, as well as legal, obligation to the patient to assure accepted standards of care.

The court found that hospitals nationwide follow the practice of establishing and operating review and other committees for the purpose of regulating medical staff privileges and for insuring that only those privileges for which a practitioner is fully qualified are granted. The court also found that it was the standard practice of hospitals to "actually monitor and review the performance of staff doctors and to restrict or suspend their privileges or require supervision when such doctors have demonstrated an inability to handle a certain type of problem."

The court stated that it is both desirable and feasible for a hospital to assume certain responsibilities for the care of its patients. Here, the duty of supervising the competence of its staff practitioners was assumed by the hospital. The Department of Surgery had assumed this review and monitoring function and was acting "for

51. Id.
52. 500 P.2d at 340.
53. Id.
54. 500 P.2d at 341.
55. Id.
56. Id.
57. Id.
and on behalf of the hospital” in executing this duty. The court concluded:

if the department was negligent in not taking any action against [the surgeon] or recommending to the board of trustees that action be taken, then the hospital would also be negligent.

Since the negligence of the hospital was predicated upon failure to perform its obligation to [the patient] to see to it only professionally competent persons were on its staff, it follows that its knowledge, actual or constructive, of [the surgeon’s shortcomings, was an essential element for consideration in determining whether or not the hospital exercised reasonable care or had been guilty of negligence.

Evidence of the filing of [these four] lawsuits was admissible against the hospital on the question of notice, as to the general competency of [the surgeon] to continue to be a member of the hospital staff.

This entire area of corporate responsibility for the medical staff is summed up most graphically by Judge Goldberg in Gonzales v. Nork and Mercy Hospital.

I have reached the conclusion that the hospital is liable with great reluctance, because I am sure that the Sisters of Mercy have done everything within their power to run a proper institution. But they, like every hospital governing board, are corporately responsible for the conduct of their medical staff. I do not anticipate that they will suffer financially, because the ultimate responsibility rests on Dr. Nork. “A person . . . who by the improper exercise of a legal power, intentionally creates liability against the other, is liable to the other for the . . . creation of liability.” Restatement of Torts 871 (1939). Mercy is a culprit, but it is also a victim. As for the doctors on the Mercy staff, two thoughts keep going through my mind. The one is from Dr. Jones: “No one told any one anything.” The other is from Edmund Burke:

“The only thing necessary for the triumph of evil is for good men to do nothing.”

58. Id.
59. Id.
60. 500 P.2d at 343.
61. 500 P.2d at 344.
63. Id. at 759.
But the court in Moore v. Board of Trustees of Carson-Tahoe Hospital\textsuperscript{64} has one of the most succinct discussions of the role of the hospital in today’s society and how far it has come from its workshop days:

Today in response to demands of the public, the hospital is becoming a community health center. The purpose of the community hospital is to provide patient care of the highest possible quality. To implement this duty of providing competent medical care to patients, it is the responsibility of the institution to create a workable system whereby the medical staff of the hospital continually reviews and evaluates the quality of care being rendered within the institution. The staff must be organized with a proper structure to carry out the role delegated to it by the governing body. All powers of the medical staff flow from the board of trustees, and the staff must be held accountable for its control of quality. The concept of corporate responsibility for the quality of medical care was forcibly advanced in Darling v. Charleston Community Memorial Hospital, wherein the Illinois Supreme Court held that hospitals and their governing bodies may be held liable for injuries resulting from imprudent or careless supervision of members of their medical staffs. The role of the hospital vis-a-vis the community is changing rapidly. The hospital’s role is no longer limited to the furnishing of physical facilities and equipment where a physician treats his private patients and practices his profession in his own individualized manner.\textsuperscript{65}

The trend of these cases is clear: the hospital has the final responsibility for the standard of professional practice. In the examination of credentials and professional review matters, the medical staff is the hospital’s agent; when it is negligent, the hospital is liable. Their omissions become the omissions of the hospital. The hospital has the duty and responsibility to limit privileges and appointments when it has actual or constructive knowledge of professional incompetence. The burden is on the hospital to ensure that the staff complies.\textsuperscript{66}

In neither Kentucky nor Ohio has the doctrine of corporate responsibility for hospitals been faced directly. However, one case in each jurisdiction has at least made reference to the doctrine indi-

\textsuperscript{64} 88 Nev. 207, 495 P.2d 605 (1972).
\textsuperscript{65} Id. at 211-12, 495 P.2d at 608 (citations omitted).
\textsuperscript{66} Note, Hospital’s Expanding Role and Responsibility in Health Care Delivery, 14 Washburn L. J. 580, 596 (1975); Southwick, The Hospital as an Institution—Expanding Responsibilities Change Its Relationship with the Staff Physician, 9 Calif. W.L. Rev. 429, 453 (1973).
rectly through dicta. In *McElhinney v. William Booth Memorial Hospital*,” the plaintiff was removed from the staff for comments made about the professional performance of some other members of the staff and hospital employees. The court found the plaintiff to be “an especially competent, dedicated and busy surgeon whose prime concern is the welfare of his patients and the *improvement of hospital conditions.*” There was not a scintilla of evidence of negligence or incompetence found.

After a discussion of the specific acts of which plaintiff was charged, the court states:

> The goal of providing high standards of medical care requires that physicians be permitted to assert their views when they feel that treatment of patients is improper or that negligent hospital practices are being followed. Considerations of harmony in the hospital must give way when the welfare of patients is involved. . . .

If one interprets the quoted language as meaning that physicians must be allowed freedom to review the professional performance of their colleagues, the natural conclusion would follow that the hospital is responsible for this monitoring and review. This interpretation is reinforced by *Blair v. Eblem,* which cites *Pederson,* albeit for the proposition that quality care is defined by a nationwide standard.

In Ohio, the *Kahn v. Suburban Community Hospital* case cites *Darling* and *Joiner* directly and states: “hospital governing boards are responsible for upgrading the standards of health care to be maintained in a hospital.” The court further states, “so long as staff selections are . . . geared by a rationale compatible with hospital responsibility . . . a court should not interfere.” It would seem, therefore, that when the issue of corporate responsibility is raised in Ohio, the court will follow the general trend in other jurisdictions.

It is significant that the *Darling* court viewed the Standards of the

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67. 544 S.W.2d 216 (Ky. 1976).
68. Id. at 217 (emphasis added).
69. Id.
70. Id. at 218.
71. 461 S.W.2d 370 (Ky. 1970).
72. Id. at 373.
73. 45 Ohio St. 2d 29, 340 N.E.2d 398 (1976).
74. Id. at 45, 340 N.E.2d at 402.
75. Id., 340 N.E.2d at 402.
76. Id. at 44, 340 N.E.2d at 402 (quoting Sosa v. Board of Managers of Val Verde Memorial Hosp., 437 F.2d 173, 177 (5th Cir. 1971)).
Joint Commission on Accreditation of Hospitals (JCAH), the state licensing regulations, and the hospital's by-laws as manifesting the view of the medical profession that "it is both desirable and feasible that a hospital assume certain responsibilities for the care of the patient." The appeals court found that these guidelines make the governing body legally and morally responsible for the conduct of the hospital and for the conduct of the medical staff. The court's reliance in Darling on the standards of a national accrediting body such as the JCAH has been followed in other states with the qualification, in at least one state, that a qualified expert is required in their application.

The Medicare Act of the federal government gives added importance to the JCAH Standards by stating that a hospital is deemed to be an eligible provider of services if it has in effect a utilization review plan and "is accredited by the Joint Commission on Accreditation of Hospitals . . ." or a program found by the Secretary of Health, Education, and Welfare to be "essentially equivalent" to the JCAH. At least one source finds that this creates a national standard of care.

With this reliance by the courts and the federal government on the JCAH Standards as providing a guide to the standard of care required of hospitals, it is pertinent to review the applicable stan-

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77. 50 Ill. App. 2d 253, 279-84, 200 N.E.2d 149, 163-64 (1964). The Joint Commission on Accreditation of Hospitals was organized in 1952 by the American Hospital Association, American Medical Association, American College of Physicians, American College of Surgeons, and Canadian Hospital Association. Its purpose was to certify the safety and minimum standards of quality of hospital performance. While request for a survey for accreditation purposes is voluntary and the initiative must come from the hospital itself, state licensure, third-party reimbursements, internships and residency programs, as well as participation in Medicare, are often contingent upon accreditation. As a result, the majority of hospitals do seek accreditation. U.S. CHAMBER OF COMMERCE, A PRIMER FOR HOSPITAL TRUSTEES 66 (1974); R. CUNNINGHAM, GOVERNING HOSPITALS: TRUSTEES AND THE NEW ACCOUNTABILITIES, 26-27 (1976). About eighty-five percent of the short-term hospital beds in the United States are in J.C.A.H. accredited hospitals. Holbrook & Dunn, Medical Malpractice Litigation: The Discoverability and Use of Hospital's Quality Assurance Committee Records, 16 WASHBURN L.J. 54, 58 (1976).

78. Id.


83. 27 AM. JUR. Proof of Facts § 57 (1966).
standards, along with the case law, to determine what hospitals must do to avoid liability of the kind imposed in Darling, Joiner, and Purcell. Such a review is particularly pertinent at this time because the JCAH republished the entire Accreditation Manual in April, 1976 and has subsequently revised the three key standards, Quality of Professional Services, Governing Body and Management, and Medical Staff in December, 1976 and April, 1977.84

The clear trend of Darling, Purcell, Pederson, and Joiner is that the hospital must take appropriate steps to insure that only competent medical staff members are selected, that those selected are granted privileges only to perform procedures for which they are qualified and that there is a control mechanism to evaluate the quality of care given and to identify those practitioners who have become incompetent, need improvement or who are attempting procedures for which they are not qualified. Generally it can be said that these responsibilities fall into two broad categories: appointment or reappointment and quality assurance activities. Under the appointment or reappointment category falls initial appointment, reappointment, delineations of privileges and reduction, suspension, or withdrawal of privileges. The quality assurance activities encompass utilization review, medical audit, tissue review, transfusion review, review of surgical procedures, and review of emergency services. While it is true that the ultimate responsibility for the quality of care is the governing body's, the care itself and the policing function must be delegated by the board to the organized medical staff. Before one can fully comprehend how this system functions, a general familiarity with the medical staff organization is necessary.

**The Medical Staff Organization**

The standards of the Joint Commission on Accreditation of Hospitals (JCAH) provide: "There shall be a single organized medical staff that has the overall responsibility for the quality of all medical care provided to patients, and for the ethical conduct and professional practices of its members as well as for accounting therefore to the governing body."85 The typical medical staff organization is

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84. JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, ACCREDITATION MANUAL FOR HOSPITALS (1976 & Supp. 1977) [hereinafter referred to as JCAH MANUAL].
85. Id. at 103.
not complex; in fact, it resembles the customary hierarchical organization found in most corporations. If any complexity exists, it results from the fact that while its members are not employees of the hospital, it owes its very existence to the hospital's governing board. The board must not only approve its bylaws and membership, but also is responsible for its activities.

As is indicated in the historical review above, this was not always true. In fact, the early practice of medicine was totally independent of the hospital; usually the doctor cared for his patients in their homes. Early hospitals were not founded for the primary purpose of providing medical care but as an outgrowth of the establishment of lodging houses by religious organizations, which in time began to take in the homeless.

The services for such doctors as did visit the hospital were often a gift of their time to the unfortunate. They did not see any immediate advantage to themselves in giving their services. . . . The focus of medical practice at that time was in the home. . . . Even up to the middle of the last century the hospital provided a wretched substitute for home care. Most of the early hospitals were not founded by doctors, and doctors were not an integral part of the organizational bureaucracy. They were and still are officially guests of the hospital. MacEachern, in his text on hospital management, first published in 1935 and considered by many to be the "bible" of hospital administration, did not even even include the medical staff in the chapter on organization but rather discussed it in a later chapter as a separate entity. There is a subsection in the chapter, however, dealing with the governing board's relation-

86. Id.
88 supra, at 113.
89. 20 C.F.R. § 405.1021(e) (1976); JCAH MANUAL, supra note 84, at 103.
92. Moss, supra note 90, at 171.
94. M. MacEachern, Hospital Organization and Management (1962).
95. Id. at 83-124.
96. Id. at 157-312.
ship to the medical staff. Many of the most difficult policy questions facing hospitals and medical staffs today revolve around this organization problem.\textsuperscript{97}

In another sense, however, the physicians have been very much in control having, until recent times, the unquestioned authority to provide the hospital's most important product—patient care.\textsuperscript{98} They were clothed with an informal authority that was accepted by every segment of the organization. Their patients were dependent upon them, yet they were independent of the institution. Their responsibility was to their patients, and they were free of formal organizational constraints.\textsuperscript{99} The suggestion that any form of organizational bureaucracy could intervene between the doctor and his patient was unheard of.\textsuperscript{100}

Through the ensuing years, the physician's use of the hospital increased greatly. While he utilized the hospital's new therapeutic facilities, his professional rights were jealously guarded.\textsuperscript{101} Other hospital personnel, including management personnel, took a subordinate role. By the turn of the century and throughout the first half of this century, the physician was in full command.\textsuperscript{102} "In his absence the organization ran in deference to precedent he had established or in anticipation of those he would establish."\textsuperscript{103}

It was against this background that \textit{Darling} and its progeny were decided. The medical staff organizational structure was firmly entrenched and subsequent events have done little if anything to change that situation. The structure now described by the JCAH\textsuperscript{104} is basically the same as that recommended by MacEachern in his 1957 edition.\textsuperscript{105} It is this entrenched medical staff organization with which the hospital management must contend in implementing the required programs defined by the courts.

The hospital seems to have this unique quality to assume new roles and responsibilities without discarding old ones.

\textsuperscript{97} Moss, \textit{supra} note 90, at 171.
\textsuperscript{98} Id.
\textsuperscript{99} Id.
\textsuperscript{100} Id. at 172.
\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{103} Wilson, \textit{The Physician's Changing Hospital Role}, 18 \textit{Human Organization} 177, 178 (1959-60), quoted in Moss, \textit{supra} note 90, at 172.
\textsuperscript{104} JCAH Manual, \textit{supra} note 84, at 104.
\textsuperscript{105} See Moss, \textit{supra} note 90, at 83-124.
The hospital retained its function as charitable asylum when it became the doctor's workshop, and it has retained its functions as charitable asylum and doctor's workshop during the years it has also been a community medical enterprise, and unquestionably it will retain some of its functions as charitable asylum and doctor's workshop and community medical enterprise now that it is evolving also as public health facility. Unfortunately . . . the new roles and responsibilities are not laid on neatly, a layer at a time, and they cannot ever be clearly differentiated, one from another.  

Now, in addition, hospital managements must implement new programs designed to police the quality of medical care and the competence of the practitioners providing that care and, to make matters worse, must depend upon the medical staff itself to put into operation these quality control programs. Unfortunately, assuming this responsibility for "peer review" of his contemporaries flies in the face of the physician's traditional and jealously guarded professional independence. Physicians see this as an erosion of their right to exercise independent professional judgement in the care of their patients. At the very least, this responsibility for review is met with apathy on the part of physicians and the resulting programs are somewhat perfunctory. Seldom if ever has a medical staff attacked the problem with zeal. In some cases, it has responded with outright animosity and rebellion. Nevertheless, it is the medical staff upon which the hospital management must rely to implement its programs.

The classical medical staff organization has certain unique characteristics. First, not all members have the same standing and/or rights. The membership is usually divided by staff categories, each with clearly defined rights and responsibilities. These medical staff categories are generally:

**Active medical staff:** These are practitioners who provide most of the medical service within the hospital and are eligible to vote for and to hold medical staff offices.

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109. See, e.g., St. John's Hospital Medical Staff v. St. John's Regional Medical Center, 245 N.W.2d 472 (S.D. 1976).
110. JCAH Manual, supra note 84, at 104-05; 20 C.F.R. § 405.1023(t), 1023(g) (1976).
Associate medical staff: These are practitioners who are being considered for active staff membership. While they may not hold medical staff office, they may serve on committees and generally are able to vote.\textsuperscript{112}

Other staff categories include courtesy, consulting, and honorary, whose members generally do not vote and have restricted hospital admission privileges.\textsuperscript{113}

The organizational structure is usually developed utilizing the bureaucratic framework as a guide.\textsuperscript{114} It has departments,\textsuperscript{115} representing various medical specialties such as medicine and surgery, and committees,\textsuperscript{116} relating to staff responsibilities. These departments and committees report to the medical executive committee (MEC), which usually is composed of the staff officers\textsuperscript{117} and is chaired by the staff president.\textsuperscript{118}

Officers

The senior medical officer and head of the medical staff organization has the title of president, chief of staff, or medical director.\textsuperscript{119} Whatever his title, he has the responsibility for enforcing the medical staff by-laws, rules, and regulations.\textsuperscript{120} While he is answerable to the board rather than the medical staff, in most hospitals he is elected by the staff and serves on a voluntary, nonpaid basis.\textsuperscript{121} Unless membership is specified in the by-laws, he appoints all medical staff committee members.\textsuperscript{122} He is responsible for the functioning of the clinical organization\textsuperscript{123} and for representing the staff to the hospital management.\textsuperscript{124}

\textsuperscript{112} JCAH Manual, supra note 84, at 104; 20 C.F.R. § 405.1023(g) (1976); Schulz, supra note 111, at 75.
\textsuperscript{113} See note 112 supra.
\textsuperscript{114} Shortell, Hospital Medical Staff Organization: Structure, Process and Outcome, Hospital Administration 96 (Spring, 1984).
\textsuperscript{115} JCAH Manual, supra note 84, at 106; 20 C.F.R. § 405.1023(g) (1976).
\textsuperscript{116} JCAH Manual, supra note 84, at 111; 20 C.F.R. § 403.1023(j) (1976).
\textsuperscript{117} JCAH Manual, supra note 84, at 107; 20 C.F.R. § 403.1023(r) (1976).
\textsuperscript{118} Williams, The Chief of Staff—the Hospital’s Man or the Staff’s Man?, in THE MEDICAL STAFF IN THE MODERN HOSPITAL 27 (1967).
\textsuperscript{119} Schulz, supra note 111, at 77.
\textsuperscript{121} Schulz, supra note 111, at 77.
\textsuperscript{122} JCAH Manual, supra note 84, at 106.
\textsuperscript{124} JCAH Manual, supra note 84, at 106.
Committees

The medical staff executive committee, the only committee specifically required by the JCAH, acts for the medical staff and has responsibility for the effectiveness of all medical staff activities. It coordinates the activities and general policies of the various departments and receives and acts upon the reports of the various medical staff committees.

The remaining committee structure is largely a function of what each individual medical staff desires. The Medicare regulations provide: "The structure of committee organization is a decision to be made by the medical staff as long as the required committee functions are carried out." The JCAH Standards also echo this line of thinking: "The form and complexity of the medical staff organization will vary substantially . . . . Although the establishment of committees is a common organizational device, other methods also are acceptable, provided the effective discharge of the [medical staff's] responsibilities can be demonstrated by the documentation of activities."

The required committee functions are spelled out in some detail by both Medicare and the JCAH but may be summarized as medical staff selection and medical care evaluations. These are precisely the functions delineated by Darling and its progeny and will be discussed in some detail in the sections that follow.

Departments

Departmentalization of the medical staff depends upon the complexity of the staff duties and functions. Medicare recommends departmentalization in general hospitals of 75 beds or more. The

125. Id. at 107.
126. Id.
129. JCAH Manual, supra note 84, at 108.
130. For an excellent analysis of the medical staff committee structure see, 1 INTERQUAL, MEDICAL STAFF BY-LAWS 59 (1976). Most of the work on this document was accomplished at the JCAH while its principal draft persons, C. Jacobs and S. Wegley, were Associate Director and Director of the Quality Review Center for Health Law Research, respectively, at that organization. A special advisory panel of the American Society of Hospital Attorneys assisted in the project.
department chairmen are key members of the staff organization and its selection and review programs.

The clinical department chairmen are essential elements in the line of authority within the medical staff organization, and are accountable to the executive committee for all professional and medical staff administrative activities within their departments. They must be responsible for departmental implementation of actions taken by the executive committee. They must also maintain continuing surveillance of the professional performance of all members of the medical staff with privileges in their department, and must report regularly thereon to the medical staff executive committee. 132

The only other pertinent item in the medical staff organization that relates to its fulfilling the judicially delineated duties of the hospital is the staff organization’s relation to the board of trustees. This liaison function has traditionally been fulfilled by the Joint Conference Committee, a committee composed of members of the medical staff, the governing body, and the administration. 133 Some commentators, including a former JCAH Associate Director, however, have not been overly impressed with this committee as a liaison device, and some find it ineffective. 134 The JCAH itself allows medical staff membership on the board, membership of the medical staff president on the board, or appointment of individual medical staff members to board committees as alternative means to fulfill the liaison function. 135 However the function is accomplished, it is quite apparent that there must be active communication between the board and medical staff organization if the required working relationship is to be developed.

As stated above, there is some reluctance on the part of medical staffs to accept the new court dictates or at least to accept lay board control of medical care. In 1974, after the JCAH updated its 1970 standards in 1973, the American College of Hospital Administrators (ACHA) published its recommendations. 136 In the same year, the Catholic Hospital Association (CHA) promulgated guidelines to its member facilities. 137 For the purposes of our discussion here, the

132. JCAH Manual, note 84 supra at 106.
133 Schulz, supra note 111, at 77.
134. Id.
135. JCAH Manual, supra note 84, at 82.
136. American College of Hospital Administrators, Recommendations on Standards to the Joint Commission on Accreditation of Hospitals (1974) [hereinafter cited as ACHA Recommendations].
137. Catholic Hospital Association, Guidelines on Roles and Relationships of Board,
pertinent sections of those documents specify that the governing body is responsible for the quality of patient care provided in the hospital\(^{138}\) and, more significant, that the chief executive officer, appointed by the board, is responsible for the medical staff and its activities.\(^{139}\) The CHA document went so far as to provide that:

The physician, like any other health professional, must contribute to overall institutional objectives and participate in determining standards of quality care in terms defined by the board. . . . [T]he physician is accountable for his actions and performance through the chief executive officer to the board.\(^{140}\)

The ACHA went even further:

The governing authority, its administration, and its medical staff must be integrated and operate in a coordinated manner in keeping with these principles. It is not reasonable to have those involved in direct patient care restricting their concerns to quality of care while the governing authority and administration restrict their interest to physical plant and finances. The public and its representatives do not make such distinctions, nor do the courts of law.\(^{141}\)

It did not take long for the medical profession to respond. B.J. Anderson, director of the American Medical Association’s (AMA) Health Law Department, addressed the question directly in a paper made a part of a 1974 report on physician-hospital relations.\(^{142}\) The AMA’s position is that physicians and hospitals are mutually responsible and accountable for the patient care standards and that the medical and managerial expertise must be mutually dependent and cannot be separated.\(^{143}\) It is the staff’s responsibility to oversee

\(^{138}\) ACHA RECOMMENDATIONS, supra note 136, at 2; CHA GUIDELINES supra note 137, at 16.

\(^{139}\) See note 138 supra.

\(^{140}\) CHA GUIDELINES, supra note 137, at 13 (emphasis added).

\(^{141}\) ACHA RECOMMENDATIONS, supra note 136, at 1-2.


\(^{143}\) Id. There is some recent authority for this premise. See Corleto v. Shore Memorial Hospital, 138 N.J. Sup. 302, 350 A.2d 534 (1975) (holding that the medical staff constitutes an unincorporated association that can be sued along with or instead of the hospital) St. John’s Hospital Medical Staff v. St. John’s Regional Medical Center, 245 N.W.2d 472 (S.D. 1976) (holding that medical staff by-laws are a contract between the staff and the hospital which cannot be unilaterally changed by the hospital’s governing body). But see, Horty,
the medical aspects of the delivery of quality care, and if the staff 
fails in this responsibility, control of this function falls to the hospi-
tal.\textsuperscript{144} But, the report continues, when the general principles of 
corporate law are given strict application to hospitals, there results 
mutual misunderstanding and disputes between medical staff and 
hospital governing boards.\textsuperscript{145} There are limitations imposed by law 
on the exercise of corporate authority by the hospital governing 
body and the authority to control is not absolute.\textsuperscript{146} If, states the 
report, the relationship is analyzed "solely on the basis of the gen-
eral principles of corporate law, the . . . individual members of 
[the medical] staff stand in the relationship of agents of the corpo-
ration for purposes of providing medical care services on the corpo-
rate property."\textsuperscript{147} Accordingly, the only feasible test of control of 
such agents is the governing body's power to revoke medical staff 
privileges.\textsuperscript{148} In the AMA's view, the governing body is responsible 
for the organization, management, and conduct of the institution 
but must delegate the responsibility for medical functions to the 
staff.\textsuperscript{149} The responsibility for the quality of medical care provided 
to patients in the hospital is, therefore, the responsibility of the 
medical staff which functions most effectively as a "'a medical 
governing board,' exercising authority in medical matters compara-
tible to those exercised by the governing body in performing corporate 
managerial functions.'\textsuperscript{150}

Perhaps the true meaning of the AMA proposal is misconstrued, 
but it appears that the AMA would place the medical staff on an 
equal level with the governing board. This simply does not comport 
with the facts. In the first place, a medical staff is not formed 
indipendently; individual practitioners are admitted to the staff by 
the hospital governing board. The staff bylaws, rules, and regula-
tions are not drawn up and adopted by the medical staff; they are

\textsuperscript{144} AMA, Physician-Hospital Relations, \textit{supra} note 142, at 14.
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Id. There is little if any authority for this contention. While \textit{Parcell}, 18 Ariz. App. at 
81, 500 P.2d at 341, did hold that the staff, as a body, was the hospital's agent for carrying 
out the quality assurance function, there is little authority that holds individual medical staff 
membeers, not employees of the hospital, to be hospital agents.
\textsuperscript{148} AMA, Physician-Hospital Relations, \textit{supra} note 142, at 14.
\textsuperscript{149} Id. at 15.
\textsuperscript{150} Id.
submitted to the governing board which may, or may not, approve them. Total hospital authority and responsibility are vested in the board and only certain elements of that responsibility are delegated to the medical staff.\textsuperscript{151}

The AMA report continues with a discussion of \textit{Darling}. Following the same general theme that the individual medical staff member is an agent of the hospital the report then indicates that the Supreme Court of Illinois did not call upon the hospital management “to control the clinical practice of medicine on a case by case basis.”\textsuperscript{152} It is very interesting how the report construes the implication of \textit{Darling}:

The true significance of the \textit{Darling} case, though hardly mentioned by legal commentators, is simply this: when a hospital selects for a patient the physician who is to treat him, it has an obligation to act wisely in selection.

Despite all of the language in the \textit{Darling} case as to the failure of the hospital to abide by its own bylaws relating to the quality of medical care or to fulfill the applicable standards of the Joint Commission on Accreditation of Hospitals and the state health regulations, none of these considerations would have even been discussed in the case if Doctor Alexander had been selected by Darling to be his attending physician rather than selected by the hospital to provide treatment. The “nub” of the \textit{Darling} case is simply that although Doctor Alexander was not an employee having a contract of service with the hospital, his hospital privileges required him to have in effect a “contract for services” in the hospital by being available for treatment on emergency call. Therefore, although he may not have been a servant of the hospital, a common law principal and agent relationship could be implied and is apparent in the decision.\textsuperscript{153}

It is difficult to see how one can explain \textit{Darling} away with the contention that had Dr. Alexander not been on “call” in the emergency room, and therefore “selected” by the hospital for the patient, the case against the hospital would never have arisen. While it is true that Dr. Alexander was on emergency room call,\textsuperscript{154} as was Dr. Dumouchel in \textit{Pederson},\textsuperscript{155} and Dr. Gonzales in \textit{Joiner},\textsuperscript{156} one can

\begin{itemize}
\item \textsuperscript{151} Horty, \textit{supra} note 143, at 167.
\item \textsuperscript{152} AMA, \textit{Physician-Hospital Relations}, \textit{supra} note 142, at 15.
\item \textsuperscript{153} Id. at 15.
\item \textsuperscript{154} Darling v. Charleston Community Hosp., 33 Ill. 2d at 328, 211 N.E.2d at 255.
\item \textsuperscript{155} Pederson v. Dumouchel, 72 Wash. 2d at 74-75, 431 P.2d at 975.
\item \textsuperscript{156} Joiner v. Mitchell County Hosp. Auth., 125 Ga. App. at 1, 186 S.E.2 at 308.
\end{itemize}
hardly make the same case for Dr. Nork\textsuperscript{157} or Dr. Purcell.\textsuperscript{158} Even the holding in Darling had little to do with the emergency room selection of Dr. Alexander since it was concerned with the

1. failure of the hospital to have a sufficient number of nurses capable of recognizing the deficient care and bringing the same to the attention of hospital administration and the medical staff so that adequate consultation could have been obtained and the condition rectified; and,\textsuperscript{159}

2. failure to require consultation or to review the treatment given.\textsuperscript{160}

The same is true in Pederson; the court was concerned with the hospital permitting an operation under general anesthesia without the presence and supervision of a medical doctor.\textsuperscript{161} The holding had nothing to do with the fact that Dr. Pederson happened to be "assigned" the patient because he was in the emergency room. In Joiner,\textsuperscript{162} the same fact is reflected. The court was concerned with the failure of the hospital to adequately examine the qualifications of Dr. Gonzales prior to granting staff privileges. The court states:

\begin{quote}
[P]laintiff does not seek to hold the hospital liable under the doctrine of respondeat superior or principal and agent, but upon the doctrine of independent negligence in permitting the alleged negligent physician to practice his profession in the hospital, when his incompetency is known. Such negligence is comparable to that of the owner of a motor vehicle permitting an incompetent, inexperienced, or reckless driver to operate such motor vehicle.

