Nova Law Review 35, 2

Nova Law Review*
ARTICLES

Use and Misuse of Evidence Obtained During Extraordinary Renditions: How Do We Avoid Diluting Fundamental Protections? Victor Hansen

Providing Attorneys for Children in Dependency and Termination of Parental Rights Proceedings in Florida: The Issue Updated Michael J. Dale Louis M. Reidenberg

It's Never Too Late to Make Amends: Two Wrongs Don't Protect a Victim's Right to Restitution Woody R. Clermont

The Law and Economics of Mutual Fund Investment Adviser Fiduciaries: Jones v. Harris Associates L.P. George Steven Swan, S.J.D.

Taking on Big Money: How Caperton Will Change Judicial Disqualification Forever Scott B. Gitterman

LEGAL SCHOLARSHIP

Legal Scholarship Introduction John Sanchez

Clarion Call or Sturm Und Drang: A Response to Pierre Schlag's Lecture on the State of Legal Scholarship David R. Cleveland

Reflections on Rothko and Writing: A Response to Pierre Schlag's Lecture on the State of Legal Scholarship Olympia Duhart

NOTES AND COMMENTS

Is Miranda on the Verge of Extinction?: The Supreme Court Loosens Miranda's Grip in Favor of Law Enforcement Illan M. Romano

Virtual Adoption: The Inequities of the Equitable Doctrine Jaime P. Weisser

VOLUME 35 SPRING 2011 NUMBER 2
## NOVA LAW REVIEW

**Volume 35**  
**Spring 2011**  
**Number 2**

### ARTICLES

- **Use and Misuse of Evidence Obtained During Extraordinary Renditions: How Do We Avoid Diluting Fundamental Protections?**  
  Victor Hansen  
  p. 281

- **Providing Attorneys for Children in Dependency and Termination of Parental Rights Proceedings in Florida: The Issue Updated**  
  Michael J. Dale  
  Louis M. Reidenberg  
  p. 305

- **It’s Never Too Late to Make Amends: Two Wrongs Don’t Protect a Victim’s Right to Restitution**  
  Woody R. Clermont  
  p. 363

- **The Law and Economics of Mutual Fund Investment-Adviser Fiduciaries: Jones v. Harris Associates L.P.**  
  George Steven Swan, S.J.D.  
  p. 393

- **Taking on Big Money: How *Caperton* Will Change Judicial Disqualification Forever**  
  Scott B. Gitterman  
  p. 475

### LEGAL SCHOLARSHIP

- **Legal Scholarship Introduction**  
  John Sanchez  
  p. 501

- **Clarion Call or Sturm Und Drang: A Response to Pierre Schlag’s Lecture on the State of Legal Scholarship**  
  David R. Cleveland  
  p. 503

- **Reflections on Rothko and Writing: A Response to Pierre Schlag’s Lecture on the State of Legal Scholarship**  
  Olympia Duhart  
  p. 513

### NOTES AND COMMENTS

- **Is *Miranda* on the Verge of Extinction? The Supreme Court Loosens *Miranda*'s Grip in Favor of Law Enforcement**  
  Illan M. Romano  
  p. 525

- **Virtual Adoption: The Inequities of the Equitable Doctrine**  
  Jaime P. Weiss  
  p. 549
USE AND MISUSE OF EVIDENCE OBTAINED DURING EXTRAORDINARY RENDITIONS: HOW DO WE AVOID DILUTING FUNDAMENTAL PROTECTIONS?

VICTOR HANSEN*

I. INTRODUCTION ................................................................................... 281
II. TRIAL IN FEDERAL COURT ................................................................. 284
III. TRIAL IN MILITARY COURTS-MARTIAL ............................................. 293
IV. TRIAL BY MILITARY COMMISSION ..................................................... 294
V. THE FUNDAMENTAL PROBLEM WITH MILITARY COMMISSIONS...... 300
VI. CONCLUSION ...................................................................................... 302

1. INTRODUCTION

We are well into President Obama's second year in office and long past the deadline set out in his executive order directing the closure of the Guantanamo Bay detention facility by January of 2010.1 Meanwhile, the debate continues to rage over where the masterminds of the 9/11 attacks should be tried. Initial efforts to move the 9/11 co-conspirators to New York and try them in federal district court have been rebuffed,2 and President Obama and Attorney General Holder have been roundly criticized by some for their initial efforts to move these cases to federal court.3 These, and other cases that originated under military commissions proceedings, remain in legal limbo and the question of where to try these suspects has become a sort of “third rail” that no politician wants to touch, lest they are accused of being soft on terrorists.4

* Professor Victor Hansen is a Professor of Law at New England Law in Boston where he teaches Criminal Law, Criminal Procedure, Evidence and National Security Law. The author wishes to thank Elizabeth Funk for her invaluable research assistance.

4. In December Congress passed legislation significantly restricting the ability of the President to move people from Guantanamo by prohibiting funding of those efforts. Also, on March 7th the President signed an Executive Order, which among other things, allows for the resumption of military commissions at Guantanamo, expresses a desire to close Guantanamo, establishes a system of periodic review of those detainees at Guantanamo who will not face
Many in legal academia—including myself—have criticized this current debate as being superficial and unprincipled. Nevertheless, it is clear that those opposed to trying suspected terrorists in federal court have tapped into a genuine and powerful force, and there is no question that this opposition raises legitimate and important questions about national security and the role the law should play in balancing the need for security against individual rights and freedoms.

Up to this point, the question has been framed as: What is the best forum for trying these suspected terrorists? Perhaps it is time to re-frame the question. Instead of asking what forum is best suited to try the 9/11 co-conspirators and others currently detained at Guantanamo, maybe we should be asking what legal accommodations must be made if we try these suspects at all, and whether one choice offers an alternative that will be less corrosive to our system of justice.

Later generations will look back at our legal responses to terrorism just as we have looked at our own history—sometimes with pride and other times with shame and regret. In times of trial, the legitimacy of our legal system is upheld by close adherence to principles upon which that system is based. If we only adhere to those principles in times of peace and abandon them in times of trouble, or when difficulties arise, there is little justification for preserving such a system. Reframing the debate to ask what compromises and accommodations must be made to our system of justice in order to bring accused terrorists to justice might allow us to get closer to this fundamental question.

Reframing the debate in this way also allows us to better see the motives behind many government programs such as extraordinary renditions, enhanced interrogation techniques, and the formation of military commissions. Once we see these motives more clearly, we can better determine their legitimacy.

By reframing the question to focus on the legal accommodations needed to bring these suspects to justice, I believe two inescapable conclusions follow. First, our decision to use extraordinary renditions, "black sites," and military commission of federal trial but will still be detained, and preserves the right to try certain individuals in federal court. See Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011). Neither this legislation nor the Executive Order resolves this question of where to try suspected terrorists like KSM. On April 4, 2011, Attorney General Eric Holder reversed an earlier decision and announced that the so called "9/11 co-conspirators" would be tried by military commission, not in federal court as had been previously announced. Attorney General Holder said that while he believed that trial in federal court was the better option, recent congressional action had made that option virtually impossible. Statement of the Attorney General on the Prosecution of the 9/11 Conspirators, U.S. Dep't of Justice, Apr. 4, 2011, http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-110404.html.
enhanced interrogation techniques has had far reaching implications on our system of justice, and has affected that system in very specific ways that were likely unanticipated by the proponents of these programs.\(^5\) Second, with respect to the evidence obtained by coercion, the greatest corrosion to our system of justice will occur if we opt to try these suspects by the current formulation of the military commissions system, though ultimately the adverse effects of these programs will be realized in any forum these terrorist suspects are tried.

It is useful to go back and ask what the government hoped to achieve by holding suspected terrorists like Khalid Sheikh Mohammed in CIA “black sites” located in third countries, subjecting them to water boarding and other interrogation techniques that are certainly cruel, inhumane, and degrading, even if not classified as torture.\(^6\) The concern here is not the legality or illegality of these practices, but the “products” that the government hoped to obtain by using these practices.

There were at least two primary products the government hoped would come from these practices: First, to gain usable, actionable intelligence to detect and disrupt terrorist networks and prevent future attacks against the United States’ interests;\(^7\) and second, to use information obtained in subsequent prosecutions of specific terrorist suspects.\(^8\) I believe it is fair to assume the reason the United States sought to achieve these objectives by means of extraordinary rendition is because the government wanted to employ techniques of questionable legality, if not outright torture to obtain this information.

There is clearly an inherent tension in seeking useful intelligence to prevent future terrorist attacks and simultaneously collecting information for subsequent prosecution. That tension is nothing new and compromises must

---

5. In military terminology, a “black site” is a location at which an unacknowledged black project is conducted. Recently, the term has gained notoriety in describing secret prisons operated by the United States (U.S.) Central Intelligence Agency (CIA), generally outside of U.S. territory and legal jurisdiction. It can refer to the facilities that are controlled by the CIA used by the U.S. government in its War on Terror to detain alleged unlawful enemy combatants. U.S. President George W. Bush acknowledged the existence of secret prisons operated by the CIA during a speech on September 6, 2006. See Bush Admits to CIA Secret Prisons, BBC NEWS, (Sept. 7, 2006, 4:18 AM), http://news.bbc.co.uk/2/hi/americas/5321606.stm.


be made if information is going to be used for both purposes. Moreover, there is an ongoing debate whether information obtained by torture or other coercive interrogation techniques really provides useful intelligence. While both of these issues are important, they are not the focus of this essay.

The primary concern here is with the use of coerced statements in any subsequent criminal prosecution of suspected terrorists. I seek to examine how schemes of rights infringements, such as extraordinary renditions and coercive interrogations, translate into specific and corrosive questions of accommodation. If accommodations are made now to bring these suspects to justice, does choosing one system over another at least reduce, if not eliminate the accommodations that must be made, so as to limit the corrosive impact on our system of justice?

Currently, there are three proffered alternatives for prosecuting individuals who were subject to extraordinary rendition and coercive interrogations. The first alternative is trying them in federal district court. The second alternative is trying them via a court-martial proceeding under the Uniform Code of Military Justice. The third option is to try them by military commission. What are the consequences of embarking on a practice of extraordinary renditions, torture, and coercive interrogations when the government later wants to prosecute those suspects? Specifically, how would each of these forums address the admissibility of coerced statements?

II. TRIAL IN FEDERAL COURT

Prior to the creation of military commissions, trying terrorists in federal court was the norm and despite the existence of military commissions, the vast majority of terrorist cases are still being tried in federal district courts. Even so, the cases that have been tried in federal courts are different in nature than the cases we are talking about. With the exception of Ghailani case recently tried in a New York federal court, the cases tried in federal courts involved terrorist acts, attempts, or plots by suspects apprehended within the United States. These cases did not involve issues of extraordinary rendi-


tion, allegations of torture, or other coercive interrogations, and therefore the more complicated questions involved in the possible trial of Khalid Sheikh Mohammed and the other 9/11 co-conspirators have not yet been addressed by the federal courts.

Nevertheless, trial in federal court provides the most familiar method for prosecuting even these more complex cases. So, if we move forward with a federal court trial, potential questions are: How are the federal courts going to address the admissibility of coerced confessions? What accommodations would have to be made in order for this evidence to be admitted and considered? And what type of impact would that have on the more run-of-the-mine cases?

Before addressing these questions, one fundamental issue needs to be considered: To what extent, if any, do the constitutional protections against coerced confessions even apply to cases where the alleged crimes, capture, rendition, and interrogations took place outside of the United States? This is not an easy question and while it is not the primary focus here, some thoughts about it are important.12

There is much dispute over if and how constitutional protections that are a routine part of domestic criminal prosecutions would apply to criminal prosecutions of these suspected terrorists, whose connection to the United States is tenuous at best.13 While the Supreme Court of the United States has not addressed this issue directly, past cases do provide some guidance. The two most recent cases where the Court addressed the extraterritorial application of the Constitution are *United States v. Verdugo-Urquidez*14 and *Boumediene v. Bush*.15 From these cases, we can glean principles that may provide guidance in the trial of cases that involved extraordinary renditions and coercive interrogations.

*Verdugo-Urquidez* dealt with the warrantless search of the defendant’s home in Mexico by DEA agents and Mexican law enforcement officials.16

---

12. These issues are relevant to some degree regardless of the forum used to try these suspects. If certain constitutional protections are available to terrorist suspects in federal court, there is the possibility that these protections should also apply to military commissions. Even though the Court in *In re Yamashita*, 327 U.S. 1 (1946), limited its review in that case to questions of jurisdiction of the military commission appointed to try General Yamashita, that Court noted that while it does not make the laws of war, it respects them “so far as they do not conflict with the commands of Congress or the Constitution.” *In re Yamashita*, 327 U.S. at 7–8, 16.


Published by NSUWorks, 2011
Although the defendant was a Mexican citizen, the Supreme Court addressed the issue of whether the Fourth Amendment’s warrant requirement applied to this search outside of the U.S. border.\textsuperscript{17} Applying a social contract theory, a plurality reasoned that since the defendant was not a citizen or legal alien, and because he had no significant contacts with the United States, the Fourth Amendment did not apply to this search.\textsuperscript{18}

Justice Kennedy provided the fifth vote upholding the search, but took a different approach to the extraterritorial application of the Fourth Amendment.\textsuperscript{19} Adopting the Court’s earlier test in what has become known as the Insular Cases,\textsuperscript{20} Justice Kennedy asked whether the application of the Fourth Amendment in this situation was “impracticable and anomalous.”\textsuperscript{21} Justice Kennedy reasoned it was and determined the Fourth Amendment’s warrant requirements did not apply.\textsuperscript{22} Justice Kennedy did seem to suggest, however, that other constitutional protections that relate to fundamental due process might apply.\textsuperscript{23}

Later, in \textit{Boumediene}, Justice Kennedy wrote for the majority, holding the constitutional right to habeas corpus applied to the detainees being held on a military base in Guantanamo Bay, Cuba.\textsuperscript{24} As in his concurrence in \textit{Verdugo-Urquidez}, Justice Kennedy took a practical approach to the extraterritorial application of the Constitution.\textsuperscript{25} In \textit{Boumediene}, Justice Kennedy listed three primary factors relevant to determining the extraterritorial application of the right to habeas corpus.\textsuperscript{26} These factors are: “(1) the [detainees’] citizenship and status . . . and the adequacy of the process through which that status [was determined]; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.”\textsuperscript{27} These factors reject formalism and instead take a pragmatic view of the Constitution’s extraterritorial application.

\textsuperscript{17} Id. at 261.
\textsuperscript{18} Id. at 274–75.
\textsuperscript{19} Id. at 275 (Kennedy, J., concurring).
\textsuperscript{20} The Insular Cases, as they are referred to, are the following cases: Balzac v. Porto Rico, 258 U.S. 298 (1922); Dorr v. United States, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903); Downes v. Bidwell, 182 U.S. 244 (1901).
\textsuperscript{21} Verdugo-Urquidez, 494 U.S. at 278 (Kennedy, J., concurring).
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{25} Id. at 766–71.
\textsuperscript{26} Id. at 766.
\textsuperscript{27} Id.
While this approach is driven by context and lacks the clarity of bright line rules, it does provide some guidance for questions of whether, and to what extent, due process requirements would apply to confessions obtained overseas by government agents using coercive interrogation techniques. In light of these cases, it seems likely that fundamental due process protections against the admissibility of coerced confessions will apply, even though the confessions were obtained outside of the United States. This is particularly true, since these trials would most likely be conducted in the United States. It is much less certain whether the Court-created *Miranda* rights warnings would be required. This is so for a number of reasons, not the least of which is that the Court has never held that *Miranda* warnings are an independent constitutional requirement.\(^{28}\)

One concern of those opposed to trying these suspects in federal court is a “watered down” constitutional effect.\(^{29}\) If these constitutional protections are applied to the confessions and any derivative evidence obtained from these confessions, the evidence will either be suppressed completely, or the courts will have to “water down” certain constitutional protections. The effect will be a risk to the rights of ordinary non-terrorist citizens.

Assuming that, at a minimum, due process prohibitions against coerced confessions would apply to statements obtained while these suspects were being held at overseas locations, what might these cases look like? We can assume from public statements about the interrogation methods used that some of these suspects were subjected to water boarding, sleep deprivation, slapping, shoving, and long periods of isolation and uninterrupted interrogations.\(^{30}\) So what are the courts likely to say about the confessions and derivative evidence that were the products of these interrogations?

Nearly eighty years ago, the Supreme Court in *Brown v. Mississippi*\(^{31}\) invalidated the confessions of three black defendants because those confessions were the product of whipping, hanging, and other physical torture.\(^{32}\) The Court ruled that:

> The due process clause requires “that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil

---

29. *See*, e.g., McNeal, *supra* note 5, at 954.
32. *Id.* at 281–82.
and political institutions.” It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.  

In subsequent cases, the Court looked at other forms of coercion short of physical torture, such as long hours of uninterrupted isolation and interrogation, and ruled that these techniques can also violate due process.  

The Court’s concern is with both the reliability of the confessions that followed from coercion, and that confessions obtained via this degree of coercion violate basic principles of fundamental fairness.  

With these principles as a backdrop, it is difficult to see how a court could admit the statements obtained by water boarding, extreme sleep deprivation, and various other interrogation techniques the government has publicly acknowledged. These techniques seem to be intended to overbear the will of the detainees and to obtain confessions. It can be said of water boarding, extreme sleep deprivation, slapping, pushing, and other such techniques as was said by the Court in Brown, “the use of the confessions thus obtained as the basis for conviction and sentence [would be] a clear denial of due process.”  

This is not, however, the end of the matter. In past years, the Court developed a number of exceptions to excluding evidence so as to allow the admissibility of some evidence even when a suspect’s constitutional rights were violated. How might these exceptions apply to confessions obtained in cases involving the extraordinary rendition of terrorist suspects? The three most likely exceptions the courts may look to apply are: (1) the independent source, (2) inevitable discovery, and (3) the attenuation exception to the exclusionary rule. Each of these exceptions was created by the Court to avoid giving the criminal defendant an undeserved windfall from the application of the exclusionary rule. These exceptions were also created to ensure that law enforcement is not placed in a worse position by the exclusionary rule.

33. Id. at 286 (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).  
35. See generally id.  
37. Brown, 297 U.S. at 286.  
39. See id. at 536–39.  
40. Id. at 537.
than they would have had they complied with the constitutional requirements.41

The first of these exceptions, the independent source exception, states if lawful evidence was obtained independent of the illegal police conduct, that evidence should not be excluded from trial.42 There are two variations to the independent source exception.43 In the first variation, police misconduct leads to certain facts X and Y.44 However, if fact Z is discovered by independent legal methods, courts will say that fact Z was obtained by an independent legal method and not subject to the exclusionary rule.45 In the second variation, both legal and illegal methods led to the same facts.46 So long as the legal methods for discovering the facts are completely separated from the illegal methods, the evidence was obtained by an independent legal source and the evidence will not be excluded.47

The Court has applied this exception to searches conducted in violation of the Fourth Amendment.48 Could it also apply to confessions obtained by coercion and torture? Publicly available information suggests that after a number of terrorist suspects were subjected to extraordinary renditions and coercive interrogations, the government subsequently developed "clean teams" to interrogate these suspects.49 These "clean teams" would re-interrogate the terrorist suspects without using coercion, torture or other questionable interrogating methods but would instead gain the detainee's trust and establish rapport as a precursor to obtaining statements.50 It seems that the government is hoping that some version of the independent source doctrine might apply to statements obtained by these "clean teams."

It is uncertain whether this approach will work. The critical aspect of the independent source doctrine is that the evidence was obtained free of any illegality.51 The government will have a difficult time making this predicate showing since the questioning by these clean teams followed the coercive interrogations and it cannot be said that these statements are free of the initial taint. The Court has addressed this issue in the context of Miranda viola-

41. Id.
42. Id. at 537–38.
43. Murray, 487 U.S. at 537.
44. Id. at 538.
45. Id.
46. See id at 538–39.
47. See id. at 537–39.
48. E.g., Murray, 487 U.S. at 542–43.
50. See id. at 954–55.
51. See Murray, 487 U.S. at 537–38.
tions and held that when the initial violation involved a *Miranda* violation that was not otherwise coercive, the subsequent questioning was free from the initial *Miranda* taint.52

The Supreme Court in *Oregon v. Elstad* was careful to point out that the only constitutional violation was a failure to read the suspect his *Miranda* warnings and that the interrogation was not otherwise coercive.53 In the case of terrorist suspects rendered to third countries where they were tortured and coerced, we have much more than a mere *Miranda* issue. As currently formulated, it is very unlikely that a federal court could apply the independent source doctrine to statements obtained by these so called “clean teams.”

In order for the independent source doctrine to apply to these statements, the doctrine would have to be modified and diluted. Courts might reason that after a certain amount of time has passed, statements that were initially obtained by torture and coercion can be discovered independently so long as that subsequent discovery did not involve coercion. Another possibility is that courts might create some kind of terrorist exception to the normal application of the independent source doctrine. This exception might allow for evidence that may still contain the taint of the initial illegality to be admitted. This might be because the evidence is crucial to the prosecution, and because the nature of the crimes charged are so serious that we simply cannot afford to exclude this evidence from the trial.

Modifying and diluting the independent source doctrine in either of these ways would be problematic because once the doctrine is diluted in this context, what is to prevent the courts from diluting it in other more ordinary cases? There is also the larger problem of creating lesser protections for certain kinds of crimes or criminal suspects before guilt has been established. Such an approach harkens back to a system that was long ago rejected-and rightly so-by our legal system.

Inevitable discovery is another exception to the exclusionary rule.54 Under this exception, courts may admit evidence that was illegally obtained if the government can show it would have inevitably found the evidence by legal means.55 This exception differs from the independent source exception because under the inevitable discovery exception, the government will not be able to show that it actually obtained the evidence by legal means.56 Instead,

53. *Id.* at 318.
55. *Id.*
56. See *id.*

https://nsuworks.nova.edu/nlr/vol35/iss2/1
the government must demonstrate that hypothetically, if given enough time, it would have inevitably discovered the evidence legally.\footnote{See \textit{id}.}

As with the independent source exception, the government will be hard-pressed to show that the evidence obtained by coercive interrogations would have eventually been discovered by legal means, at least as the inevitable discovery exception is currently formulated. This is primarily because the very justification most often used for employing coercive interrogation techniques was the difficulty of obtaining necessary information any other way. Other than getting the suspected 9/11 terrorists themselves to divulge information about past and future plots, it is unlikely the government could demonstrate the evidence contained in the 9/11 terrorist confessions was about to be discovered by lawful means. This is so, based on our intelligence failures leading up to the 9/11 attacks, and the fact that terrorist cells tend to be compartmentalized and isolated.

If the inevitable discovery exception were to work, courts would be forced to modify and most probably dilute the exception. Modifications might come by expanding the time between the illegal discovery and the inevitable discovery. Or courts possibly might find that once the information from a coercive confession is verified, it is possible the government could have put the pieces together without the tainted evidence. Either of these or some other modifications to the exception would be problematic and once used in this context, there is always the possibility that they would be expanded to other types of cases.

The third, and quite possibly the most likely exception to the exclusio-nary rule is the attenuation exception being applied not to the statements obtained by torture and coercion, but to other evidence derived from those interrogations.\footnote{See \textit{Brown v. Illinois}, 422 U.S. 590, 602 (1975).} This differs from the independent source exception because with attenuation there is no legal source for the evidence.\footnote{Wong Sun \textit{v. United States}, 371 U.S. 471, 485 (1963) (quoting Silverthorne Lumber Co. \textit{v. United States}, 251 U.S. 385, 392 (1920)).} It differs from inevitable discovery in that the government is not required to show a potential legal source for the evidence existed.\footnote{Id. at 487.} The rationale for the attenuation doctrine is that at some point, the consequences of the government's illegal conduct are so removed from the evidence that the effect of deterrence is outweighed by the interests in admitting relevant evidence.\footnote{See \textit{Brown}, 422 U.S. at 612 (quoting \textit{Michigan v. Tucker}, 417 U.S. 433, 447 (1974)).}
In *Brown v. Illinois*, the Court noted three factors to help determine if there is sufficient attenuation between the constitutional violation and the evidence which the government seeks to admit. The first factor is the temporal proximity between the illegal conduct and the evidence that is being offered. The second factor considers what intervening circumstances, if any, occurred which might sever the connection between the government’s illegality and the evidence. The third factor is the flagrancy of the government’s conduct.

Applying these factors to the confessions obtained by torture and coercion during extraordinary rendition, one can hardly say the confessions were attenuated from the illegality since the confessions were the very product of the illegality. But one should ask about the information that was subsequently developed from these interrogations. Is it possible that some of this derivative information is so attenuated from the coercion that the loss of this evidence at trial is too high of a cost to pay? It is hard to formulate specific factual situations where the attenuation exception might apply, but it is possible to see how such a potential might exist which would allow the government to offer evidence derived from the confession even if it is not allowed to offer the confession itself. Depending on the quality and quantity of this evidence, the government might determine that it has sufficient evidence to convict these terrorist suspects in federal court. While the government has not made the evidence publicly available it would use if Khalid Sheikh Mohammed and the other 9/11 conspirators were tried in federal court, it is very likely to rely in part on the attenuation doctrine to get this evidence before a federal jury.

Courts applying the attenuation exception have recognized that the application of this doctrine is contextual, requiring a very specific factual application. As a result, there may be less likelihood that if the attenuation exception were applied to the evidence derived from these confessions, it would have a bleed over diluting effect on other cases outside of the terrorism realm. Nevertheless, that concern still exists, particularly in light of the government’s initial decision to ignore basic constitutional protections was

---

63. *Id.* at 603–04.
64. *Id.* at 603.
65. *Id.* at 603–04.
66. *Id.* at 604.
hardly inadvertent. 68 If derivative evidence from these blatant violations can be attenuated, when would the attenuation exception not apply?

III. TRIAL IN MILITARY COURTS-MARTIAL

Prosecuting suspected terrorists who have been subjected to extraordinary renditions, torture, and coercion in federal court presents enormous evidentiary challenges if the government hopes to admit either the evidence of their confessions or evidence derived from those confessions. These challenges may not be insurmountable, but there is a very legitimate concern that courts would have to so dilute some fundamental constitutional protections in order for the evidence to be admitted that basic protections enjoyed by all citizens would be placed at risk. For some, this is the strongest argument against trying these suspects in federal court and instead using some alternate process so that our fundamental protections would remain intact. How might this type of evidence fare in an alternative system, and would fundamental protections outside of the terrorism context remain viable?

Other than federal court, the next most obvious and readily available system would be trial of these terrorist suspects in a military court-martial. Military courts have jurisdiction to try these suspects. 69 Article 18 of the Uniform Code of Military Justice Congress specifically grants jurisdiction to military courts to try violations of the law of war. 70 While there is debate over exactly which offenses fall under the law of war, there is little doubt that murder of innocent, civilian non-combatants is a war crime. As principles and accessories to murder, Khalid Sheikh Mohammed and others who had been held at CIA sites in foreign countries could come under court-martial jurisdiction. How would the admissibility of coerced confessions be treated in this forum?

The protections against self incrimination and the prohibition of coerced confessions in the military follow virtually the same constitutional framework as in federal court. There are no special exceptions or allowances for coerced confessions in the military system. 71 The due process protections are equally applicable. 72 This means that the litigation and resolution of confes-

69. UNIF. CODE OF MILITARY JUSTICE art. 18; 10 U.S.C.A § 818 (West 2009).
70. See UNIF. CODE OF MILITARY JUSTICE art. 18.
71. See Burns v. Wilson, 346 U.S. 137, 140 (1953).
sions obtained by torture and coercion are likely to be the same in the court-martial system as they are in federal court.

Likewise, the application of the exclusionary rule works much the same in military courts-martial as in federal court. Statements that are obtained by coercion are not admissible.\footnote{United States v. Freeman, 65 M.J. 451, 453 (C.A.A.F. 2008).} Like their federal counterparts, military courts also reason that even if a subsequent statement was free of coercion, if the initial statement was the product of coercion, the independent source and inevitable discovery exceptions to the exclusionary rule are not likely to apply.\footnote{See United States v. Gardinier, 65 M.J. 60, 63 (C.A.A.F. 2007), rev’d by 67 M.J. 304 (C.A.F.F. 2009).}

In addition to these protections, military law imposes greater requirements for rights warnings than the requirements imposed by the Court in \textit{Miranda} and subsequent cases. Article 31(b) of the UCMJ requires that any person suspected of committing an offense be warned of his right against self incrimination.\footnote{UNIF. CODE OF MILITARY JUSTICE art. 31(b); see also 10 U.S.C. § 831 (2006).} This protection is broader than \textit{Miranda} warnings in two ways. First, the warnings are not contingent on the suspect being placed in custody. Second, the warnings are a statutory requirement, not a court created protection. The warnings are required by statute, and therefore, courts have much less flexibility to create exceptions to the rule’s requirements than the Supreme Court has done in limiting \textit{Miranda}.

\section*{IV. TRIAL BY MILITARY COMMISSION}

What this means is that those who are concerned that federal courts may prove to be too difficult of a forum in which to try terrorist suspects are not likely to see military courts-martial as a better option, or as good of an option. In order for these confessions and other derivative evidence to be admitted, military courts would have to dilute constitutional protections in much the same way as federal courts.

Creating a completely separate system to try only these terrorist suspects seems, for many, to be the better approach. Because the system would be cabined off from the rest of the criminal justice system, decisions by these courts as to the admissibility of confessions would have no precedential value in the regular court system, so the argument goes.

The Bush administration was never completely clear as to why it initially opted for military commissions.\footnote{See generally News Release, \textit{Defense Department Briefing on Military Commissions Hearings}, U.S. DEP’T OF DEFENSE (Aug. 17 2004, 1:35 PM), http://www.defense.gov/} John Altenburg, who was selected by
the then Secretary of Defense Rumsfeld to serve as the Appointing Authority for the military commissions, articulated the rationale for the military commissions as follows:

[T]he government chose for many different reasons to use a military commission process. It doesn’t mean that the others were wrong. It just means that the government chose on balance, given the nature of the allegations that were being made and I think especially national security interests, that they chose to use the commission process, thinking that, that would meet the balanced needs.\footnote{Id.}

This is hardly a clear and specific explanation of the rationale for military commissions.

The government’s brief in \textit{Hamdan v. Rumsfeld}\footnote{Brief for Respondent, supra note 78, at 44.} likely offers the most specific justification for the military commissions. According to the government, military commissions have a long history under United States and international law.\footnote{Brief for Respondent at 1, \textit{Hamdan v. Rumsfeld}, 548 U.S. 557 (2006) (No. 05-184); Press Release, Kathleen T. Rhem, Am. Forces Press Servs., Dep’t of Defense, Long History Behind Military Commissions (Aug. 19, 2004), http://www.defense.gov/news/newsarticle.aspx?id=25489 [hereinafter Long History behind Military Commissions].} Under United States law, military commissions are the military’s “‘common-law war courts.”\footnote{Brief for Respondent, \textit{supra} note 78, at 45 (quoting Madsen v. Kinsella, 343 U.S. 341, 347–48 (1952)).} These commissions are not bound by an established set of rules or procedure. Rather, the commissions and their procedures are created and “adapted in each instance” to meet the needs of that specific occasion.\footnote{Id. at 45 (quoting Madsen v. Kinsella, 343 U.S. 341, 347–48 (1952)).} Certainly, one of the needs in this specific occasion is the challenge of getting confessions and derivative evidence before a fact finder that was the product of torture and coercion.