[A] hospital has authority to examine the qualifications of any physician seeking staff privileges and to limit his practice to those areas in which he is deemed qualified to practice or to completely bar him from such practice if he is incompetent, unqualified, inexperienced or reckless.\textsuperscript{163}
\end{quote}

It is probable that each of these cases would have reached the same result if the physicians involved had admitted the patient as the patient's private physician, selected by the patient. It is frivolous to contend that the hospital's emergency room relationship with the physician was the underlying rationale for the result. It is very im-

\textsuperscript{158} Purcell & Tucson General Hosp. v. Zimbleman, 500 P.2d at 339.
\textsuperscript{159} Darling v. Charleston Community Hosp., 3311. 2d at 333, 211 N.E.2d at 258.
\textsuperscript{160} Id.
\textsuperscript{161} Pederson v. Dumouchel, 72 Wash. 2d at 80, 431 P.2d at 975.
\textsuperscript{162} Joiner v. Mitchell County Hosp. Auth., 229 Ga. at 142, 189 S.E.2d at 414.
\textsuperscript{163} Id.
important to realize, however, that Darling did not impose liability on the hospital for the physician's negligence but for its own negligence.164

A second AMA report took issue with the suggestion by the CHA and ACHA that the medical staff should report to the governing board through the chief executive officer.165 While the report accepted the fact governing boards have the ultimate legal and moral responsibility for the quality of patient care provided within the institution, it said the CHA and ACHA proposals could only lead to domination of medical staff by lay boards and lay administration.166 It accused both organizations of attempting to achieve "the subjugation of the self-governing medical staff to control centralized in the chief executive officer. . . ."167 and warned that government as well may attempt "incursions upon the prerogatives of the medical staffs. . . ."168 Medical staffs are encouraged to take a firm stand against control by the governing board of medical staff activities related to patient care.169

It was not long before other physician organizations took the challenge. In a 1975 document, the Association of American Physicians and Surgeons (AAPS) stated that the welfare of the patient is the combined responsibility of physician and management.170 But AAPS would not accept that there was a corporate responsibility for the quality of medical care. It contended that there could be no responsibility for medical care, or the quality of that care, except by the physician who renders the care.171 And, according to the AAPS, the medical staff of a hospital is under no obligation to perform the quality control functions assigned to it by the board.172 "[I]n the absence of [a contractual arrangement] there is nothing

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164. Springer, The Darling Case: Ten Years Later, TRUSTEE, July 1976, at 17, 20. This article gives an excellent review of the developments since Darling and the impact of the case on hospitals and medical staffs.


166. Id. at 17.

167. Id.

168. Id.

169. Id.


171. Id. at 18.

172. Id. at 19.
in the common law that duty-binds a private staff physician to do what the hospital board of its administration tells him to do. The private physician is an independent contractor as far as the law is concerned.” 173 The document continues this line of reasoning by providing:

Ethical and Common-Sense Considerations of Hospital Interference. One of the most vital principles of all for any staff to get straight with the trustees of its hospital is that the staff as a group of independent contractors is answerable only to that board of trustees. There can be no middlemen, no hospital administrator, for example, interrupting this true and traditional interchange of authority and responsibility between the trustees and the medical staff. . . . The administrator, for his part, is an employee of the board. Since not even the board can legally practice medicine, and therefore is unqualified to sit in judgement on a physician’s ability to practice, certainly an employee of the board is usurping authority in attempting to judge such ability. Governing Principles for a Medical Staff’s “Bill of Rights”.

The ideal staff . . . bylaws . . . must provide that—without coercion, duress, or undue influence—the medical staff:

* * * * *

6. Is answerable as a group of independent contractors only to the board of trustees of the hospital; [and]

* * * * *

9. Is protected against any usurpation by an administrator or board of trustees of the sole legal authority of its members to practice medicine. 174

It is manifest that the AAPS document ignores the difference between an organized medical staff and the individual member of that staff. It is true that there is no statutory or common law authority allowing a hospital to dictate how the individual practitioner shall practice medicine and it is also true that a hospital, as a corporate entity, cannot itself practice medicine. This concept is sometimes misconstrued, however, to indicate that the governing board is not responsible for the quality of care provided. “[T]his is the inherent right of the staff as a unit or the individual physicians by training and licensure. Both medically and legally, the lay members of the governing board are incompetent to pass judgement on the quality of medical care.” 175

173. Id.
174. Id. at 20.
175. Lescoe, Regulation of Health Care by Medical Staff Bylaws, 5 J. LEG. MED. 17, 18 (Feb. 1977).
To support this proposition, the cases of *Collins v. Westlake Community Hospital*, 178 an Illinois Appellate Court decision, and a statement by "Justice Warren Burger"177 from *Alden v. Providence Hospital*, 178 to the effect that that a hospital can only treat patients "as an agent of the patient's private physician, and under his explicit order."179 Technically, this reliance is incorrect. The *Collins* decision was reversed in 1974 by the Illinois Supreme Court, 180 where it was held that the hospital could in fact be liable if its nurses failed to test the patients appropriately. In *Alden*, Circuit Judge Burger, concurring in part and dissenting in part, stated:

A hospital, as its name implies, is a hostel with special services, but it is nonetheless essentially a custodial institution, albeit a very high form of custody. Obviously this does not mean that it is sufficient for a hospital to admit a patient to its premises and then close its eyes to whatever befalls him. "It may be liable, in the first instance, if it has failed adequately to screen the members of its medical staff [nurses, attendants and physicians] or if it has permitted them to act beyond the scope of their competence.”

... It is not the function of a private hospital to diagnose or treat patients except as the agent of the patient's private physician or under his explicit order. This is because it is the physician, not the hospital, who is the healer. Diagnosis and treatment are the functions of the physicians, not the private proprietary hospital. It "serves the function only of a specialized facility, not a direct service healing institution." Of course there can be exceptions to this rule; for example, a private hospital might be liable for an act of malpractice even if performed by the patient's private physician if the hospital had reason to know that such act of malpractice would occur, and failed to challenge the physician. ... 181

Therefore, it would certainly appear that it is also true that there is substantial authority for the requirement that the hospital must supervise that medical care provided to insure it meets certain standards. The institution must take reasonable measures to determine that the care provided meets those standards. If it does not meet those standards and the hospital has actual or constructive knowl-

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177. Lescoe, *supra* note 175, at 18.
178. 382 F.2d 163 (D.C. Cir. 1967).
179. Lescoe, *supra* note 175, at 18.
181. 382 F.2d at 166 (Emphasis added) (Citations omitted).
edge thereof, and if the probable cause of a patient's injury is that deficient care, than the hospital can be found guilty of independent negligence for having not taken the required action to preclude the injury.

This brief dissertation on the response of the medical community to the hospital's new-found responsibilities hopefully has given the reader some perspective of the problem involved in implementing quality assurance activities. To say the least, there is a reluctance on the part of the organized medical staff to actively engage in "peer review."

Quality assurance, the preferred term for peer review, concerns itself with three general areas: selection and retention of medical staff members; evaluation of medical care; and utilization of hospital resources. The first and second of those will be discussed in some detail below. The latter is primarily concerned with appropriateness of hospital care and any definitive discussion is beyond the scope of this article. Briefly, however, its purpose is to effect appropriate utilization of the hospital's resources without an adverse effect on patient care. To accomplish this purpose, the hospital establishes a utilization review plan and patients falling outside certain defined standards are reviewed by a utilization review committee. Only the committee, composed primarily of the hospital's medical staff, can make a determination that care being provided is unnecessary. Once such a determination is made, reimbursement will no longer be made under Medicare and most other third-party payor programs. Three criteria are utilized to make a determination that care is necessary. The care provided must be:

1. Consistent with professionally recognized health care standards;
2. Medically necessary; and
3. Impossible to be provided more economically in a different facility, i.e., an extended care facility, nursing home or at the patient's home.

The utilization review concept has as its protagonist a little known federal law passed in 1972. The primary purpose of this act

183. Id. at 43.
184. Id. at 9.
185. Id.
186. 42 U.S.C. § 1320c (Supp. II 1972). A. Gosfield, supra note 182 is an excellent review and analysis of the entire federal program and its implications.
was to keep down the cost of care rendered under Medicare but utilization review has now been extended to cover all patients under new standards issued by the JCAH. Considering the public concern being expressed at all levels of government and industry the usage of such programs is likely to increase in the future.

**Selection and Retention of Physicians: "Who Made Thee a Prince and a Judge over Us?"**

Selection and retention of medical staff members has long common law history. In addition, the JCAH Standards concerning this subject have recently been supplemented and greatly expanded to provide a higher level of credentials review and more power over the medical staff by the hospital management. The standards make it clear that while the authority to evaluate the professional competence of existing staff and applicants for staff privileges is delegated to the medical staff, the ultimate authority and responsibility for appointment remains with the governing body. The board's bylaws must delineate the mechanism:

Because the governing body has the authority and the responsibility for appointing members of the medical staff, its bylaws must establish a procedure for processing and evaluating the applications for medical staff membership, and for the granting of clinical privileges. This procedure necessarily involves the administration, the medical staff, and the governing body. The appointment and reappointment of medical staff members should be based upon well-defined and written criteria related to the goals and standards of the hospital, as set forth in the bylaws, rules and regulations of the medical staff. The governing body shall utilize the advice of the medical staff in granting and defining the scope of clinical privileges to individuals, commensurate with their qualifications, experience, and present capabilities.

188. JCAH Manual, supra note 84, at 28.
191. JCAH Manual, supra note 84, at 81.
192. Id.
As if to underscore the fact that the board has this ultimate authority, the new revision provides:

A practitioner applying for medical staff membership, and/or for clinical privileges must sign a statement to the effect that he has read and agrees to be bound by the medical staff bylaws and current hospital policies that apply to his activities as a medical staff member and that are consistent with the medical staff bylaws.\(^{193}\)

In the prior standards, the language was considerably less forceful. The applicant only had to agree to "abide by the hospital bylaws and the medical staff bylaws, rules and regulations."\(^{194}\)

The Medicare Conditions of Participation underscore this board authority and responsibility:

The governing body . . . bylaws . . .:

Provide for the appointment of members of the medical staff . . .

The governing body appoints members of the medical staff.\(^{195}\)

[T]here is an active staff, . . . which . . . [makes] recommendations to the governing body upon all appointments to the staff and grants of hospital privileges. . . .\(^{197}\)

The leading case dealing with negligent selection by a hospital of a medical staff member is Joiner,\(^{198}\) discussed in some detail above. There the court found the hospital had a duty to "act in good faith and with reasonable care in the selection of a physician, . . . ."\(^{199}\)

The plaintiff had contended that the hospital was negligent because it failed to require satisfactory proof of the physician's professional qualifications and failed to accomplish a background investigation or otherwise determine his professional competency.\(^{200}\) The hospital responded with three answers: 1) The doctor was a physician licensed by the state; 2) the hospital did not undertake to tell the physician how to treat the patient; and, 3) the screening of candi-

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\(^{193}\) Id.

\(^{194}\) Johnson, supra note 190, at 61.


\(^{196}\) 20 C.F.R. § 405.1021(e) (1976).

\(^{197}\) 20 C.F.R. § 405.1023(f) (1976).


\(^{199}\) 125 Ga. App. at 3, 186 S.E.2d at 308.

\(^{200}\) Id.
dates for admission to the medical staff was left to the already existing organized staff. The court held for the patient, stating:

The mere fact that he was a licensed physician of the State of Georgia recommended by the other doctors on the staff as required by law does not overcome the averments that the hospital was negligent in failing to exercise care in determining his professional competency, should it later appear by evidence that the doctor was incompetent or an unskillful physician.

In other words, the hospital cannot rely upon the physician's state license; it must make its own independent investigation into his qualifications and competency.

This duty on the part of the hospital is directly reflected in both the Medicare and JCAH Standards. Medicare provides:

*Standard; staff qualifications.*
Members of the staff are qualified legally, professionally, and ethically for the positions to which they are appointed. The factors explaining the standard are as follows:

1. To select its members and delineate privileges, the hospital medical staff has a system, based on definite workable standards, to evaluate each applicant by its credentials committee (or in small hospitals, committee-of-the-whole) which makes recommendations to the medical staff and to the governing body.
2. Privileges are extended to duly licensed qualified physicians to practice in the appropriate fields of general practice, internal medicine, surgery, pediatrics, obstetrics, gynecology, and other recognized and accepted fields according to individual qualifications.
3. Criteria for selection are individual character, competence, training, experience, and judgment.
4. Under no circumstances is the accordance of staff membership or professional privileges in the hospital dependent solely upon certification, fellowship, or membership in a specialty body or society. All qualified candidates are considered by the credentials committee.
5. The scope of privileges to be accorded the physician is indicated. The privileges of each staff member are specifically stated or the medical staff defines a classification system. If a system involving classification is used, the scope of the divisions is well-defined, and the standards which must be met by the applicant are clearly stated for each category.
The JCAH Standards are even more explicit:

Qualifications:
Unless otherwise provided by law, only those physicians and dentists holding an appropriate current license and offering evidence that their training and/or experience, current competence, professional ethics, and, if requested, health status, are adequate to assure the medical staff and governing body that any patient treated by them will receive optimal achievable quality of care shall be eligible for medical staff membership. No individual shall be automatically entitled to membership on the medical staff or to the exercise of any clinical privileges merely because he is licensed in any state, or because he is a member of any professional organization, or because he is certified by any clinical examining board, or because he has clinical privileges or staff membership at another hospital or freestanding clinic.

Methods of Selection:
[The application] shall provide information relative to the applicant’s medical or dental education and training, his professional experience, references who are knowledgeable about his competence and ethical character, current licensure[s], and a specific request for staff assignments and clinical privileges . . . . It is strongly recommended that additional information be provided, including that relating to involvement in any adverse malpractice action, or to any previously successful or currently pending challenges to licensure or registration [state or district, Drug Enforcement Administration], or to loss of medical or dental organizational membership, or to loss of medical staff membership or privileges at another hospital.

Implicit in any application for appointment to the medical staff is the applicant’s consent to the inspection by the medical staff credentials committee of pertinent records and documents that are material to an evaluation of his professional and ethical qualifications and his ability to carry out the clinical privileges requested. . . .

Privilege Delineation:
There must be delineation of privileges for each medical staff member, regardless of the type and size of hospital. Delineation of privileges shall be based on all verified information available in the applicant’s or staff member’s credentials file . . . . When there is not sufficient information to document the training, experience, and current competence of an initial staff applicant or of a current staff member requesting additional privileges action shall be withheld until such information is made available and verified. Departmental and/or
major clinical service recommendations relating to clinical privileges shall be part of the basis for any medical staff recommendation. Delineation of privileges should be reasonably comprehensive and not stated simply as a specialty designation, such as "Family practice," "general surgery," or "general medicine . . . ."

[T]here must be evidence that the granting of privileges is based on the member's demonstrated current competence . . . .

Privileges should also be related to an individual's documented experience in categories of treatment areas or procedures and to the results of treatment, as shown in patient care evaluation studies. Where privileges' delineation is based primarily on experience, the individual's credentials file should reflect the specific experience and successful results that form the basis for the granting of privileges. Consultation may be required when a staff member treats specified conditions. Care must be taken when granting privileges that by their nature require that a continuing experience be met to ensure proficiency and safety.

Clinical privileges are hospital-specific. Thus an individual may be a member of more than one hospital staff, yet have different practice privileges in each hospital. The possession of adequate professional qualifications based on training and experience does not in itself ensure the granting of specific privileges. An individual may be assigned to a specific department or major clinical service before he is granted privileges to perform certain procedures.

**Staff Reappointment/Reappraisal:**
Reappointment policies shall provide for appraisal of each member of the staff at the time of reappointment, including consideration of his health status. The mechanism of reappointment should include a review of the individual's status by a designated medical staff committee, such as the credentials committee.

Medical staff reappointment and privilege delineation must be carried out in a timely manner, as required by the bylaws of the medical staff and governing body, in order to ensure the continuing function of the medical staff. It is recommended that specific information be supplied in writing by the subject staff member, to be used in the evaluating for staff reappointment and privilege delineation. This information should include the privileges requested, with any basis for change; the individual's continuing education effort made since the previous appointment; and the individual's statement relative to
any change in health status. The chief of the department or major
service to which the staff member seeks reappointment, or in which
he seeks a change in privileges, should contribute information in
writing relative to the individual's professional performance, judg-
ment, and, where appropriate, technical skill, and should indicate
any effect thereon of the staff member's health status. Other reap-
apraisal parameters should include the individual's maintenance of
timely, accurate and complete medical records; his attendance at
required staff and departmental meetings, his service on staff and
hospital committees when requested, and his pattern of care as dem-
onstrated by reviews conducted by committees, such as utilization
review, infection control, tissue, medical records, pharmacy/thera-
petics, and audit.204

It should be noted that the mandate for delineation of privileges
is not imposed in a vacuum.205 The entire scheme is designed to
promote accountability for and control of the medical care provided
in the hospital setting.206 Integrated into these standards and those
imposed by the courts is a constant reference to patient care evalua-
tion studies.207 The fundamental principles that are involved are:
the hospital as a corporate entity has the ultimate responsibility
for the standards of professional practice by medical staff members;
recommendations on staff appointments and privileges are made by
the organized staff on behalf of the hospital; and the governing body
has the duty and responsibility to limit appointments or privileges
where there is actual or constructive knowledge of professional in-
competence or failure by individual practitioners to abide by the
accepted professional standards.208 The board's duty to appoint and
select is a non-delegable duty. It relies on the credentials committee
to investigate, determine and recommend what privileges to which
an applicant staff member or current staff member under review is
entitled and whether or not that practitioner is a good candidate for
admission to the staff, promotion to a higher staff category, or if he
should be retained. But, the fact remains, it is the board that must
make the final decision.209

204. JCAH Manual, supra note 84, at 103-09.
206. Id.
207. JCAH Manual, supra note 84, at 106 and 109; See notes 275-306 infra for a discussion
of the scope of these studies and their impact upon the evaluation process.
208. Southwick, supra note 5, at 461.
209. Moore, Medical Staff-Corporate Accountability, 43 Ins. Counsel J. 110 (1976).
This hospital responsibility for the quality of medical care, however, is a two-edged sword. Not only must the hospital answer for the quality of medical care provided by medical staff members, it must also assure the physician of his legitimate right to practice. The governing board generally has the power both to deny staff privileges and to revoke or limit them once they have been conferred.

The courts have generally reacted by limiting the scope of judicial intervention in the selection process to a determination that a decision by the hospital to deny staff privileges in any given case has not been arbitrary, capricious, or unreasonable. A hospital appointment is a virtual prerequisite to practice modern medicine; therefore, the physician is dependent upon the hospital and the hospital must honor the physician's legitimate interests.

In general, most courts will treat the private, non-profit hospital the same as the public, or governmental institution. Usually, both the voluntary and governmental hospitals will have the same standards for determining the extent of the governing board's discretion and the due process rights of the physician. This statement does not apply to proprietary for-profit hospitals, which have no duty to grant due process to the applicant for staff appointment.

Historically, the non-profit private hospital was treated as a truly private corporation and courts granted the governing board significant power in accepting or excluding physicians from the hospital medical staff. About the only restraint imposed by the court was that the institution was bound to follow procedural rules contained in the hospital or medical staff bylaws. Such provisions were usually not found in these documents.

Most of the more recent cases have not held this way, however.

210. Southwick, supra note 5, at 453.
211. Shulman v. Washington Hosp. Center, 222 F. Supp. 59 (D.D.C. 1963) (power to appoint and remove at will); West Coast Hosp. Ass'n v. Hoare, 64 So. 2d 293 (Fla. 1953) (power rests within sound discretion of governing body).
213. Southwick, supra note 5, at 453.
214. Id. at 453-54.
215. Id. at 454.
216. Id.
The new judicial doctrine finds that the procedural rules with respect to reduction, suspension, withdrawal of privileges, or exclusion from the medical staff must be reasonable, non-discriminating, non-arbitrary, and non-capricious. 217 Due process of law must be given the physician when he applies for staff membership or is the subject of discipline. 218

At least one commentator states that the rationale for this change in judicial attitude is either public policy, application of the fourteenth amendment by a finding of state action to the private hospital, or a hospital licensing or anti-discrimination statute. 219 This entire area of the law is summed up succinctly in Moore v. Board of Trustees of Carson-Tahoe Hospital. 220

The right to enjoy medical staff privileges in a community hospital is not an absolute right, but rather is subject to the reasonable rules and regulations of the hospital. Licensing, per se, furnishes no continuing control with respect to a physician's professional competence and therefore does not assure the public of quality patient care. The protection of the public must come from some other authority, and that in this case is the Hospital Board of Trustees. The Board, of course, may not act arbitrarily or unreasonably in such cases. The Board's actions must also be predicated upon a reasonable standard. 221

In addition to all the stated reasons for requiring a reasonable standard and some type of due process protection, one might also suspect that another reason is that most hospitals now have some type of hearing procedure in the hospital or medical staff bylaws that provides the necessary due process when followed. Both Medicare and the JCAH require provisions that provide the right to a hearing. The JCAH provisions provide:

In holding the medical staff responsible for making recommendations to the governing body concerning staff appointments and reappointments, as well as the granting, curtailment, suspension, or revocation of clinical privileges, the governing body must require that the medical staff bylaws include a mechanism for review of decisions, including the right to be heard at each step of the process, when requested by the practitioner. The final decision must be rendered by the gov-

217. Id.
218. Id.
219. Id.
221. Id. at 212, 495 P.2d at 608.
erning body, within a fixed period of time. Whenever the governing body does not concur in a medical staff recommendation relative to clinical privileges, there shall be provision for a review of the recommendation by a joint committee of the medical staff and governing body before a final decision is reached by the governing body.222

The Medicare regulations provide that the bylaws of the medical staff shall include "[a] mechanism for appeal of decisions regarding medical staff membership and privileges."223

In view of the fact that about eighty-five percent of the short-term hospital beds in the United States are in JCAH accredited hospitals224 and the fact that the major portion of hospitals participate in the Medicare program, it would appear that most hospitals would be required to have some type of "fair hearing plan" in effect. Therefore, to require hospitals to follow their bylaws would automatically require most to afford due process absent any necessity to find state action.

Historically, Kentucky followed the general trend in most jurisdictions. In 1942, the state’s highest court held in Hughes v. Good Samaritan Hospital,225 that exclusion of a physician from the medical staff of a private hospital was within the discretion of that private hospital’s governing board. The plaintiff, a surgeon at the defendant hospital, after being removed from the hospital’s medical staff, brought the action contending that the board could not deprive him of his right to staff membership without basis.226 The court held that plaintiff had no vested right to staff membership and that it was within the reasonable discretion of the hospital to remove his privileges.227 The court stated that there was no manifested arbitrary or capricious reason for the withdrawal, but rather an exercise of reasonable discretion.228

In Burkhart v. Community Medical Center,229 the court cast doubt upon its holding in Hughes but did not expressly overrule it.230 In July, 1976, the Kentucky Supreme Court decided McElhinney v.

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222. JCAH Manual, supra note 84, at 81.
224. Holbrook & Dunn, supra note 77, at 58.
225. 289 Ky. 123, 158 S.W.2d 159 (1942).
226. Id. at 162.
227. Id.
228. Id.
229. 432 S.W.2d 433 (Ky. 1968).
230. Id. at 435-36.
William Booth Memorial Hospital. 231 Again, the court did not expressly overrule Hughes but stated in dicta that the older cases followed in Hughes regarded staff privileges in a private hospital as a privilege rather than a right, stating, "This distinction has been increasingly under fire in many areas of the developing law." 232 The court then declined to discuss the extent of judicial review that should be available where a privilege as contrasted with a right is revoked. But a hospital must act in accordance with its charter and bylaws regardless of whether it is public or private. 233

In McElhinney, the hospital had revoked a surgeon's staff privileges because he was "unreasonably critical of the professional performance of some personnel with whom he works" at the hospital, and because of a few inconsequential infractions of regulations. 234 Specifically, he had complained of lesbian overtures by a supervisory nurse to one of his patients, dust levels in the operating room, and that the chief of pathology was too frequently unavailable to read frozen sections. He also entered criticisms of professional performance and hospital procedure upon the records. 235 Significantly, there was "not a scintilla of evidence of negligence or incompetence in [the doctor's] care of patients." 236

The hospital regulations providing grounds for suspension or termination of staff privileges did not include any standard concerning inability to work in harmony with other hospital personnel. In the absence of such a standard, the court would express no opinion as to its validity. 237 The greatest impact of the decision, however, is the court's holding concerning the discretion that may be exercised by the hospital's board of trustees when deciding medical staff appointments and retention. The court stated:

[A] private hospital, regardless of the breadth of discretion that may be extended to it, cannot revoke the staff privileges of a physician in the absence of a sufficiently definite standard prescribing the conduct for which revocation is adjudged. 238

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232. Id. at 218 citing Silver v. Castle Memorial Hosp., 53 Haw. 475, 497 P.2d 564, cert. denied, 409 U.S. 1048 (1972). This case is discussed below in conjunction with due process standards.
233. Id.
234. Id. at 217.
235. Id.
236. Id.
237. Id.
238. Id. at 218.
In other words, the board has a wide discretion, so long as it is exercised in a reasonable manner and there are standards available which preclude the decision power from being arbitrary or capricious.

In Ohio, the common law history is relatively brief. The first case decided by the court of last resort was adjudicated in July, 1976.²³ There are two lower court cases which provide some insight into the developing law, however, the history here is also brief.

In 1969, the Court of Appeals of Ohio decided *Davidson v. Youngstown Hospital Association.*²⁴ Here a podiatrist had submitted an application to the hospital for staff membership and specific surgical privileges. The application was denied on the basis of a hospital rule limiting orthopedic surgical privileges to practitioners who were "board qualified or certified."²⁴¹ The court first ruled that the hospital was a private hospital, notwithstanding that it received part of its funds from public sources and through public solicitation and had been granted nontax status. But it is private only in the sense that it is not governmental and that does not give it standing to claim immunity from public supervision and control.²⁴² "The power of the staff to pass on medical staff applications is a fiduciary power which must be exercised reasonably and for the public good."²⁴³ But the court stated that while the hospital is vested with broad discretionary power, this power must be exercised in a reasonable manner.