Looking to the evolution of the military commissions process from its initial inception in 2002 to its current form in 2009, how the commissions treat coerced confessions has been a particular point of focus. The initial rule regarding the admissibility of evidence stated broadly:

Evidence shall be admitted if, in the opinion of the Presiding Officer (or instead, if any other member of the Commission so requests at the time the Presiding Officer renders that opinion, the

\footnote{Brief for Respondent, \textit{supra} note 78, at 44.\[hereinafter Briefing on Military Commission Hearings].}
opinion of the Commission rendered at that time by a majority of the Commission), the evidence would have probative value to a reasonable person. 82

Under this broad rule coerced confessions, like any other evidence could be admitted and considered if a majority of the commission believed the confessions had probative value. This would be true for derivative evidence as well.

Since this first attempt at military commissions, there have been at least four major modifications. 83 The latest version is reflected in the Military Commissions Act as amended in 2009. 84 This version of the commissions system is unquestionably a much more sophisticated and robust criminal justice system then what was first proposed in 2002. 85 In spite of the clear advancements in the process, even this latest version of military commissions carves out special rules designed to allow for greater admissibility of coerced confessions than would be permissible either in federal court or in a military court-martial. 86 These rules are reflected most clearly in both the act itself and the Manual for Military Commissions, which sets out the specific procedural rules that govern the commissions. 87

Commissions Rule of Evidence 304 titled “Confessions, admissions, and other statements” set out the current rules as follows:

(a) “General Rules . . .

(1) Exclusion of Statements Obtained by Torture or Cruel, Inhumane, or Degrading Treatment. No statement, obtained by the use of torture or by cruel, inhumane, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd)), whether or not under color of law, shall be admissible in a [trial by] military commission . . . except against a person accused of torture or such treatment as evidence that the statement was made.

84. See id.
87. See U.S. DEP’T OF DEFENSE, MANUAL FOR MILITARY COMM’NS (2010) [hereinafter MANUAL FOR MILITARY COMM’NS].
(2) Other Statements of the Accused. A statement of the accused may be admitted in evidence in a military commission only if the military judge finds—

(A) that the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and

(B) that—

(i) the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence; or

(ii) the statement was voluntarily given."

(3) Statements from persons other than the accused allegedly produced by coercion. When the degree of coercion inherent in the production of a statement from a person other than the accused, offered by either party, is disputed, such statement may only be admitted if the military judge finds that—

(A) the totality of the circumstances renders the statement reliable and possessing sufficient probative value;

(B) the interests of justice would best be served by admission of the statement into evidence; and

(C) the statement was not obtained through the use of torture or cruel, inhumane, or degrading treatment as defined in section 1003(d) of the Detainee Treatment Act, Pub. L. 109-148 (2005) (codified at 42 U.S.C. 2000dd(d)).

(4) "Determination of Voluntariness. In determining for purposes of [(a)(2)(B)(ii)], whether a statement was voluntarily given, the military judge shall consider the totality of the circumstances, including, as appropriate, the following:

(A) The details of the taking of the statement, accounting for the circumstances of the conduct of military and intelligence operations during hostilities[;]

(B) [t]he characteristics of the accused, such as military training, age, and education level[; and]
(C) the lapse of time, change of place, or change in identity of the questioners between the statement sought to be admitted and any prior questioning of the accused.”

(5) Derivative Evidence.

(A) Evidence Derived from Statements Obtained by Torture or Cruel, Inhumane, or Degrading Treatment. Evidence derived from a statement that would be excluded under section (a)(1) of this rule “may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection,” unless the military judge determines by a preponderance of the evidence that—

(i) “the evidence would have been obtained even if the statement had not been made [;]” or

(ii) use of such evidence would otherwise be consistent with the interests of justice.

(B) Evidence Derived from Other Excludable Statements of the Accused. Evidence derived from a statement that would be excluded under section (a)(2) of this rule may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection, unless the military judge determines by a preponderance of the evidence that—

(i) “the totality of the circumstances renders the evidence reliable and possessing sufficient probative value; and”

(ii) use of such evidence would be consistent with the interests of justice.88

A close examination of these rules shows that they are designed to allow for admission of the very kind of confession evidence, which is likely to be excluded in federal court and military courts-martial. First, the section provides for a uniform definition of torture, cruel, inhumane, and degrading treatment. Second, it establishes a per se exclusion of confessions obtained by these methods. Of course the devil is in the details, and there continues to

88. The statutory analysis is compiled from MIL. COMM. R. EVID. 304, MIL. R. EVID. 304, and 10 U.S.C. § 948r (2006), with quoted material primarily from the United States Code, Title 10, section 948r and rule 304 MIL. COMM. R. EVID.
be debate over whether specific techniques, such as water boarding and other coercion, fall within this definition.

Coercion that does not rise to the level of torture or cruel, inhumane, or degrading may still be coercive, but the rules do not establish a per se exclusion. If statements taken from an accused were obtained by some lower level of coercion, those statements may be admitted against the accused if the military judge determines the evidence is reliable, probative, and was either obtained in circumstances closely related to combat operations, or was voluntary. Under this rule, it seems unlikely that statements obtained while suspects were rendered to CIA “black sites” in third country sites would be closely related to combat operations.

The real issue is whether such statements are voluntary. In considering whether the statement was voluntary, Rule 304(c) sets out three factors: (1) the context under which the statement was taken; (2) the personal characteristics of the accused/declarant; and (3) the attenuation between the alleged coercion and the statement. The attenuation factor seems to have been created for the express purpose of allowing statements to be admitted and considered even if coercion was involved. As noted above, federal courts and military courts-martial have typically taken a much more restrictive view of attenuation. It is certainly possible and foreseeable that a commissions judge would determine that a statement given under these circumstances might be voluntary in a military commission, even if it would not be voluntary or admissible in federal court or a court-martial.

If the statements were made by someone other than the accused and allegations are made that the statements were coerced, those statements can be admitted if: (1) they are reliable and probative; (2) they were not obtained by coercion that rises to the level of torture, cruel, inhumane, or degrading treatment; and (3) the admission would satisfy the vague standard of being in the interests of justice. This rule potentially allows for greater admissibility of statements than would be permissible in the other two forums.

Finally, the rule defines the standards for admitting evidence that was derived from confessions obtained by torture, cruel, inhumane, or degrading treatment. If derivative evidence is being offered against the accused, the

89. See 10 U.S.C. § 948r(c).
90. The government of course might argue that given the nature of the unique threat posed by terrorism, the battlefield and combat operations are not limited by space and time and thus exist at all times and in all places.
91. See 10 U.S.C. § 948r(d)(1)–(3).
93. See MIL. COMM. R. EVID. 304(b).
94. See id.; see also 10 U.S.C. § 948(r)(a) 2009.
government must show an independent source for the evidence, prove inevitable discovery, or prove that admission of the derivative evidence would be in the interests of justice. 95 It is this “interests of justice” prong that is a significant departure from established practice in federal court and military courts-martial. As detailed above, the independent source and inevitable discovery doctrines are well recognized. 96 Even though these exceptions may be difficult to establish in situations where the evidence was derived from coercive interrogations, that possibility exists. But this second, much broader “interests of justice” basis is not recognized as an independent exception to the exclusionary rule. Since this standard is so vague and malleable, it might be much easier for a judge to admit evidence under this standard that was derived from torture—particularly given the emotionally and politically charged nature of the offenses with which the terrorism suspect is accused.

If the derivative evidence came from coercive statements but did not rise to the level of torture, or cruel, inhumane, or degrading treatment, the admissibility of this derivative evidence is even easier. The evidence need only be relevant and probative, and admission must satisfy the interests of justice. 97 Looking at these rules in light of the challenges for admitting coerced statements and derivative evidence in federal court and military courts-martial, the rules seem to be specifically crafted to get around many of those difficulties.

V. THE FUNDAMENTAL PROBLEM WITH MILITARY COMMISSIONS

One might ask, is this a better approach? It could be argued that creating this separate system to deal with problematic evidence is a better approach because it allows for some form of justice, while not as protective as what would be found in federal court or military courts-martial, but protective enough. One could also argue it has the added advantage of creating a completely separate system, so that there is little risk that any dilution of protections would bleed over into those other forums. But these arguments warrant close scrutiny. It is important to remember the problem of admitting confessions and other evidence obtained by torture and other coercive methods is a problem of our own making. Neither the suspected terrorists nor the crime of terrorism created the dilemma that we now face. Our response to the attacks of September 11th, combined with our

95. See MIL. COMM. R. EVID. 304(b)(3); MIL. COMM. R. EVID. 304(c).
97. 10 U.S.C. § 948(r)(c).
fear that more attacks might follow, led the government to employ extraordinary renditions and harsh interrogation methods. It is critical to keep this point in mind as we consider whether creating a separate system allowing for greater admissibility of this evidence is really the best way to maintain fundamental protections against coercive questioning in the regular criminal justice system.

A system created for the purpose of allowing the government to avoid the consequences that come from obtaining information in violation of basic due process protections is morally suspect. This is even more so for the very reason that the problem was one of the government’s own making. The government had a choice not to go down this road and instead to follow a well-established precedent for the treatment of detainees. In choosing to disregard that option, the government was certainly aware of the risks. Can a system of justice be legitimate when, at its core, it is designed to allow the government to avoid these consequences?

I would argue that a justice system created under this premise is a system that has the greatest potential to dilute fundamental protections not only for suspected terrorists, but for ordinary citizens who will never face the possibility of being tried in a military commission. This is so for several reasons.

Concepts of terrorism, terrorist acts, terrorist organizations, unlawful enemy combatants, unprivileged belligerents, and a host of other terms used to identify the category of crimes and suspects selected for trial by military commission, are not clear or precise. If today members of Al Qaeda fit this category because of the threat they pose to our security, what is to prevent members of a drug cartel operating on the border of the United States from being defined as terrorists at some future date and subjected to trial by military commission as part of a “war on drugs?” The precedent set by these military commissions could certainly allow for that.

Second, there is the risk of establishing a precedent that, whenever the government finds the current protections too restrictive, it will simply create an alternative means of trying defendants. In reality, this is the unfortunate legacy of many past military commissions. While military commissions have a long history in our legal system, it is not necessarily a proud history. Creating a special set of rules for the current situation creates a new incentive for the government to both disregard important protections and then avoid the consequences of those violations.

The government undoubtedly looked to this dubious legacy when it created the initial commission’s procedures. Even though the current round of military commission’s rules are a vast improvement from the first procedures created in early 2002, many of the changes have come only after involvement by the courts and later, by Congress. Even after involvement by
the courts and Congress, in the end many of the commission procedures were created for the very purpose of denying—or at least avoiding—fundamental protections. It is difficult to imagine how a system with such a bad pedigree could not have a corrosive impact on the protections against coerced testimony. The corrosive impact of creating a completely separate system that avoids basic protections is not easy to measure, but it is likely not any less corrosive than some possible dilution of protections that might occur if these cases are tried in federal court or in a court-martial.

In addition to these problems, trying terrorist suspects in military commissions puts this entire legal system in untested waters. Under this system, there is no controlling precedent to turn to. Commission judges are required in the first instance to determine if evidence derived from torture should be admitted in the “interests of justice.” There is no telling what this even means, or how a judge could ever find that such evidence satisfies the interests of justice. Because there is no precedent for these decisions, judges will be on their own, and given the broad standard that they are applying, it is doubtful that these decisions will have consistency or transparency.

Contrast that process with how judges in federal court or a court-martial would decide the admissibility of confessions. These judges have an established body of case law before them on which to base their decisions. Because of that established precedent, these judges will also be less likely to take extreme positions, and because their decisions are subject to review under a well established process, those decisions have the important added value of transparency. All of these protections will help to ensure that basic due process protections will not be stretched to the breaking point, either for those suspected terrorists or for citizens accused of other crimes. No similar limitations or protections exist if these cases are tried by military commission.

VI. CONCLUSION

The government under the Bush administration started down a very troubling path when it opted to engage in extraordinary renditions, torture, and cruel, inhumane, and degrading treatment in hopes of getting confessions from suspected terrorists. Beyond the important moral and legal issues raised by engaging in this conduct, there are the second and third order effects that we are now left to deal with. Whether these effects were fully contemplated or anticipated at the time is unknown, but now, as we debate which forum is best suited for trying terrorism suspects, the problems and challenges have come into focus. If it was not clear before, it certainly is now that introducing evidence obtained by these means can have a corrosive effect on our broader legal system.
When we ask what forum for these trials would have the least corrosive impact on our system of justice, we see the unfortunate, if not unsurprising, answer is that introducing evidence that is a product of coercion in any forum is likely to dilute fundamental protections that all citizens enjoy. One conclusion might be that the problems of admitting confessions and derivative evidence that are the products of torture and coercion are intractable and there is no forum suitable for these cases. That seems to me to be an extreme and unrealistic position. That fact is that, for several reasons, the government and the public in general expect these suspects to be brought to justice. If we are going to try them, then we must ask which forum really is best suited to ensure that they can be brought to justice without jeopardizing fundamental protections against coerced confessions.

At first blush, trying terrorist suspects who have been subjected to torture and other coercive questioning in a separate military commissions system seems like a good answer. It compartmentalizes these cases and arguably protects against compromises which are made in this system from bleeding over to more mainstream cases. Closer examination of this issue leads to a different conclusion. First, the category of who can be tried by military commission is hardly airtight. Today's criminals can easily become tomorrow's terrorists if the government sees the threat as serious enough to broaden the category. A system so subject to manipulation is not protective of fundamental due process rights. There is also the problem that those making the decisions on questions of admissibility in the military commissions system are without the guidance of precedent. They are left to their own determinations to apply concepts so broad as to lack any real meaning. This does not bode well for the kind of careful and reasoned opinions we have come to expect from judges in our criminal justice system.

More corrosive than this is the illegitimacy of a system that was created for the purpose of watering down fundamental protections. The decision to torture and coerce confessions in order to obtain evidence was wrong. These are interrogation methods that have long been rejected, and rightly so, in our system of justice. The errors in resorting to these discarded methods should not be compounded by creating a system that specifically seeks an end-run around basic protections in order for this evidence to be admitted. A system such as this lacks fundamental legitimacy. It is a system that puts the rights of everyone at risk.

Those who argue that we need to move these cases to military commissions in order to protect the rights of ordinary citizens ignore these even greater risks of corrosion and dilution. In other words, moving these cases to military commissions as presently constituted would cause the very result
that the proponents of that choice claim they want to prevent. On this basis, military commissions are not the better option.

Introducing or attempting to introduce coerced confessions or derivative evidence in federal court is problematic. As noted above, even if the court applied exceptions to the exclusionary as currently formulated, it will be difficult for much of this evidence to be admitted. Some accommodations will likely have to be made if this evidence is to be considered. While creating such accommodations is not ideal, it is certainly less extreme than completely revamping a justice system for the express purpose of eliminating fundamental protections altogether.

Even if accommodations are made to admit this evidence in federal court, there are added protections within the system that will limit the corrosive effects of these accommodations. Federal court proceedings are more transparent than the proceedings we have thus far seen from military commissions. By transparency, I am referring to both the courtroom procedures and the development of the evidentiary and other rules governing those procedures. I also include the rulings and opinions of federal court judges. Because of the transparency of both the process and the decisions, federal judges are bound to more clearly identify and explain when and why they might be modifying established protections found in the exclusionary rule in order to admit certain evidence. Moreover, consistency and following established precedent are critical aspects of judicial decision-making. Transparency and consistency thus serve as important checks that are likely to limit any diluting and corrosive impacts that might otherwise occur from trying these terrorist suspects in federal court.

In addition to these protections, there are multiple levels of review of any trial court’s decisions and rulings. This review process also helps to ensure consistency, as well as prevent trial courts from ignoring or diluting the law in order to reach a desired outcome.

These protections have a double benefit. First, in the trial of the actual terrorist suspects, these protections will limit the possible corrosive impacts from occurring. Second, in other, more ordinary trials not involving terrorist suspects, these checks will limit any accommodations made under the unique facts of a terrorist case from encroaching into these more ordinary cases.

These various structural protections, anchored in the values of consistency and transparency, would not be nearly as robust in a military commissions system created for the express purpose of watering down fundamental rights. Put simply, trial in federal court is preferable because the dilution of rights is less likely in that system than it would be in a military commissions system.
PROVIDING ATTORNEYS FOR CHILDREN IN DEPENDENCY
AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS IN
FLORIDA: THE ISSUE UPDATED

MICHAEL J. DALE*
LOUIS M. REIDENBERG**

I. INTRODUCTION ............................................................................................................. 305
II. STATEMENT OF THE PROBLEM ................................................................................. 311
III. OVERVIEW OF RECENT CHANGES IN FLORIDA ................................................ 314
   A. Recent History ............................................................................................................ 314
      1. The Bar Commission ......................................................................................... 318
      2. The Blue Ribbon Panel ..................................................................................... 319
      3. Privatization ....................................................................................................... 320
      4. The 2010 Bar Bill ............................................................................................... 322
   B. The Guardian Ad Litem Program ........................................................................... 323
   C. The Department of Children and Families and Its Lawyers ............................ 332
   D. Counsel for Parents ............................................................................................. 336
   E. Counsel for Children ............................................................................................. 338
IV. ETHICAL ISSUES IN THE FLORIDA SYSTEM ....................................................... 340
V. THE THINKING OUTSIDE FLORIDA ....................................................................... 346
   A. Client-Directed Representation ........................................................................... 347
   B. Best Interest Representation ................................................................................ 348
   C. Recent Colloquia and Model Acts ....................................................................... 349
VI. MAKING THE CASE FOR INDEPENDENT LEGAL REPRESENTATION
    IN FLORIDA .............................................................................................................. 350
VII. CONCLUSION ............................................................................................................ 362

I. INTRODUCTION

Florida’s system for providing protection and safety to children in the State’s child welfare system has changed over the past decade. Regrettfully, the changes do not appear to have had a significant impact in two areas:

* Professor of Law, Nova Southeastern University Law Center.
** Member of the Bar of the State of Minnesota.

The authors thank research assistants Valerie Barton, Jessica Chiappone, Keri Joseph, Brent Reitman, Stacie Schmerling, Stephanie Taylor, and Daniel Weiler, as well as colleagues law librarians Rebecca Rich and Mitchell Silverman, Esq., Professor Michael Flynn and Legal Secretary Jesse Monteagudo for their assistance in the preparation of this article. The authors dedicate this article to the memory of Tracey K. McPharlin.
increasing the safety and protection of children in the system and providing children with independent attorneys to advocate on their behalf. Investigations, lawsuits, grand juries, amendments to court rules, and newspaper ar-
Articles continue to demonstrate the myriad failures in the Florida system.\(^4\) Two notorious examples highlight the shortcomings: the cases of the foster child, Rilya Wilson, who disappeared in 2001, and Gabriel Myers, who was found dead by hanging in his foster home in 2008. Rilya Wilson’s disappearance produced articles around the country and a detailed investigation which has exposed serious flaws in Florida’s child welfare system.\(^5\) The Wilson case produced legislation, the Rilya Wilson Act, which requires coordination between the Department of Children and Families (DCF) and community-based providers with local school readiness coalitions and licensed early education child care providers.\(^6\) The Act also dramatically increased the prominence and significance of the role of the Guardian Ad Litem Program (GAL Program).\(^7\)


\(^6\) See Abby Goodnough, Woman Accused of Killing a Missing Child in Florida, N.Y. TIMES, Mar. 17, 2005, at A24; see also BLUE RIBBON PANEL REPORT, supra note 2.

\(^7\) FLA. STAT. § 39.604(3) (2010).

\(^8\) See BLUE RIBBON PANEL REPORT, supra note 2.
Seven-year old Gabriel Myers was found hanged in the bathroom of the foster home in which he lived while being administered a number of psychotropic medications.9 His death resulted in a DCF investigation, which produced a report containing 107 findings related to shortcomings in the child welfare system’s approach to children with mental health medication issues.10 The central finding in the report was: “It is clear that, throughout his


10. GABRIEL MYERS WORK GRP., FLA. DEP’T OF CHILDREN & FAMILIES, REPORT OF GABRIEL MYERS WORK GROUP ON CHILD-ON-CHILD SEXUAL ABUSE 3 (May 14, 2010) [hereinafter GABRIEL MYERS REPORT MAY 2010], available at http://www.dcf.state.fl.us/initiatives/GMWorkgroup/docs/Gabriel%20myers%20COC%20report%20May%2014%202010.pdf. First, it does not appear in the report that an expert in suicidology was an active resource. This is a particularly significant shortcoming because research discloses that the number of suicides by children ages 5–7 in 2007 in the United States was 2 out of a population of approximately 12 million. WISQARS Injury Mortality Report, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/injury/wisqars/fatal.html (last visited Apr. 20, 2011) (Follow “Fatal Injury Reports 1999–2007” hyperlink; then select “suicide” and “custom age range 5 to 7”; then follow “submit request” hyperlink). See also SUICIDE PREVENTION CTR., WHAT FOSTER PARENTS CAN DO TO PREVENT SUICIDE (Dec. 2010), http://www.sprc.org/Featured_resources/customized/pdf/FosterParents.pdf. Second, additional findings were that: “While the child’s [GAL] [is] responsible for ascertaining and informing the court of the child’s position, it is not clear that this is happening [on a regular and consistent basis]. Furthermore, not all [foster] children . . . have a [GAL].” GABRIEL MYERS WORK GRP., FLA. DEP’T OF CHILDREN & FAMILIES, REPORT OF GABRIEL MYERS WORK GROUP 12 (Nov. 19, 2009) [hereinafter GABRIEL MYERS REPORT NOV. 2009], available at http://www.dcf.state.fl.us/initiatives/GMWorkgroup/docs/GabrielMyersWorkGroupReport082009Final.pdf.

The Work Group heard a number of advocates express their view that the court should appoint an attorney for each child whose mental health needs suggest use of psychotropic medication. BERNARD P. PERLMUTTER, THE ROLES OF THE CHILD’S ATTORNEY AD LITEM AND THE CHILD’S PERSPECTIVE IN PSYCHOTROPIC MEDICATION HEARINGS 4–5 (Aug. 5, 2009), available at http://www.dcf.state.fl.us/initiatives/GMWorkgroup/docs/meeting080509/BP_GMYERS_PRES_20090810113031.pdf. Further, many proffered that the best practice is for all children in dependency to be appointed an attorney (with sufficient training and experience to provide meaningful and effective assistance of counsel). See id. at 12. The problem of lack of counsel is magnified when one reviews Florida Administrative Rule 65C-35.005 entitled “Child Involvement in Treatment Planning.” FLA. ADMIN. CODE ANN. r. 65C-35.005 (2010). Under the regulation, the only way a child may obtain counsel is if “a child of sufficient age, understanding, and maturity declines to assent to the psychotropic [drugs]” or “[w]henever the child requests the discontinuation of the psychotropic medication, and the prescribing physician refuses to order the discontinuation . . . .” Id. r. 65C-35.005(3)(b), (4). In both situations, the matter must be referred to a DCF CLS lawyer who shall request an attorney be appointed. Id. The ethical issues this raises for lawyers representing DCF should be obvious.
placement in foster care, and although he was attended by many well-meaning professionals, Gabriel Myers was ‘no one’s child’. . . . No individual or agency became a champion to ensure that he was understood and that his needs were identified and met in a timely manner.’’ It appears that Myers had not been appointed an independent attorney, although two different individuals had acted as his guardian ad litem (GAL). 

Two years earlier, the Florida Statewide Advocacy Council reviewed 1180 DCF family files and determined that 652 or more of the children were, or had been, on psychotropic medications. This information was filed with the Supreme Court of Florida and resulted in an amendment to the Florida Rules of Juvenile Procedure, requiring hearings for children receiving such medication. However, that number appears to have increased. In a non-final report in August 2010, DCF reported approximately 2583 children from ages zero to seventeen were being prescribed psychotropic medications.

The Florida media also regularly reports on other deaths and injuries in the An effort to correct the perceived psychotropic medication issue in the Florida Legislature, in the Spring of 2010, failed. S.B. 1860 2010 Leg. (Fla. 2010) (died in Comm. on Children, Families, & Elder Affairs Apr. 30, 2010); H.B. 1567 2010 Leg. (Fla. 2010) (died in Health Care Servs. Policy Comm. Apr. 30, 2010); Grimm, supra note 9; Carol Marbin Miller & Marc Caputo, Effort to Protect Children from Overmedication Fails, MIAMI HERALD, Apr. 30, 2010, at 7B.

12. See id. at 5–6. It is significant that the Myers tragedy arose despite the presence of two GALs, given that the 2002 Blue Ribbon Report on the Rilya Wilson matter found implementation of a robust GAL Program to be central to the correction of children’s foster care problems. See BLUE RIBBON PANEL REPORT, supra note 2. Inexplicably, the Gabriel Myers report contains no discussion of the role of the GALs in the case. The Myers report also recommends that DCF “[i]dentify and hold accountable a champion, normally the case manager, to ensure the child is treated as a prudent parent would treat their own child.” GABRIEL MYERS REPORT NOV. 2009, supra note 10, at 6 (emphasis added). This irony is now compounded by the fact that under the current contract between DCF and the private lead agencies in the Florida child welfare system, legal decision making rests with DCF CLS lawyer and not with the case manager. See Contract between Fla. Dep’t of Children & Families and Child & Family Connections, Inc., 45 (July 1, 2009) [hereinafter Contract] (on file with Nova Law Review).

Published by NSUWorks, 2011
child welfare system.16 More recently, Florida has moved toward a reduction of the number of children in foster care.17 However, Florida still ranks low in comparison to other states in national surveys of child welfare services.18

Most importantly for the discussion here, since 2000 there has been almost no change in the system of independent legal representation of children in child welfare proceedings in Florida.19 Children in Florida still have no absolute right to an independent attorney as a matter of case law precedent, state statute, or public policy.20 Thus, independent legal representation takes place, if at all, on an ad hoc basis if the trial judge so decides.21 This is the case despite the fact that the Florida GAL 2009 Annual Report states in the first paragraph on the first page that the child’s “champion is the GAL Program. The Program is uniquely independent. Even as the volunteer learns the child’s wishes, and . . . express[es] [his or her] wishes to the court, the Program is not bound by [those] wishes. Our only obligation . . . is to advocate for the child’s best interest.”22


20. See FLA. R. JUV. P. 8.217; In re D.B., 385 So. 2d 83, 87 (Fla. 1980); Dale, Providing Counsel, supra note 2, at 770.


22. FLA. GUARDIAN AD LITEM PROGRAM, FLA. GUARDIAN AD LITEM 2009 ANNUAL REPORT 2 (2009) [hereinafter GAL 2009 REPORT], available at http://www.guardianadlitem.org/documents/GAL-2009AnnualReport.pdf (emphasis added). This statement is particularly ironic because in November the report of the Gabriel Meyers work group stated that what was needed for each child was “a champion.” GABRIEL MYERS REPORT NOV. 2009, supra note 10,
On the other hand, counsel for the parents employed by the Office of Criminal Conflict and Civil Regional Counsel (Office of Regional Counsel), DCF, and the State of Florida's GAL Program have each dramatically expanded and changed since 2000. In addition, an inexplicable oddity in Florida is that the GAL Program has been statutorily named as a free-standing independent party in a dependency and termination of parental right (TPR) case with attorneys of its own, separate from the child who, although unrepresented by an attorney, is also a party. The child is, therefore, the only unrepresented party in a dependency proceeding. As this article shall demonstrate, the Florida system is fundamentally flawed. It is a gerry-rigged scheme that produces irreconcilable ethical conflicts for the attorneys working in the system, is pragmatically unworkable, and most importantly, indefensibly denies children the right to an independent attorney to represent them.

This article begins with a statement of the problem and then provides an overview of changes in the Florida child welfare system since 2000. It focuses on changes in the approach to legal representation in the GAL Program, DCF, and the system of providing attorneys for parents now known as the Office of Regional Counsel. It then reviews the irreconcilable conflicts, confusion, and serious ethical constraints faced by the attorneys practicing in the system; reviews the current professional thinking as to the role of attorneys for children outside the State of Florida; discusses Florida constitutional principles that entitle children to attorneys; and then concludes by arguing in favor of providing independent attorneys for all children in Florida from the beginning of a dependency case through TPRs.

II. STATEMENT OF THE PROBLEM

The right to an attorney is one of America’s most basic civil, legal privileges. Yet, children in Florida have no absolute right to independent attorney

at 6. Myers had two GALs whom the GAL Annual Report says are “champion[s]” for the child. See id.

STANDARDS OF OPERATION 23. See FLA. STAT. § 39.01(51) (2010). Florida is one of only three states that uses this approach; the others are Ohio and Oklahoma. See OHIO REV. CODE ANN. § 2151.281 (2010); OKLA. STAT. tit. 10A, § 1-4-306 (2010). The Florida scheme would be impossible in the Federal Court system because of the case and controversy clause of the United States Constitution, Article III, Section 2, Clause 1. See Muskrat v. United States, 219 U.S. 346, 351, 353–55 (1911) (citing U.S. Const. art. III, § 2, cl. 1); see also Flast v. Cohen, 392 U.S. 83, 96 (1968).

24. FLA. STAT. § 39.01(51).

representation in dependency and termination of parental rights cases. The majority of child advocate attorneys argue that attorneys for these children should represent their clients' "expressed wishes" rather than "best interest" and that children are entitled to be heard in court. Most representation and determinations under a best interest model "take[] place without the child being heard, without the necessary resources, and without the trained, qualified investigation and deliberation that would best serve the child."