If the exclusion of a person from its medical staff is based on the sound and reasonable exercise of discretionary judgment, the courts will not intervene, but if the exclusion stems from unreasonable, arbitrary, capricious or discriminatory considerations, equitable relief is available.²⁴⁴

In *Davidson* the court upheld the hospital, relying on *Darling,* stating, "[S]uch hospitals have a legitimate concern that the members of its staff be required to have adequate training and experience

²⁴¹ Id. at 248, 250 N.E.2d at 895 (Board qualified means the practitioner has completed the requisite training to take the specialty board examination; certified means he has successfully completed the examination and is certified by the particular specialty board to meet their standards.)
²⁴² Id.
²⁴³ Id.
²⁴⁴ Id. at 251, 250 N.E.2d at 896.
before undertaking various procedures of medical treatment.\textsuperscript{245}

In 1974, an Ohio appellate court again was faced with a medical staff privileges case in \textit{Gotsis v. Lorain Community Hospital.}\textsuperscript{246} Here the hospital had not renewed the physicians privileges but had purported to grant a temporary three month appointment which was not authorized by the hospital’s code of regulations.\textsuperscript{247} The court held that a private hospital has sole discretion in setting standards for selection and retention of its medical staff, and in the absence of state involvement, its action in that regard is not subject to judicial review, except that it must follow its own charter and by-laws.\textsuperscript{248}

In 1976, the Ohio Supreme Court decided \textit{Khan v. Suburban Community Hospital.}\textsuperscript{249} Dr. Kahn attended medical school in India and received postgraduate surgical and orthopedic training in Scotland, England, and Canada and was a member of the Royal College of Surgeons. Upon coming to the United States, he completed an internship in medicine and surgery, passed the New York State Medical Board Examination and became a licensed Ohio physician by the reciprocity between New York and Ohio.\textsuperscript{250} He was appointed to the medical staff with major privileges in general surgery, which includes gynecology and orthopedics, in 1969. In 1973, his major privileges were terminated (he maintained minor privileges) when the hospital board of trustees adopted a bylaw provision which restricted and set explicit standards for major privileges in recognized specialties.\textsuperscript{251} Dr. Khan did not meet any one of the specified criteria.\textsuperscript{252} The trial court found for the hospital holding the criteria were reasonable. The appellate court agreed that the criteria were reasonable but went one step further and found them to be unreasonable when applied to Dr. Khan.\textsuperscript{253}

The basic purpose of qualifications such as the criteria herein involved is to insure competency. The criteria herein are so designed. However, there is no better test of competency than performance itself. Dr. Khan is legally licensed to perform general surgery and did

\begin{itemize}
\item \textsuperscript{245} Id.
\item \textsuperscript{246} 46 Ohio App. 2d 8, 345 N.E.2d 641 (1974).
\item \textsuperscript{247} Id. at 19, 345 N.E.2d at 648.
\item \textsuperscript{248} Id.
\item \textsuperscript{249} Kahn v. Suburban Community Hosp., 45 Ohio St. 2d 39, 340 N.E.2d 398 (1976).
\item \textsuperscript{250} Id. at 40, 340 N.E.2d at 399.
\item \textsuperscript{251} Id. at 40-41, 340 N.E.2d at 400.
\item \textsuperscript{252} Id.
\item \textsuperscript{253} Id. at 43, 340 N.E.2d at 402.
\end{itemize}
so completely at defendant hospital for approximately four years. To exclude him from further practice merely because he has not attained membership in certain medical organizations is arbitrary, capricious, and unreasonable.254

The Supreme Court found that by this holding,

[T]he Court of Appeals strayed into a morass of error. It is the board, not the court, which is charged with the responsibility of providing a staff of competent physicians. The board has chosen to rely on the advice of its medical staff and the court may not surrogate for the staff in discharging this responsibility.255

The court stated that the narrow responsibility of the court in these cases is to assure that the qualifications imposed by the hospital are reasonably related to its operation and administered fairly. If staff selections are administered with fairness, are based on a reasonable rationale of hospital responsibility, and not encumbered by irrelevant considerations, there should be no interference by the court.256

The court continued stating that it is the responsibility of the hospital governing board to upgrade the standards of health care to be maintained in its hospital,257 citing both Darling and Joiner.258

The great weight of case authority in the United States is that a board of trustees of a private hospital has the authority to appoint and remove members of the medical staff of the hospital and to exclude members of the medical profession in its discretion from practicing in the hospital. And, the action of hospital trustees in refusing to appoint a physician to its medical or surgical staff, or declining to renew an appointment that has expired or changing the requirements for staff privileges, is not subject to judicial review. The action of the board of trustees is final in such matters. A court may not substitute its judgement for that of the hospital trustees' judgement.259

The syllabus by the court of the case reads as follows:

Where the board of trustees of a private, nonprofit hospital adopts reasonable, nondiscriminatory criteria for the privilege of practicing major general surgery in the hospital, and procedural due process is followed in adopting and applying such criteria, and a staff physician is unable to qualify thereunder, a court should not substitute its

254. Id.
255. Id. at 43-44, 340 N.E.2d at 402.
256. Id.
257. Id.
258. Id. at 45, 340 N.E.2d at 402.
259. Id. at 44-45, 340 N.E.2d at 402.
evaluation and judgement of such matters for those of the board of trustees and order the granting of such specialty privileges to the physician.\textsuperscript{260}

The requirement for procedural due process, while implied throughout the case, is not explicitly spelled out therein. It is not new, however; it was expressly required and discussed in some detail in \textit{Silver v. Castle Memorial Hospital},\textsuperscript{291} referred to in the \textit{McElhinney} case.\textsuperscript{292} In \textit{Silver}, the hospital had granted the physician temporary surgery privileges for a period of one year under the observation of other doctors. At the close of this probationary period, the medical staff committee conducted an investigation and made a recommendation to the board of trustees not to renew his staff privileges. The hospital board concurred and decided not to renew. At this point he was granted a hearing and for the first time was made aware of the allegations against him and given an opportunity to speak in his own defense. The decision to deny his privileges was upheld.\textsuperscript{263} The court found for the physician holding that due process was denied.\textsuperscript{264} The court stated that the majority of jurisdictions have held that private hospitals have an absolute right to exclude physicians without court interference,\textsuperscript{265} "unless the hospital has failed to conform to its own procedural requirements . . . ."\textsuperscript{266} The following passage from \textit{Shulman v. Washington Hospital Center}\textsuperscript{267} was quoted:

There are sound reasons that lead the courts not to interfere in these matters. Judicial tribunals are not equipped to review the action of hospital authorities in selecting or refusing to appoint members of medical staffs, declining to renew appointments previously made, or excluding physicians or surgeons from hospital facilities . . . . Not all professional men . . . are of identical ability, competence, or experience, or of equal reliability, character, and standards of ethics. The mere fact that a person is admitted or licensed to practice his

\textsuperscript{260} Id. at 39 (emphasis added).
\textsuperscript{261} Id. at 497 P.2d at 564, cert. denied, 409 U.S. 1048 (1972); see also Note, Hospital Medical Staff Privileges: Recent Developments in Procedural Due Process Requirements, 12 \textit{Willamette L. J.} 137 (1975); Blum, "Due Process" in Hospital Peer Review, 294 \textit{The New England J. Med.} 29 (1976); Southwick, \textit{Medical Staff Privileges: A Matter of Fairness}, \textit{Trustee} 7 (Aug. 1976).
\textsuperscript{262} Id.
\textsuperscript{263} Silver v. Castle Memorial Hosp., 53 Haw. at 476, 497 P.2d at 566.
\textsuperscript{264} Id.
\textsuperscript{265} Id. at 477, 497 P.2d at 567.
\textsuperscript{266} Id. at 477, 497 P.2d at 567-68.
profession does not justify any inference beyond the conclusion that he has met the minimum requirements and possesses the minimum qualifications for that purpose . . . . [T]he hospital in admitting a physician or surgeon to its facilities extends a moral imprimatur to him in the eyes of the public. Moreover not all professional men have a personality that enables them to work in harmony with others, and to inspire confidence in their fellows and in patients. These factors are of importance and here, too, there is room for selection. In matters such as these the courts are not in a position to substitute their judgement for that of professional groups.268

The court then stated that it agreed that hospitals should have broad discretionary power in making staff selection and privileges decisions, that the state licensing procedure was not sufficient to protect the interest of the patient, and that the staff privileges determination is the general method utilized throughout the country to review and screen for qualifications and competency.269 The court would not agree, however, that this discretionary power is absolute or that such a decision is not subject to judicial review.270 "The better rule provides that such review be available as to whether the doctor was afforded procedural due process, and as to whether an abuse of discretion by the hospital board occurred, resulting in an arbitrary, capricious or unreasonable exclusion."271

In discussing the difference between a private hospital and a public hospital, a point alluded to in McElhinney,272 the court stated:

[T]he generally accepted view is that "a public hospital is an instrumentality of the state, founded and owned in the public interest, supported by public funds, and governed by those deriving their authority from the state. A private hospital is founded and maintained by private persons or a corporation, a state or municipality having no voice in the management or control of its property or the formation of rules for its government." The principal distinguishing feature of a hospital that is characterized as being private is that it as an entity has the power to manage its own affairs and is not subject to the direct control of a governmental agency. Such a private identity is usually evidenced by the fact that under the hospital's charter or corporate powers granted, it has the right to elect its own board of officers and directors. It is this board in whom is placed, either ex-

268. Id. at 64 quoted in Silver v. Castle Memorial Hosp., 53 Haw. at 478, 497 P.2d at 567.
270. Id. at 479, 497 P.2d at 568.
271. Id.
272. See note 67 supra.
pressly or impliedly, the discretionary power of granting staff privileges.

It is evident that recently some courts have recognized another hospital classification falling between that of public and private. Such a status can be termed "quasi public" . . . achieved if what would otherwise be a truly private hospital was constructed with public funds, is presently receiving public benefits or has been sufficiently incorporated into a governmental plan for providing hospital facilities to the public . . . . However, if the proposition that any hospital occupies a fiduciary trust relationship between itself, its staff and the public it seeks to serve is accepted, then the rationale for any distinction between public, "quasi public" and truly private breaks down and become meaningless, especially if the hospital's patients are considered to be of primary concern.

In holding that the actions of [the] hospital in this case are subject to judicial review we do not mean to characterize [the hospital] as anything other than a private hospital. In relation to this point we are in concurrence with the reasoning that "a private nonprofit hospital, which receives tax benefits because of its nonprofit and nonprivate aspects and which constitutes a virtual monopoly in the area in which it functioned, is a 'private hospital' in the sense that it is non-governmental, but that it is in no position to claim immunity from public supervision and control because of its private nature. The power of the staff of such a hospital to pass on staff membership applications is a fiduciary power which must be exercised reasonably and for the public good." 273

The Hawaii court continues with a discussion of the requirements of procedural due process. This process requires a balancing of the varying interests involved.

... The doctor has an interest in being able to pursue his profession which requires that the necessary facilities be available to him. The hospital is interested in preserving its autonomy and in maintaining quality control in its medical staff. The public's interest lies in the perpetuation of that quality control and, in the sense that its services are and remain available to those in need, in the productivity of the hospital.

The purposes and interests of everyone concerned would be defeated if hospitals were required to engage in excessively burdensome procedures in screening staff applicants. However, due process, in this context, requires that a fair and thorough consideration be made

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of a doctor's application for initial appointment or reappointment to the staff. Therefore, a hearing before the deciding board must be provided. [C]ertain procedural safeguards must be provided. The doctor should be on notice that a hearing is available to him. He should be given timely notification sufficiently prior to the hearing for him to adequately prepare a defense. In conjunction with such notice, a doctor whose privileges are being revoked or who is being denied reappointment should be provided a written statement of the charges against him. Such statement should be sufficiently adequate to appraise him of the specific charges against him. A doctor who is being denied initial appointment to a hospital staff should be provided a written statement specifying the reasons his application is being denied.

Because a hospital board has no subpoena power, there can be no right to confront and cross-examine persons who have made adverse statements of a doctor unless such persons testify at the hearing. However, a doctor should have the right to call his own witnesses.

It should be within the discretion of the hospital board as to whether counsel may attend the hearing.

If we may assume that Silver sets the trend, and at least in Kentucky and Ohio the trend appears to be in that direction, hospitals should ensure that the hospital and medical staff bylaws afford the required hearing process. In hospitals that are accredited by the JCAH or that participate in Medicare, the hearing plan is a requirement of the accrediting standards. But hospitals and medical staffs must take steps to ascertain that these plans are implemented in fact and are followed when a staff member is under review or an application is being considered.

PATIENT CARE EVALUATION: "YE SHALL KNOW THEM BY THEIR FRUITS."

Many state statutes concerning hospitals require the governing body to establish mechanisms to assure that quality care is being provided. While neither Ohio nor Kentucky have such provisions, the Ohio court has cited Darling and Joiner for the proposition that the governing board is responsible for the quality of care provided in the hospital. There is no explicit citation to such cases by the Kentucky court, however, in McElhinney, it did indicate that there

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274. Id. at 484-85, 497 P.2d at 571.
275. See INTERQUAL, REQUIRED STAFF FUNCTIONS AND ORGANIZATIONS, 1A SERIES ON MEDICAL STAFF AND HOSPITAL BYLAWS AND THE LAW 2 (1976).
276. 45 Ohio St. 2d at 45; 340 N.E.2d at 402.
is a goal of providing high standards of medical care and this requires that, "physicians be permitted to assert their views when they feel that treatment of patients is improper or that negligent hospital practices are being followed. Considerations of harmony in the hospital must give way where the welfare of patients is involved. . . ."277

Let us again look to the language of Darling and Purcell for the specific requirements concerning evaluation of patient care. The Darling court found the hospital negligent because it, "[f]ailed to . . . review the treatment rendered to the plaintiff and to require consultants to be called in as needed."278 In Purcell the court found "that the custom and practice among hospitals was to actually monitor and review the performance of staff doctors and to restrict or suspend their privileges or require supervision when such doctors have demonstrated an inability to handle certain types of problems."279

In Gonzales v. Nork and Mercy Hospitals of Sacramento,280 the hospital was in full compliance with the 1965 JCAH Standards at the time the injury arose. The court said these standards were deficient in several respects:

(1) They were predicated on the assumption that the doctor was reporting honestly and that the records were truthful and accurate. Such assumptions cannot be made, since the hospital has a duty to protect its patients against fraudulent doctors. (2) The required clinical review was subjective according to the personal standards of the reviewer. The review in court done by Dr. Maass showed that such a subjective review will not disclose known deficiencies. (3) The review was random. Therefore, bad cases were picked up only by chance. (4) The review was infrequent . . . . (5) The review was casual, uncritical and sandwiched in between the doctors' other work . . . . (6) The review did not include a comparison of the doctors' progress records and the nurses' notes. (7) No protocol, profile or record was made of doctors' deficiencies so that there was no common fund of knowledge available to the hospital.281

278. Darling v. Charleston Community Hosp., 33 Ill. 2d at 333, 211 N.E.2d at 255.
280. Memorandum of Decision 228566 (Super. Ct. Cal., 1973), reported in InterQual, Case on Accountability and Credentials Matters, 7-A A Series on Medical Staff and Hospital Bylaws and the Law 3 (1976).
281. Id. at 8.
The court continued by saying that this holding that the standards were deficient may amount to holding the whole "health care industry negligent." And if it does, "so be it."\(^{282}\) As authority for this proposition, the court quoted Judge Learned Hand writing in *The T. J. Hooper*:

>[A] whole calling may have lagged in the adoption of new and available devices. It may never set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.\(^{283}\)

The court continued:

The hospital has a duty to protect its patients from malpractice by members of its medical staff when it knows or should have known that malpractice was likely to be committed upon them. Mercy Hospital had no actual knowledge of Dr. Nork's propensity to commit malpractice, but it was negligent in not knowing, because it did not have a system for acquiring knowledge; it did not use the knowledge available to it properly; it failed to investigate the Freer case, which would have given it knowledge; and it cannot excuse itself on the ground that its medical staff did not inform it. I accept the reasoning of the courts of Arizona, *Purcell v. Zimbelman*; Georgia, *Mitchell County Hospital Authority v. Joiner*; Illinois, *Darling v. Charleston Community Memorial Hospital*; Nebraska, *Foley v. Bishop Clarkson Memorial Hospital*; New York, *Fiorentino v. Wenger*; and Nevada, cf. *Moore v. Board of Trustees of Carson-Tahoe Hospital*. I reject that of Montana, *Hull v. North Valley Hospital*. I particularly rely on the reasoning as to proximate cause in *Purcell v. Zimbelman*.\(^{284}\)

The JCAH reacted quickly to the decision. The Board of Commissioners adopted a resolution in December 1973 stating that it "considers the quality of patient care to be the central purpose of its entire accreditation process."\(^{285}\) Five major measures were identified which it believed to be directly contributory to the improvement and maintenance of quality care:

1. The delineation of clinical privileges congruous with credentials and demonstrated ability;
2. The provision of continuing professional education, based pri-
arily on the demonstrated needs of providing optimal quality of care;
3. The prudent use of the hospital's resources through utilization review measures, based primarily on the demonstrated needs of providing optimal quality of care;
4. The continual monitoring of the critical indicators of practice through the defined functions of the medical staff organization; and
5. The retrospective review and evaluation of the quality of patient care through a valid and reliable patient care evaluation procedure.286

As the result of these actions, the JCAH adopted a new section of the Accreditation Manual for Hospitals, in April, 1974, called Quality of Professional Services.287 This section was continued in the Accreditation Manual published in April, 1976 and was expanded to include utilization review in the December, 1976 Supplement. No changes were made in the section by the April, 1977 Supplement.288

The new JCAH standards concerning evaluation of care provide:

STANDARD The Hospital shall demonstrate that the quality of care provided to all patients is consistently optimal by continuously evaluating it through reliable and valid measures. Where the quality of patient care is shown to be less than optimal, improvement in quality shall be demonstrated.

INTERPRETATION . . .
Evidence of the quality of patient care provided in the hospital shall be demonstrated by measurement of actual care against specific criteria . . . Criteria must be explicit and measurable, and must reflect the optimal level of care that can be achieved through current medical and related health-science knowledge.

. . . .

Criteria shall include expected patient outcomes, such as health status at discharge, complications, mortality, morbidity, and demonstrated knowledge of the patient concerning his health status, level of functioning, and self-care after discharge. Criteria reflecting desirable processes of care should be used when it has been demonstrated that observed patient outcomes are long delayed; when medical intervention cannot, or can only marginally, affect patient outcomes; when specific diagnostic or therapeutic processes are known to affect patient outcomes; or when it is known that certain processes may result in the early detection or prevention of potential complication or chronic disabilities . . . .

286. Id. at 129-30.
287. Id.
288. JCAH MANUAL supra note 84, at 27.
The measurement of the quality of patient care shall contribute to the reliability of the evaluation process.

Variations from the established criteria shall be identified and justified. Variations that are not justified to peer satisfaction must be analyzed. If analysis indicated inappropriate patterns of patient care, action must be taken to correct problems. Such action should be specific to the problem and may include adjustments in staff privileges. To demonstrate that corrective action has been effective, follow-up studies must be completed. If a problem poses a threat to patient health or safety, the follow-up must be immediate and should continue until it is clearly demonstrated that the problem has been corrected. If identified problems represent less than optimal patient care but are not immediately threatening to patients, follow-up must be completed within a reasonable period of time.

The general findings of and specific recommendations from evaluation studies conducted by the medical staff must be reported to the executive committee, the chief of the medical staff, the chief executive officer, and the governing body.

The results of the quality-of-care evaluation shall be specifically reflected in other quality-protective functions of the medical staff, including reappointment and reprivileging of medical staff members, control of the utilization of the hospital and its resources, the continual monitoring of practice within the professional staffs, and provision of continuing professional education.

The Medicare requirements are not as specific. Until 1976, there was only one reference to the evaluation of patient care as such; the indication was that the function may be referred to an audit or evaluation committee. To determine such requirements one had to look throughout the Medical Staff section which, taken together, provided for review, but not as an integrated activity. These requirements are as follows:

(b) Standard; autopsies. The medical staff attempts to secure autopsies in all cases of unusual deaths and of medical-legal and educational interest. It is recommended that a minimum of 20 percent of all terminal cases be autopsied. The factors explaining the standard are as follows:

(1) The hospital has an autopsy rate consistent with the needs of its ongoing staff education program.

289. Id. at 27-28.
(2) Autopsy reports are distributed to the attending physician and become a part of the patient's record. Whenever possible, they are utilized in conference.

(c) Standard; consultations. The medical staff has established policies concerning the holding of consultations:

(4) The patient's physician is responsible for requesting consultations when indicated. It is the duty of the medical staff, through its chiefs of service and executive committee, to make certain that members of the staff do not fail in the matter of calling consultants as needed.

(o) Standard; Tissue Committee. The tissue committee (or its equivalent) reviews and evaluates all surgery performed in the hospital on the basis of agreement or disagreement among the preoperative, postoperative, and pathological diagnosis, and on the acceptability of the procedure undertaken.

(p) Standard; Meetings. Meetings of the medical staff are held to review, analyze and evaluate the clinical work of its members.

(2) Staff and departmental meetings are held for the purpose of reviewing the medical care.

(3) Minutes of such meetings give evidence.

(i) A review of the clinical work done by the staff (which) includes consideration of selected deaths, unimproved cases, infections, complications, errors in diagnosis, results of treatment, and review of transfusions.

In 1976, however, a section entitled Medical Care Evaluation Studies was added. While the intent of this section is somewhat different from a medical audit, such audits do meet the requirements of medical care evaluation studies. The new section states:

Medical care evaluation studies are performed to promote the most effective and efficient use of available health facilities and services consistent with patient needs and professionally recognized standards of health care. Studies emphasize identification and analysis of patterns of patient care, and suggest possible changes for maintaining consistently high quality patient care and effective and efficient use of services. Each medical care evaluation study (whether medical or administrative in emphasis) identifies and analyzes fac-

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tors related to the patient care rendered . . . the facility, and where indicated, results in recommendations for change beneficial to patients, staff, the facility, and the community. Studies on a sample or other basis must include, but need not be limited to: admissions, durations of stay, ancillary services furnished (including drugs and biologicals), and professional services performed on the hospital premises. At least one study must be in progress at any given time, and at least one study must be completed each year. The study will be accomplished by considering and analyzing data obtained from any one or a combination of the following sources:

(1) Medical records or other appropriate hospital data;
(2) External organizations which compile statistics, design profiles, and produce other comparative data; and
(3) By cooperative endeavor with the PSRO, fiscal intermediary(ies), providers of services, or other appropriate agencies.

The group or committee shall document the results of each medical care evaluation study and how such results have, where appropriate, been used to institute changes to improve the quality of care and promote effective and efficient use of facilities and services.293

The audit procedure, as conceived by the JCAH, is a totally integrated procedure that is designed to determine the type of care being provided in the facility and, through “feed-back” and education mechanisms, to improve the level of that care. To enforce this goal, a certain number must be accomplished by each given hospital. While this number is not delineated in the JCAH Manual, it did specify separately the number that would be required. This number, based on hospital admissions, ranges from four to twelve and became effective July 1, 1976.294

To implement its audit program the JCAH has developed a mechanism called the Performance Evaluation Procedure (PEP). While a complete review of the program is beyond the scope of this paper, a brief overview is pertinent to give the reader a perspective of its impact on the quality control function.295

The first step in the PEP procedure is to select an audit topic. It may be a problem, diagnosis, procedure, or other treatment modality, i.e., radiation therapy. The topic should be selected on a rational basis to represent a significant percentage of the hospital’s work load. Those topics that account for relatively large numbers

293. Id.
294. JCAH, Perspective on Accreditation (July-Aug. 1975).
295. See Jacobs, supra note 285 for an in-depth review of the entire audit concept.
of hospital discharges should be given priority.\textsuperscript{296} But consideration must be given to other factors such as:

(1) the severity of patient harm if appropriate intervention does not occur,
(2) the extent to which proper management can prevent or correct patient disability, and
(3) the likelihood that meaningful corrective action could result if deficient performance were uncovered.\textsuperscript{297}

Once the topic is selected, definite standards against which the treatment can be evaluated are determined.\textsuperscript{298} The function of the standards is to make the evaluation objective and there are usually three categories: justification standards (to determine if the intervention was necessary);\textsuperscript{299} outcome standards (to determine optimal achievable discharge status);\textsuperscript{300} and indicator standards (such as length of stay and complications).\textsuperscript{301} The next step in the procedure is to evaluate the individual cases, chosen at random, and exclude those that meet the standards. Those that do not are subjected to variation analysis. This is peer analysis of all variations from the standard for clinical justification or deficiency.\textsuperscript{302} The final step in the system is analysis and action. After the deficiencies have been disclosed, two analytic steps must take place: problem identification and problem solution. The source and cause of the problem must be identified and corrective action taken to eliminate it.\textsuperscript{303} The corrective action may be in the form of education, feedback, add needed equipment, change of procedures, adjustment of clinical privileges, monitor of performance, or other forms of corrective action.\textsuperscript{304}

It is important to recognize how the audit system impacts on delineation of privileges. "The aim of [PEP] is to disclose patterns of hospital care so that the excellence of performance or any performance problems can be recognized."\textsuperscript{305} As is stated succinctly by Jacobs:

\begin{enumerate}
\item JACOBS, supra note 285, at 49-50.
\item Id.
\item Id. at 51.
\item Id. at 52.
\item Id.
\item Id. at 62.
\item Id. at 73.
\item Id. at 93.
\item Id. at 98.
\item Id. at 93.
\end{enumerate}
While corrective actions are being instituted and professional performance is being improved, it is important that audit also be used to make certain that practitioners are not functioning beyond the level of their proven competence. This means careful, audit specific delineation of clinical privileges. A hospital's obligation to its patients includes the assurance that physician and nursing expertise is adequate for the demands of each patient's condition. Therefore, the hospital needs a mechanism for assuring that those who practice within its walls are competent. The protective mechanisms that traditionally were thought to perform this function—including licensure, board certification, professional society surveillance, malpractice suits, and informal peer monitoring—are now perceived as being inadequate to the task.

Because of these problems, hospitals when granting clinical privileges, have usually undertaken some preliminary delineation into the service areas such as medicine, surgery, obstetrics and gynecology, pediatrics, psychiatry, radiology, pathology, and anesthesiology.

The only ways that hospitals have to ensure that physicians practice medicine only within the area of their competence are to use discretion in medical staff appointments and to delineate individual clinical privileges from the outset. The Joint Commission proposes that every hospital show that "an effort has been made to match expertise with clinical privileges to the extent that is practical for the individual hospital, considering its complexity, location and available medical manpower." For this matching of expertise and privileges to be meaningful, it must be intimately linked to and make full use of the findings of patient care audit.

As part of the process of granting privileges, information from patient care audits pertinent to individual physician performance should be forwarded to the credentials committee and incorporated in each physician's file. 306

CONCLUSION

The historical relationship that has existed from early times between hospitals and physicians is all but gone. The hospital that was the physician's "workshop" no longer exists. Increasingly, the community is relying on the hospital as a primary source of care. At the same time, because of the environmental evolution in the practice

306. Id. at 103-04.
of medicine and because technological change is making the practitioner rely heavily on the sophisticated medical instrumentation available only in the modern hospital, the physician is also becoming increasingly dependent upon the hospital for the core of his practice.

Of this new relationship, the courts have had their say. The teaching of Darling, Joiner, Purcell, and Pederson is clear: The hospital now has an independent responsibility to assure quality medical care is provided in its facility. No longer can the hospital ignore the doctor's practice within its walls on the basis that he is not the hospital's employee. It must take appropriate action to determine that the care he provides is quality care. But this does not mean that the hospital must independently supervise the care of each individual practitioner. Rather it means that the hospital must take reasonable steps to ensure that practitioners are competent and to evaluate the care provided. This may be accomplished by an effective medical staff selection and retention program combined with an effective quality assurance program.

The hospital must take the necessary steps to determine that the physicians making application to its staff are qualified and competent. This is accomplished by an indepth review of the applicant's credentials and other factors of which the credentials committee (or other reviewing agency) has actual or constructive knowledge. Steps must also be taken to ascertain that the care provided by practitioners currently on the staff is adequate. This can be accomplished by a medical audit program combined with tissue, transfusion and other such reviews.

The mandate from the courts is unambiguous. The hospital must have an effective staff selection and control program and when problem areas come within its actual or constructive knowledge, it must implement corrective action. But the hospital is to a great extent dependent upon its organized medical staff to implement these actions. And this paper has adequately demonstrated the reluctance of the organized medical professional associations to acquiesce to the dictates of a lay board of trustees. The board which accepts the suggestions of the Catholic Hospital Association or the American College of Hospital Administrators and develops an organizational structure where the staff reports to the chief executive officer has automatically drawn the lines for an adversary confrontation with the staff. So where does all this leave the hospital?

It appears obvious that the courts and other regulatory agencies
have placed the burden for quality medical care on the hospital's governing body. But it is just as obvious that the governing body does not have the technical expertise to do the job itself and this is not solved by delegating the duty to a lay administrator. Only the medical staff has the qualifications to effectively accomplish either the credentials review or quality assurance programs. Rather than entering into an adversary confrontation over the question of who is responsible, the answer lies in cooperation of the three elements involved, the governing board, the medical staff, and the chief executive officer. An understanding by all three of their historical relationships is an excellent place to start. Second, each must comprehend what the courts are and are not saying. And third, the medical staff must have adequate administrative support to get the job done. When each understands the role he is required to play, the relationship can and will work. Hopefully, this article has assisted in that understanding.
On October 19, 1976, Congress passed the Copyright Revision Act of 1976. This New Act is the first major copyright revision to take place since the Old Copyright Act was passed in 1909. Since the Old Act was implemented, the motion picture, phonograph record, magnetic recording tape, radio, and television media have all been developed and highly refined. All of these technological developments have had as their purpose the dissemination of the intellectual creations of man. One such creation is a performer’s style. This article will focus on the protection accorded the style of members of the entertainment industry and explore the New Act in terms of its impact on any protective rights the performer may have, either by virtue of statute or under the common law.

At the outset, to properly explore the area of stylists’ rights, it is necessary to briefly review the history of copyright and its rationale. As it first developed with the Statute of Anne, statutory copyright protection was extended to intellectual works as a stimulus to authors to create, invent, or generally pursue their trade and thereby enjoy any benefits of their works. The hoped-for result was to encourage learning by reserving to the author the right not to have his creation appropriated by another. Whatever financial inducement

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3. “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . .” 8 Anne, ch. 19 (1709).