A child's attorney "provides legal services for a child and... owes all of the same duties that are due [to] an adult client, including undivided loyalty, confidentiality, diligence, conflict of interest, communication, duty to advise, and competent representation." Under the traditional, client-directed, or expressed wishes model, the attorney-client evidentiary privilege applies. Attorneys are governed by ethics rules that impose a duty includ-

27. Id. at 17.
ing, but not limited to, maintaining the child’s confidences, counseling, and advising the client.\textsuperscript{31} The attorney abides by the child client’s expressed wishes concerning the objectives of the representation, counseling him or her on those objectives.\textsuperscript{32} If an attorney reasonably believes that the child’s expressed wishes conflict with the child’s legal interests, including being contrary to the child’s best interests, and the attorney has been unable in his or her efforts to successfully counsel and advise the client, and a child cannot adequately act in the child’s own interest as described in the Florida Rules of Professional Conduct, then as a last step the attorney may seek to have a GAL appointed to advocate for the child’s legal interests.\textsuperscript{33} Alternatively, an attorney may ethically withdraw from representation.\textsuperscript{34} The American Bar Association (ABA) has made it clear that a “nonlawyer guardian ad litem cannot and should not be expected to perform any legal functions on behalf of a child.”\textsuperscript{35}

According to a 2009 report by the Washington, D.C. based nonprofit organization First Star, 63% of the states mandated the appointment of attorneys for the child.\textsuperscript{36} Fifty-one percent of the states mandated that the child’s attorney, when appointed, serve in a client-directed capacity.\textsuperscript{37} Since First Star’s first report in 2007, seventeen states improved their state laws governing children client-directed legal representation for child victims in dependency court and foster care proceedings.\textsuperscript{38} According to First Star, nationally between 2007 and 2009 the number of states providing independent attorney representation to children increased.\textsuperscript{39} Florida was not among them.\textsuperscript{40} In

\begin{itemize}
\item \textsuperscript{31} MODEL RULES OF PROF'L CONDUCT R. 1.4, 1.14 (2003).
\item \textsuperscript{33} Federle, \textit{supra} note 32, at 106. ABA Model Rule 1.14(b) provides greater guidance to the lawyer. \textit{See} MODEL RULES OF PROF'L CONDUCT R. 1.14(b). It says: “[w]hen the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including . . . appointment of a [GAL].” \textit{Id.}
\item \textsuperscript{34} MODEL RULES OF PROF'L CONDUCT R. 1.16(b).
\item \textsuperscript{35} AM. BAR ASS‘N, STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES 2 (1996) [hereinafter ABA STANDARDS OF PRACTICE], available at http://www.americanbar.org/content/dam/aba/migrated/family/reports/standards_abuse_neglect.authcheckdam.pdf.
\item \textsuperscript{36} NATIONAL REPORT CARD, SECOND EDITION, \textit{supra} note 26, at 8.
\item \textsuperscript{37} \textit{Id.}
\item \textsuperscript{38} \textit{Id.} at 9.
\item \textsuperscript{39} \textit{Compare} NATIONAL REPORT CARD, FIRST EDITION, \textit{supra} note 28, at 13, with NATIONAL REPORT CARD, SECOND EDITION, \textit{supra} note 26, at 8.
\end{itemize}
fact, in First Star’s first report, Florida received a grade of an F.\textsuperscript{41} Then, in First Star’s second report, Florida again received an F.\textsuperscript{42}

As things stand now, the Florida system is structured in a manner that provides no attorney for a child, but does provide GAL Program representation of the child’s best interest in dependency proceedings through a separate party, the GAL Program, with whom the child has no legal relationship recognized under American law.\textsuperscript{43}

III. OVERVIEW OF RECENT CHANGES IN FLORIDA

A. Recent History

The Florida Legislature has declared “that the health and safety of children [is] of paramount concern” in the administration of child welfare services.\textsuperscript{44} However, when it comes to the representation of children in the dependency system, Florida law establishes a system of competing interests between what is best for the child and the child’s legal rights. Florida law provides that children in foster care have a GAL who is a separate party.\textsuperscript{45} As a matter of practice, the GAL Program is appointed as the party to represent the child’s best interests.\textsuperscript{46} It then assigns a GAL, usually a volunteer layperson, for the child.\textsuperscript{47} The GAL Program then also assigns a staff

\begin{itemize}
\item \textsuperscript{40} NATIONAL REPORT CARD, FIRST EDITION, supra note 28, at 33.
\item \textsuperscript{41} Id.
\item \textsuperscript{42} NATIONAL REPORT CARD, SECOND EDITION, supra note 26, at 46.
\item \textsuperscript{43} FLA. STAT. §§ 39.402(8)(c), .822(1) (2010); FLA. R. JUV. P. 8.215; In re D.B., 385 So. 2d 83, 87 (Fla. 1980). In effect, under Florida law one represents another party. See FLA. STAT. §§ 39.402(8)(c), .822(1); FLA. R. JUV. P. 8.215; In re D.B., 385 So. 2d at 87.
\item \textsuperscript{44} FLA. STAT. § 39.4085.
\item \textsuperscript{45} Id. § 39.01(51); FLA. R. JUV. P. 8.215.
\item \textsuperscript{46} FLA. STAT. § 39.4085(20). The term “attorney ad litem” (AAL) is rarely used nationally. It is defined in Florida as “an attorney who has completed any additional requirements as provided by law. The AAL shall have the responsibilities provided by law.” FLA. R. JUV. P. 8.217(c). The attorney is appointed “to represent the child in any proceeding.” FLA. R. JUV. P. 8.217(b); see, e.g., TEX. PROB. CODE ANN. § 34A (West 1956). In Arkansas, attorneys ad litem represent children in abuse and neglect cases. See Administrative Order No. 15, ARK. JUDICIARY, https://courts.arkansas.gov/adlititem/public/order_15.cfm (last visited Apr. 20, 2011).
\item \textsuperscript{47} See FLA. R. JUV. P. 8.215(b)–(c).
\end{itemize}
attorney to represent it. An “attorney ad litem” (AAL) may only be appointed, in the discretion of the court, to represent the child’s legal interests. As the following discussion illustrates, children are rarely appointed an independent attorney.

Since 2000, the argument in Florida over what kind of “representation” dependent children should have in dependency proceedings, GALs, AALs, or a combination of both, has been the subject of sharp debate. As one judge who sat as a member of the Florida Bar Commission on the Legal Needs of Children Representation Subcommittee said in 2001, while GALs are required to advocate the child’s wishes to the court, they “are duty bound to recommend what [is in the] best [interest of] the child, not necessarily what the child wants.” Some juvenile court judges in Florida oppose across the board independent representation of children by attorneys. One judge has called it “harmful to children,” unnecessary, and too expensive to be feasible, and argued that only some children, not all, need an AAL. Another judge has stated that she “does not believe that every child in her courtroom needs an attorney.”

One judge explained that “a lawyer is bound by the attorney-client privilege to keep the secret as the client wishes. But a GAL can tell the child’s secret without violating any ethical canons—and is actually prohibited from advocating contrary to the safety of the child.” This judge argued further that under the lawyer-driven model, “lawyers either violate their ethics or hurt children.” The judge also said, “Where we...

48. Id.
49. Id. at 8.217(a), (b).
51. Pudlow, supra note 50; see also Fl.A. R. Juv. P. 8.215(c)(3).
52. Pudlow, supra note 50.
53. Id.
54. Id.
56. Pudlow, supra note 50.
57. Id. While provocative, these statements demonstrate a fundamental failure in understanding lawyers’ ethics. For a discussion of this topic, see infra Part IV.
NOVA LAW REVIEW

316

differ is when it comes to the best interest of the child. If the model is attorney-driven, you cannot have best interest. 58 Another judge has said that lawyers representing children will argue that their client should get a tattoo. 59

In an earlier article, one of the authors of this article argued that the best interest of the child versus the child's stated interest is a "red herring," and that attorneys should be hired in every case. 60 Both authors of this article support this proposition. Finally, at one time an attorney who lobbies the Legislature to fund advocacy programs stated, "Every child needs a well-trained lawyer. . . . We can't pick and choose which children should be saved." 61

Over the past decade, public policy decisions have resulted in expansion of the GAL Program in Florida rather than instituting a system of independent attorneys for children. When it amended Chapter 39 to establish the Statewide GAL office in 2003, the Legislature found "that the Governor's Blue Ribbon [Panel] concluded that 'if there is any program that costs the least and benefits the most, this one is it,' and that the volunteer is an 'indispensable intermediary between the child and the court, between the child and DCF." 62

These legislative findings are suspect for a number of reasons. First, research discloses no objective documentation supporting the Blue Ribbon Panel's findings. 63 Second, at the time the Legislature relied upon the Blue Ribbon Panel findings to increase funding, 64 the GAL Program consisted almost exclusively of volunteers, and its funding was limited. Today, the Legislature funded budget of the program, with a large full-time staff, exceeds $30 million. 65 Third, at the time the Legislature relied upon the Blue Ribbon Panel findings, there was no other program existing in Florida with which to compare the GAL Program in terms of benefits and costs. Finally,

58. Id.
59. Blankenship, supra note 50.
60. See Dale, Providing Counsel, supra note 2, at 813.
63. The Panel appears to have based its opinion upon the statements of a number of witnesses who urged the Panel to place GALS among its highest priorities and statistics in DCF District 11. See generally BLUE RIBBON PANEL REPORT, supra note 2.
64. FLA. STAT. § 39.8296(1)(c).
65. Research discloses various other sources of statewide GAL Program income in individual counties from, for example, a series of foundations, such as Voices for Children, and in kind contributions from the counties. A detailed discussion of GAL funding follows at Part III(B) infra.
the Legislature made no independent findings to support its conclusion, perhaps because there is very little professional literature supporting the effectiveness of GALs or CASAs in child welfare cases.66

In fact, to date the Legislature has not mandated, nor has there been, an objective in-depth study of the effectiveness of the GAL Program; still, the debate continues. The following discussion summarizes the ongoing debate about attorneys for children in Florida.

1. The Bar Commission

In 2002, the Florida Bar Commission on the Legal Needs of Children, a committee composed of a variety of child advocates, issued a report with recommendations to improve Florida's system of child representation in court proceedings. The Commission found that “[c]hildren should have Legal Counsel and/or a [GAL] represent them in court whenever their interests may be at stake” in child abuse, neglect, and TPR cases. While judges should maintain discretion to appoint counsel for children in certain proceedings, the Commission advocated that judges “shall” appoint legal counsel “[i]n cases where the state is seeking commitment or placement of a dependent child, for longer than 24 hours” in a staff-secure or physically secured facility.

“Children in court proceedings have specific legal needs and rights, and often they are the only unrepresented party,” the Commission said. “Children are entitled to the same zealous advocacy adult clients expect of their lawyers. Yet, too often, children come to court powerless, with no one representing them at all . . . . Judges are left to make life-altering decisions about a child without sufficient information to back up sound decisions.”

“Florida needs to catch up with the majority of states that protect children by providing them counsel. . . . [It is] the only way that Florida can protect against tragedies in the lives of children in foster care, and shorten the amount of time they stay in care.”

In 2002, the Florida Bar Commission on the Legal Needs of Children’s Representation Subcommittee supported Senate Bill 686 to provide attorneys for abused and neglected children in dependency proceedings with the goal that “no child go unrepresented in court.” The bill would have increased the GAL Program budget by $12 million but it was pulled before it was heard by the House. Judge Kathleen Kearney, former secretary for DCF

67. See generally Legal Needs of Children, supra note 61.

68. Id. at 10.

69. Id. at 11.

70. Id. at 6.

71. Id. at 5; Thomas Tryon, Kids in Court: Into the Lion’s Den, Without Legal Counsel, Sarasota Herald Trib., Aug. 4, 2002, at F1 (quoting Legal Needs of Children, supra note 61, at 5).

72. Carol Marbin Miller, Lawyers Sought for Kids in State Care, Miami Herald, Nov. 21, 2001, at 11B (quoting Howard Talenfeld, a Broward County child advocate).

73. Jan Pudlow, Bill to Double GAL Budget Down but, Maybe, Not Out, Fla. Bar News (Apr. 15, 2002), http://www.floridabar.org/DIV/COM/JN/JNNews01.nsf/Articles/7BCE5713787C8BB085256B950049EE6A.

74. Id.
and a former juvenile court judge, was an opponent of the bill and was said to be “of the opinion there are too many lawyers in the courtroom right now.” She was quoted as saying, “There are some areas of the country where every child gets an attorney and in the fight in court, the child’s well-being, safety, and permanency get lost. It ends up not being about the child, but about who wins.” Judge Kearney felt that the best way to represent children is through GALs and that attorneys should only be appointed at the judge’s discretion.

Even though Senate Bill 686 did not pass in 2002, the GAL Program budget was increased by $7.5 million. $1.7 million of this funding was used to finance the Ninth Judicial Circuit AAL Project in Orange County, where GALs were appointed in every case and attorneys were appointed on a case-by-case basis in the judge’s discretion. Of the $7.5 million for legal representation for children, ‘only about $3 million of that [was] actually ear-marked for attorneys, and the majority of that [was] ear-marked for attorneys for the GAL Program.’ The program was discontinued after one year.

2. The Blue Ribbon Panel

In 2002, Governor Jeb Bush convened a Blue Ribbon Panel on Child Protection to investigate Florida’s child welfare system after the disappearance of Rilya Wilson. The five-year-old disappeared from Florida’s foster care system for sixteen months before it was discovered that she was missing, and that she had neither a GAL nor an attorney. At the time of her

75. Id.
76. Id.
77. Id. This statement appears to be at odds with the New York experience where all children have been provided with independent counsel since the late 1960’s. Merril Sobie, The Child Client: Representing Children in Child Protective Proceedings, 22 Touro L. Rev. 745, 752 (2006); Erik Pitchal, Children’s Constitutional Right to Counsel in Dependency Cases, 15 Temple Pol. & Civ. Rts. L. Rev. 663, 665 (2006).
79. Id.
80. Id.
83. Blue Ribbon Panel Report, supra note 2; Miller, supra note 82.
disappearance, it was estimated that 50% of dependent children did not have a GAL.84 The Blue Ribbon Panel also found DCF to be “‘underfunded, understaffed, underappreciated’ and ‘overworked . . . overburdened, overwhelmed.’”85 It found that Florida’s child protection system had been through twenty-two revisions in thirty-three years.86

“[T]he panel recommended that the Florida Legislature set among its highest priorities the full funding of the [GAL] Program [so] that every child under [DCF supervision] would have a GAL.”87 The Legislature then reiteratrd the unsupported statement of the Governor’s Blue Ribbon Panel that “‘if there is any program that costs the least and benefits the most, this one is it,’ and that the GAL volunteer is an ‘indispensable intermediary between the child and the court, between the child and DCF.’”88 As noted, research discloses no documentary support for this statement.89

Since its inception, the GAL Program had been supervised by court administration within the circuit courts.90 However, this was perceived as a conflict of interest because the program was being supervised by judges before whom the GALs were to appear.91 As a result of the Blue Ribbon Panel’s finding, a Statewide GAL Office was created within the Justice Administrative Commission in 2004, in order to “provide a statewide infrastructure to increase functioning and standardization among the local programs currently operating in the [twenty] judicial circuits.”92

3. Privatization

In the late 1990’s the Florida Legislature enacted legislation, entitled “PRIVATIZATION,” championed by then-Governor Jeb Bush, to turn around the foster care services system in Florida which had been tarnished by scandal for many years.93 The legislation expressed the specific intent

84. Miller, supra note 82.
86. Id.
87. GAL 25 YEARS OF CHILD ADVOCACY, supra note 82, at 14.
89. See supra note 65, and accompanying text.
91. Id.
92. Id. § 39.8296(2), (1)(d).
that DCF privatize or outsource (i.e., contract with competent community based agencies) “the provision of foster care and related services statewide.”94 The legislation provided a three year time period within which to phase in and accomplish “privatization” statewide, beginning on January 1, 2000.95 The process was intended to transform a child welfare system that had been monopolized by government and charities through combining and outsourcing foster care and related services to service agencies with increased local ownership of both service delivery and design.96 Services were to be provided by not-for-profit-lead agencies that developed and managed comprehensive, community based-networks of providers who were equipped to deliver all services and supports necessary to meet the needs of child victims and their families.97 Protective investigation remained with the state or a few sheriff departments.98

The lead agencies were to have the capacity to carry out a number of tasks, including: “family preservation, independent living, emergency shelter, residential group care, foster care, therapeutic foster care, intensive residential treatment, foster care supervision, case management, postplacement supervision, permanent foster care, and family reunification.”99 Safety of children was to be, at all times, the foremost concern.100 The impact of this change as it relates to the need for attorneys for children is clear. First, an outside private agency with different perspectives and leadership impacts the quality and quantity of care children receive in foster care. It is one step removed from DCF, and accountability becomes more attenuated.

Second, the standard DCF contract with lead agencies provides that Children’s Legal Services (CLS), which defines itself as a “statewide law

---

94. FLA. STAT. § 409.1671(1)(a) (2010).
95. Id. The label describing this process was also changed by the 2000 Florida Legislature from “privatization” to “community based child welfare” and then thereafter changed to “community based care.” For a discussion of the underlying reasons for the changes, see Wolfe, supra note 93.
97. Id.
98. FLA. STAT. § 39.3065 (2010).
99. Id. § 409.1671(1)(a).
firm,”101 has all “legal decision-making authority pertaining to any dependency and termination of parental rights proceeding from inception to completion.”102 This scheme adversely affects children because it places traditional child welfare party decision-making in the hands of a non-party clientless state-wide law firm within the Department—CLS.103 Put differently, it is as though CLS lawyers are representing themselves.104

4. The 2010 Bar Bill

Beginning in 2008, the Legal Needs of Children Committee of the Florida Bar began developing proposed legislation to provide counsel to children in some dependency and TPR cases.105 Relying on the work of this Committee, the Florida Bar through its then president announced its strong support for the Committee’s Bill.106 The 2010 bill provided that children would be represented by attorneys in certain articulated cases, including children who have been in and out of home care for more than two years and in whose cases no TPR petition has been filed, children with developmental disabilities, and children faced with psychotropic medication.107 Significantly, it did not include children when they first entered the child welfare system.108

101. Contract, supra note 12, at 44.

102. Id. at 45.

103. See Dep’t of Children and Families Legal Workgroup, Rep. of the Dep’t of Children and Families Legal Workgroup 17–18 (Sept. 17, 2007) (on file with Dep’t of Children and Families) [hereinafter Legal Workgroup].