4. “Whereas Printers, Booksellers and other Persons, have of late frequently taken the Liberty of printing, reprinting, and publishing . . . Books and other Writings without the
might have existed in 1709, it was certainly minute in light of today's potential economic benefits.

Based on Article I of the United States Constitution,\(^5\) there has existed a statutory copyright system since 1790. As technology has developed, the subject matter of statutory copyright has increased.\(^6\) Simultaneously, increased technological advancement has resulted in the opportunity to secure enormous economic benefits from intellectual creations. These economic opportunities are prompted primarily by the use of an advanced media providing a vast market for the sale of intellectual property. We now see a wide use of product endorsements through television and radio, and overnight success of people and products through rapid dissemination of ideas and creations. Therefore, while some, and perhaps most, still cling to the notion that copyright protection encourages learning,\(^7\) there are others who feel that such protection has the function of securing to an author the fruits of his personal property, regardless of any creativity.\(^8\) Consequently, the free enterprise system and the idea of private

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5. "The Congress shall have power ... to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." U.S. CONST. art. I, § 8, cl. 8.

6. The first congressional copyright statute, passed in 1790 governed only maps, charts and books. Act of May 31, 1790, ch. 15, §§ 1-7, 1 Stat. 124. In 1802, the Act was amended to grant protection to any person “who shall invent and design, engrave, etch or work ... any historical or other print.” Act of Apr. 29, 1802, ch. 36, § 2, 2 Stat. 171. Protection was extended to musical compositions when the copyright laws were revised in 1831. Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436. In 1865 photographs and their negatives were added to the list of protected works. Act of Mar. 3, 1865, ch. 126, § 1, 13 Stat. 540. Again, in 1870, the list was augmented to cover paintings, drawings, chromos, statuettes, statuary, and models or designs of fine art. Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198. In 1912 the list of protected materials was expanded to include motion pictures. Act of Aug. 24, 1912, Pub. L. No. 62-303, ch. 356, 37 Stat. 488. Prints and labels for articles of merchandise were added by Act of July 31, 1939, Pub. L. No. 76-244, ch. 396, § 2, 53 Stat. 1142. Finally, in 1971, sound recordings were included. Act of Oct. 15, 1971, Pub. L. No. 92-140, §§ 1(a)-(1)(b), 85 Stat. 391.

7. "The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

8. Nevertheless, there is nothing to indicate that the Framers in recognizing copyright intended any higher standard of creation in terms of serving the public interest than required for other forms of personal property. We may assume that the men who wrote the Constitution regarded the system of private property per se as in the public interest. In according a property status to copyright they merely extended a recognition of this public interest into a new sector.

property have forced the incentive, that is, securing a fair return to an author’s labor, to completely overshadow the desired result of encouraging learning and promoting progress. The common law has even developed a substantive right to the pecuniary value of a person’s personality or likeness, such right being enforcible only when that personality or likeness attains a certain degree of marketability.  

For the stylist, the opportunity to derive vast financial rewards from his effort has also created the problem of securing the benefit for himself. Since other persons have exploited style without rewarding the stylist, many performers have been prompted to seek protection.

Past litigation on the issue of style has involved many different performers including Charlie Chaplin, The Beatles, Nancy Sinatra, and Bert Lahr. Equally multitudinous are the theories of recovery pursued, but the results have by no means been consistent. The courts have long been aware that style exists and that it has value. In 1937 the Supreme Court of Pennsylvania stated in *Waring v. WDAS Broadcasting Station, Inc.*, that a musical composition, copyrightable at that time under the Old Act, is an incomplete work in itself. The performer who by interpretation adds something to the composition has taken part in a creative process and, therefore, has a property right in that contribution to the work. Unfortunately for most originators of a specific style, the majority of courts has not sympathized with the *Waring* court. Nonetheless, many performers have used the forum of the courtroom in an attempt to protect their

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9. See notes 50-59 infra.
15. A musical composition in itself is an incomplete work; the written page evidences only one of the creative acts which are necessary for its enjoyment; it is the performer who must consummate the work by transforming it into sound. If, in so doing, he contributes by his interpretation something of novel intellectual or artistic value, he has undoubtedly participated in the creation of a product in which he is entitled to a right of property, which in no way overlaps or duplicates that of the author in the musical composition.

*Id.* at 441, 194 A. at 635.

For an in-depth analysis of the *Waring* case see Bass, *Interpretive Rights of Performing Artists*, 42 Dick. L. Rev. 57 (1938).
styles. The following is a brief synopsis of the theories pursued and the results obtained.

The theory of unfair competition was the first used to protect the performer's style or manner of performance. The first such plaintiff was Charlie Chaplin in Chaplin v. Amador, where the defendant donned the role, garb, and mannerisms of plaintiff Chaplin, made movies similar to those of the plaintiff, and attempted to market them featuring a star named "Charlie Aplin." Plaintiff brought an action for unfair competition, demanding an injunction to prevent the showing of the films, and the court afforded relief. The court made it clear that it was not creating a monopoly in that the protected right is not in the exclusive use of the role, garb, and mannerisms. Rather, the interest protected is the freedom from being imitated in such a way as to deceive the public and work a fraud upon the plaintiff and the public. The appellate court agreed with the lower court's holding that the picture complained of was planned and executed to secure patronage on the basis of the plaintiff's reputation. The theory of the Chaplin case, the simplest and most direct application of unfair competition theory to a performer's style, was followed by Gardella v. Log Cabin Products Co. This case involved the vocal imitation of the plaintiff in the defendant's radio commercials. Though no relief was granted, the court stated that a showing of a likelihood of confusion in the minds of the public as a result of the imitation would make out a case of unfair competition.

Spawned from the Chaplin and Gardella cases was Lahr v. Adell Chemical Co., wherein the defendant company imitated plaintiff's style of vocal, comic delivery in a television commercial for its laundry detergent. The plaintiff, Bert Lahr, brought an action to recover

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17. Defendants sent letters to motion picture distributors throughout the country. One of the letters contained the following announcement: "We announce the production of twelve two-reel record breaking comedies featuring Charlie Aplin in the well-known character, famous the world over." Id. at 361, 269 P. at 545.
18. "It is plaintiff's right to be protected against those who would injure him by fraudulent means; that is, by counterfeiting his role—or, in other words, plaintiff has the right to be protected against 'unfair competition in business.'" Id. at 363, 269 P. at 546.
19. 89 F.2d 891 (2d Cir. 1937).
20. "Appellants would have no right to trade upon [appellee's] reputation or to pass off an imitation of her singing or form of entertainment which either caused deception, or was likely to do so." Id. at 895 (citations omitted).
21. 300 F.2d 256 (1st Cir. 1962).
damages for invasion of privacy, defamation, and unfair competition. While the First Circuit held that there was no invasion of the right of privacy, it was more favorable toward Lahr on the alternative grounds of defamation and unfair competition. On the theory of defamation, the court stated that a charge that Lahr had stooped to perform below his usual level of performance was actionable, and a mere deceptive imitation of him, as opposed to an overt representation that Lahr in fact did the commercial, would be an adequate enough charge of stooping in order to provide him with a cause of action. With respect to the unfair competition claim, the court stated that although mere imitation is insufficient to constitute grounds for relief, the rule would not hold if there were any confusion as to the source of the imitation. In addition, the court expressed reluctance to hold that a mere imitation would give rise to any cause of action.

With the Lahr holding, the unfair competition theory seemed to be an effective tool for protecting style. The effectiveness of its application was lost, however, with the United States Supreme Court decisions of Sears, Roebuck & Co. v. Stiffel Co. and Compco Corp. v. Day-Brite Lighting, Inc. The Sears/Compco doctrine

22. "We deal first with the right of privacy. The Massachusetts court has avoided recognizing such a right. Plaintiff alleges nothing on this score which tempts us to depart from that practice." Id. at 258 (citations omitted).

23. The idea here is that if the public is deceived into thinking that the imitation in the commercial is actually the plaintiff, and plaintiff has never done television commercials before, then the impression is that plaintiff has debauched himself to the point of engaging in what is normally considered the lowest form of artistic creativity, namely, commercial advertising. The court in Lahr was quick to add that if the imitation is inferior, plaintiff's claim that he is defamed due to a poor imitation is not enough to provide a cause of action: If every time one can allege, "Your (anonymous) commercial sounded like me, but not so good," and contend the public believed, in spite of the variance, that it was he, and at the same time believed, because of the variance, that his abilities had declined, the consequences would be too great to contemplate.

Id. at 259.

24. A California District Court in Davis v. Trans World Airlines, 297 F. Supp. 1145 (C.D. Cal. 1969) implied, however, that if the imitation in the radio or television commercial remains anonymous, and there is no holding out that the commercials embody a performance by the party being imitated, then no personal rights of the plaintiff have been violated. The court, however, did not indicate what would constitute a holding out.

25. "And we might hesitate to say that an ordinary singer whose voice, deliberately or otherwise, sounded sufficiently like another to cause confusion was not free to do so." Lahr v. Adell Chem. Co., 300 F.2d at 259.

26. Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, rehearing denied, 376 U.S. 973 (1964); Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, rehearing denied, 377 U.S. 913 (1964) [hereinafter collectively referred to as Sears/Compco]. Since these decisions were rendered,
effectively put an end to any bid for recovery made on the basis of unfair competition. The first plaintiff to feel the impact of this doctrine was singer Nancy Sinatra in *Sinatra v. Goodyear Tire & Rubber Co.* Plaintiff Sinatra had achieved instant national stardom by her recording of the song "These Boots are Made for Walking." Defendant, Goodyear Tire & Rubber Co., attempting to capitalize on the popularity of the song, coined "Wide Boots" as the name of an auto tire it marketed. The defendant obtained a license from the copyright owner to use the song in its commercial. Failing to obtain the services of plaintiff for the commercial, defendant hired a singer to imitate plaintiff's voice. Additionally, the physical appearance, dress, and mannerisms of the plaintiff, made famous in connection with the song, were used by the girls who appeared fleetingly in the commercial. Plaintiff alleged that her voice had acquired secondary meaning in connection with the song, and that the intentional imitation of her voice was done to deceive the public.

The *Sinatra* court quickly distinguished the *Chaplin* case on the grounds that defendant was not passing off plaintiff's product as its own. The court also distinguished *Lahr*, stating that plaintiff was not claiming a uniquely personal sound in her voice alone. Rather, she was claiming that the combination of her voice with the other copyrightable elements of the song, namely, the music, lyrics, and arrangement, made her the subject of popular identification. As to those elements, the court concluded that the plaintiff had no rights, and at that point her action failed. The court further held that the strong federal policy enunciated by *Sears/Compco* would be encroached if plaintiff could protect an uncopyrightable work under

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they have been cussed and discussed by nearly all associated with patents or copyrights. The cases enunciate the common law federal preemption doctrine, which provides that if an article lacks the protection of a federal patent or copyright, then states may not forbid others to copy the article, regardless of any common law or statutory right; for states to forbid others to copy the article would be to permit them to keep from the public that which the federal laws leave in the public domain.

"To forbid copying would interfere with the federal policy, found in Art. I, § 8, cl. 8, of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain." *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237 (1964).


27. 435 F.2d 711 (9th Cir. 1970), cert. denied, 402 U.S. 906 (1971).
29. 300 F.2d 256 (1st Cir. 1962).
the guise of a state unfair competition statute.\textsuperscript{30}

In Booth v. Colgate-Palmolive Co.,\textsuperscript{31} actress Shirley Booth, known for her television portrayal of the comic strip character "Hazel," also felt the sting of Sears/Compco. Booth resembled Sinatra in that the defendant obtained a license to use the copyrightable "Hazel" comic strip, and then hired another to imitate the sound of plaintiff's voice. The court quickly disposed of plaintiff's defamation action.\textsuperscript{32} The unfair competition claim, made under Section 43(a) of the Lanham Act\textsuperscript{33} met a similar fate. The court stated that any right plaintiff might have had was undercut by the Sears/Compco cases which had been recently affirmed by the Supreme Court in Goldstein v. California.\textsuperscript{34} The court declined to apply the foremost performer's rights case of Metropolitan Opera Association, Inc. v. Wagner Nichols Recorder Corp.,\textsuperscript{35} distinguishing it on the basis that

\begin{itemize}
\item \textsuperscript{30} "The resulting clash with federal law seems inevitable if damages or injunctive remedies are available under state law." Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d at 717 (footnote omitted).
\item \textsuperscript{31} 362 F. Supp. 343 (S.D.N.Y. 1973).
\item \textsuperscript{32} The plaintiff cited Lahr as precedent for the proposition that "the anonymous imitation of a professional entertainer's voice in a commercial may constitute defamation." Id. at 349. The court declined to follow Lahr, however, because it had been decided under Massachusetts law, whereas plaintiff's case was to be decided under New York law, which required proof of special damages, absent defamation per se. Since plaintiff had not made such a showing, the court found her defamation claim to be untenable. Id.
\item \textsuperscript{33} Any person who shall affix, apply, or annex, or use in connection with any goods or services, . . . any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce . . . shall be liable to a civil action by any person . . . who believes that he is or is likely to be damaged by the use of any such false description or representation. 15 U.S.C. § 1125(a) (1976).
\item \textsuperscript{34} 412 U.S. 546 (1973). This was the first Supreme Court decision to lessen the impact of the Sears/Compco cases. However, from the performer's standpoint, the case exempted state protection of sound recordings only from the preemptive effect of Sears/Compco. With respect to protection of the performer's style, the Sears/Compco doctrine remained intact. See Comment, Goldstein v. California: Breaking Up Federal Copyright Preemption, 74 Colum. L. Rev. 960 (1974).
\item \textsuperscript{35} 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950), aff'd, 279 App. Div. 632, 107 N.Y.S.2d 795 (1951). There, the plaintiff, an opera company, was granted an injunction restraining the
Metropolitan Opera involved the appropriation of an actual performance and in no way involved an imitation. Relying on Sinatra, the court cited the policy reasons for not recognizing a performer's right of protection against imitators: the problems of supervision by a court of equity, the undue restraint on the copyright proprietor's market, and the possible impediment of the progress of useful arts.38

Another avenue of protection traveled by the stylist has been the theory of common law copyright. However, even in this line of cases, if the plaintiff recovered at all, the court ultimately based its holding on what appears to be unfair competition. In Columbia Broadcasting, Inc. v. Documentaries Unlimited, Inc.,37 the defendant recorded a broadcaster's news announcement off the air and incorporated it as part of a phonograph record for commercial distribution. The plaintiff brought an action for infringement of a common law copyright in the announcement itself. The court held that there had not been a publication amounting to a dedication of the work to the public, which would have barred plaintiff from asserting a right to common law copyright protection. Recognizing the significance of style as the foundation for plaintiff's employment, the court granted relief. Upon rehearing, the single exception to the Sears/Compco doctrine was applied,39 and the court held that states may, in appropriate circumstances, grant relief where deceptive or fraudulent practices are shown.40 Further, the court held that the Sears and Compco cases did not affect an author's common law copyright in an unpublished work.41

In Lennon v. Pulsebeat News, Inc.42 the distinctive manner of speech and expression of the popular rock group, The Beatles, was afforded protection under the aegis of common law copyright. Here

commercial sale by defendants of unauthorized recordings of live broadcasts on the ground that such sale constituted unfair competition.

39. A state, of course, has power to impose liability upon those who deceive the public by passing off their copies as original when they know that the public is relying upon an original manufacturer's reputation for quality and integrity. Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, 237 (1964).
41. Id.
the defendant attempted to market recordings of press conferences given by The Beatles. Citing *Documentaries Unlimited* as precedent, the court prevented defendant from utilizing for profit the distinctive manner of speech and expression that had become a valuable property belonging exclusively to The Beatles.

The courts have recognized the value of a particular manner of performance and have identified it as existing independently of the work and medium used to express it. The problem for the performer at this stage is finding a theory of recovery to accommodate the particular right in question. Plaintiffs have been forced to pursue theories of relief that do not correspond directly to the right in question. Had the defendant in *Chaplin* been using plaintiff's garb to advertise the sale of autos on billboards, it is very unlikely that Chaplin could have recovered for unfair competition since the parties would not have been competing against one another.

A failure to meet the elements required to make out a case for unfair competition gave rise to the use of the theory of misappropriation. This judge-made offshoot of the law of unfair competition has been utilized only once in an attempt to protect a performer's style. In *Current Audio, Inc. v. RCA Corporation*, the plaintiff, Elvis Presley's record company, had an exclusive contract with Presley to record his performances. The defendant, a magazine publisher, taped and reproduced in the form of small plastic records, a press conference given by Presley, and inserted them in its magazine. Alleging misappropriation, plaintiff sought to have the sale enjoined. The court recognized that Presley's style of performance was certainly unique. But at that point, the court's sympathy for the record company's position halted. The court distinguished this

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44. While neither *Documentaries Unlimited* nor *Lennon* involved a dispute over actual imitation, the basis of relief in each case was the distinctive manner of speech of the plaintiff.
46. The use of the doctrine as an effective legal tool originated in *International News Serv. v. Associated Press*, 248 U.S. 215 (1918), where the plaintiff, which had gathered news for publication at great expense, was held to have a quasi-property right in the product of its efforts so that it could restrain defendant from publishing news that plaintiff had gathered.
47. 71 Misc. 2d 831, 337 N.Y.S.2d 949 (Sup. Ct. 1972).
case from Documentaries Unlimited finding that Presley was not, during the press conference, "performing" as that word is generally understood. Hence, there was no property right in Presley's distinctive manner of speech as there had been in Documentaries Unlimited. However, the court indicated that if Presley had actually engaged in a performance, as opposed to a free and open press conference, the result may have been different. Although the facts of Current Audio were nearly identical to those of Lennon, the court took no note of the Lennon case.

In addition to being denied relief on the misappropriation claim, the plaintiff in Current Audio failed to recover on a theory based on a right of publicity. This right is somewhat akin to the right of a corporation to take advantage of the benefits derived from the secondary meaning or goodwill it has built up in its name but, in the context of a performer's style, it is based on the performer's right in the pecuniary value of his personality and likeness.

In Lugosi v. Universal Pictures Co., defendant motion picture company had entered into licensing contracts with various merchandising companies, giving such companies the right to use the character, "Count Dracula," as it had been performed by the plaintiff's father, Bela Lugosi, in two famous motion pictures which had been produced by the defendant. The plaintiffs, Bela Lugosi's heirs,

49. Mr. Presley was in no way "performing" as that word has application to his "form of art expression, and his distinctive and valuable property" in contrast, for example, to "a broadcaster's voice and style of talking," which was a crucial feature of the case of Columbia Broadcasting System, Inc. v. Documentaries Unlimited . . . erroneously relied upon by defendant.
71 Misc. 2d 831, 835, 337 N.Y.S.2d 949, 953 (citation omitted).
sought damage and an injunction, contending that selling the license amounted to a breach of the original contract between Lugosi and the motion picture company. The court found for the defendant on the ground that Lugosi's right to “sell” his Dracula personality was personal and did not survive him, but stated that even though the character, Count Dracula, was in the public domain, the decedent had put his own individual stamp on the character, thereby creating a property right in his manner of performance. The court approved the trial court's conclusion that it was Lugosi's manner of performance that created the pecuniary value which defendant had granted through the licenses.

A similar situation was presented in Price v. Hal Roach Studios, Inc., which also involved a dispute over the use of the names and likenesses of deceased actors who had, during their lifetimes, made motion pictures for the defendant. Defendant motion picture studio attempted to grant merchandising rights to various manufacturers. Plaintiffs, the sole beneficiaries of the decedents, sought to have the activity stopped. The court found a right of publicity in the names and likenesses of the decedents, such right surviving death and descending to the heirs. Citing Lugosi, the court also stated that this case was much easier to decide since the decedents had developed their own characters. More importantly, the court held that Goldstein v. California removed the right of publicity from the preemptive realm of Sears/Compco, that the right in question was a property right, and that such right was clearly assignable. The case signals the completion of the right of publicity as a basis for recovery by enunciating the specific right acquired and the length

52. Generally, a fictional character is not subject to copyright protection. But if the pictorial representation of a character is embodied in an arrangement of incidents and literary expressions as opposed to mere delineation of the character, the character is entitled to protection. Detective Comics, Inc. v. Bruns Publications, Inc., 111 F.2d 432 (2d Cir. 1940), modifying, 28 F. Supp. 399 (S.D.N.Y. 1939). See also Kellman, The Legal Protection of Fictional Characters, 25 Brookyn L. Rev. 3 (1960).

53. 70 Cal. App. 3d at 571, 139 Cal. Rptr. at 37. One commentator thinks that the publicity right "becomes important" only where the party seeking to protect it "has achieved in some degree a celebrated status." Nimmer, supra note 50, at 216.


57. Id. at 844.

58. Id. (citing Haeland Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir.), cert. denied, 346 U.S. 816 (1953)).
of its enforceability.\textsuperscript{59}

Although the cases span a period of some fifty years, it can safely be said that they are only pioneering efforts toward protection of a particular manner of artistic rendition. With but few exceptions, plaintiffs have been denied recovery.

The protection of style presents some obvious problems. The first is that a style is intangible and difficult to define. One writer suggests that this has led the courts generally to choose to leave it unprotected.\textsuperscript{60} Given this intangible quality and the general reluctance to provide protection, it is ironic that a performer's style is the aspect of his artistic work which spells the difference between vast success or perpetual entertainment serfdom. The problem is that the style always exists in conjunction with the art form which it might enhance, and which, under present technological systems, is never exclusively separable from that art form which comprises it. As a result, the concept of style borders on the realm of idea and as such is denied protection under both the Old Act\textsuperscript{61} and the New Act.\textsuperscript{62}

The other problem a stylist confronts is the fact that there is no theory of recovery that specifically addresses that which he seeks to protect. The result, as evidenced by relevant case history, is that the performer must seek protection under an alternative common law theory. The consequence of forcing the stylist to put a square peg in a round hole has been, as we have seen, a line of cases yielding very inconsistent results. Even more discouraging to a stylist is that any possibility of recovery under any of those alternate theories was shattered by the \textit{Sears/Compco} doctrine.

The remedy is to give the stylist statutory copyright protection. The Old Act did not extend such protection and it remains to be

\textsuperscript{59} The court did not mention a specific amount of time for which the right lasts, only that it is an assignable property right passing to the decedent's heirs. Price v. Hal Roach Studios, Inc., 400 F. Supp. at 844-45.

\textsuperscript{60} Note, \textit{Intellectual Property—Performer's Style—A Quest for Ascertainment, Recognition, and Protection}, 52 DEN. L.J. 561 (1975). "The reason behind denial [of protection] is, in large part, an unwillingness of the courts to enter an area in which the lines have not been drawn regarding what is and what is not 'style.'" Id. at 566.

\textsuperscript{61} It has been held that it is not the idea, but the expression of the idea that is protectable. \textit{See} Baker v. Seldon, 101 U.S. 99 (1879); Nicholas v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930), \textit{cert. denied}, 282 U.S. 902 (1931).

\textsuperscript{62} 17 U.S.C.A. § 102(b) (1977) provides as follows: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."
decided whether it will be granted by the New Act. The tape piracy cases involving the unlicensed reproduction of another's phonorecordings before the sound recording amendment of 1971, usually granted recovery on the theories of unfair competition and misappropriation, such theories appearing to be tailor-made for the right in question. One writer has stated that the stylist has protection coincidental to that of the sound recordings through the effective use of enforceable contracts and the right of privacy. However, with respect to a stylist, the cases have shown that such is not the situation. The victim of tape piracy finally obtained protection with the enactment of the sound recording amendment. The stylist, on the other hand, has only the New Act to look to for protection.

Under the New Act, the stylist will find a road to recovery. He will be confronted with the possibilities of either statutory or common law protection, the former certainly more attractive than the latter. However, by virtue of the wording of the New Act, it is not certain to which avenue he will be entitled. The New Act was years in preparation and is very comprehensive. Substantial litigation will necessarily occur before the stylist learns the exact parameters of his rights and remedies. Presently, therefore, there remains the question of possible statutory protection, and, absent that, what-

63. 17 U.S.C.A. § 102(a) (1977) extends protection to "original works of authorship fixed in any tangible medium of expression."
68. The original bill for the general revision was introduced in both the House and the Senate on July 20, 1964.
ever common law remedies are available to the stylist. For the stylist, the New Act raises three initial inquiries:

i. Is style now a subject of statutory copyright protection?
ii. Is style specifically excluded from protection under the New Act?
iii. If style is not the subject of statutory copyright protection, is the stylist left any common law remedy?

Under the Old Act, statutory protection of copyright was extended to all "writings of an author." While the term seems quite broad, the courts have construed it narrowly, particularly where a performer’s rights were involved. The antiquated language of the Old Act has been replaced by Section 102(a) of the New Act, which adopts a much more modern and practical definition of the subject matter of copyright. The New Act enunciates a two-pronged test to determine what subject matter is given statutory protection: (a) the subject matter must be an "original work of authorship," and (b) the subject matter must be "fixed in a tangible medium of expression." This change in definition is a direct result of the technological advancements which have created new and unique ways to reproduce and communicate intellectual creations. The concept of "writings," therefore, has become very much outdated. The question of whether a work is a statutory "writing" need no longer be litigated. The new terms, "original works of authorship" and "tangible medium of expression," have given Congress the power to add to the list of proper subject matter various works embodied in a type of tangible form not yet developed, but which may be developed in the future. Hence, the concept of what is proper subject

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72. 17 U.S.C.A. § 102 (a) (1977). This section provides in part as follows:

Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.


74. "Although the coverage of the present statute is very broad, . . . , there are unquestionably other areas of existing subject matter that this bill does not propose to protect but that
matter may be expanded without changing the wording of the statute itself. Section 102(a) enumerates categories that qualify as proper subject matter as long as they meet the tangible form requirement. The statute makes clear that proper subject matter is not limited to the categories listed. Therefore, it is not entirely clear what qualifies as an "original work of authorship." The predominant enigma for the stylist is the requirement of tangible form.

The work must be "fixed" in a tangible medium of expression before copyright protection is available. The work is considered fixed in that tangible medium "if there has been an authorized embodiment in a copy or phonorecord and if that embodiment is sufficiently permanent or stable to permit the work to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." There exists no requirement that the work be capable of copying, only that it be perceivable or communicable. Consequently, there is a distinction between the work itself and the tangible form embodying it. It is possible to have a work without having a tangible form embracing it, but it is only when these two requirements merge into fixation that the work achieves protection. Thus, if one has a style which is placed in a tangible form enabling it to be "perceived," then it follows that protection may vest in that work. And certainly, if that form renders the style susceptible to copying, then protection would vest. This, of course, assumes the future Congresses may want to." Id. at 51-52, reprinted in [1976] U.S. CODE CONG., supra note 73, at 5665.

75. "Works of authorship include the following categories:
   (1) literary works;
   (2) musical works, including any accompanying words;
   (3) dramatic works, including any accompanying music;
   (4) pantomimes and choreographic works;
   (5) pictorial, graphic, and sculptural works;
   (6) motion pictures and other audiovisual works; and

76. "The terms 'including' and 'such as' are illustrative and not limitative." 17 U.S.C.A. § 101 (1977).


78. "The author may write a "literary work," which in turn can be embodied in a wide range of "copies" and "phonorecords . . . ." It is possible to have an "original work of authorship" without having a "copy" or "phonorecord" embodying it, and it is also possible to have a "copy" or "phonorecord" embodying something that does not qualify as "an original work of authorship." Id.

79. "It follows that Congress could grant the performer a copyright upon it, provided it was embodied in a physical form capable of being copied." Capitol Records, Inc. v. Mercury
absence of a judicial declaration that a style is tantamount to an "idea" and will be treated as such. 80

Sound recordings present some special problems. Many stylists have sought protection of their unique styles embodied in sound recordings. Sound recordings have been protected under the Old Act since February 12, 1972, 81 and will continue to enjoy protection under the New Act. 82 However, section 114(a) provides that the owner of a copyright in a sound recording has no right of performance under section 106(4). 83 What the stylist seeks to protect is a performance right. This right is specifically excluded from protection if the work is in that tangible form known as a phonorecord. In addition, section 114(b) states that there are no exclusive rights under section 106 extending to "the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording." 84 Consequently, a stylist

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83. "The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), and (3) of section 106, and do not include any right of performance under section 106(4)." 17 U.S.C.A. § 114(a) (1977).

Section 106 provides as follows:

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work to display the copyrighted work publicly.


Subsection (b) of section 114 makes clear that statutory protection for sound recordings extends only to the particular sounds of which the recording consists, and would not prevent a separate recording of another performance in which those sounds are imitated . . . . Mere imitation of a recorded performance would not constitute a copyright infringement even where one performer deliberately sets out to simulate another's performance as exactly as possible.

who places his work of authorship in a sound recording is expressly excluded from any sort of protection under section 114. The New Act is even more explicit in its intent to deny a stylist a right against imitation by stating that any right in derivative works under section 106(2) "is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality." Consequently, if there is a protected right of style in a sound recording, it is only in the actual sounds contained in that particular recording, and any possible imitation is expressly permitted. All this assumes, of course, that the stylist is, in fact, the owner of the copyright in the sound recording.

However, Congress was not unequivocal in its decision to deny performers a right of performance in a copyrighted sound recording. Section 114(d) of the New Act leaves the question of performance rights open for the time being. The section calls for the Registrar of Copyrights to submit to Congress, after January 3, 1978, a report recommending whether section 114 should be amended to provide for a performance right. The addition of section 114(d) itself suggests that a statutory recognition of performer rights is imminent, but that Congress chose to postpone such recognition until more in-depth consideration is undertaken. At first glance, section 114(d) appears to protect a stylist who embodies his work in a sound recording. But at this time, it is clear that a stylist will be denied statutory protection for a style embraced in a sound recording. Such protection would amount to granting stylists a performance royalty; but royalties are payable only to the owner of the underlying musical composition.

Also, in section 115(a)(2), there is language which seems to authorize the owner of a license for the making and distributing of a phonorecord of a non-dramatic musical work to use any style of

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86. The section provides as follows:
   On January 3, 1978, the Register of Copyrights, after consulting with representatives of the broadcasting, recording, motion picture, entertainment industries, and arts organizations, representatives of organized labor and performers of copyrighted materials, shall submit to the Congress a report setting forth recommendations as to whether this section should be amended to provide for performers and copyright owners of copyrighted material any performance rights in such material. The report should describe the status of such rights in foreign countries, the views of major interested parties, and specific legislative or other recommendations, if any.
This section operates more as a limitation than an authorization: it authorizes the use of any style to adopt a musical work as long as it does not change the fundamental character of the work or the basic melody.

Though a stylist may not find statutory protection, the New Act has been designed to allow him to pursue common law remedies. The preemption doctrine embodied in section 301 of the New Act will not replace all common law rights, but only those equivalent to the rights granted by the New Act. This codification of the

87. A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.


88. 17 U.S.C.A. § 301 (1977) sets forth the scope of federal preemption:

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to —

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978; or

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2047. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2047. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2047.

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.


89. "The intention of section 301 is to preempt and abolish any rights under the common law or statutes of a State that are equivalent to copyright and that extend to works coming
preemption doctrine will certainly ameliorate the blanket effect of Sears/Compco.

At the outset, section 301 provides that if there is a work in tangible form which comes within the subject matter of copyright as specified in sections 102 and 103, and there exist state common or statutory law that provide legal or equitable rights equivalent to those provided in section 106 of the New Act, then those state laws are preempted and are ineffective in providing protection for the author of the work. The concept of publication is also absent. The rule of preemption applies regardless of whether the work is published. The issue of publication will still need to be litigated, but not with respect to the scope of preemption.

Whereas section 301(a) enunciates the general rule of preemption, section 301(b) is intended to clarify what areas are not preempted and are thus entitled to common law protection. This codified preemption doctrine is a moderate version of the Sears/Compco doctrine. Under Sears/Compco, whatever was not within the subject matter of the Old Act was presumed to have been intended by Congress to be left in the public domain, and thereby unprotectable. However, under the New Act, whatever falls without the purview of the statute may still find protection in common law or state statutory remedies.


90. Under the Old Act, various acts of an author which evidenced a dedication of his work to the public constituted publication. If the author “published” his work without having complied with the requirements for statutory protection, e.g., filing copies with the Register of Copyrights, then the work was deemed to have been thrust into the public domain, and the author forever barred from claiming a copyright in the work. Consequently, courts were frequently called upon in infringement actions to determine whether certain acts of the author amounted to publication. Under the New Act publication is no longer an issue. See House Report, supra note 73, at 129-33, reprinted in [1976] U.S. Code Cong., supra note 73, at 5745-49.

91. “With the development of the 20th Century communications revolution, the concept of publication has become increasingly artificial and obscure. . . . Not unexpectedly, the results in individual cases have become unpredictable and often unfair. A single Federal system would help to clear up this chaotic situation.” Id. at 130, reprinted in [1976] U.S. Code Cong., supra note 73, at 5745.

92. See Nimmer, supra note 69, at 471-72.


94. Clause (1) provides that neither works fixed in a tangible medium nor works not within the subject matter of copyright are affected by preemption. Clause (2) excludes any cause of action arising before the effective date of the Act. Clause (3) excludes rights that are not equivalent to any of those rights granted by section 106.

Ultimately, section 301(b) gives the stylist some flexibility in protecting his work. For example, if it were determined that the style does not satisfy the tangible form requirement, or that style amounts to an "idea," then the stylist has only common law or state statutory remedies, regardless of whether such rights are equivalent to those granted under section 106. On the other hand, if a style satisfies the subject matter requirements of sections 102 and 103, then the stylist is still left to his common law or state statutory remedies, as long as they are not the equivalent of any of the rights granted him under section 106 to a copyrightable work. Therefore, this codified preemption doctrine raises the question of whether those common law theories which the stylist relied upon in the past grant the stylist any rights equivalent to those granted by section 106. If so, those theories of recovery are preempted.

As originally drafted, section 301(b)(3) contained examples of what the legislature considered to be state statutory or common law rights not equivalent to those granted under section 106. However, these examples were deleted from the final version of section 301 during the final house debates on the bill. The reasons for the deletion were to prevent total nullification of the federal preemption doctrine, and to clarify Congress' intention to deal strictly with copyright law, not the codification of state common law. Under the New Act, courts are free to use discretion in deciding which state rights differ in nature from those rights included under federal copyright, and which state rights may continue to be protected under state law.

While the theory of unfair competition returns to the stylist's

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96. Prior to amendment, section 301(b)(3) appeared as follows:
(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyrights as specified by section 106, including rights against misappropriation not equivalent to any of such exclusive rights, breaches of contract, breaches of trust, trespass, conversion, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation.


97. 122 CONG. REC. 10872, 10910 (1976).

98. "[M]y amendment is intended to save the 'Federal preemption' of State law section, which is section 301 of the bill, from being inadvertently nullified because of the inclusion of certain examples in the exemptions from preemption.

"This amendment would simply strike the examples listed in Section 301(b)(3)." Id. (remarks of Rep. Seiberling).

99. "We are in effect, adopting a rather amorphous body of State law and codifying it . . . . Rather [,] I am trying to have this bill leave the State law alone and make it clear we are merely dealing with copyright laws. . . ." Id.
arsenal of effective theories of protection, the stylist still faces the difficulty of proving the elements of deception, passing off, and false representation. Although not directed squarely toward protection of a stylist's property right in his performance, proof of deception would make the protection different in kind from that granted by the New Act. Therefore, a stylist may pursue a cause of action under state law regardless of whether his work is the proper subject matter of federal copyright law. Similarly, while some may assert that misappropriation is nothing more than copyright protection under another name, the statute makes it clear that it is not preempted if based on a right not within the scope of the New Act. Since an action for misappropriation is based only against acts of competitors, protection against misappropriation is nonexclusive and, therefore, different from copyright. Conversely, an author who has simply refrained from obtaining a copyright would probably be unable to bring an action for misappropriation.

Under common law copyright, the stylist is entitled to protection only if his work is not embodied in a tangible form. Once the work becomes fixed, section 301 automatically preempts the common law copyright. Consequently, if a court determines that the style within a work is too evanescent to actually become "fixed" in a

100. "Section 301 is not intended to preempt common law protection in cases involving activities such as false labeling, fraudulent representation, and passing off even where the subject matter involved comes within the scope of the copyright statute." HOUSE REPORT, supra note 73, at 132, reprinted in [1976] U.S. CODE CONG., supra note 73, at 5748.

101. "Misappropriation" is not necessarily synonymous with copyright infringement, and thus a cause of action labeled as "misappropriation" is not preempted if it is in fact based neither on a right within the general scope of copyright as specified by section 106 nor on a right equivalent thereto. For example, state law should have the flexibility to afford a remedy . . . against a consistent pattern of unauthorized appropriation by a competitor of the facts (i.e., not the literary expression) constituting "hot" news, whether in the traditional mold of International News Service v. Associated Press . . . or in the newer form of data updates . . . .

Id. (footnote omitted) (citation omitted).

102. The theory of misappropriation has traditionally rested on competition between the parties to the action. The question here is not so much the rights of either party as against the public but their rights as between themselves. . . . And although we may and do assume that neither party has any remaining property interest as against the public in uncopyrighted news matter after the moment of its first publication, it by no means follows that there is no remaining property interest in it as between themselves.


tangible form and identifiable as a work itself, then the stylist will always have a common law copyright remedy. Certainly, a cause of action based on defamation would not be preempted by the New Act since the protection sought is not of an exclusive right in property, but rather of reputation.

Of all the common law theories pursued by a stylist in the past, the one perhaps most similar to those rights granted under the New Act is the right of publicity. The first noticeable similarity is that the publicity right is exclusive. Yet it is certainly not subject to any limited time provision as are those rights enumerated in section 106. This alone does not distinguish it from the rights granted in section 106 since that section addresses itself to the nature, not the duration, of the right. The most striking difference is that a person's reputation or personality in which a publicity right exists, cannot really be placed in a tangible form. The stylist can, therefore, use the right of publicity for protection. However, one's name and likeness are also publicity-right property and these can be placed in a tangible form. To that extent, the stylist could not rely on state protection of a right of publicity if it were found that the publicity right, i.e. the right to marketability in one's own field as well as in areas where his likeness may be profitably exploited, were substantially equivalent to rights granted under section 106. Other similarities and differences are too close to call. If the stylist is to succeed in escaping the effects of preemption he will have to show that the rights protected by state law differ substantially from section 106 rights.

It is certain that the New Act has accomplished two important goals toward the protection of a stylist’s interest: first, it has definitely broadened the scope of copyright subject matter so that if federal protection is not extended to the stylist, now it may be in the future without the statute having to be rewritten or amended. In this respect, the New Act protects not only present subject matter, but future subject matter as well. Second, the scope of federal preemption has finally been clarified and reduced, and its effects ameliorated. In the presence of denial of valuable federal statutory protection, the stylist at least will have limited access to other state statutory and common law theories of protection.

Daniel J. Temming
NOTES

COUNTY GOVERNMENT—HOME RULE—THE GENERAL ASSEMBLY MUST GRANT GOVERNMENTAL POWERS TO FISCAL COURTS "WITH THE PRECISION OF A RIFLE SHOT AND NOT WITH THE CASUALNESS OF A SHOTGUN BLAST"—FISCAL COURT v. CITY OF LOUISVILLE, 559 S.W.2d 478 (KY. 1977).

The Jefferson County Fiscal Court, under the authority of Kentucky Revised Statutes section 67.083,1 popularly known as the Home Rule Act, passed several ordinances which were intended to affect the entire county.2 The Fiscal Court of Jefferson County then brought action against several cities within Jefferson County and against Bill Blanford as class representative of the unincorporated area residents of the county to have its rights under the Home Rule Act declared. Anticipating that the 1974 General Assembly would make changes in the Home Rule Act, the parties agreed to hold the action in abeyance pending the revision. Since no changes to the act came from the session, the case was submitted for judgment upon the pleadings, briefs, and stipulated issues.3

The trial court, in a well-reasoned opinion found section 67.083 to be a lawful delegation by the General Assembly to the fiscal courts in the Commonwealth of general power which could only be

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(1) The fiscal court of any county is hereby authorized and empowered to exercise all the rights, powers, franchises, and privileges including the power to levy all taxes not in conflict with the constitution and statutes of this state now or hereafter enacted, which the fiscal court shall deem requisite for the health, education, safety, welfare and convenience of the inhabitants of the county and for the effective administration of the county government to the same extent as if the general assembly had expressly granted and delegated to the fiscal court all the authority that is within the power of the general assembly to grant to the fiscal court of said counties.

(2) The county judge is hereby authorized and empowered to exercise all of the executive powers pursuant to subsection (1) of this section.

(3) The powers granted to counties by this section shall be in addition to all other powers granted to counties by other provisions of law. A permissive procedure authorized by this section shall not be deemed exclusive or to prohibit the exercise of other existing laws and laws which may hereafter be enacted but shall be an alternative thereto.

Id.

2. Fiscal Court v. City of Louisville, 559 S.W.2d 478, 479 (Ky. 1977).

3. Id.
exercised to affect the unincorporated areas of the counties. The Jefferson County Fiscal Court appealed the judgment on the ground that the trial court’s limitation of the Home Rule Act to unincorporated areas was in error. The defendant cities and the defendant class representative cross-appealed, maintaining that the Home Rule Act was an unlawful delegation of the powers of the General Assembly.

The Supreme Court of Kentucky, after commenting on the lack of legislative history for section 67.083, invoked the proceedings and debates in the constitutional convention of 1890-91 as an aid in determining the extent of the legislature’s power to grant home rule. The court was convinced that the delegates to the convention meant to restrict the power of the legislature because of its past transgressions. The court believed the delegates intended that the county and its voters should participate in decisions involving such important matters as home rule for counties. The court next alluded to constitutional and historical distinctions between cities and counties which serve as a basis for differing grants of authority to each. In extending this traditional distinction, the court said that the exercise of power by the county governments into municipal areas would create increasingly complex problems and frictions.

Adapting oft-quoted dictum the court sought to determine the constitutionality of the Home Rule Act. The question considered was whether the act was invalid as an improper delegation of legislative power to the county fiscal courts. The court’s conclusion was that by section 67.083, the General Assembly granted a “quit claim deed” to the fiscal courts of all its powers. The court based its reversal on the traditional premise that “all power exercised by the fiscal court must be expressly delegated to it by statute.” The court concluded that a delegation of power to the fiscal courts must be “thoughtful, purposeful and deliberate” and that section 67.083 did not meet the standard. However, the court conceded that since the Kentucky Constitution limits the taxing powers which may be

5. Fiscal Court v. City of Louisville, 559 S.W.2d at 480.
6. Id.
7. Id. at 480-81.
9. Fiscal Court v. City of Louisville, 559 S.W.2d at 481.
10. Id. (emphasis in original).
11. Id. at 482.
granted to counties, the General Assembly "had to know" what powers passed to the counties, making the general grant of taxing power "thoughtful, purposeful and deliberate."  

The analysis of whether section 67.083 is repugnant to the constitution of the Commonwealth presents two major issues. They are:

(1) Whether the Home Rule Act is an overly broad grant of legislative power to fiscal courts which is prohibited by the constitution?
(2) Whether the constitution restricts the legislature from granting to fiscal courts general powers similar to those granted municipalities?

DELEGATION OF LEGISLATIVE POWER TO FISCAL COURTS

The Kentucky Constitution provides that the General Assembly is vested with the legislative power of the Commonwealth. 14 The courts of both the federal government and the several states have zealously guarded against any attempts at unconstitutional delegation of legislative powers to other governmental officers or bodies. 15 Kentucky's highest court has adopted the general rule of constitutional law that the legislature may not delegate its power to make a law. 16 However, in Commonwealth v. Associated Industries of Kentucky 17 the court investigated the origin of the maxim that "legislative power may not be delegated" and stated that it was not to be found in the Kentucky Constitution. 18 It traced the genesis of the idea to John Locke and after a discussion of the contemporary governmental philosophy of that period opined as follows:

So, if Locke was the fountainhead of the thesis that power could not be delegated, we feel sure that the experience of the last several centuries would have caused him to repudiate this idea. Experience has demonstrated some of the power must be invested in other bodies so that the government may function in a world that progressively is becoming more complex. There is nothing wrong with this so long as

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13. Fiscal Court v. City of Louisville, 559 S.W.2d at 482.
14. "The legislative power shall be vested in a House of Representatives and a Senate, which, together, shall be styled the 'General Assembly of the Commonwealth of Kentucky.'" Ky. Const. § 29.
16. Bloemer v. Turner, 281 Ky. 832, 137 S.W.2d 387 (1939); Craig v. O'Rear, 199 Ky. 553, 251 S.W. 828 (1923).
17. 370 S.W.2d 584 (Ky. 1963).
18. Id. at 586.
the delegating authority retains the right to revoke the power. The wrong (and the hypocrisy) lies in affirming the truth of the catch phrase while at the same time denying its existence by a devolution of the power. The plain realities of recent cases show that rarely enactments involving this question are held defective. 19

There should be no question but that the legislature retained the right to revoke the powers granted to the fiscal courts in the Home Rule Act. The problem must lie therefore in the extent of the powers given under the act.

The court was of the opinion that section 67.083 represented a "quit claim deed" to all of the legislature's powers granted to the fiscal courts. 20 The use of the term "quit claim deed" by the court indicated that the court interpreted the Home Rule Act to be an irrevocable abandonment by the General Assembly of any claim to the powers encompassed. However the legislature may repeal or limit the powers authorized in the Home Rule Act at any future session. Nowhere in the act does the legislature express the intention to have made its last determination of the powers granted to the fiscal courts. The act authorized the exercise of general police and taxing in the counties affecting the administration of county government so long as this exercise was not in conflict with statutes or the constitution. 21 The court acknowledged in Farmer v. Marr 22 that the fiscal court has varied powers and duties, stating that "[t]he fiscal court, in a sense, is an executive board with both legislative and ministerial powers." 23 Since the constitution does not establish the powers of the fiscal court, the fiscal court has all powers granted to it by the legislature. The question then becomes: Is the Home Rule Act in excess of the powers the legislature can confer on the fiscal court?

The Kentucky Supreme Court in Craig v. O'Rear 24 had earlier attempted to express parameters within which powers may be delegated. It stated that the phrase, "the Legislature may not delegate its powers [means] that it may not delegate the exercise of its discretion as to what the law shall be, but not that it may not confer

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19. Id. at 588 (emphasis added).
20. Fiscal Court v. City of Louisville, 559 S.W.2d at 481.
21. See note 1 supra.
22. 238 Ky. 417, 38 S.W.2d 209 (1931).
23. Id. at 423, 38 S.W.2d at 211.
24. 199 Ky. 553, 251 S.W. 828 (1923).
discretion in the administration of the law itself." 25 Recently the court in *Holsclaw v. Stephens,* 26 endeavored to reaffirm and explain the guidelines. That case explained that,

[i]t must not be overlooked that legislatures in Kentucky are not in continuous session and of necessity they cannot undertake to determine all facts incident to the administration of the laws which they enact. Therefore when we say that the legislature may not delegate its powers, we mean that it may not delegate the exercise of its discretion as to what the law shall be, but not that it may not confer discretion in the administration of the law itself. *Generally speaking a delegation of discretion is not unlawful if sufficient standards controlling the exercise of that discretion are found in the act and Butler v. United Cerebral Palsy of Northern Kentucky, Inc. . . . discloses other relevant considerations concerning delegation of legislative authority such as procedural safeguards and the right of the delegating authority to withdraw the delegation.*

Thus the court reveals that the salient considerations in determining whether a particular delegation of power by the legislature meets constitutional muster are the necessity of continuing administration of the law, the presence in the act of controlling standards, and the right to revoke the delegation. In the instant case the court ruled that section 67.083 was without the bounds set for a delegation of authority to a lesser governmental body. Ostensibly, the court held this way because the act allowed the fiscal courts to decide what the law should be rather than merely giving them the authority to apply a legal standard set by the legislature, and because the act did not contain sufficient controlling standards for its administration.

By construing the act differently, the court would not have found a conflict with the constitution. The court could have found that the law shall be as follows: the fiscal courts can exercise local control over local concerns involving health, education, safety, welfare, or convenience of its inhabitants; the exercise of such discretion in administering such local control is limited to that which is not in conflict with the constitution or the statutes; and the exercise of such authority can be revoked at any time. 28 This construction of

25. *Id.* at 560, 251 S.W. at 831.
26. 507 S.W.2d 462 (Ky. 1974).
27. *Id.* at 471 (emphasis added)(citations omitted).
28. The original opinion handed down with the decision in Fiscal Court v. City of Louisville contained a broad application of the non-delegation rule to the Home Rule Act with language such that could be construed to affect delegations of power to administrative agencies as well
section 67.083 is not without recent precedent. The Supreme Court of Ohio, interpreting a substantially similar statutory provision,\(^\text{29}\) found that that act did not grant boundless powers to counties in contravention of the Ohio Constitution.\(^\text{30}\) The Ohio Constitution provides that "[t]he legislative power of the state shall be vested in a General Assembly,"\(^\text{31}\) as does the Kentucky Constitution. The statute in question gave to the counties authority to enact any ordinance not specifically prohibited by the general laws or by the constitution, a grant similar to that in the Kentucky Home Rule Act. The Ohio Court of Appeals found the Ohio statute to be an unconstitutional delegation of power by the legislature, stating that "a Board of County Commissioners could run hog wild and, 'by ordinance or resolution make any rule, or act in any manner not specifically prohibited by general law.' This is not only delegation, it is abdication of legislative power."\(^\text{32}\) But the Ohio Supreme Court disagreed with this interpretation and reversed, stating, "We do not agree with the argument that it purports to grant limitless legislative power. As indicated by the statutory language, this power may be exercised only 'pursuant to and in conformity with the Constitution of Ohio.'"\(^\text{33}\) Of course there are distinctions between the Kentucky and Ohio statutes.\(^\text{34}\) The Ohio act specifically provided that as the fiscal courts. However, the court, in the modified opinion rendered upon denial of the motion for rehearing, was careful to limit discussion of the unconstitutional delegation of power in this case to the county governments. The opinion in the instant case should not be expanded beyond its context to apply to delegations of power to administrative agencies. See generally, Ziegler, Legitimizing the Administrative State: The Judicial Development of the Non-delegation Doctrine in Kentucky, 4 N. Ky. L. Rev. 87 (1977) (an analysis of the non-delegation principle as applied prior to the decision in this case).


\(^\text{30}\) Pursuant to and in conformity with the Constitution of Ohio and without limiting the powers and duties otherwise vested in the board of county commissioners, the board may:

(M) By ordinance or resolution make any rule, or act in any matter not specifically prohibited by general law; provided that, in the case of conflict between the exercise of powers pursuant to division (M) of this section and the exercise of powers by a municipality or township, the exercise of power by the municipality or township shall prevail, and further provided that the board may levy only taxes authorized by general law.

\textit{Id.}

\(^\text{31}\) \textit{Ohio Const.} art. II, § 1.


\(^\text{33}\) Blacker v. Wiethe, 16 Ohio St. 2d at 67, 242 N.E.2d at 657.

\(^\text{34}\) \textit{Compare} note 1 supra with note 29 supra.
in the case of conflict between city and county power, the city would prevail, thereby abating a serious problem which concerned the Kentucky Supreme Court and which was the very impetus for the instant case. The Ohio act also limited the taxing power of the county to those taxes authorized by general law rather than the broad authority of taxation "not in conflict" allowed by the Kentucky statute. But on the basic proposition of constitutional construction of delegation of legislative power to county governments, upon which the instant case was decided, the Ohio and Kentucky Supreme Courts have taken polar positions. The comparison of the Ohio and Kentucky opinions, both of which were based on the same general constitutional and statutory scheme, demonstrates that the alternative construction of section 67.083 suggested above is not only plausible, but has been adopted elsewhere. However, with the present decision, the Supreme Court of Kentucky has announced that if a trend toward liberalization of delegation of legislative authority by broad grants of power to county governments has begun, the Commonwealth will not participate.

In considering whether section 67.083 was an overly broad grant of legislative power to the fiscal courts, the court also questioned whether the delegates to the constitutional convention intended to limit the ability of the legislature to grant powers such as home rule. The court pointed to a general intent of the convention to restrict the legislature. 35 Even a superficial perusal of the debates in convention will indicate that there were strong feelings among several members because of the past abuses of the legislature. Prominent among these controversial legislative actions was the creation of new counties and the existence of pauper counties. In 1849, before the adoption of the previous constitution, Kentucky had 100 counties. At the time of the convention, there were 119. This proliferation of new counties induced the chairman of the Committee on Municipalities to report, "Of these 119 counties, only 43 are self-supporting. 76 of these municipal organisms pay less into the State Treasury than they take out." 36 The committee had introduced what were to become sections 63, 64, and 65 of the present constitution. These sections prohibit the creation of new counties whenever the resulting boundaries would encompass less than 400 square miles, and require

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35. Fiscal Court v. City of Louisville, 559 S.W.2d at 480.
a majority vote where counties are divided.37 A substitute section was submitted to allow creation of new counties by the legislature with a minimum size of 8,000 inhabitants and without a vote of the county populace.38

Part of the response from the committee to this substitution is quoted by the court in Fiscal Court v. City of Louisville as indicative of the general intention of the convention delegates to submit important matters to a vote.39 It is evident by the adoption of sections 63-65 that such was the intention of the convention in regard to the formation of new counties. But such intention does not warrant the conclusion that the convention meant all major issues relating to counties should be submitted to the voters. Indeed the convention also intended through restrictions against special legislation in section 59 to take the legislature out of involvement in purely local matters.40 This prohibition of legislative interference in local legislation through special acts, by its nature, requires local government participation in its own affairs. Section 60 of the constitution prevents the legislature from enacting laws to take effect after approval of other authority. The exception of counties and cities from this proscription foresaw some local control over local matters.41 Although the convention definitely intended to limit the power of the General Assembly by prohibiting gerrymandering and legislating in purely local matters, it does not necessarily follow that the convention intended to restrict the granting to local bodies of the power to control their own affairs.

DELEGATION OF SIMILAR POWERS TO FISCAL COURTS AND MUNICIPALITIES

The several county fiscal courts are established under authority of section 144 of the Kentucky Constitution.42 This section directs

39. Fiscal Court v. City of Louisville, 559 S.W.2d at 480.
40. Ky. Const. § 59. This section enumerates twenty-eight specific areas in which special or local legislation is prohibited. The section concludes with: “Twenty-ninth: In all other cases where a general law can be made applicable, no special law shall be enacted.” Id.
41. “No law, except such as relates to . . . the regulation by counties, cities, towns, or other municipalities of their local affairs, shall be enacted to take effect upon the approval of any other authority than the General Assembly, unless otherwise expressly provided in the Constitution.” Ky. Const. § 60.
42. Counties shall have a Fiscal Court, which may consist of the Judge of the County Court and the Justices of the Peace, in which Court the Judge of the County Court
that each county shall have a fiscal court, determines who shall be members of the court, and provides that a majority of the members is a quorum able to transact business.\textsuperscript{43} It does not define the jurisdiction of the court, however. Since the constitution is deemed a limitation on the power of the legislature, the legislature has all the power not taken from it by the constitution.\textsuperscript{44} As an exercise of this power, the legislature establishes the jurisdiction and authority of the fiscal court.\textsuperscript{45} The authority to organize cities and towns in the Commonwealth is provided in section 156 of the constitution.\textsuperscript{46} Thus the state legislature has express power to delegate to municipalities all powers needed for local self-government.\textsuperscript{47} Neither constitutional provision specifies what shall be the powers of the corresponding political body. Since there are no general constitutional powers of counties and cities, any powers these subdivisions possess must be given them by the General Assembly.

The legislature has granted general powers to city councils according to the six classes established by the constitution.\textsuperscript{48} Although the powers granted each class are different, ranging downward from complete home rule for cities of the first class, each enabling statute generally encompasses police powers and administrative authority.\textsuperscript{49} The legislature has granted only specific administrative powers to the fiscal courts, such as to maintain county roads and expend county funds for limited purposes.\textsuperscript{50}

\textsuperscript{43} Id.

\textsuperscript{44} See Gross v. Fiscal Court, 225 Ky. 641, 643, 9 S.W.2d 1006, 1007 (1928).

\textsuperscript{45} Id.

\textsuperscript{46} The cities and towns of this Commonwealth, for the purposes of their organization and government, shall be divided into six classes. The organization and powers of each class shall be defined and provided for by general laws, so that all municipal corporations of the same class shall possess the same powers and be subject to the same restrictions.

\textsuperscript{47} See Barrow v. Bradley, 190 Ky. 480, 483, 227 S.W. 1016, 1018 (1921).


\textsuperscript{49} See note 48 supra.

\textsuperscript{50} Ky. Rev. Stat. § 67.080 (Supp. 1976). Other empowering statutes such as Ky. Rev. Stat. § 67.320 (1971) which authorizes fiscal courts to establish county fire departments have
The practice of granting only specific and limited authority to fiscal courts has required the counties to approach the legislature for additional powers whenever local circumstances require action. The problem is compounded by the fact that the Kentucky General Assembly meets only every two years, and by the constitutional limitations on special legislation. It was in this general scheme of constitutional provisions and legislative enactments that the county Home Rule Act was passed.