104. See Contract, supra note 12, at 44. At the same time, Exhibit B of the lead agency contract states key parties and the critical witnesses in the case are the case managers and child protective investigators. Id.


106. Gary Blankenship, Bar to Support Legislation to Provide Lawyers for Kids in Dependency Court, Fla. Bar News (Jan. 1, 2010), http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf (search “Bar to Support Legislation to Provide Lawyers for Kids in Dependency Court”; then follow hyperlink); Julie Levin, Lawyers Go to Bat for Children in State Care, Miami Herald, July 26, 2009, at 6BE.

107. S.B. 1860 2010 Leg. (Fla. 2010) (died in Comm. on Children, Families, & Elder Affairs Apr. 30, 2010). At some point in the legislative process this category of child was removed from the bill. See generally id.

108. See id. The authors of this article opposed the Bill. Michael J. Dale & Louis M. Reidenberg, Op-Ed, All Florida’s Abused Kids Deserve Lawyers, Sun-Sentinel, Feb. 28, 2010, at 4F. Curiously, one of the major supporters of the Bill was quoted as saying, “[f]oster care is like being in the ocean . . . [t]he longer children are there, the better chance they’ll drown.” Blankenship, supra note 50. One would have thought that this view would have justified a provision in the bill that all children receive an independent attorney at the begin-
RIGHT TO COUNSEL FOR CHILDREN

2011

bill died when it reached the Committee on Children, Families, and Elder Affairs. Thus, by the fall of 2010, children in Florida still had no right to independent legal representation, while substantial changes had, however, occurred in the legal representation of the other three parties in Chapter 39 proceedings—the GAL Program, DCF, and parents.

B. The Guardian Ad Litem Program

Florida’s system of GAL participation in dependency proceedings has dramatically changed since 2001. In order to understand how Florida’s GAL Program works, it is first important to understand its sources of funding. The origin of the GAL approach to child protection is the federal Child Abuse Prevention and Treatment Act of 1975 (CAPTA), a federal funding statute. In compliance with the federal law, in 1984 Florida enacted juvenile court rules “requiring that the appointed GAL represents the best interests of the child as opposed to representing the child within the context of the counsel-client relationship.”

To receive funding under CAPTA, a state must have:

provisions and procedures requiring that in every case involving an abused or neglected child which results in a judicial proceeding, a [GAL], who has received training appropriate to the role, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings.

Although CAPTA does not clearly delineate the duties a GAL must perform, CAPTA does specify two purposes for which a GAL must be appointed: “to obtain first-hand, a clear understanding of the situation and needs of the child; and to make recommendations to the court concerning the

111. Petition of the Fla. Bar to Amend the Fla. Rules of Juvenile Procedure, 462 So. 2d 399, 426 (Fla. 1984) (per curiam) [hereinafter Petition of the Fla. Bar].
112. § 5106(a)(b)(2)(xiii) (emphasis added).
best interests of the child." The law allows attorneys to be GALs. The law does not say anything about the issue of the attorney representing the child as a traditional client with the ethical obligations that attach to it. It may be argued that a state that allows CAPTA funds to pay for traditional attorneys to represent children is not in compliance with the law. However, as Professor Katherine Hunt Federle has noted, no state has ever been found to be out of compliance for this reason. Florida, as this article explains, has spent a nominal amount of state GAL Program funds on traditional attorneys for children.

Florida has authorized, but never met, the mandate of 100% GAL "representation" required under CAPTA. Litigation to successfully enforce CAPTA is unlikely because several federal courts have held that there is no private right of action under the statute. The remaining remedy, asking the Secretary of Health and Human Services to cut off funding to Florida, is unlikely. Despite the federal and state mandates that each child in judicial dependency proceedings be appointed a GAL, in 2009 there were approximately 5400 children in the dependency system with no advocate.

113. Id. (emphasis added).
118. See note 120 infra.
though there is a deficiency, according to the U.S. Department of Health and Human Services Administration for Children and Families, the State will continue to receive federal funding as long as the governor is making diligent efforts towards 100% representation.120

The agency responsible for administration of CAPTA grant funds in Florida is DCF.121 In 2001, the GAL Program budget was $14.1 million.122 By 2006–07, the budget had increased to $34,349,313.123 In 2000, a GAL was actually only involved in 58% of the cases in which the GAL Program was appointed.124 The highest number of children represented came in 2007, when 32,520 children had a GAL, but this number has steadily declined, according to the Program, due to budget cuts even though the Program consists primarily of volunteers.125 In 2007–08, the budget was reduced by 4%, and in 2008–09 it was reduced by an additional 3.2%, totaling over $2.5 million in cuts.126 Furthermore, 4% of the 2007–08 existing appropriation was withheld.127 In 2008, the program stated that it was going to request an additional $5 million in funding in order to comply with the statutory mandate that all children have a GAL.128 However, the funding was not received, and the GAL Program was reduced by an additional 7.5% for the 2009–10 fiscal

124. Information Brief, supra note 122, at 2.
126. Id. at 2.
127. Id.
128. Id.
year to a total of $31,986,200.00.129 The total state legislative funded budget for the GAL Program was $30,427,288.130 For the fiscal year 2009–10, the State received $1,978,011 in CAPTA funds.131 The CAPTA funds are used by DCF for other child welfare purposes and not for the GAL Program. Nor does the GAL Program receive the $818,800.00 in funds received by the State of Florida under the federal Children's Justice Act.132 The federal Children's Justice Act grants to states the power to develop, establish, and operate programs that improve investigation and prosecution of child abuse and neglect cases. Some states use these funds to train lawyers who represent parties in these cases.133 Some states use the funding to support child advocacy centers or support child fatality review teams.134 The GAL Program also has resources beyond its state legislative allocation of funds. These include free office space, county donations, foundation support, and corporate and public giving. State legislation has allowed the Statewide GAL Office to "create a direct-support organization" to raise funds, obtain grants, gifts, and bequests of various types including securities and property for the Statewide GAL Office.135 The GAL Program has also developed a series of direct-support non-profit organizations to


130. Government Program Summaries, supra note 129.

131. See CHILD & FAMILY SERVICES PLAN, supra note 121, at 144. It does not appear that any of the CAPTA funds are actually used to fund either GALs or attorneys for children. CAPTA funds are spent by DCF for other child welfare purposes. Telephone Conversation with Darrell Vabaldo, Chief of Resource Mgmt., Family Safety and Preservation Servs., Dep't of Children & Families, (Dec. 23, 2010); E-mail from Darrell Vabaldo, Chief of Resource Mgmt., Family Safety and Preservation Servs. to Author, DCF (Dec. 1, 2010, 12:59PM) (on file with Nova Law Review).

132. See E-mail from Vabaldo to Author, supra note 131; 42 U.S.C. § 5106(c).

133. 42 U.S.C. § 5106(c). Some of these funds are to be used to establish a state task force on children's justice.


raise private funds for its mission. The GAL Program Annual Report does not appear to report any of this non general revenue funding income, which amounts to $6,316,190.49.

In addition to funding, one needs to understand the role of the GAL Program in a dependency proceeding in Florida. GALs represent the best interests of children in court proceedings. Although GALs appear in court, they do not represent the child in the sense that the law recognizes that term. Rather, they "represent" to the court what they believe is in the best interests of the child. Most GALs are volunteer lay people. Attorneys also can volunteer as GALs. But when they do, they do not have an attorney-client relationship with the child, do not represent the child's legal interests, have no confidential relationship with the child, and may not provide legal advice to the child. The GAL Program has staff attorneys who appear in court, but they represent the GAL Program, not the child.

136. GAL 2008 REPORT, supra note 125, at 29. There are 22 foundations working with the GAL Program statewide. See id. at 29–30. For example, Voices For Children Foundation, Inc. of Miami, in its fundraising literature, states that: “[GALs] are trained, court-appointed adults who [represent the best interests of] abused, abandoned, and neglected children involved in dependency court proceedings." Press Release, Voices For Children Found., Voices for Children Foundation Welcomes Nelson F. Hincapie as Its New President & CEO (May 28, 2009) (on file with Nova Law Review). Voices for Children Foundation raises funds to support the GAL Program in their efforts to ensure our children have a voice in dependency court and that their immediate needs are met. Id.; see GAL 2008 REPORT, supra note 125, at 29. In 2009, the Foundation spent $30,657.00 on lobbyists. See Voices for Children 2009 Tax Return.

137. Nor does the Report contain any valuation of the economic amounts of the services provided by the volunteer GALs.


139. See M.W. v. Davis, 756 So. 2d 90, 96 n.16 (Fla. 2000), in which the GAL Program argued an amicus against application of increased due process protections through Baker Act requirements to located mental health facility placements for children in the dependency system. But see Florida Guardian Ad Litem 2010 Annual Report which states that the Program provides advocacy that pursues the child’s “legal” interests as well as the child’s “best” interests. FLA. GUARDIAN AD LITEM PROGRAM, FLORIDA GUARDIAN AD LITEM 2010 ANNUAL REPORT 4 (2010) [hereinafter GAL 2010 REPORT], available at http://www.guardianadlitem.org/documents/GALAnnualReport2010.pdf.

140. STATEWIDE GUARDIAN AD LITEM OFFICE, STANDARDS OF OPERATION 15 (2006) [hereinafter STANDARDS OF OPERATION] (“[GAL] staff and volunteers shall not ... give legal advice or otherwise practice law in their capacity as a [GAL], unless the [GAL] is an attorney.”).

141. GAL 2009 REPORT, supra note 22, at 4.
statutory scheme also allows for the appointment of an AAL to represent the child’s legal interests, this is discretionary with the court and is rarely exercised, as this article demonstrates.\textsuperscript{142}

The next concept to understand is the statutory scheme under which the GAL Program operates. Chapter 39 and the Florida Rules of Juvenile Procedure define a GAL in inconsistent and contradictory ways. First, a GAL is defined as:

\begin{quote}

a certified [GAL] program, a duly certified volunteer, a staff attorney, contract attorney, or certified pro bono attorney working on behalf of a [GAL] or the program; staff members of a program office; a court-appointed attorney; or a responsible adult who is appointed by the court to represent the best interests of a child in a proceeding . . . who is a party to any judicial proceeding as a representative of the child, and who serves until discharged by the court.\textsuperscript{143}
\end{quote}

The next section of Chapter 39 inconsistently states: “A [GAL] shall be appointed by the court at the earliest possible time to represent the child in any child abuse, abandonment, or neglect judicial proceeding, whether civil or criminal.”\textsuperscript{144} The section of Chapter 39 dealing with taking children into custody and shelter hearings states: “At the shelter hearing, the court shall . . . appoint a [GAL] to represent the best interest of the child, unless the court finds that such representation is unnecessary.”\textsuperscript{145} In addition to the definitional inconsistency, the section’s reference to the court’s authority to not appoint a GAL runs counter to CAPTA, the federal funding statute that makes the appointment mandatory.\textsuperscript{146} Florida, of course, has never had a full assignment of GALs.\textsuperscript{147} Under Florida law, the court can also discharge the GAL at the dependency dispositional hearing, also apparently in violation of CAPTA.\textsuperscript{148} At the TPR proceeding, Chapter 39 states that, among the duties of the GAL, is to “represent the best interests of the child until the jurisdiction of the court over the child terminates or until excused by the court.”\textsuperscript{149}

\begin{footnotes}

\footnote{142. \textit{Id.} at 20.}
\footnote{143. \textit{Fla. Stat.} § 39.820(1) (2010) (emphasis added); see also \textit{Fla. R. 7.} § 8.215(b) (stating “[t]he court shall appoint a [GAL] to represent the child in any proceeding as required by law.”).}
\footnote{144. \textit{Fla. Stat.} § 39.822(1) (emphasis added).}
\footnote{145. \textit{Id.} § 39.402(8)(c)(1).}
\footnote{147. \textit{GAL 2009 REPORT}, \textit{supra} note 22, at 12 (stating an 80% representation rate); see also \textit{Dale, Providing Counsel, supra} note 2, at 791–92.}
\footnote{149. \textit{Id.} § 39.807(2)(b)(3) (emphasis added).}
\end{footnotes}
The GAL or GAL Program representative is to "review all disposition recommendations and changes in placements and must be present at all critical stages of the dependency proceeding or submit a written report of recommendations to the court." GALs are either volunteers or members of the staff of the GAL Program acting as parties in child welfare proceedings. In June 2009, the GAL Program had nearly 8000 volunteers who represent the best interests of 27,000 abused and neglected children throughout the state, according to latest reports, in about 85% of the cases.

Attorneys who volunteer for the GAL Program may represent the child's best interests as the [GAL], with support from a case coordinator and a program attorney; . . . utilize their area of expertise to assist the GAL Program, including probate, special education, guardianship, immigration, administrative law and appeals; [or they] can represent the child in a regular attorney-client relationship as the attorney ad litem (AAL).

The Florida GAL Program materials state that attorneys who volunteer as GALs do "not owe a duty of confidentiality to the child, and [they advocate] for what [they] believe is in the child's best interest, rather than what the child wants." As of August 2008, there were approximately 700 lawyers volunteering as GALs.
It is also important to understand how attorneys operate within the GAL Program. The Florida GAL Program employs approximately 145 staff attorneys. According to its literature, “[P]rogram attorneys represent the best interests and protect the legal interests of children in all phases of court proceedings from trial through the appellate process.”

As this article demonstrates, as a matter of legal standing and legal ethics, the Florida GAL Program attorneys do not and cannot represent the legal interest of children in dependency or TPR proceedings. There is no statutory authority enabling them to act on behalf of the legal interests of children. Curiously, however, substantial GAL Program literature says that they do. For example, in a letter rejecting the First Star Report referred to earlier in this article, the then GAL Program Executive Director stated:

The Report also fails to acknowledge that when the child’s ability to make decisions in regard to representation is impaired, according to the Florida Bar Rules, an attorney may have to act as “de

The pro bono attorneys are asked to accept 2 new cases per year. Each case may have between 1 and 7 children. The program receives $659,681.28 in GAL Program contracted services. See Email from C. Nicholson to Rebecca Rich, supra.


158. GAL 25 YEARS OF CHILD ADVOCACY, supra note 82.

159. The GAL Program describes itself as “having a dedicated appellate division to represent the best interests of children whose cases are appealed.” FLA. GUARDIAN AD LITEM PROGRAM, FLORIDA GUARDIAN AD LITEM 2010 ANNUAL REPORT 7 (2010) [hereinafter GAL 2010 REPORT], available at http://www.guardianadlitem.org/documents/GALAnnualReport2010.pdf. Apparently, “[t]he appellate team makes an appearance in every appeal in which the GAL Program is appointed in the trial court.” Id. This may be the case even when the issue on appeal has nothing to do with best interests of the child. See e.g., B.T. v. Dep’t of Children & Families, 16 So. 3d 940 (Fla. 5th Dist. Ct. App. 2009).

160. In order to help guide the advocacy team and leave ‘no stone unturned’ regarding the child’s legal needs and best interests, the Program utilizes a comprehensive tool called the Advocacy Framework. The Advocacy Framework is a critical checklist that ensures the advocacy team is reviewing all aspects of a child’s case and making the best recommendations to the court regarding the child’s placement; mental, physical, and educational needs; and legal and best interests.

GAL 2010 REPORT, supra note 159, at 4 (emphasis added).
This statement by the former executive director, an attorney, mischaracterizes the concept of legal representation of a client. The child does not have an attorney in Florida. The child is not the client of the GAL Program. There is no simpler way to put it. To say the attorney for the GAL Program duplicates the attorney for a child as a "de facto GAL," demonstrates a fundamental misunderstanding of the Florida Rules of Professional Responsibility.

This fundamental misunderstanding has existed since the inception of the Program and continues to this day. The GAL Program lawyer's client is the GAL Program, according to the GAL Program Attorney Standards of Practice.

The Statewide GAL Office Standards of Operation state that:

161. GAL Rejects Grade, supra note 42.
162. See Fla. R. Prof. Conduct 4-1.14 (1993). But see GAL Rejects Grade, supra note 42. A powerful example of the distinction is found in a recent Fourth District Court of Appeal case. See R.F. v. Dep’t of Children and Families, 50 So. 3d 1243 (Fla. 4th Dist. Ct. App. 2011). A child in foster care, through his GAL, petitioned the court of appeal for a writ of certiorarvi to review a juvenile court order that the boy return to Florida because his continued stay in New York where he was living successfully with his paternal uncle and aunt violated the Interstate Compact on the Placement of Children. Id. at 1243. Despite the fact that the boy’s GAL believed staying with the uncle was in the boy’s best interest, CLS and the GAL Program, through its attorney, argued that “[m]aking an exception in this case would [be] contrary to this child’s best interest as it would be contrary to the best interest of any child.” Id. at 1244–45. The appellate court rejected this argument on the facts and the law. Id. at 1245. The case demonstrates first what could happen when a child does not have an independent attorney, and second why neither the GAL nor the attorney for the GAL Program can adequately represent the child.

163. At least one Florida appellate court has questioned, in dicta, the standing of the GAL Program on appeal. See Dep’t of Children & Families v. S.T., 963 So. 2d 314, 315 (Fla. 4th Dist. Ct. App. 2007). “Because DCF has joined in this petition, we set aside any doubts we may harbor about GALP’s standing or authority in its own name—rather than through the party represented by a [GAL]—to seek review of orders in these proceedings. Id. at 315; see also Job Posting for Florida GAL, Executive Director, (on file with Nova Law Review) (stating among other job qualifications, the ability to “ensure effective legal advocacy and increased representation of children,” and the “[a]bility to determine the feasibility or desirability of new concepts of . . . service delivery designed to preserve the civil and constitutional rights and fulfill other needs of dependent children”). This statement is contradicted by the statutory mandate of section 39.820 of the Florida Statutes, which states that the GAL Program “is appointed by the Court to represent the best interests of a child in a proceeding as provided for by law.” Fla. Stat. § 39.820(1) (2010).
164. STATEWIDE GUARDIAN AD LITEM OFFICE, GUARDIAN AD LITEM PROGRAM ATTORNEY STANDARDS OF PRACTICE 1.4.1 (2006) [hereinafter ATTORNEY STANDARDS OF PRACTICE].
From a legal perspective, the volunteer or case coordinators are the authorized constituents for the GAL Program for purposes of Rule 4-1.13, Rules Regulating The Florida Bar. Therefore, the program attorney is bound by Rule 4-1.2, Rules Regulating The Florida Bar, and must abide by the decisions of the volunteer or case coordinator regarding the objectives of representation and must consult with them regarding the means by which the objectives are pursued.\footnote{165}

The Statewide GAL Program literature also states that GAL Program staff attorneys provide GALs with legal guidance and represent the GALs, not the children, at evidentiary hearings.\footnote{166} In fact, the GAL Program attorneys represent the GAL staff as employees or agents of the GAL Program and the volunteers as representatives of the program.\footnote{167}

C. The Department of Children and Families and Its Lawyers

In 1989, the Supreme Court of Florida required that the state agency, then known as the Department of Health and Rehabilitative Services (HRS), receive adequate legal representation at every stage of the dependency proceeding.\footnote{168} Prior to that time, contested dependency cases were handled by either the State Attorney or the HRS (now DCF) lawyers.\footnote{169} Uncontested proceedings, however, were handled by non-lawyer HRS caseworkers.\footnote{170} After studying the impact of allowing non-lawyer caseworkers to handle uncontested dependency proceedings, a Supreme Court of Florida committee determined that allowing non-lawyers to handle these proceedings created inadequate legal representation, "extensive delays, and the failure of the system to adequately meet the needs of abused and neglected children."\footnote{171} Following the Supreme Court of Florida committee investigation on the impact

\footnote{165. Standards of Operation, supra note 140, at 20 § 4.6 (2) (discussing Fla. R. Prof. Conduct 4-1.2 (2010)).}
\footnote{166. See Attorney Standards of Practice, supra note 164, at 1.4.1, 2.6.1.}
\footnote{167. See id. at 1.4.1.}
\footnote{169. See In re Advisory Op. HRS Nonlawyer Counselor, 547 So. 2d at 909-10.}
\footnote{170. See id. at 911.}
of the use of non-lawyers, the Legislature created Child Welfare Legal Services (CWLS) overseen by the Attorney General.\footnote{172} In May 2007, then DCF Secretary Robert Butterworth established a Legal Review Work Group—the Office of the General Counsel and CWLS—to examine the work of attorneys within the Department.\footnote{173} The latter, attorneys appearing in dependency and TPR cases, according to the Department, "should be the only attorneys representing the position of the State in dependency and termination of parental rights proceedings."\footnote{174} They are currently referred to as CLS attorneys.\footnote{175} As discussed previously, DCF's contracts with private providers, also known as lead agencies, provide that "CLS has legal decision making authority pertaining to any dependency and termination of parental rights proceeding from inception to completion."\footnote{176}

In August 2008, Secretary Butterworth's successor, George Sheldon, announced that DCF general counsel "would continue to represent the interests of the agency in . . . [most] matters," whereas "CLS [lawyers] would focus on what is best for children."\footnote{177} In furtherance of that mandate, CLS has repeatedly stated that it acts in a parens patriae role as set forth in Chapter 39.\footnote{178}

\footnote{172. Id. at 2–3.}
\footnote{173. LEGAL WORKGROUP, supra note 103, at 4.}
\footnote{174. Id. at 19.}
\footnote{175. About the Department: Children's Legal Services, supra note 138. The CLS budget for 2010 is $43,397,059.00. CHILDREN & YOUTH CABINET, 2010 FLORIDA CHILDREN'S BUDGET REPORT [hereinafter CHILDREN & YOUTH CABINET BUDGET REPORT] (on file with Nova Law Review).}
\footnote{176. Contract, supra note 12, at Exhibit B 45. This contractual approach appears to be at odds with LEGAL WORKGROUP, supra note 103, at 17 ("Providers have been contracted to make safety decisions regarding the child in all aspects of the dependency case."). An additional oddity is that as part of the private provider contract with DCF, the provider, although not the client of the CLS lawyer, shall pay for depositions, expert witnesses, service of process and costs among others. Contract, supra note 12, at Exhibit B 45–46.}
\footnote{177. George Sheldon, Collaboration for Children, in The Department Launches Law Firm for Children (Child.'s Legal Services, Tallahassee, Fla.), Aug. 2008, at 2.}
\footnote{178. Contract, supra note 12, at 44 Exhibit B. Indeed, in Exhibit B of its standard contracts with Florida's private lead agencies which have taken on DCF's responsibilities to provide services to children in the child welfare system, one finds the following description of CLS' role: CLS . . . [is] a statewide law firm within the Department. CLS attorneys are employed by the Department and represent the State of Florida, acting through the Department in its parens patriae role, in fulfilling the duties as set forth in Chapter 39, F.S. CLS's duty in representing the State is to ensure the health, safety and well being of children and the integrity of families when they come into contact with the Department as a result of an allegation of abuse, abandonment or neglect. Id.}
In 2007, Governor Crist established a DCF Task Force on Child Protection.\textsuperscript{179} A Legal Services Subcommittee of the Task Force, among other things, was charged with “looking at best practices relative to the representation of children in the legal system.”\textsuperscript{180} The subcommittee first noted that all parties except the child have legal representation.\textsuperscript{181} The subcommittee then recommended inter alia that “[c]hildren in the dependency system are parties to the case and should be represented by an attorney.”\textsuperscript{182} Recognizing limited resources, the subcommittee then suggested that the attorney for the child should come from resources in the GAL Program—specifically the GAL Program attorneys who would no longer represent the GAL Program.\textsuperscript{183} The subcommittee also recommended, “The [GAL] should no longer be a party to the case.”\textsuperscript{184} At the request of DCF Task Force Chairperson, former Attorney General Butterworth, the Committee deferred these two recommendations.\textsuperscript{185}

Despite the changes instituted by the two most recent DCF Secretaries, the role of CLS attorneys is confused and may adversely affect the unrepresented children.\textsuperscript{186} CLS now describes itself on the one hand as “The Statewide Law Firm for Florida’s Children.”\textsuperscript{187} Its business card even includes the phrase “Law Firm for Florida’s Children.”\textsuperscript{188} A 2009 Florida Office of

\begin{enumerate}
\item[180.] DEP’T OF CHILDREN & FAMILIES, TASK FORCE ON CHILD PROTECTION MEETING SUMMARY 6 (Mar. 9, 2009) [hereinafter DCF TASK FORCE MEETING SUMMARY] (on file with Nova Law Review); LEGAL SERVS. SUBCOMM., REPORT TO THE TASK FORCE ON CHILD PROTECTION 3 (on file with Nova Law Review).
\item[181.] LEGAL SERVS. SUBCOMM., supra note 180, at 2.
\item[182.] Id. at 3.
\item[183.] Id.
\item[184.] Id.
\item[185.] DCF TASK FORCE MEETING SUMMARY, supra note 176, at 11.
\item[186.] See About the Department: Children’s Legal Service and Counsel for Kids Reference Guide, supra note 138.
\item[187.] Id.
\item[188.] See CLS business card (on file with the Nova Law Review). The representation made on the card raises consumer protection issues. See id. Section 501.201 et. seq. of the Florida Statutes contains Florida’s version of the Deceptive and Unfair Trade Practices Act, sometimes referred to as “UDTPA” or “The Consumer Protection Act.” See generally Fla. Stat. § 501 et. seq. (2010). This statute in section 501.203(8) defines “trade or commerce” to include the offering by any means a service. Id. § 501.203(8). Further, section 501.212, which lists the acts or practices excluded from the application of this statute, does not exclude the activities of CLS from potential application of this statute. See id. § 501.212. A deceptive act or practice is defined in Florida to mean any act or practice that is a “representation, omission or practice that is likely to mislead [a] consumer acting reasonably in the circumstances, to the consumer’s detriment.” Millennium Commc’ns & Fulfillment, Inc. v. Office of the

https://nsuworks.nova.edu/nlr/vol35/iss2/1
Program Policy and Government Accountability research memorandum contains the following statement: “CLS attorneys, supervisors, and managers reported a substantial improvement in the quality of the department’s legal representation of dependent children since restructuring CLS.” On the other hand, CLS also says in its descriptive literature that “[t]he CLS Model can be analogized to that of a prosecutor. Prosecutors and CLS attorneys have ethical obligations beyond that of other lawyers. Each is expected to pursue justice rather than simply seeking victory for their clients.” Each of these statements appears to be legally incorrect, incongruent, and in all

Att’y Gen., 761 So. 2d 1256, 1263 (Fla. 3d Dist. Ct. App. 2000). Therefore, based on the enactment, prohibition, coverage, definitions, and exemptions provided in the Florida Deceptive and Unfair Trade Practices Act, the CLS’s representation regarding its status as the law firm for children may constitute a violation of this statute. In a private right of action, as permitted by section 501.211 of this statute, children, as persons “aggrieved” would be entitled to receive as a remedy injunctive relief, actual damages and prevailing party attorney’s fees and costs. See Fla. Stat. § 501.211(1) (2010).


190. About the Department: Children’s Legal Services, supra note 138. Some of the Department’s literature makes no sense. For example, a research memo from the Office of Program Policy Analysis and Government Accountability includes the following statement:

Both the workgroup and prior OPPAGA reports had concluded that the department needed to improve relationships with key stakeholders and better delineate the roles and responsibilities of the various entities involved in dependency proceedings. To address these issues, department and CLS administrators announced through written and oral communication that CLS attorneys represent the State of Florida, acting through the department, rather than the department or its contracted providers.

OPPAGA RESEARCH MEMORANDUM, supra note 189. Chapter 39 provides that the Department is a party in dependency and TPR cases. Fla. Stat. § 39.01(51) (2010); Fla. R. Juv. P. 8.210(a) (2010).

191. See R. REG. FLA. BAR 4-3.8, 4-1.13; see also Meghan Scahill, Prosecuting Attorneys in Dependency Proceedings in Juvenile Court: Defining and Assessing a Critical Role in Child Abuse and Neglect Cases, 1 J. CENTER CHILD & RTS. 73, 76 (1999); JENNIFER L. RENNE, LEGAL ETHICS IN CHILD WELFARE CASES, 20-25, (Claire Sandt ed., 2004) (recognizing that some states use an office of the prosecutor without a client, a concept which is irreconcilable
likelihood not in conformity with the Florida Model Rules of Professional Responsibility.\(^{193}\)

D. Counsel for Parents

A parent’s right to counsel in a dependency case in Florida is purely statutory.\(^{194}\) Whether the parent’s right to counsel, including government funded counsel in a dependency case, is provided under the Florida Constitution, has not been decided by the Supreme Court of Florida.\(^{195}\) However, the parent’s categorical right to an attorney in a TPR case under the federal constitution was decided by the Supreme Court of the United States in \textit{Lassiter v. Department of Social Services}\(^{196}\) and by the Supreme Court of Florida in \textit{In re D.B.}\(^{197}\). In \textit{Lassiter} the court rejected the concept that as a matter of due process under the Fourteenth Amendment every parent was entitled to a lawyer leaving it to the trial court to decide on a case-by-case basis.\(^{198}\) However, in the \textit{D.B.} case, which was decided one year before \textit{Lassiter}, the Supreme Court of Florida held that all parents must be provided counsel in all TPR cases and, under limited circumstances, in dependency proceedings.\(^{199}\) The Florida Legislature then enacted a statute codifying the opinion.\(^{200}\) In a series of decisions relying on the new statute, the intermediate appellate courts reversed trial court decisions terminating parental rights because of the trial
courts’ failure to assign counsel in the earlier dependency proceeding.\textsuperscript{201} The repeated rationale for the reversals was the likelihood that a TPR proceeding would ensue.\textsuperscript{202} As a result, in 1998 the Legislature amended Chapter 39 to statutorily authorize appointment of counsel for parents in dependency as well as TPR cases.\textsuperscript{203} Since that time, all indigent parents have been appointed attorneys in dependency and TPR cases even when no charges are brought against one of the parties.\textsuperscript{204} According to one recent appellate court opinion:

\begin{quote}
[A]s a matter of common sense, the ‘non-offending parent’ may need, and indeed may be entitled, to take action based upon any possible relief afforded by DCF to the offending parent. . . . [A] ‘non-offending’ indigent, non-attorney parent can hardly be expected to navigate through such proceedings without counsel.\textsuperscript{205}
\end{quote}

Until recently the attorneys appointed to represent indigent parents in Florida were private practitioners chosen by the court and paid a statutory fee.\textsuperscript{206} Then in 2006, the Legislature passed a law, effective October 1, 2007, setting up an entity entitled the Offices of Criminal Conflict and Civil Regional Counsel which now represents indigent parents in dependency and TPR cases.\textsuperscript{207} The civil regional counsel offices are located in each one of the five state appellate court districts.\textsuperscript{208} The Senior Regional Counsel is appointed by the Governor and confirmed by the State Senate for a four-year term.\textsuperscript{209} Despite numerous problems establishing the new offices, including lawsuits by various complimentary agencies and disputes with county governments, the offices are now fully functional and are providing representa-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{202} See id.
\item \textsuperscript{204} W.G. v. S.A. (\textit{In re A.G.}), 40 So. 3d 908, 910 (Fla. 3d Dist. Ct. App. 2010); \textit{But see} C.L.R. v. Dep’t of Children & Families, 913 So. 2d 764, 767 (Fla. 5th Dist. Ct. App. 2005) (per curiam).
\item \textsuperscript{205} \textit{In re A.G.}, 40 So. 3d at 910.
\item \textsuperscript{206} See Joseph P. George, Jr., \textit{Cost Effective Representation for the Indigent, OFFICE OF CRIMINAL CONFLICT & CIVIL REG’L COUNSEL THIRD REGION OF FLA.}, \url{http://rc3fl.com/history/} (last visited Apr. 20, 2011).
\item \textsuperscript{207} \textit{FLA. STAT.} § 27.511(1) (2010). This non-profit public organization also represents both criminal defendants and juvenile delinquent respondents when the Office of the Public Defender has a conflict. \textit{Id.} §27.511(5).
\item \textsuperscript{208} \textit{Id.} § 27.511 (1).
\item \textsuperscript{209} \textit{Id.} § 27.511 (3).
\end{itemize}
\end{footnotesize}
tion to indigent persons in a much more cost-effective manner than previously. In those cases where the regional counsel cannot serve indigent persons, such as in the case of two parties in a dependency/TPR proceeding where conflict exists, private court-appointed attorneys still continue to be assigned and are paid by the State Justice Administrative Commission.