In Hogge v. Rowan County Fiscal Court the court stated that the constitution has left to the legislature the right to define the power and duties of the fiscal court and that the fiscal court possesses no authority which the legislature has not expressly or impliedly conferred upon it. The court further limited any implied authority to that reasonably necessary to execute or discharge the express duties of the fiscal court. In Grimm v. Moloney the court pointed out that the legislature has express authority to delegate to cities and towns all powers required for local self-government. Recognizing that both counties and cities derive their powers from the legislature, do other considerations require the granting of lesser powers to counties than to cities?

In Kentucky, counties and cities are established as local governmental units or political subdivisions with the dual purposes of performing purely local functions and as an arm of the state in the administration of state functions. Traditionally a county is a subdivision of the state government, organized as an arm of the state for the purpose of exercising some functions of the state government. On the other hand the city has traditionally been a voluntary association created by the will of the inhabitants of a specified region for the purpose of governing themselves. This distinction developed from the basic differences between cities and counties. A city needed to exercise local police powers and other self-government

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51. Ky. Const. § 36. See also note 40 supra.
53. 313 Ky. 387, 231 S.W.2d 8 (1950).
54. Id. at 388, 231 S.W.2d at 8.
55. 358 S.W.2d 496 (Ky. 1962).
56. Id. at 500.
58. See 1 E. Yokley, MUNICIPAL CORPORATIONS § 9 (1956).
authority in order to remedy the ills of high-density urban areas. Crime, traffic problems, fire protection, installation of sewers, protection of health, and myriad other concerns peculiar to urban areas required the delegation of broad powers to city governments. With the advent of the urban and suburban sprawl, it is now difficult to ascertain where the cities and towns end and where the counties begin their respective jurisdictions. This problem is not peculiar to Jefferson County where this case arose, but it is common throughout the Commonwealth. With the spread of urban development into the counties have come the urban problems which the cities were originally created to control. A distinction between counties and cities based on the kinds of problems traditionally confronted by city governments now has little validity. It is a distinction without a difference.

The supreme court in Fiscal Court v. City of Louisville directs attention to the fact that cities have been granted broad police powers. But since both cities and counties derive their powers from the legislature, the legislature should be able to grant similar powers to counties except where constitutionally restricted. As the court pointed out, counties are more restricted constitutionally in taxing powers than are cities. However the constitution does not limit the general grants of powers to cities and counties, and the legislature could grant similar powers to each of them.

The court further directed attention to the potential conflict between the jurisdiction of the cities and the county jurisdiction granted under section 67.083, especially if the county's powers were allowed to supercede the city's powers. The trial court anticipated this problem by restricting the exercise of power under the Home Rule Act to the unincorporated areas of the county. There is nothing contained in section 67.083 which states that the county power is greater than the city power. Neither is there anything in the act which allows the fiscal court to supercede the city council's police powers. The trial court observed that the city home rule act for first

59. Fiscal Court v. City of Louisville, 559 S.W.2d at 480.
60. Ky. Const. § 157. Counties are limited to a tax rate maximum of $.50 per $100.00. Cities are limited by population between the range of $.75 to $1.50 per $100.00. Ky. Const. § 181 permits the legislature to delegate to counties and cities the power to impose and collect certain license fees. The legislature may also authorize cities to tax personal property for municipal purposes by means other than an ad valorem tax.
61. Fiscal Court v. City of Louisville, 559 S.W.2d at 481.
class cities was enacted by the same General Assembly that passed the County Home Rule Act and that nothing in either act establishes that both acts were not intended to take effect in their respective jurisdictions. Undoubtedly conflicts should be anticipated between the county government and the city governments contained within county boundaries. If the two bodies cannot agree upon their corresponding powers or duties in a common area, then the legislature can clearly fix the delineation or in a proper case, the parties can seek a declaratory judgment settling the controversy. In past decisions the court acknowledged that such conflicts can be resolved and suggested that city and county representatives determine their respective responsibilities. The limitation of the exercise of the County Home Rule Act to the unincorporated areas of a county and the determination to resolve potential conflicts of jurisdiction is a more responsible route than that of surrender.

**CONCLUSION**

In the final analysis, however, it cannot be said that either the trial court or the supreme court was incorrect in its finding. The constitution does not define the power of the fiscal court or give an indication of its parameters. The trial court found that the Kentucky Constitution section 29 grant of legislative power to the General Assembly did not prohibit that body from empowering the fiscal courts to manage their local affairs. The appellate court found the constitutional provision for legislative powers did not permit the General Assembly to allow fiscal courts to make local decisions which the court felt were inherently legislative in nature. The Supreme Court of Kentucky has rendered a conservative, strict-constructionist interpretation of the constitution of this Commonwealth. The decision has not found wide acceptance. It is significant that the court cites no cases in support of its traditional premise that all power exercised by the fiscal court must be "expressly" delegated to it by statute. Surely the history and traditions of the

64. Fiscal Court v. City of Louisville, No. 164782, slip op. at 6 (Jefferson Cir. Ct., filed Oct. 6, 1975).
65. City of Paducah v. McCracken County, 305 Ky. 539, 204 S.W.2d 942 (1947).
66. See City of Richmond v. Madison County Fiscal Court, 290 Ky. 293, 297, 161 S.W.2d 58, 60 (1942).
67. See notes 65 & 66 supra.
Commonwealth are important as guideposts and are not to be ignored without sound reasons. But at the same time the past should not prevent the legislature and courts from embarking upon a new course for the future merely because it differs from the traditional manner. The county governments must now deal with vastly different problems than they were required to do in past decades, and the legislature responded to this change by granting the fiscal courts broad power under section 67.083. In its decision, the court did not explain why history and tradition prevented broad grants of power to county governments, but simply stated that it did so. The court did not show any provision of the Kentucky Constitution which proscribed a broad grant of power to fiscal courts but rather attempted to demonstrate that such was the intent of the delegates to the constitutional convention. But these same delegates intended through special legislation for counties to restrict the legislature from meddling rather than to restrict the legislature from allowing the local governments to deal with their own affairs. There are occasions when the carefully pointed shotgun is more effective and useful than a precise and accurate rifle. The fact remains, however, that the instant decision is an interpretation of the constitution of this Commonwealth by its highest court. It is, therefore, the law. As Justice Jackson once said when speaking of the United States Supreme Court, "We are not final because we are infallible, but we are infallible only because we are final." 88

The decision rendered by the court is not as prohibitive as it may seem at the first glance. The opinion, taken as a whole, is a narrow one. The court does not prevent the legislature from granting any powers of local self-government. The court's problems with section 67.083 stem from the broad and all-encompassing nature of the enactment. The statute does not limit itself expressly to unincorporated areas, a potential conflict addressed by the court. A "carte blanche" grant of all powers which the legislature had the power to grant without any guidance from that legislature was repugnant to the constitution, in the court's interpretation. This is not to say that the desired end of local exercise of authority cannot be reached after the court's decision in this case.

Of course, county home rule can be established through constitutional change. Such a governmental scheme is used in Florida. 69 It

is commonly known, though, that constitutional change is a slow and difficult path to follow. The General Assembly, on the other hand, is not stayed by the court from expanding the powers of the several fiscal courts to manage their own affairs. The court merely insisted that when such powers are granted to a local body, they be delineated and defined explicitly as to what the law shall be, i.e., what specific powers a fiscal court may exercise locally under authority of the state, much as cities now exercise powers within their boundaries under authority of the state. The grant of such powers to fiscal courts could be effected by either a specific listing of the areas in which local authority may be exercised or by a general authorization to exercise police and taxing powers in the unincorporated areas. Any specific listing by its nature will not be all-inclusive, and the fiscal courts will of course be restricted in their power to act. But such a delegation of authority should certainly meet the constitutional limitation on the ability of the legislature to delegate its lawmaking power. On the other hand, a general grant of police and taxing powers to fiscal courts will certainly be met with close scrutiny, in view of the instant decision. An unbridled grant of the authority to exercise the police powers by the fiscal courts will, quite possibly, meet the same fate as did section 67.083. Attention should be directed to the distinctions between the Ohio statute granting general county power and the Kentucky county home rule statute. The Ohio statute confronted the potential conflict between cities and counties attempting to exercise similar powers within the same geographic area and directed which governmental body would prevail, abating a problem area of the Kentucky act discussed by the Kentucky Supreme Court. The Ohio statute also expressly limited the taxing power given to counties to those taxes authorized by general law, thereby restricting the subject matter and the method of taxation to the discretion of the legislature. Even the wording of the general grants of authority in the Kentucky and in the Ohio statutes, though similar in effect, suggest that the Ohio statute is more limited than the Kentucky act. The Ohio act allows the exercise of authority "not specifically prohibited by general law," while the Kentucky grant permits the exercise of authority "not in conflict with the constitution and statutes... to the same extent as if the general assembly has expressly granted and dele-

70. See notes 1 & 29 supra.
gated to the fiscal court all the authority that is within the power of the general assembly to grant to the fiscal court of said counties."  

The gist of the decision in the instant case is that an unlimited grant of general power to the fiscal courts is an unconstitutional delegation of legislative power. The decision does not declare that the fiscal courts may not exercise the types of authority sought to be granted to them by section 67.083, but it does insist that the grant state what the law shall be and provide controlling standards. A delegation of police powers to fiscal courts should be considered a grant of local authority to administer the police powers of the Commonwealth in a local area, much as cities administer such powers within their respective jurisdictions. Kentucky's highest court has stated that all sovereign governments possess the police powers and the authority to delegate those powers to municipalities within their jurisdictions.

The historical distinction between cities and counties should not be allowed to restrain the same grant of local authority to county governments. The theory that it always has been, therefore it always shall be, applied for its own sake, has little validity in modern times.

Larry C. Deener

Editor's Note: The 1978 Kentucky General Assembly enacted H.B. 152 which significantly affected the powers of fiscal courts and amended Ky. Rev. Stat. 67.083. The amendment generally brought section 67.083 within the guidelines set by the Kentucky Supreme Court by deleting the broad language of delegation which had been found unconstitutional and by specifically enumerating the powers of a fiscal court. The amendment also addressed the question of conflict between fiscal court powers and those powers possessed by cities within their jurisdictions, directing that the county ordinances which prescribe penalties would be effective throughout the county, unless such city had already enacted the same or more stringent standards.

73. Maupin v. City of Louisville, 284 Ky. 195, 199, 144 S.W.2d 237, 239 (1940).

On March 29, 1976, the Kentucky Legislature passed two companion acts in an attempt to meet the growing malpractice insurance crisis in the Commonwealth. The first act, Senate Bill 248, established a patients’ compensation fund which assumed any liability of a health care provider that exceeded $100,000. The second act, Senate Bill 249, created a joint underwriting association to insure the availability of malpractice insurance for all health care providers in the state.

This health care package was comprehensive and far-reaching. By adopting the use of a joint underwriting association, Senate Bill 249 utilized a device presently employed by twenty-four other states. The patients’ compensation fund of Senate Bill 248 was similar to the medical malpractice insurance system adopted by Indiana. The package would have been very effective in reducing the costs of malpractice insurance in the state. Unfortunately, two key provisions of Senate Bill 248—sections 9 and 10—were found to be unconstitutional, and the Kentucky Supreme Court struck these provisions down on June 21, 1977, in the case of McGuffey v. Hall.

This note will analyze both acts and the reasons why sections 9 and 10 of Senate Bill 248 did not pass constitutional scrutiny. It will then explore ways to rehabilitate the Kentucky Medical Malpractice Act.


2. The joint underwriting association operates as a safeguard against total cancellation of professional liability coverage by requiring liability insurance carriers in a state to join together in order to provide such coverage. "As a stopgap means of insuring medical personnel when traditional coverage is not readily available, JUA's will likely prove adequate for the purpose of assuring the public of a fully implemented health-care system". Comment, Recent Medical Malpractice Legislation—A First Checkup, 50 Tul. L. Rev. 655, 661-62 (1976).

3. Ind. Code §§ 16-9.5-1-1 to -9-10 (1976). At this time, the constitutionality of Indiana’s medical malpractice act has not been tested.

4. 557 S.W.2d 401 (Ky. 1977).
Senate Bill 248

Senate Bill 248 is an act relating to health care malpractice insurance and claims. Its basic purpose is to reduce the cost of health care malpractice insurance and ensure its availability.5 The key provisions of this act include the following points:

1. A prayer for relief in a malpractice complaint can no longer recite a specific dollar amount for damages, but may only contain an allegation that the damages are sufficient to establish the jurisdiction of the court.6
2. The fact that a health care provider makes an offer or tenders payment to a malpractice claimant is not admissible as evidence in a later trial. Any payment made will be used to offset a damage award.7
3. A jury may apportion damages among several malpractice defendants in differing percentages, or may find the defendants jointly and severally liable.8
4. A warranty or guaranty by a health care provider must be in writing and signed before it is admissible as evidence in a malpractice action.9
5. Whenever a settlement is made or damages are awarded, the Commissioner of Insurance will report the health care provider to the state licensing board.10
6. Before trial no settlement or compromise can be effective without the approval of the Commissioner of Insurance.11
7. A patient’s informed consent is presumed in two situations: where a reasonable person would have a general understanding of the procedures, alternatives, and inherent risks from the information provided by the health care provider,12 or where an emergency exists and consent cannot reasonably be obtained.13
8. A member or witness of a medical review board acting in

6. Id. § 304.40-270.
7. Id. § 304.40-280(1).
8. Id. § 304.40-290.
9. Id. § 304.40-300.
10. Id. § 304.40-310(2).
11. Id. § 304.40-310(3)(a).
12. Id. § 304.40-320(2).
13. Id. § 304.40-320(3).
good faith is immune from civil suit.\textsuperscript{14}

9. The Department of Insurance is granted authority to create a Kentucky Patients' Compensation Fund. The major provisions of this fund include the following points:

(a) Each health care provider in the state must carry professional liability insurance in the minimum amount of $100,000 per occurrence and $300,000 per year, or else qualify as a self-insurer.\textsuperscript{15}

(b) Each health care provider will be charged an annual payment for the compensation fund. The amount will be determined by the Commissioner of Insurance, and will range up to ten percent of the annual insurance premium for a physician, and up to fifty dollars per bed for a hospital. These funds will take the form of a surcharge of the insurance premium; they will be collected by the insurance companies and forwarded to the Commissioner.\textsuperscript{16}

(c) The Commissioner will provide the minimum required coverage for any health care provider who cannot obtain insurance or who must pay over 300\% of an average premium. This protective coverage is limited to a maximum of ten physicians per year.\textsuperscript{17}

(d) If a judgment or settlement exceeds the initial coverage of $100,000, the patients' compensation fund will be liable for the remainder.\textsuperscript{18}

(e) If malpractice claims exceed the resources of the patients' compensation fund, they will be paid out of the general fund of the Commonwealth. This amount is to be repaid by the patients' compensation fund with interest at the earliest possible time.\textsuperscript{19}

\textbf{Senate Bill 249}

Senate Bill 249 is an act establishing a medical malpractice insurance joint underwriting association. Its purpose is to insure the availability of adequate health care liability insurance through the

\begin{itemize}
\item \textsuperscript{14} Id. § 311.377(1).
\item \textsuperscript{15} Id. § 304.40-330(3).
\item \textsuperscript{16} Id. § 304.40-330(5)(a).
\item \textsuperscript{17} Id. § 304.40-330(6).
\item \textsuperscript{18} Id. § 304.40-330(7)(a).
\item \textsuperscript{19} Id. § 304.40-330(8)(c).
\end{itemize}
implementation of a mandatory pooling system. The key provisions of this act include the following points:

1. Authority is granted for the creation of a temporary Joint Underwriting Association to operate under the following guidelines:
   (a) Membership to the association is required of all liability insurers as a condition for selling insurance in the state.
   (b) The association will issue malpractice insurance policies to applicants for a maximum coverage of $100,000 per claim and $1,000,000 per year.
   (c) The association will cease to function when the Commissioner of Insurance determines that medical malpractice insurance is readily available on the open market, or after two and one-half years.

2. The Commissioner shall assess all members for initial expenses, maintenance costs, and amounts necessary to defray losses.

3. The association will be a nonprofit organization, and all policies issued will be subject to a rating system in which final premiums will equal administrative expenses, losses, taxes, and reasonable service charges.

4. Each policy holder will pay to the association an additional charge equal to one-third of each premium payment. These payments will form a reserve fund and will be used to "stabilize" the association. All funds received will be held in trust and invested.

5. All licensed physicians, hospitals, and other licensed health care providers will be entitled to apply to the association for medical malpractice coverage.

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20. Id. § 304.40-010.
21. Id. § 304.40-030(1).
22. Id. § 304.40-030(4)(a).
23. Id. § 304.40-030(2) to -030(3).
24. Id. § 304.40-040(2).
25. Id. § 304.40-050(4).
26. Id. § 304.40-060(2).
27. Id. § 304.40-070(1).
McGuffey v. Hall

Senate Bill 248 was originally challenged in separate declaratory judgment actions filed by two doctors. These actions were consolidated for trial before Judge Williams of the Franklin Circuit Court. Judge Williams found certain provisions of section 10 to be unconstitutional. On appeal, affirming in part and reversing in part, the Kentucky Supreme Court held, in an opinion written by Mr. Justice Palmore, that both section 9 and section 10 were constitutionally defective.

SECTION 9

All the provisions of the new act, with the exception of section 9, were created as sections of Kentucky's Insurance Code. Section 9, on the other hand, is an amendment of Kentucky Revised Statutes Chapter 311, which relates solely to the practice of medicine, osteopathy, and podiatry. Thus, the first defect of section 9, held the court, was its violation of section 51 of the Kentucky Constitution. This section provides that no law shall relate to more than one subject, and the subject shall be expressed in its title. Section 9 provides for the civil immunity of any member, participant, or witness of a medical review board when such person has acted in good faith. The court was of the opinion that any relationship between a malpractice claim and a peer review proceeding was purely coincidental, and that the protection conferred by section 9 was directed against defamation suits, not against malpractice actions. For this reason, the subject matter of section 9 was not sufficiently

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28. See McGuffey v. Hall, 557 S.W.2d at 406. The suits were motivated by the belief that the new act represented "a dangerous step towards Government control of the private practice of medicine and a threat to both doctors' and patients' rights to complete procedural due process of law." Lenihen, Kentucky's Medical Malpractice Laws Provide Compulsory Unlimited Coverage at Reduced Rates, 40 Ky. Bench & B. 15, 33 (July, 1976).
29. McGuffey v. Hall, 557 S.W.2d at 416.
30. Id. at 406.
31. Id.
32. Id. The Kentucky Constitution states:
   No law enacted by the general assembly shall relate to more than one subject, and that
   shall be expressed in the title, and no law shall be revised, amended, or the provisions
   thereof extended or conferred by reference to its title only, but so much thereof as is
   revised, amended, extended or conferred, shall be re-enacted and published at length.
   Ky. Const. § 51.
33. McGuffey v. Hall, 557 S.W.2d at 407.
related to the subject of malpractice claims or insurance to satisfy section 51. The McGuffey court said:

[T]here are wholesome limits to what can be loaded into one bill. We have only to ponder the incredible morass in Washington, D.C., to be admonished against what can happen to legislation when it can be made up, side-tracked, taken apart, switched around and put together again like a freight train. Happily, our Constitution does not permit it.34

In addition to violating the state constitution, section 9 also violated the supremacy clause of the federal Constitution because of its specific inclusion of Professional Standards Review Organizations (PSRO’s).35 Professional Standards Review Organizations are regional boards created by federal law in connection with the Medicare and Medicaid programs. These boards are required to set standards for medical services based upon customary standards of local physicians.36 The court believed that because Congress had chosen to occupy this field, the state could not choose to enter it. The court made reference to Pennsylvania v. Nelson,37 in which the Supreme Court found the Pennsylvania Sedition Act38 to be in conflict with the Smith Act.39 The Court stated that “the federal statutes touch a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject.”40 Thus, section 9 unconstitutionally invaded an area preempted by federal law.

SECTION 10

Section 10 of Senate Bill 248 provides for the creation and funding of the Kentucky Patients’ Compensation Fund. Two of these provi-

34. Id. at 407.
35. Id. U.S. Const. art. VI states:
This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.
sions, sections 10-3 and 10-6, were found unconstitutional as an unjustified exercise of the state's police power. Because they interfered with the natural right of an individual to pursue a legitimate business or profession, these sections were held to violate sections 1 and 2 of the Kentucky Constitution.

The test in Kentucky of whether a police power is valid was stated in Bond Brothers v. Louisville & Jefferson County Metropolitan Sewer District: "The touchstone is necessity and reasonable relationship. It is fundamental that such an extraordinary power is not without limitation, for it may not operate unreasonably beyond the occasion or necessity of the case. It may not unreasonably invade private rights. . . ." It is fundamental that an act must "have some reasonable relation to such objects as public safety, health, peace, good order or morals." In other words, the state's police power is "limited only by the consideration that its action in the matter may not be arbitrary, but must be rested upon some tangible and reasonably clear public purpose to be served, and which has a reasonably substantial tendency to further the interest of the public welfare."

The court listed several Kentucky cases that had examined different police powers. City of Louisville v. Kuhn invalidated a statute that prohibited barber shops from opening before 8:00 A.M. and remaining open after 6:00 P.M. The court stated that "if it is apparent that there is no plausible or reasonable connection between the provisions of the statute and the supposed evils to be suppressed, there exists no authority for its enactment."

Tolliver v. Blizzard decided the validity of a city ordinance in the town of Olive Hill, Kentucky. The ordinance required a license

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42. Ky. Const. § 1 states in part: "All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned . . . [t]he right of acquiring and protecting property."

Ky. Const. § 2 states: "Absolute and arbitrary power over the lives, liberty and property of free men exists nowhere in a republic, not even in the largest majority."

43. 307 Ky. 689, 211 S.W.2d 867 (1948), cert. denied, 339 U.S. 943 (1950) (reasonableness of sewer service rates).
44. Id. at 696, 211 S.W.2d at 872.
45. Schoo v. Rose, 270 S.W.2d 940, 941 (Ky. 1954).
47. 284 Ky. 684, 145 S.W.2d 851 (1940).
48. Id. at 692-93, 145 S.W.2d at 856.
49. 143 Ky. 773, 137 S.W. 509 (1911).
for anyone wishing to sell lemonade, milkshakes, soda water, or "coco-cola," and flatly prohibited the sale of any other type of soft drink. The defendant was arrested when he attempted to sell lemon sours, lemon sodas, and malt mead in his restaurant. The court struck down the ordinance as an unconstitutional exercise of the police power:

The ordinance before us is not restricted in its application. It prohibits the sale of many harmless drinks, and is so broad in its scope and so discriminatory in its character as to constitute an unlawful interference with the liberty of the citizen, which includes, not merely the right to acquire property, but the right to buy and sell it.50

The key, then, is that the police power must be necessary, and there must be a reasonable relationship between the exercise of the power and the goal sought to be achieved. In Jasper v. Commonwealth,51 for example, the court upheld the constitutionality of the Kentucky Junk Yard Act.52 This law prohibited the operation of any junk yard within 2,000 feet of the centerline of a road unless a permit was obtained from the Department of Highways. The permit was to be granted only if the yard was effectively hidden from view by artificial or natural screening. The court concluded that the obvious purpose of the act was to enhance the scenic beauty of the state’s roadways. Here, aesthetic considerations were sufficient to invoke the police power.53

A more recent case, Stephens v. Bonding Association,54 tested the constitutionality of a bill that had abolished the business of bail bonding in the state of Kentucky. The bill was upheld, and the court concluded that "[t]he financial condition of the defendant should not be a determining factor in his relationship to the criminal process. The result of the checkbook system of pretrial justice is the creation of a lucrative private business."55 In both Jasper and Stephens, the ends sought by the acts involved were necessary, reasonable, and rationally related to the public welfare.

50. Id. at 777, 137 S.W. at 511.
51. 375 S.W.2d 709 (Ky. 1964).
53. Jasper v. Commonwealth, 375 S.W.2d at 711.
55. Stephens v. Bonding Ass’n, 538 S.W.2d at 582.
Upon an analysis of sections 10-3 and 10-6, the court took judicial notice of the malpractice crisis in Kentucky:

It is common knowledge that insurance companies have become increasingly chary of providing medical malpractice insurance and that as a result, such insurance has become so expensive that some members of the medical community may very well curtail their services rather than insure against the risks, to the detriment of the general public, which in one way or another ultimately pays the bill in any event.56

Even though the bill was centered around a legitimate legislative purpose—"[t]o promote the health and general welfare of the inhabitants of the Commonwealth"57—the court did not find a reasonable relationship between the provisions of the act and the goal sought to be achieved. For one thing, the purpose of the bill was to lower the cost of malpractice insurance, not to protect patients who may be injured as a result of malpractice. The court noted that no evidence had been introduced to support the speculative theory that malpractice victims need protection from unsatisfied claims against doctors. It stated, "One rarely, if ever, hears of unsatisfied claims against them, whether or not they are insured. If statistics indicate a contrary trend in this state, they should be made known. . . ."58

Secondly, since the purpose of the bill was to lower the cost of insurance, the court could not see how a scarce commodity like malpractice insurance would be rendered less scarce by requiring its mandatory purchase: "[T]here is neither a showing nor anything else of which we may take judicial notice to indicate how it might tend to alleviate the problem of scarcity and high cost of medical malpractice insurance."59

In addition, there were no limits whatsoever as to what the health care provider would have to pay for the required insurance. The provision's only ceiling was 300% of the average premium then charged. As the court pointed out, the act would literally force physicians to buy insurance even if the premium rates equaled or exceeded the limits of coverage. This, maintained the court, is a potential pitfall: "What we say here is that a blanket mandate to insure or else, be the cost what it may, might very well invite consti-

56. McGuffey v. Hall, 557 S.W.2d at 414.
58. McGuffey v. Hall, 557 S.W.2d at 414.
59. Id. at 416.
tutional trouble beyond that which has been resolved in this opin-
ion."^{60}

Thus, the court declared section 10-3 to be violative of sections 1
and 2 of the Kentucky Constitution. In a similar manner, section
10-6, which limited the number of members covered by the initial
insurance coverage of $100,000 to ten physicians per year, was
thought to be arbitrary and without foundation. The court held that
this provision "appears" to be violative of section 2.^{61}

The second constitutional flaw of section 10 was found in the
provision which established the funding for the Kentucky Patients'
Compensation Fund—section 10-8c.^{62} The court declared that this
section violated sections 50 and 177 of the Kentucky Constitution.
Section 50^{63} provides generally that the legislature cannot authorize
a debt without containing a provision for the collection of taxes to
discharge the debt within thirty years. In addition, the act must be
presented before the people at a general election and receive a ma-
dority vote before it can become effective. The second half of section
50, which allows the borrowing of money by the general assembly
to pay debts, without a vote of the people, was intended to apply
only to the debts in existence at the time the constitution was
adopted.^{64} The court held that the constitutional message of section
50 was clear:

No commitment against future general revenues can be made with-
out a vote of the people. This is nothing less than the keystone guar-
anty of the state's fiscal responsibility. No agency of the state, includ-
ing its legislature, can place an obligation against the general funds
otherwise available for appropriation and expenditure by a future
legislature.^{65}

60. Id.
61. Id. at 415.
63. No act of the general assembly shall authorize any debt to be contracted on
behalf of the Commonwealth except for the purposes mentioned in § 49, unless provi-
sion be made therein to levy and collect an annual tax sufficient to pay the interest
stipulated, and to discharge the debt within thirty years; nor shall such act take effect
until it shall have been submitted to the people at a general election, and shall have
received a majority of all the votes cast for and against it: Provided, the general
assembly may contract debts by borrowing money to pay any part of the debt of the
state, without submission to the people, and without making provision in the act
authorizing the same for a tax to discharge the debt so contracted, or the interest
thereon.

Ky. Const. § 50.
64. Stanley v. Townsend, 170 Ky. 833, 186 S.W. 941 (1916).
65. McGuffey v. Hall, 557 S.W.2d at 409.
A long line of cases dealing with section 50 had been analyzed by the court in *Turnpike Authority of Kentucky v. Wall.* In Wall, the court considered the constitutionality of the Turnpike Authority Act, which had created the Turnpike Authority as an independent corporate agency of the Commonwealth. The Authority was responsible for the construction of toll turnpikes and the issuance of revenue bonds to finance these turnpikes. In the event that the revenues were insufficient to cover expenses, the act authorized the Department of Highways to subsidize the Authority out of the general fund. This, maintained the court, was the creation of a future debt and was prohibited. The court explained that a debt was any obligation which bound the Commonwealth to levy and collect taxes in order to pay for it:

In each of the four Highway Department cases just mentioned there was in practical effect an attempt to impress a first and prior charge upon all funds, as and when received, that the legislature might see fit to make available, from any source, for highway purposes. This was held tantamount to a general obligation against the future taxing power of the state, prohibited by Const. §§ 49 and 50.

Section 177, on the other hand, prohibits the state and any of its agencies or subdivisions from pledging the credit of the Commonwealth to any individual, company, association, corporation, or municipality. Sections 50 and 177 somewhat overlap, and it is often difficult to determine what the “lending of credit” actually is. The court recognized this difficulty in its analysis of two cases.

In *Hager v. Kentucky Children's Home Society,* for example, an act which appropriated $15,000 a year to the Kentucky Children's

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66. 336 S.W.2d 551 (Ky. 1960). These cases included: Curlin v. Wetherby, 275 S.W.2d 934 (Ky. 1955); State Highway Comm'n v. King, 259 Ky. 414, 82 S.W.2d 443 (1935); Billeter & Wiley v. State Highway Comm'n, 203 Ky. 15, 261 S.W. 855 (1924); Crick v. Rash, 190 Ky. 820, 229 S.W. 63 (1921). Each of these cases emphasized that the legislature could not make expenditures against revenues anticipated from future levies.


68. Turnpike Authority v. Wall, 336 S.W.2d at 557.

69. Ky. Const. § 177.

70. The credit of the Commonwealth shall not be given, pledged or loaned to any individual, company, corporation or association, municipality, or political subdivision of the state; nor shall the Commonwealth become an owner or stockholder in, nor make donation to, any company, association or corporation; nor shall the Commonwealth construct a railroad or other highway.

Ky. Const. § 177.

71. 119 Ky. 235, 83 S.W. 605 (1904).

Home Society was challenged as being violative of section 177. The court declared that the care of helpless and destitute children was undoubtedly a duty of the state. By allocating this money, the state was paying a private entity to fulfill the state's obligation to care for these children. The court held that it made no difference whether the obligation was met by a state agency or a private party, so long as it was met. In finding the act valid, the court stated:

The state cannot now loan or give its credit to any person or corporation for any purpose—public or otherwise. But this does not mean at all that the state cannot buy and pay for what it needs to enable it to discharge its governmental duties. Nor does it mean that the state cannot employ the services of a person or corporation to do a lawful act which it has the right to have done, and to pay for it. 73

The question of what constituted a pledge of credit was again raised in *Industrial Development Authority v. Eastern Kentucky Regional Planning Commission.* 74 This case tested the constitutionality of an act 75 creating the Industrial Development Finance Authority as an independent state agency. The act provided that any local development agency could apply to the Authority for financial assistance in constructing industrial building projects. The Authority was empowered to make loans to such applicants when it was determined that the particular project would accomplish the public purposes of the act. The General Assembly was authorized to appropriate funds into a special revolving trust which was to be used for the loans. Funds obtained from repayment of the loans would go into the fund.

The court thought that it was clear that the Authority was not pledging the credit of the state since it was not guaranteeing the payment of any obligation. Instead, it was taking on the status of a creditor. It noted that

[i]n such a case, the Authority would not be giving or pledging or lending the credit of the state, because the Authority would not be undertaking to become a surety on, or guarantor of the payment of, any bonds or other obligations in which the state's money was invested. It would be in the position of a creditor rather than in that of a debtor. . . . 76

73. Hager v. Kentucky's Children's Home Soc'y, 119 Ky. at 240-41, 83 S.W. at 607.
74. 332 S.W.2d 274 (Ky. 1960).
76. Industrial Development Auth. v. Eastern Ky. Regional Planning Comm'n, 332 S.W.2d at 278.
It is clear that section 10-8c did not provide for the fulfillment of a state duty (as did the act in Hager). It is also clear that the Kentucky Patients' Compensation Fund did not acquire the status of creditor (as did the agency in Industrial Development). Doctors were not required to pay the fund back for any amounts expended on their behalf in malpractice claims. The compensation plan had acquired the status of a surety, and because of this, was unconstitutional. The court pointed out that "the 'credit' provision of section 177 of the constitution seeks to prevent transactions that might result in future liabilities against the general resources of the state and thereby encroach upon the freedom of another generation to utilize those resources as it then deems necessary or appropriate."77

For the reasons that have been discussed, the court concluded that both sections 9 and 10 were invalid in their entirety due to the nature of their deficiencies. The court also had "deep misgivings" concerning section 3, but did not expressly find it to be unconstitutional.78 Because the remaining provisions of Senate Bill 248 were not essentially or inseparably connected with sections 9 and 10, these remaining provisions were allowed to stand.79 In effect, all that now remains of Senate Bill 248 are a few minor provisions that concern the procedure for maintaining a malpractice action. In spite of the act's constitutional deficiencies, it is believed that corrective legislative measures can be implemented to rehabilitate the major innovation of Senate Bill 248, The Kentucky Patients' Compensation Fund.

CORRECTIVE MEASURES
—SECTION 3

Although section 3 was not expressly found unconstitutional, the court nevertheless had deep misgivings about it because it appeared to invade the rule-making authority of the court.80 The substitution of the ad damnum clause with a general prayer for relief has been a popular recommendation for medical malpractice legislation.81 It has been the feeling that unnecessary publicity (and the resulting

77. McGuffey v. Hall, 557 S.W.2d at 411.
78. Id. at 406.
79. Id. at 416.
80. Id. at 406.
81. See, e.g., Sheehan, supra note 1 (recommendations of the National Association of Independent Insurers).
stigma upon the defendant physician) arises when the claim for damages is extremely high, and it is alleged that juries would award smaller awards if the ad damnum clause were eliminated.\textsuperscript{82} In 1975, a survey conducted in California revealed that the damages demanded in complaints were fifty-three times higher than the actual damages awarded.\textsuperscript{83} Despite this, removal of the ad damnum clause is, in reality, a minor procedural remedy. Because the major innovation of Senate Bill 248 is the patients' compensation fund, the existence or removal of section 3 is not a significant issue. If section 3 were to be later declared unconstitutional, it would surely be severable from the act without impairing the act itself.

—SECTION 9

Since the court clearly stated that the subject of section 9 was "review board immunity" and not "health care,"\textsuperscript{84} the most obvious answer to correct the deficiency of section 9 is to make it a separate act under the subject of review boards. By deleting any attempt to include Professional Standards Review Organizations, a separately enacted section 9 would avoid violating section 51 of the Kentucky Constitution\textsuperscript{85} and the supremacy clause of the federal Constitution.\textsuperscript{86}

—SECTION 10-3

The court made reference to the adoption of a "wait and see" approach in regard to the delegation of authority.\textsuperscript{87} The court believed that it was appropriate in certain instances to give a department officer broad authority to establish legislation and then to apply constitutional tests to the legislation once it was implemented. For this reason, it was permissible to allow the Commissioner of Insurance authority to exempt from the act certain physicians with limited practices\textsuperscript{88} and authority to fix the amount paid by each health care provider as a surcharge into the compensation

\textsuperscript{84} McGuffey v. Hall, 557 S.W.2d at 406.
\textsuperscript{85} See note 32 \textit{supra} for text.
\textsuperscript{86} See note 35 \textit{supra} for text.
\textsuperscript{87} McGuffey v. Hall, 557 S.W.2d at 415.
\textsuperscript{88} Ky. Rev. Stat. § 304.40-330(2).
Therefore, it would equally be permissible to grant the Commissioner authority to determine those physicians who would receive the initial insurance coverage protection. This approach would avoid the arbitrary effect of using a set number and would not violate section 2 of the state constitution.

—SECTION 10-6

There are several practical advantages for having the mandatory insurance provision. For one thing, the annual payment required from each health care provider for the compensation fund is based upon a percentage of each insurance premium. By requiring every physician to carry malpractice insurance, the surcharge is easily determined. Secondly, the process of collecting the surcharge is easily facilitated by requiring the insurance companies to collect and forward the proceeds to the Commissioner. Despite this, as the court pointed out from the evidence presented, the purpose of the provision is not reasonably related to the goal of reducing malpractice insurance costs. And, continued the court, a blanket mandate to insure could lead to serious constitutional difficulty.

Perhaps the best answer is to eliminate the mandatory insurance requirement altogether. It is clear that in practical effect, unless a physician has the finances to qualify as a self-insurer, he is going to purchase liability insurance, and lots of it. The surcharge could be based upon a percentage of an average insurance premium, and payment could be required annually from the health care provider directly to the Commissioner of Insurance as a condition for licensure. This procedure would eliminate insurers from the collection process. The court clearly pointed out that the requirement of the surcharge was a permissible exercise of the state's police power.

The surcharge itself is not at all dependent upon the existence of a mandatory insurance requirement.

89. Id. § 304.40-330(5)(c).
90. Id. § 304.40-330(3).
91. See note 42 supra for text.
92. McGuffey v. Hall, 557 S.W.2d at 414.
93. Id. at 416.
94. In Los Angeles County, for example, it is estimated that over 90% of all physicians have liability coverage of a million dollars or more. Some coverages run as high as five million dollars. See Kendall & Haldi, The Medical Malpractice Insurance Market, printed in U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE app. 494, 594 (1973).
95. McGuffey v. Hall, 557 S.W.2d at 415-16.
As it was already pointed out, by seeking to make the state a guarantor of the compensation fund, section 10-8c was violative of the state constitution. There are two ways to correct this deficiency. One is to follow the procedure established by the state constitution and place the issue before the voters at a general election, seeking authority for the establishment of a state fund to pay malpractice claims for a period of thirty years. This procedure would be cumbersome and time-consuming, and it is extremely speculative that two-thirds of the Commonwealth's voters would give their approval to such a measure. A second method mentioned by the court in McGuffey was to limit the claims against the fund to the assets existing in the fund, with no guarantee of solvency from the state. As such, the fund would not violate the funding requirements of the constitution.

It is clear that under this system, the fund would be merely a collateral source of recovery for a malpractice claimant. If the fund could not satisfy a claim, the claimant would then proceed in the usual manner against the defendant health care provider. Some states, such as Indiana and Oregon, have limited a claimant's recovery solely to the assets existing in the fund, with no recourse against the health care provider. Such a procedure in Kentucky would clearly violate section 54 of the state constitution. By serving as merely an additional source of recovery, the fund would not be unconstitutional, but "would be a gratuitous windfall to the claimant."

96. See notes 49 & 54 supra and accompanying text.
97. Id.
98. McGuffey v. Hall, 557 S.W.2d at 410-11.
100. OR. REV. STAT. § 752.040 (1977). In 1976, the Oregon Medical Association brought action seeking a declaratory judgment that the Oregon Medical Malpractice Act was unconstitutional. In Oregon Medical Ass'n v. Rawls, 276 Or. 1011, 557 P.2d 664 (1976), the court declined to review the act on the grounds that the plaintiff did not have standing to challenge the act. Nevertheless, commentators have suggested that the act violates the Oregon Constitution because it deprives a malpractice victim of his full remedy at law. See A. Sobel & D. Gentry, Constitutional Reflections on House Bill 2647 (April 24, 1976) (Unpublished seminar paper on file in Lewis & Clark Law School Library) (Mr. Sobel and Ms. Gentry are co-authors of an amicus curiae brief filed in Rawls).
101. "The general assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property." KY. CONST. § 54.
102. McGuffey v. Hall, 557 S.W.2d at 416.
The question that remains is whether or not such a compensation fund would actually lower the cost of malpractice insurance in the Commonwealth. If the fund did not have a reasonable relationship to this goal, it would be an unjustifiable exercise of the state's police power and would violate section 2 of the Kentucky Constitution.103

Current figures relating to malpractice insurance claims and costs are usually difficult to assemble. For one thing, malpractice actions take a very long time to close and are the most difficult to try.104 Because of the complexity of expert medical testimony that is required, a malpractice case usually takes two to three times longer than other personal injury cases. Over ten percent of all malpractice claims remain open for at least six and one-half years after they have been filed.105

Secondly, until recently, medical malpractice insurance policies were written with relatively long periods of coverage. These policies protected the health care provider against claims arising from treatment provided during the policy year. Some of these claims, because of exceptions to the statute of limitations and the extreme length of time in litigation, were not paid until years after the initial issuance of the policy.106 Because of this "long tail" effect, it is possible that the costs of all the claims attributable to a treatment year would not be known until many years later.107

While it would be beyond the scope of this paper to thoroughly analyze the current costs of insurance premiums and malpractice claims in Kentucky, some facts may provide a clear picture of the situation nationally. In 1970, for instance, a claim was asserted for every 226,000 visits made to a health care provider. Only one in ten ever reached trial.108 For the entire year of 1970, 16,000 claims were closed out. Of the judgments and settlements paid that year, over half were under the sum of $2,000.109 Only three percent of the judgments exceeded $100,000, and only one in a thousand exceeded a million dollars.110 In 1974, the average cost per claim for St. Paul

103. See note 42 supra and accompanying text.
105. Id. at 11.
107. Id.
108. See HEW, supra note 104, at 11.
109. Id. at 10.
110. Id. at 11.
Fire & Marine Insurance Company, one of the largest malpractice liability insurers in the country, was only $12,534.¹¹¹ And in 1975, California, which is regarded as having the most critical malpractice crisis in the country,¹¹² had six jury awards for over a million dollars.¹¹³ There had been only sixteen such awards in the state's entire history.¹¹⁴

From these figures, it would appear that a large percentage of malpractice claims are closed out at a cost that is not extremely expensive. Many of these claims would be covered by the initial $100,000 coverage provided by the health care provider. It is hoped that the compensation fund would be able to absorb a significant portion of the claims that exceed $100,000.

This is not to imply that large malpractice judgments are not now being rendered.¹¹⁵ Nor is it assumed that a compensation fund will provide the perfect solution to Kentucky's medical malpractice crisis. It is also clear that the fund would not eliminate the need for a physician to obtain protection beyond the initial coverage of $100,000. But it is reasonable to assume that the fund will assist in reducing the cost of that insurance, and this is the primary goal sought to be achieved by Senate Bill 248.

Andrew R. Hamilton

¹¹¹. See Sheehan, supra note 1, at 97.
¹¹². Id. at 82.
¹¹⁴. Id.
¹¹⁵. Recently in Houston, a jury awarded seven million dollars in a malpractice action for a woman who had died in childbirth as a result of a hospital's negligence. See [1977] 2 PROF. LIAB. Rptr. 25.
Eleven nontenured faculty members of Murray State University received notice in the spring of 1974 from the University that their contract to teach would not be renewed for the 1975-76 school term. No reasons for the nonrenewal were given, nor were the teachers provided with an opportunity for a hearing to determine the reasons. Wells and others brought suit against the Board of Regents for declaratory judgment, injunctive relief, and damages. Plaintiffs complained that Murray State University had denied them due process of law as guaranteed by the fourteenth amendment in refusing to provide them with a hearing and reasons for the decision not to renew their contract. The district court granted Murray State University's motion for summary judgment because none of the plaintiffs had acquired tenure status under the 1949 or 1969 tenure policy. The 1949 policy provided automatic tenure for professors and associate professors after a three-year probationary period. The 1969 policy required a "deliberate and thoroughly considered act" and provided that "[t]enure may be granted only by formal action of the Board of Regents of Murray State University upon the recommendation of the President." No plaintiff had been granted tenure, and the 1969 policy did not require a statement of reasons for nonrenewal of the contract of a nontenured faculty member, nor did it provide for a hearing. The Sixth Circuit Court of Appeals agreed with the district court's grant of summary judgment because Bishop v. Wood requires the district court to apply state law, and the district court correctly decided that Kentucky does not recognize

3. The tenure policy was promulgated under Ky. REV. STAT. § 164.365 (1971):
   Anything in any statute of the commonwealth to the contrary notwithstanding, the power over and control of appointments, qualifications, salaries and compensation payable out of the state treasury or otherwise, promotions, and official relations of all employees of . . . Murray State University . . . shall be under the exclusive jurisdiction of the respective governing boards of each of the institutions named.
4. Wells v. Board of Regents, 545 F.2d at 17 (quoting Murray State University Faculty Handbook (1969)).
5. Wells v. Board of Regents, 545 F.2d at 17.
any property interest in nontenured teaching jobs so as to trigger due process protection. The plaintiffs did not argue that their dismissal was a retaliation against them for exercising their constitutional rights.

Again in 1974, Murray State University was charged in a civil rights action for failure to renew a teacher's contract. Gordon S. Plummer, chairman of the art department, alleged that he had received a contract right for tenure by virtue of a letter written to him on March 31, 1971 when he began teaching at Murray State University. The University renewed his 1971 contract for the year commencing July 1, 1973. Later, Dr. Plummer was notified that the 1973 contract would not be renewed for 1974. No reasons were given.

7. Wells v. Board of Regents, 545 F.2d at 17. Circuit Judge Edwards would have remanded to the District Court for a determination of the property right question under Kentucky law rather than under federal law. Id. at 18 (Edwards, J., dissenting).
8. Id. at 17.
   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
11. Plummer relied on the following language of the letter:
   You have been selected as Chairman of the Art Department by a student committee, the faculty and its committee, the Dean of Fine Arts, and the administration. We have offered you our highest academic rank and a salary which is the upper range for chairman. This university has tended, over a period of years, toward strong departments administered by strong chairmen. Our administration provides support for a chairman in this and would not entertain unprofessional or hasty actions or movements to undermine a chairman's position. We would operate from a position of agreeing with the chairman when possible, and discuss the reasons at such times as requests might necessarily be denied.

   We would further propose a procedure in which, during the first three years in which you might serve as Chairman of the Art Department, a yearly review would be conducted. This review and consultation will be conducted near the ninth month of the contract year. This consultation will provide any guidelines necessary for continued cooperation. If satisfactory progress is indicated by the Art Chairman, the Dean of Fine Arts, and the President of Murray State University . . . or his representatives, this will suggest automatic continuation of the contract for the ensuing year.

   Within this same period, if you ceased to act as chairman (for any reason other than immorality, inefficiency, incompetency, or failure to cooperate with the plans and policies of the University, or failure to perform satisfactorily the duties assigned to you, or for conduct that has destroyed your usefulness to the institution), you would be considered for immediate tenure as a teaching faculty member. Existing Murray State University procedures for consideration of tenure would be followed and would include consideration of Murray State University and prior service.

Id. at 717.
to him. Plaintiff argued either that he had a contract right to tenure granted by the letter, or that he was entitled to the procedural due process rights of notice and hearing of the charges against him due to the loss of liberty and the stigma suffered due to the loss of his employment. The court of appeals affirmed the district court’s grant of summary judgment in favor of the Board of Regents, holding that no constitutional rights were violated.

Tenure in academic practice connotes the status of an employee, who, upon attaining this status, can only be dismissed for cause. As used in contracts of teachers in institutions of higher learning, word “tenure” refers to a status granted, usually after a probationary period, protecting him from dismissal except for serious misconduct or incompetence.

There is a distinction in the law of Kentucky between tenure of elementary or high school teachers (public educators) and that of college or university teachers (university educators). Public education tenure is defined as a continuing service contract under which employment of a teacher remains in force and effect until terminated by law. At the university level, “[t]enure denotes relinquishment of the employer’s unfettered power to terminate the employee’s services.”

12. Plummer had been an associate dean at the State University of New York at Buffalo.


14. KY. REV. STAT. § 161.720(4) (Supp. 1976): “The term ‘continuing service contract’ shall mean a contract for the employment of a teacher which shall remain in full force and effect until the teacher resigns or retires or reaches the age of 65, or until it is terminated or suspended as provided in KRS 161.790 and 161.800.”

KY. REV. STAT. § 161.790 (1971) governs termination of a public educator’s contract:

(1) The contract of a teacher shall remain in force during good behavior and efficient and competent service by the teacher and shall not be terminated except for any of the following causes:

(a) Insubordination, including but not limited to 1. violations of lawful rules and regulations established by the local board of education for the operation of schools, and 2. refusal to recognize or obey the authority of the superintendent, principal, or any other supervisory personnel of the board in the performance of their duties;

(b) Immoral character or conduct unbecoming a teacher;

(c) Physical or mental disability;

(d) Inefficiency, incompetency, or neglect of duty, when a written statement identifying the problems or difficulties has been furnished the teacher or teachers involved.

teachers are provided procedural due process by Kentucky Revised Statute section 161.790 which sets forth the notice and hearing requirements for termination of a tenured teacher. University-level, tenured teachers are protected by the university's rules and regulations, the fourteenth amendment of the United States Constitution, and Section 11 of the Kentucky Constitution. Wide discretion is given to each board of regents of the several universities, while statutory rules of public education tenure are determined for the entire state, and no discretion rests in any body other than the legislature. Tenure laws in general provide for a probationary period during which the teacher has nontenured status. At the end of the probationary period, something must happen: The public education teacher must be recommended by the superintendent for, and be granted, tenure, or the employee must be terminated. The university teacher is treated in a similar manner depending upon the policy of the particular board of regents. The purpose "for the

16. See note 14 supra.
17. The 1975-76 tenure policy of Murray State University is substantially the same as the 1969 policy:
After the faculty member has achieved tenure, his employment contract will be renewed each year unless he is removed by the Board of Regents for immorality, inefficiency, incompetence, or failure to cooperate with the plans and policies of the University, or failure to perform satisfactorily the duties assigned to him, or for conduct that has destroyed his usefulness to the institution, or if there is no longer a position available within the University for which he is qualified.
Murray State University Faculty Handbook 42 (1975-76). Compare this with the policy of another Kentucky university:
Faculty chairpersons or appropriate administrative personnel should recommend dismissal to the Provost and then the President, setting forth specific facts establishing any of the following grounds required by law: Incompetency, neglect of or refusal to perform his/her duties, or for immoral conduct.
Northern Kentucky University Faculty Policies and Procedures 9 (1977).
18. "[T]he accused . . . cannot be . . . deprived of his life, liberty or property, unless by the judgment of his peers or the laws of the land . . . ." Ky. Const., § 11.
This is generally interpreted in the same manner as the fourteenth amendment of the United States Constitution. Dorr v. Fitzcr, 525 S.W.2d 462, 466 (Ky. 1975).
21. See, e.g., Gullett v. Sparks, 444 S.W.2d 901 (Ky. 1969) (teacher's tenure is statutory and not contractual); Op. Ky. Att'y Gen. 73-421 (1973) (local board of education may not make master's degree prerequisite to continuing contract because tenure regulated by statute unalterable by regulations of local board).
23. Id. § 161.750 (Supp. 1976).
24. At Murray State University faculty members serve a "probationary period normally consisting of five (5) full academic years of continuous service." Murray State University Faculty Handbook 40 (1975-76). If a faculty member is not granted tenure, he will be notified
probationary period is to give the Board a chance to evaluate the teacher without making a commitment to rehire him." 

Many nontenured teachers, such as Wells and Plummer, who have not had their contracts renewed feel that they should be given the reasons for their nonrenewal during this probationary period. If the reasons are false, arbitrary, or capricious, the teachers feel they should have a hearing in order to allow them to clear their names, to show the falsity of the charges, to confront their accusers, and to remove the stigma that may attach from their colleagues and peers when it becomes known that their employment was terminated. Teachers feel that nonrenewal will hinder their future job prospects. These nontenured teachers claim to have a right to continue teaching, and that the denial of this right by state action without providing for procedural due process is prohibited by the Constitution.

Wells and Plummer each argue that when Murray State University did not renew their teaching contracts, even though they were nontenured, they were denied property and/or liberty interests in violation of the fourteenth amendment. Generally, the claims allege an implied contract right, an unwritten property right, or a denial of liberty to freely pursue gainful employment because colleagues and future employers will view them with a jaundiced eye because of their nonrenewal. Wells and Plummer feel they were fired rather than not having their contracts renewed. Being fired from Murray State University renders them less desirable in the job marketplace, makes future employment difficult, and, when subsequently employed, places their salary at a lower rate than that of other teachers.

The United States Supreme Court in Board of Regents v. Roth and Perry v. Sindermann addressed the property/liberty arguments raised previously by nontenured university teachers and dis-
cussed the constitutional limitations. The following teachers are said to have a protected property interest: (1) the tenured teacher; (2) the teacher with a contract for a specified term whom the board seeks to dismiss during such term; (3) the teacher who has a "clearly implied promise of continued employment" (the de facto tenure); (4) the teacher who is entitled to such an interest by state law. The following are said to have a protected liberty interest: (1) the teacher denied renewal for a stated reason (such as immorality or dishonesty) which would damage his standing in the community; (2) one foreclosed from other employment opportunities because of a stigma or disability imposed upon him by the board.

The majority of cases decided by the sixth circuit deal with the nontenured teacher's claim of expectancy of continued employment under the Roth provision of clearly implied promise of continued employment (the de facto tenure). During the pendency of the Wells and Plummer decisions, this court decided Ryan v. Aurora City Board of Education where Ohio public education teachers under a limited contract did not have their contracts renewed by the local


30. Board of Regents v. Roth, 408 U.S. at 576-77 (citing Weiman v. Updegraff, 344 U.S. 183 (1952)).

31. Board of Regents v. Roth, 408 U.S. at 577 (citing Connell v. Higginbotham, 403 U.S. 207 (1971)). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Board of Regents v. Roth, 408 U.S. at 577.

32. "Property interests... are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Id. See also Bishop v. Wood, 426 U.S. 341 (1976); Arnett v. Kennedy, 416 U.S. 134, rehearing denied, 417 U.S. 977 (1974).

33. In general, liberty "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, ... and generally to enjoy those privileges long recognized ... as essential to the orderly pursuit of happiness by free men." Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

34. Board of Regents v. Roth, 408 U.S. at 573.

35. Id.


37. A "limited contract" is a contract "for a term not to exceed five years." Ohio REV. CODE
school board. They claimed to have an "expectancy of continued employment" under the local 1965 Policy Manual which provided that "[t]eachers who are not to be reappointed shall be given the reasons and notified in writing . . . ." The appeals court affirmed the district court's holding for the Aurora City Board of Education by stating, "a non-tenured teacher has no 'expectancy' of continued employment, whatever may be the policies of the institution, where there exists a statutory tenure system." Moreover, the court noted that "[t]he State law of Ohio does not guarantee to plaintiffs who are non-tenured teachers any right to a hearing of 'statements of reasons' as a prerequisite to non-renewal of a contract of employment." The appeals court also felt that this question should be resolved at the state level rather than at the federal court level, as "[i]t is the rule of this Circuit that judicial review in actions of school authorities involving the administration of State Teacher Tenure Laws is in the State courts, not the federal courts, with the exceptions of cases involving deprivation of rights delineated by this court." But Wells and Plummer involve university-level teachers whose tenure rights and status are set by the Board of Regents of Murray State University under authority of Kentucky Revised Statute 164.365, and not the public education teacher tenure law.

The sixth circuit did recognize de facto tenure under the reasonable expectancy of continued employment of university level teachers in Soni v. Board of Trustees. Dr. Soni became a teacher at the University of Tennessee in September 1967 with seven years of prior experience. His teaching contract was continued for the 1968 term, during which time he was recommended for tenure by the chairman of his department. No vote by the Department Tenure Committee was taken because Dr. Soni was not an American citizen, and Tennessee law prohibited permanent positions to aliens. His employ-

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38. Ryan v. Aurora City Bd. of Educ., 540 F.2d at 223.
39. Id. at 225.
40. Id. at 227.
41. Id. at 226 n.2.
42. Id. at 226 (footnote omitted). The rights are those guaranteed by the first amendment, by the self-incrimination clause of the fifth amendment, the due process clause of the fifth or fourteenth amendments, or the equal protection clause of the fourteenth amendment. Id. at 225.
44. He had been an instructor in India for six years and an Associate Professor at Oregon State University for one year. Id. at 349.
ment status was changed from a Visiting Associate Professor to an Associate Professor, however. Dr. Soni was also enrolled in the TIAA/CREF retirement program which, at that time, was restricted to "permanent type personnel." He then purchased a home in the Knoxville area, stopped looking for employment elsewhere, became a naturalized citizen in 1971, participated in department meetings, voted on tenure for other teachers, and received verbal assurances of permanency. In March 1972, he was notified of his termination as of August 1973 and was not granted a due process hearing as provided by the University's tenure policy. The sixth circuit affirmed the district court which held that:

[T]here existed sufficient objective evidence to vest in plaintiff a cognizable property interest in the form of a reasonable expectation of future and continued employment . . . [The University] objectively acted toward plaintiff in such a manner as to reasonably lead him to believe that he was a person with a relative degree of permanency in the academic community of this University. Upon acquiring this property interest, it cannot be terminated without procedural due process.

The court in Wells and Plummer distinguishes Soni on its facts. The assurances which Plummer claimed were made by letter were not the sufficiently objective acts of Murray State University to give him de facto tenure under the reasonable expectancy of continued employment test. If Murray State University's tenure policy did not require specific, deliberate, affirmative action by the Board of Regents, but merely provided for the granting of tenure by "those who initiate recommendations for academic promotions," the results of Plummer would have been the same because of the direction to rely exclusively on state law where no fundamental constitutional rights are infringed. The Sixth Circuit noted Bishop v. Wood as controlling, and held that because this Supreme Court decision required

46. Soni v. Board of Trustees, 513 F.2d at 350.
47. Id. at 350. "Proposals to bestow tenure" at the University of Tennessee "shall be the responsibility of those who initiate recommendations" and "shall be accomplished through the processing of a Personnel Change of Status Form." Id. at 354. This tenure policy has been changed by TENN. CODE ANN. § 49-3255 (1977) which requires the board of regents to promulgate tenure policy. Tenure can only be acquired upon positive approval by the board. Id.
49. See note 11 supra.
50. See text accompanying note 4 supra.
51. See note 47 supra.
the district court to interpret state law in conditions of public employment termination, the law in Kentucky, which does not vest any property right in nontenured teachers, must be applied. There is no expectancy of continuous employment for public employees absent the rules and regulations of the University’s Board of Regents.

None of the other property classifications of *Roth* or *Sindermann* apply, as this was not the case of termination of a tenured teacher, nor was it dismissal of a nontenured teacher during the course of employment. The plaintiffs in *Wells* and *Plummer* had no legitimate, objective expectation of employment, only what appears to be a unilateral, subjective expectation. Absent recognition of the “common law of the campus” by Kentucky, property rights are not vested in these university level teachers so as to require procedural due process rights in nonrenewal situations.

Public education tenure laws are specifically defined in Kentucky Revised Statutes, Chapter 161, while university tenure laws are promulgated by the Board of Regents of the particular university under Kentucky Revised Statute § 164.365. Several reasons may be suggested for the difference in treatment between these levels of teachers. (1) The statutory requirements of certification at the public education level versus no certification at the university level indicate the state has an interest in teacher qualifications at the public education level, whereas the universities are qualified in their own right to make this determination. (2) The compulsory attendance laws for public education determine the number of students attending public education facilities in Kentucky, and the rights of tenure granted by the legislature gives permanency to the teaching staff in order to accommodate the children required to attend school. (3) The university level student enrollment is not so fixed, as there is no compulsory attendance law, but rather, the student population is controlled by the Kentucky Council on Public Higher Education increasing and decreasing tuition rates for non-Kentucky resident students which regulates the number of students in the university setting. The university needs to be more flexible in its tenure policies than does the public education sector where all children of the state are required to attend. (4) The general education level in the historical perception has been that of bachelor’s or master’s degrees

53. For text of the section, see note 3 *supra*.
54. KY. REV. STAT. §§ 164.010-.020 (Supp. 1976).
in public education versus master's or doctorate degrees at the university level. The legislature implies that more educated teachers are able to negotiate their own tenure policies or not to be in need of statewide protection. (5) Generally, there is a greater use of academic freedom at the university by means of independent research, shorter teaching hours, article publication, flexibility in structuring courses, and the absence of state-imposed required courses. (6) University teachers may be subject to fewer political pressures from the local community than are public education teachers. The protection offered by the public education tenure laws insulates the individual teacher from any arbitrary or capricious action of the local school board motivated by politics. At the university level, teachers are insulated from the local community principally through the financing of the system. Local property taxes finance public education compared with state financing for universities. (7) If individual county school districts would be permitted to set their own tenure policies, the variations within the state would be tremendous because of the number of county school districts. This could inhibit teachers from moving into another district because of the need to go through a lengthy probationary period. Some districts may not adopt any tenure program; others may not have the independent resources to set up such a policy. A very disorganized and fragmented system would be created in public education.

A question raised in this area of Kentucky law is whether the prior cases dealing with public education tenure laws are applicable to university-level tenure, or whether the public education cases merely indicate how Kentucky courts would view the university tenure laws.

Cases have been reported dealing with teachers and notice of charges, dismissal for cause, lack of impartiality by the board which acts as complainant, prosecutor, and judge, and whether the local board must follow the superintendent's recommendation on granting tenure or reject the recommendee for cause. Other cases

55. There would be at least as many school districts in Kentucky as there are counties.
56. Knox County Bd. of Educ. v. Willis, 405 S.W.2d 962 (Ky. 1966).
57. Hall v. Cooley, 277 Ky. 429, 126 S.W.2d 811 (1939) (use of "foul language" by female teacher at teacher's meeting where men and women teachers present); Smith v. Board of Educ., 264 Ky. 150, 94 S.W.2d. 321 (1936) (neglect of duty, insubordination and misconduct); Lasley v. Depp. 171 Ky. 218, 188 S.W. 352 (1916) (unspecified immoral conduct).
58. Osborne v. Bullitt County Bd. of Educ., 415 S.W.2d 607 (Ky. 1967) (held denial of due process).
59. Dorr v. Fitzer, 525 S.W.2d 462 (Ky. 1975). In Dorr the superintendent had placed the
dealt with attainment of continuing contract status under various lengths of employment, the lack of right to a specific employment position, and application of laches when one board of education is replaced by another and a teacher is not employed.

An insight into the Kentucky Supreme Court's feeling for dismissal/demotion and the right to public employment can be had from Louisville Professional Fire Fighters Association v. City of Louisville where a fireman was promoted to probationary captain under the civil service rules. One year later he was demoted to sergeant without hearing. The fireman claimed denial of his due

plaintiff-teacher’s name on a list of teachers eligible for continuing contracts. The court held that the board of education had a choice whether to grant the teacher a continuing contract, and that the board’s rejection of the superintendent’s recommendation without notice or a hearing did not deprive the teacher of a vested right to continuing contract status. A dissenting judge argued that by the superintendent’s recommendation the teacher acquired a vested property right and that Board of Regents v. Roth, 408 U.S. 564 (1972), and the due process clause of the fourteenth amendment required that she have been given a hearing. Id. at 468-69 (Jones, J., dissenting). The dissenter also suggested that since the superintendent’s recommendation was not withdrawn, the board should have appealed to the state board of education under Ky. Rev. Stat. § 160.380 (Supp. 1976). That section provides, in part, as follows:

All appointments, promotions and transfers of principals, supervisors, teachers and other public school employees shall be made only upon the recommendation of the superintendent of schools, subject to the approval of the board. If the board of education cannot agree with the superintendent . . . the board of education may appeal to the state board of education to review the case and the decision of the state board of education shall be final.

Compare Dorr with Smith v. Beverly, 314 Ky. 627, 236 S.W.2d 914 (1951) (superintendent’s recommendation gave nominee for position of high school principal a vested property right); Ambergey v. Draughn, 288 Ky. 128, 155 S.W.2d 740 (1941) (teachers recommended by superintendent acquired vested right to teach); Hale v. Board of Educ., 254 Ky. 96, 70 S.W.2d 975 (1934) (acquiescence by superintendent in board’s rejection of nominee effects a withdrawal of the recommendation).

60. Estill County Bd. of Educ. v. Rose, 518 S.W.2d 341 (Ky. 1975); Whitley County Bd. of Educ., 444 S.W.2d 890 (Ky. 1969); Moore v. Babb, 343 S.W.2d 373 (Ky. 1960). All three cases applied some version of Ky. Rev. Stat. § 161.740 (Supp. 1976) which regulates a teacher’s eligibility for continuing service status after transfer from another district or after service in the armed forces.

Related federal cases regarding the length of time and the attachment of a property right are Johnson v. Fraley, 470 F.2d 179 (4th Cir. 1972) (29 years of continuing service amounted to the equivalent of tenure); Lucas v. Chapman, 430 F.2d 945 (5th Cir. 1970) (long employment in continuing relationship). But see Buhr v. Buffalo Pub. Sch. Dist., 500 F.2d 1196 (8th Cir. 1974) (7 years insufficient); Cannady v. Person County Bd. of Educ., 375 F. Supp. 689 (M.D.N.C. 1974) (19 years insufficient).

61. Snapp v. Deskins, 450 S.W.2d 246 (Ky. 1970); Ritchie v. Dunn, 297 Ky. 410, 180 S.W.2d 284 (1944).

62. Wisdom v. Sims, 284 Ky. 258, 144 S.W.2d 232 (1940).

63. 508 S.W.2d 42 (Ky. 1974).

64. Ky. Rev. Stat. § 90.190 (Supp. 1976) provides that “employees holding probationary
process rights. As to whether the probationary employee has a vested right in retaining the position to which he has been promoted, all members of the court held that:

[I]t is an established principle that provisional appointees acquire no vested rights or vested interests to permanent appointment by virtue of their temporary service . . . .

. . . [T]he essence of probationary employment is that the employer have unfettered discretion in deciding whether to retain a probationary employee.

A public education or university nontenured teacher presumably would not be accorded procedural due process rights in Kentucky if his teaching services were terminated at the end of the contract period, because he would have no vested right in retaining the position just as the fireman had no vested right in the probationary position.

If there are to be any changes in the nontenured/nonrenewal situation and due process rights, these changes would probably not come from the courts, or collective bargaining agreements between local school boards and the representative group of the public education teachers. But collective bargaining agreements at the university level may be considered a personnel or tenure policy change made by the board of regents of the particular university and the faculty as acting within the authority the legislature has given the regents.

Other than the claim of de facto tenure and protection under the property interest of Roth, one could present stronger arguments within the concept of denial of liberty, and of equal protection within the fourteenth amendment and Kentucky Constitution Section 11.

Liberty "denotes . . . the right of the individual . . . to contract to engage in any of the common occupations of life," and not to be foreclosed from other employment opportunities because of

appointments may be dismissed without the appointing authority being required to furnish . . . a written statement of the reasons."

65. Louisville Prof. Fire Fighters Assoc. v. City of Louisville, 508 S.W.2d at 43 (quoting Vaccaro v. Board of Educ., 54 Misc. 2d 206, 282 N.Y.S.2d 881, 884 (N.Y. Civ. Ct. 1967)).
66. Louisville Prof. Fire Fighters Assoc. v. City of Louisville, 508 S.W.2d at 43.
67. See note 21 supra.
stigma, and to protect his standing in the community. Imaginative arguments could be advanced in this area, as prior Kentucky decisions are nonexistent.

Classification of elementary and high school teachers with one set of definite tenure rules, and a classification of university level teachers with a broad discretion within the local board of regents may be a denial of equal protection. Whether there is reason for the different classifications, or a state interest in such classification, or whether it is arbitrary and unreasonable has not been decided in Kentucky. If it is arbitrary for the university classification, the university teachers should be brought within the general guidelines of Chapter 161 of the public education tenure laws rather than give the local school districts the wide discretion the university regents now enjoy. Otherwise, the lack of reasonable uniformity among the local public education districts, lack of portability, subjection to local political pressures, lack of stability and permanence to be introduced into the local district, and the uncertainty of continued employment by the public education teacher would cause turmoil and disruption in the public education sector.

Morton J. Earley

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70. Board of Regents v. Roth, 408 U.S. 564, 573 (1972).
71. Id.
72. But see Paul v. Davis, 424 U.S. 693 (1976) (no liberty interest in reputation). Cf. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) (organizations have legally protected right to carry on their work free from defamatory statements); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (procedural due process requires notice and opportunity to be heard before posting of notice that an individual is excessive drinker).
BOOK REVIEWS


Reviewed by John M. Lindsey*

When Chief Justice Warren Burger tried to obtain a copy of this new biography, he was unable to do so because the bookstores in Georgetown had sold their entire stock. The initial printing of almost 7,500 copies had been inadequate to satisfy public demand in the Washington area and throughout the nation as well. Additional printings were subsequently ordered by the publisher, but the Chief Justice apparently did not want to wait until new shipments arrived at local stores. The author, Professor Bate, was contacted at Harvard, and Bate personally interceded with the publishing company so that a copy of the book could be found and sent to the Chief Justice.¹

That the Chief Justice of the United States should want to read the biography of an eighteenth century English writer, who was not a lawyer, is not so surprising as it might seem. Many of Samuel Johnson's views remain just as valid today as they were in his own lifetime, and, as Professor Bate comments, "Johnson has fascinated more people than any other writer except Shakespeare. Statesmen, lawyers, and physicians quote him, as do writers and scientists, philosophers and farmers, manufacturers and leaders of labor unions."²

Born in 1709, Samuel Johnson became famous within his own lifetime as a noted author, a great lexicographer³ and a brilliant conversationalist. He achieved immortality after his death in 1784 because a Scot lawyer, James Boswell, wrote the Life of Samuel Johnson, LL.D,⁴ the greatest biography of all time.

Although something could be said in favor of again reviewing established works at respectable intervals after their initial publica-

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3. Johnson defined a lexicographer as "a writer of dictionaries; a harmless drudge . . . ."
S. Johnson, DICTIONARY OF THE ENGLISH LANGUAGE (1755).
tion, this is not a review of Boswell's masterpiece. It is sufficient to note here only one widely accepted opinion: Boswell remains unequalled in his ability to record fascinating conversations. By comparison, Watergate transcripts make dull reading. No modern biographer, including Bate, can ever hope to compete with Boswell's eyewitness account. Nevertheless, Bate's new treatment of Johnson was needed since "[f]or generations people have been discovering new details about him and re-examining old ones." Bate's effort represents the latest and finest Johnsonian scholarship available anywhere. He has created an interesting and authoritative book which should be read before attempting Boswell.

Johnson was never admitted to the bar, but he probably understood law better than most lawyers of his day. Much of Johnson's legal knowledge was acquired through his association with lawyers, particularly Henry Ballow and Robert Chambers. In addition, he undoubtedly obtained some information about law when he wrote accounts of parliamentary debates from November 25, 1740, to February 25, 1743. Johnson created many of these speeches out of his own imagination, but they were of such high quality that the actual speakers never later complained or denied authorship. Johnson also used a large variety of legal terms in his monumental Dictionary of the English Language, and this probably involved him in some form of systematic legal study.

A Johnson quotation can add spice to any legal brief or public speech; it can also help clear muddy waters and can often place a question in its proper perspective. In 1977, for example, Representative Henry B. Gonzales of Texas emphasized a point he was making in Congress by effectively using Johnson's remark to Boswell that "the [writ of] Habeas Corpus is the single advantage our government has over that of other countries." Johnson could express the essence of abstract legal concepts in simple, concrete terms, e.g., the idea of "positive law" is given practical meaning in Johnson's com-
ment, "When a person professes to be governed by a written ascertained law, I can then know where to find him."

Johnson had little patience with bland truisms such as "truth will always bear an examination." He cut through the cant of that particular statement by responding, "Yes, Sir, but it is painful to be forced to defend it. Consider, Sir, how should you like, though conscious of your innocence, to be tried before a jury for a capital crime, once a week."

The right of lawyers to advertise for clients is a much debated question today, yet Johnson dealt with the problem two hundred years ago. When Boswell exclaimed, "You would not solicit employment, Sir, if you were a lawyer," Johnson responded, "No, Sir, but not because I should think it wrong, but because I should disdain it." Johnson went on to say, "However, I would not have a lawyer to be wanting to himself in using fair means. I would have him to inject a little hint now and then, to prevent his being overlooked."

When Boswell presented Johnson with the eternal dilemma: how can a lawyer ethically support a cause which he knows to be bad, Johnson quickly removed all confusion with his famous reply:

Sir, you do not know it to be good or bad till the Judge determines it. I have said that you are to state facts fairly; so that your thinking, or what you call knowing, a cause to be bad, must be from reasoning, must be from your supposing your arguments to be weak and inconclusive. But, Sir, that is not enough. An argument which does not convince yourself, may convince the Judge to whom you urge it; and if it does convince him, why, then, Sir, you are wrong, and he is right. It is his business to judge; and you are not to be confident in your own opinion that a cause is bad, but to say all you can for your client, and then hear the Judge's opinion.

Johnson's knowledge of law has been the subject of at least two monographs: one by Lord McNair, the noted international law scholar and jurist; the other by E. L. McAdam, Jr., a Johnson authority. McAdam's painstaking research led to the striking conclusion that Johnson wrote substantial portions of the lectures

11. J. Boswell, supra note 7, at 443.
12. Id. at 725.
13. Id. at 683.
14. Id. at 388.
15. A. McNair, Dr. Johnson and the Law (1948).
16. E. McAdam Jr., Dr. Johnson and the English Law (1951).
which Robert Chambers gave as Vinerian Professor of Law at Oxford.

The lecture series, which Charles Viner founded at Oxford, had begun spectacularly. William Blackstone was appointed the first Vinerian Professor, and the initial volume of his famous Commentaries on the Law of England was based on his Oxford lectures. When Blackstone resigned the professorship and returned to law practice, his understudy, Robert Chambers, was selected successor.

Blackstone’s fame had been instant and great, and Chambers soon felt all the terrors of comparison. His fear of failure brought about almost complete intellectual paralysis. As time grew scarce and the scheduled lectures had still not been written, Chambers, desperate, called upon Johnson for help. Johnson responded to this plea with characteristic generosity and dictated about two-fifths of the first lecture. Johnson continued to assist Chambers during the months which followed, and many of the lectures in their final form turned out to be primarily the work of Johnson.

As a gentleman, Johnson kept quiet about the role he had played and would have been content to have let the secret die with him. Chambers, however, was much less discreet about destroying correspondence related to his many sessions with Johnson.

Johnson had little patience with reformers and reform movements. When Boswell accused him of laughing at schemes of political improvement, Johnson replied, “Why, Sir, most schemes of political improvement are very laughable things.” Johnson was especially suspicious of republican enthusiasm for a classless society. When he went to the home of a Mrs. Macauley, whom he called “a great republican,” Johnson could not resist telling the lady:

‘Madam, I am now become a convert to your way of thinking. I am convinced that all mankind are upon an equal footing; and to give you an unquestionable proof, Madam, that I am in earnest, here is a very sensible, civil, well-behaved fellow-citizen, your footman; I desire that he may be allowed to sit down and dine with us.’ I thus, Sir, shewed her the absurdity of the levelling doctrine. She has never liked me since.

20. Id. at 316-17.
Boswell and some later writers are responsible for the popular idea that Johnson was a staunch Tory, a label which later generations have translated as meaning conservative. Professor Bate clears away the semantic mischief connected with misuse of the terms: Tory and Whig, conservative and liberal. Johnson emerges as a great human being in no need of labeling.

Bate reminds us that Johnson was one of the first prominent voices to speak out boldly against the institution of slavery. Indeed, Johnson made his most telling argument against the American Revolution when he asked, "How is it that we hear the loudest yelps for liberty among the drivers of negroes?"

Johnson focused his powerful mind on timeless and universal problems of human society and human conduct, and his observations were not those of a man who had been isolated in an ivory tower. He knew poverty, pain, and disappointment. He also knew success, though he treated this more with indifference than enthusiasm.

Johnson's interests were as wide-ranging as his abilities were great, and his attention was directed to much in addition to literature and law. He could describe in expert detail the art of butchering; he could also instantly understand the working principles of complicated machinery; and he seemed to gain relaxation by conducting chemical experiments. His common sense grasp of economic theory is still impressive, and some of his insights in that area merit special consideration in the United States today, e.g., his conclusion that "[W]hatever body, and whatever society, wastes more than it acquires, must gradually decay . . . ." Even more pointed for our energy-short nation is Johnson's warning:

But scarcity is an evil that extends at once to the whole community: that neither leaves quiet to the poor, nor safety to the rich; that, in its approaches, distresses all the subordinate ranks of mankind; and, in its extremity, must subvert government, drive the populace upon their rulers, and end in bloodshed and massacre.

Johnson's famous comment that "a decent provision for the poor is the true test of civilization," was no glib expression of social

22. Id. at 193.
23. S. JOHNSON, The Idler, no. 22 (Sept. 16, 1758), in 4 WORKS at 213 (1825).
25. J. BOSWELL, supra note 7, at 446.
concern: his own home became a shelter for an odd assortment of poor people. Johnson extended his personal economic protection to such individuals as: the blind Anna Williams; Frank Barber, a black youth from Jamaica; Robert Levet, the medical doctor who ministered only to the impoverished; and Miss Carmichael, who "was almost certainly the prostitute Johnson late one night found lying sick and exhausted in the street." 28 Bate also tells us that Johnson on returning home "late at night for years had been putting pennies into the hands of children lying asleep on thresholds so that they could buy breakfast in the morning." 27

Bate provides more information about Johnson's early life than any other biographer, including Boswell, has ever been able to do. Johnson's father and mother are described in sufficient detail to allow the reader to form definite impressions of the role each played in his life. Johnson's only brother, Nathaniel, still remains obscure because little is known about him. Bate does advance the interesting idea that Johnson's troubled and hostile feelings about Nathaniel may have been due to some dark crime, perhaps forgery, which this brother might have committed. 28 Johnson's marriage to an older woman is treated with understanding and not derision. Bate also explores in considerable depth the two periods of severe and prolonged mental depression which Johnson experienced and managed to overcome. Johnson's most profound and most secret fear was the thought that he might lose his sanity. This anxiety haunted him during much of his life. Bate's treatment of this problem should be of interest to psychologists and others who deal with emotional disorders.

Bate's *Samuel Johnson* will have something of value for all who read it, because, as Bate explains, "Whatever we experience, we find Johnson has been there before us, and is meeting and returning home with us." 29

27. Id. at 501.
28. Id. at 161.
29. Id. at 5.

Reviewed by Johnny C. Burris*

Mr. Berger in this, his latest of a series of thought provoking books dealing with various aspects of the Constitution, turns his attentions to the fourteenth amendment.¹ He seeks to demonstrate that the Supreme Court’s role in the federal system of government is restricted to “[policing] the boundaries drawn in the Constitution.”² In its decisions interpreting the fourteenth amendment, however, the Supreme Court has passed well beyond this function, and has become a continuing constitutional convention.³ To justify his conclusion, Mr. Berger undertakes two lines of analysis. First, that historical analysis provides the only means of determining what effect the framers of the fourteenth amendment intended it to have on our system of government.⁴ The historical record surrounding the adoption of the fourteenth amendment is examined in part I of the book. Second, that the intentions of the framers of the fourteenth amendment should be binding on all future generations.⁵ This is examined in part II.

Mr. Berger’s examination of the historical record concerning the fourteenth amendment finds three primary purposes for adoption: 1) to define who is a citizen of the United States,⁶ 2) to constitutionalize the Civil Rights Act of 1866,⁷ and 3) to insure the dominance of the Republican party in the federal government.⁸ The primary concern of Congress in passing the fourteenth amendment was to insure that the South did not return the Negro to his former position of slavery in every manner but name. The Congress perceived this threat in the Black Codes which were enacted by Southern legisla-

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4. R. Berger, supra note 2, at 6-9.

5. Id.

6. To lay to rest once and for all the Dred Scott v. Sandford, 60 U.S. 1, 19 How. 393 (1857) decision that a Negro is not a citizen of the United States.

7. Act of April 9, 1866, ch. 31, 14 Stat. 27.

8. R. Berger, supra note 2, at 15-16.
tures after the Civil War. The Civil Rights Act of 1866 and the fourteenth amendment were provisions intended to prevent this type of backsliding by the South.

In section one of the fourteenth amendment, Mr. Berger found that the Congress intended only to provide the newly freed slaves with fundamental rights of a very limited nature. The first clause of section one defines those who are citizens of the United States and of the several states. The privileges and immunities clause of section one of the fourteenth amendment was intended to provide the newly freed slaves with certain limited fundamental rights which are guaranteed to all citizens of the United States. The privileges and immunities of the citizens of the United States were limited to civil rights (i.e. right to make contracts, bring suit in the courts of the land, own property, petition the government, and have the same criminal law apply to all the people). Political rights, not included in the fourteenth amendment, were those privileges and immunities of state citizenship.

Mr. Berger finds that the historical evidence demonstrates that Congress did not intend the due process and equal protection provisions of section one of the fourteenth amendment to have separate substantive effect. These provisions were to effectuate the substantive provisions of the privileges and immunities clause. Since this clause did not reach either the so-called political rights of sufferage or segregation of schools, then “due process” and “equal protection” could not be used to make substantive changes in these areas. Further, the due process provision in the fourteenth amendment was never intended to enforce certain provisions of the Bill of Rights against the states. The only sections of the fourteenth amendment intended to affect political rights were sections two and three, the latter providing for a reduction in representation for unlawful abridgement of a qualified voter’s right to vote and the former

9. “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. Const. amend. XIV § 1.
11. R. Berger, supra note 2, at 47.
12. Id. at 166-93.
13. Id. at 52-99.
14. Id. at 117-33.
16. U.S. Const. amend. XIV § 2; see U.S. Const. amend. XV.
prohibiting those who participated in rebellion from holding office.\textsuperscript{17} In short, Mr. Berger argues that the history of the adoption of the fourteenth amendment demonstrates that the framers intended that the newly freed slaves be citizens and receive the same civil rights as their former masters, but not political or social equality unless the states conferred it.\textsuperscript{18}

Mr. Berger devotes the second part of his book to demonstrating that the Supreme Court should be bound by the intention of the framers of the Constitution in their interpretations of the great document. Mr. Berger argues the sole source for determining what effect a constitutional provision should have is the intention of its framers, if those intentions are clearly ascertainable. The Supreme Court cannot be allowed to alter the meaning of the provisions of the Constitution, for to do so is to allow the court to revise the Constitution as it sees fit. The Constitution sets out the limited powers the people have granted the federal government, and the people are the only ones who may further expand or withdraw these powers from the government. In essence, the Constitution is the mainstay of democratic government because it limits the power of government. The only way to accurately interpret the Constitution is to look to what the people thought they were adopting. To allow the Supreme Court to look beyond these intentions is to allow it power well beyond that enumerated in the Constitution. The Constitution leaves the power of revision in the people through the amending process. It is not the duty of the Supreme Court to exercise it for them. The Supreme Court's function in interpreting the Constitution is to ascertain the meaning the framers intended for it to have and apply only that meaning to the case before it. To allow the Supreme Court the power to change the meaning of the Constitution would be to make it a super legislature above not only the other branches of the government, but also the people who created that government. In brief, what Mr. Berger argues for in the second part of his book is a total rejection of judicial activism and the adoption of a strict historical analysis approach to the Constitution. In essence, what he urges is a dogmatic approach to constitutional interpretation.

\textsuperscript{17} Id. § 3.
\textsuperscript{18} But see D. Hutchinson, The Foundations of the Constitution (1975); A. Mason, The Supreme Court (1962); C. Fairman, History of the Supreme Court of the United States VI (1971); J. TenBroek, Equal Under Law (1965).
It is this portion of Mr. Berger's book with which one has the most problem. The first part of the book presents an excellent, if somewhat one-sided, historical analysis of the adoption of the fourteenth amendment. In the second part, however, one must have serious reservation about accepting Mr. Berger's analysis. The Constitution is, more than any other type of legislation, a body of broad, general principles by which we are governed. The Constitution was not framed with the intention that its meaning was to be fixed for all time as of the moment of adoption. In the words of John Marshall, "a constitution is framed for ages to come."  It is important to remember the Supreme Court's function as an interpreter of the Constitution is forced upon it because of the very general nature of the document it must interpret. To take these great general provisions and give them definite meaning would be to destroy what makes the Constitution so important to our form of government . . . its flexibility. Without this flexibility the Constitution would become just another piece of legislation which would have to be amended, perhaps even yearly, to remain effective. This is not what the framers envisioned. The Constitution was drafted so as to provide the basic power and structure of our government for all future generations as well as in 1787, with only occasional amendments on issues of great importance.  

Another difficulty with Mr. Berger's type of solely historical interpretation is that the resulting historical record can seldom be called pure history. It is a unique problem to determine the group intent in drafting provisions in a document such as the Constitution. Even the fourteenth amendment required many compromises to obtain its adopted form. These compromises were born of the politics of the times, and the true intent of the framers is difficult, if not almost impossible, to determine and separate from politics.

Mr. Berger's views also distort the role of the Supreme Court in our system. It is the Supreme Court's role to maintain the balance in our constitutional system. If one branch becomes too powerful, or the majority attempts total suppression of a minority, it is the Supreme Court's duty to step in to preserve the system's balance, but only where it is necessary.  Unfortunately, this does leave re-

19. Cohens v. Virginia, 19 U.S. 82, 100, 6 Wheat. 264, 404 (1821); McCulloch v. Maryland, 17 U.S. 83, 6 Wheat. 316 (1819); see B. Cardozo, The Nature of the Judicial Process 17, 77-86, 89 (1921).
20. See A. Mason, supra note 18.
21. Rodell, Judicial Activist, Judicial Self-Deniers, Judicial Review and the First Amend-
straint of the Supreme Court's power in its own hands, but if the Court should attempt to usurp the power of other branches of government the people always serve as the ultimate judge of the Supreme Court and our whole constitutional system. To deny the Supreme Court the power to interpret our Constitution as a living, growing body of law is to invite another disaster like the Civil War. It should not be forgotten that the Civil War was partially caused by the use of a strict historical interpretation of the Constitution in the *Dred Scott* case,\(^\text{22}\) the very same theory that Mr. Berger now puts forth for us to embrace. Historical analysis is a useful aid to the Supreme Court in interpreting the Constitution,\(^\text{23}\) but it cannot and should not become a dogma to drain the Constitution of its effectiveness.