E. Counsel for Children

Children currently have no constitutional right to attorneys in Florida. A very limited number of children are represented by independent attorneys in dependency cases. The attorneys come from several sources: legal aid programs, law school clinics, attorneys hired by the statewide GAL Program, and pro-bono volunteers. The funding sources for attorneys who are paid include the Florida Bar through its IOLTA Program, County Children’s Services Councils, and the statewide GAL Program. Research does not disclose precisely how many attorneys actually represent children in dependency or TPR cases in Florida.

As stated previously, the legislative intent and goal for children in shelter and foster care is to have a GAL appointed to represent the child’s best interests and an AAL appointed, where appropriate, to represent his or her legal interests. At any stage of dependency proceedings, Florida Rule of Juvenile Procedure 8.217 allows the court to “consider whether an AAL is necessary to represent any child alleged to be dependent, if one has not already been appointed.”

In 2008, only $309,000 was appropriated by the GAL Program to AAL, allowing for representation of 600 of the more than 35,000 children in the dependency system. In 2009, the GAL Program spent $397,000 on attorneys for children or approximately one percent of its $30 million state budg-
Thus, more often than not, if an AAL is appointed, he or she is a pro-bono attorney, a legal aid attorney, or legal intern in a law school clinic.219

A leading example of a legal-aid-based program developed since 2001 is in Palm Beach County.220 The Foster Children’s Project (FCP) of the Legal Aid Society of Palm Beach County’s mission was to advocate for permanency within twelve months for all of its clients.221

In 2006, the Chapin Hall Center of the University of Chicago 222 conducted an evaluation of the program. Within its first two years of operation, the average length of stay in foster care for children represented by FCP was 12.5 months less than it was before FCP’s inception.223 FCP’s success, among other things, has been attributed to “the filing of legal motions, the filing of termination of parental rights petitions and recruitment of adoptive homes, attendance at staffing and case plan meetings, and service advocacy.”224 Chapin Hall found that the number of motions filed in cases where

218. See GAL 2009 REPORT, supra note 22, at 20.
219. Id.
223. Walsh, supra note 222.
224. ZINN & SLOWRIVER, supra note 222, at 9.
FCP was involved was 46.5% higher than in cases with similar situations where they were not involved. Similarly, the number of status checks was 49.6% higher than comparison cases. FCP children exited to permanency at rates between 1.38 and 1.59 times higher than comparison cases.

**IV. Ethical Issues in the Florida System**

Much has been written and argued in Florida and nationally about the claimed inherent conflict regarding the “best interests” of a child client “represented” by a GAL and what the authors refer to in this article as the “legal interests” approach where the child client is represented by an attorney as all clients are represented. This so-called dichotomy is first illustrated by a review of the relevant applicable ABA Model Rules of Professional Conduct, the Florida Rules of Professional Conduct which are based upon the ABA Model Rules, and the ABA Standards of Practice for Lawyers Who Represent Children In Abuse And Neglect Cases. Second, it is illustrated by an examination of the Florida approach, which the authors conclude is replete with irreconcilable ethical conflicts and contradictions for attorneys representing CLS and the GAL Program, that can only be rectified by the introduction of independent attorneys for children.

For almost a century, the ABA has been the leader in establishing the professional obligations of the legal profession. The ABA Model Rules of Professional Conduct are intended to serve as the regulatory principles governing the legal profession as to the ethical considerations and professional responsibilities of American attorneys. The basic duties, as they are set out—including knowledge, preparation, skill, and competence—apply equally to attorneys representing children as they do to attorneys representing adults. By reading both the Preamble and Scope to the Model Rules of Pro-

---

225. Id.
226. Id. at 9–10.
227. Id. at 15. In 2007, the program had an operating budget of $1.7 million. “Taking into consideration the estimated costs of substitute care, ongoing adoption subsidies, and FCP representation, the net cost of FCP associated with each additional day of permanency [post-permanency] was estimated to be as low as $32.” ZINN & SLOWRIVER, supra note 218, at 1. However, the estimated daily per-child cost associated with FCP representation pre-permanency is only $13.31. Id. at 22. The total cost of the program is approximately $2,264 per child. Walsh, supra note 222. When compared to the money saved in foster care payments, caseworker time, court time, and emotional effects on children lingering in foster care, this cost seems very reasonable.
230. See generally MODEL RULES OF PROF’L CONDUCT (2010).
fessional Conduct, one clearly can distinguish between the responsibilities of an attorney representing a child client and a GAL who is not bound by the same responsibilities.

The Preamble and Scope of the ABA Model Rules and the Florida Rules begin with the following statement: “A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” 231

The term “Representative” appears throughout both Rules. Here too, it is a term of art that has specific meaning in law, and it has meaning separate and apart from the term as used in Chapter 39 to apply to GALs. The term in the Model Rules describes a professional relationship with another individual or entity (the client) that includes being an advisor, advocate, negotiator, and evaluator as to that person or entity’s legal rights, obligations, and position. 232 The Preamble also recognizes that in order to be a representative of a client, including a child, the attorney must have a confidential relationship with the client. As the Preamble states, “a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.” 233

A discussion of certain Model Rules sheds further light on the distinction between best interests representation of a child, and representation of a child client’s “legal interests.” First, Model Rule 4-1.2, Scope of Representation, governing allocation of authority between client and attorney reads in significant part: “[A] lawyer shall abide by a client’s decisions concerning the objectives of representation, and, as required by rule 4-1.4, shall reasonably consult with the client as to the means by which they are to be pursued.” 234

Second, ABA Model Rule 1.14, amended most recently in 2002, is also crucial to the representation and requires careful review. It states:

(a) When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

232. Id.
233. Id.
234. See RULES REGULATING FLA. BAR R. 4-1.2(a) (2010).
(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a [GAL], conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests.235

The earlier ABA Code of Professional Conduct did not provide any direct guidance for the attorney representing a child.236 While the current Model Rules do not specifically state that they apply to child clients, Rule 1.14 does address the issue of dealing with a client with diminished capacity. The Commentary to Rule 1.14 does, however, reference children.237 It provides: “Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. “For example, children as young as 5 or 6 years of age, and certainly those of 10 or 12, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.”238

The expected position, therefore, is for the child’s attorney to maintain as normal an attorney-client relationship as possible. Florida’s comparable Rule of Professional Conduct, Rule 4-1.2(a), reads as follows: “Subject to subdivisions (c) and (d), a lawyer shall abide by a client’s decisions concerning the objectives of representation, and, as required by rule 4-1.4, shall reasonably consult with the client as to the means by which they are to be pursued.”239 The differing language, i.e., “reasonably,” appears to heighten the obligation of an attorney to a client under a disability.

ABA Model Rule 1.14(a) is entitled “Client with Diminished Capacity.”240 The title of the Florida Rule is “Client Under a Disability.”241 In the

---

236. MODEL CODE OF PROF’L RESPONSIBILITY EC 7-12 (1980).
238. Id. at R. 4-1.2(a).
239. RULES REGULATING FLA. BAR R. 4-1.2(a) (2010) (emphasis added).
241. RULES REGULATING FLA. BAR R. 4-1.14(a).
body of subpart (a), the only major difference appears to be the use of the word "diminished" in the ABA Rule instead of the word "impaired." 242 In the Florida Rule, the difference in terminology appears to be merely form over substance. Subdivision (b) of the ABA and Florida Rules differ to some degree in language and emphasis. 243 The ABA Model Rule provides greater latitude for attorneys to consult with others to protect the client before seeking appointment of a guardian. 244 The Florida Rule appears to limit the course an attorney can take prior to seeking a guardian when an attorney believes that the client cannot adequately act in his or her own interest. 245 The Comments to Rules 1.14 and 4-1.14 provide further guidance to the attorney but also differ in certain respects.

Comments 5, 6, and 7 to ABA Model Rule 1.14 in turn describe how the attorney may take what is referred to as "protective action" where the attorney reasonably believes the client is at risk of substantial physical or other harm. 246 Protective action includes employing third parties to assist the attorney. The attorney, of course, is obligated to carefully weigh the client’s diminished capacity when considering protective action. The Comments speak to a process for considering and balancing the various factors in evaluating the child’s decision making capacity. At the same time, the Comments urge the attorney to tread softly, “intruding into the client’s decision making autonomy to the least extent feasible.” 247 In so doing, the attorney is guided by the wishes and values of the client and the client’s best interests. 248 These comments give guidance to the child’s attorney who wishes to take action on behalf of the child client.

Model Rule 1.6 and the Comments to it even further amplify the ability of the attorney for a child to take protective action. 249 The ABA Model Rules and the Florida Rules differ in several significant ways with reference to the circumstances under which an attorney may reveal the child client’s communications in order to take “protective action.” 250 The Model Rules were

242. MODEL RULES OF PROF’L CONDUCT R. 1.14(a), with RULES REGULATING Fla. BAR R. 4-1.14(a).
243. Compare MODEL RULES OF PROF’L CONDUCT R. 1.14(b), with RULES REGULATING Fla. BAR R. 4-1.14(b).
244. See MODEL RULES OF PROF’L CONDUCT R. 1.14.
245. See RULES REGULATING Fla. BAR R. 4-1.14.
247. Id. cmt. 5.
248. Id.
249. MODEL RULES OF PROF’L CONDUCT R. 1.6 cmts. 5–6.
250. Compare MODEL RULES OF PROF’L CONDUCT R. 1.6, with RULES REGULATING Fla. BAR R. 4-1.16.
amended in 1993 and are more expansive. They allow an attorney to reveal information which may prevent substantial bodily harm—harm which may be caused by or to the client. The older ABA Model Code had limited the disclosure to harm caused by the client. The Florida Rule, which follows the older Model Code, should be amended to protect all clients, including children, from harm to themselves.

The Comments to ABA Model Rule 1.6 also stand in stark contrast to what opponents of providing attorneys to children in Florida argue—that attorneys will routinely carry out the harmful wishes of their young clients. The Comment says, "Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld." Thus, Model Rule 1.6 and the Comments thereto specifically address the concerns and issues raised by many regarding the attorney's obligation to protect his or her child clients from harm of any kind after disclosure to the attorney of information, in confidence, which the child client does not and would not reveal otherwise to anyone, whether a GAL, caseworker, or attorney with whom the child does not have a confidential relationship.

Under the Florida Rules, which do not go as far as the ABA Model Rules, attorneys for children are still bound by ethical principles so that they may not carry out the harmful wishes of their child clients. First, attorneys have an advisory function, under Florida Rule 4-2.1, to give candid advice to their client. Second, Florida Rule 4-3.3, Candor Toward the Tribunal, provides that an attorney shall not permit the child client to testify or provide evidence the attorney knows to be false, such as the child's denial of prior or future harm. Third, Florida Rule 4-1.16, Declining or Terminating Representation, provides that an attorney may withdraw from representation if "the client insists upon taking action that the lawyer considers repugnant, imprudent, or with which the lawyer has a fundamental disagreement." Finally, an ethical consideration for GAL Program attorneys, CLS attorneys and parents' attorneys is Florida Rule 4-4.3, Dealing with Unpre-

252. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1).
253. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002).
254. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2003).
255. RULES REGULATING FLA. BAR R. 4-2.1 (2006). "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation." Id.
256. RULES REGULATING FLA. BAR R. 4-3.3 (2010).
257. RULES REGULATING FLA. BAR R. 4-1.16(b)(2) (2006).
sented Persons. These lawyers need to proceed carefully as the children are unrepresented parties in the Chapter 39 proceeding.258

In 1996, the ABA adopted Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases.259 The Preface to the Standards states that all children in dependency proceedings should have an attorney.260 The definitional section states: "The term ‘child’s attorney’ means a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client."261

The Standards recognize that in a number of states an attorney is appointed as a GAL in a way that an attorney is not appointed in Florida.262 The Standards state: "A lawyer appointed as [GAL] for a child is an officer of the court appointed to protect the child’s interests without being bound by the child’s expressed preferences."263

The Commentary to the Standards attempts to explain the dual role:

Where the local law permits, the lawyer is expected to act in the dual role of [GAL] and lawyer of record. The chief distinguishing factor between the roles is the manner and method to be followed in determining the legal position to be advocated. While a GAL should take the child’s point of view into account, the child’s preferences are not binding, irrespective of the child’s age and the ability or willingness of the child to express preferences. Moreover, in many states, a [GAL] may be required by statute or custom to perform specific tasks, such as submitting a report or testifying as a fact or expert witness. These tasks are not part of functioning as a “lawyer.”264

While the Standards recognize the existence of these two roles, they do not discuss nor do they solve the problem of how to carry out the dual roles. First, the Standards do not discuss the full role of the GAL, which this article describes as standing in the shoes of the child as a fiduciary and carrying out

259. ABA Standards of Practice, supra note 35, at 1.
260. Id.
261. Id. § A-1 at 1.
262. See supra Section III.B discussing the role of an attorney appointed as a GAL in Florida.
263. ABA Standards of Practice, supra note 35, at § A-2 at 2.
264. Id.
the child’s legal interests. Second, to the extent that the child and the GAL are at odds over the child’s legal interests, the Standards do not resolve this conflict.

The problem with this approach is that an attorney may be obligated to take a position that produces an irreconcilable conflict with the attorney’s ethical duty to his or her client. The answer is that an attorney should never be the child’s GAL. Furthermore, when the attorney is representing the child in the traditional role of independent counsel, the attorney should only seek the appointment of a GAL when ABA Model Rule 1.4, governing representation of a client with diminished capacity provides for such action, as well as the ABA Standard providing a detailed explanation of how the attorney should go about representing a child as a client under a disability relying heavily on the ABA Model Rule.

The false conundrum, which has kept the area of law tied in knots in Florida for years, should be untied. Review and analysis of the principles enunciated by the ABA, in both the Model Rules and the ABA Standards, clearly demonstrate the justification for independent attorneys for children as opposed to GALs.

V. THE THINKING OUTSIDE FLORIDA

The Supreme Court of the United States has found that children are “persons” under the Constitution, and they possess “fundamental rights which the State must respect.” Consequently, “Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.” The Supreme Court has not yet recognized a due process right to counsel for children in dependency or TPR

265. See id. § A-1, at 1. “A guardian, usually a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party”. BLACK’S LAW DICTIONARY 608 (9th ed. 2010).

266. Id. § B-2, at 3.


268. See ABA STANDARDS OF PRACTICE, supra note 35, at §§ B-3 to 4 at 4–6, § B-4 & attendant Commentary.


proceedings. However, children's rights attorneys advocate that "children are citizens entitled to rights and . . . children need a voice through lawyer representation when their liberty and custody are at stake." A growing body of professional literature supports this position.

A. Client-Directed Representation

"A major question regarding the representation of children and youth is what interests children's attorneys serve and who defines those interests: the state, the attorney, the parents, or the children themselves." Client-directed lawyers owe traditional duties of loyalty, confidentiality and competent representation to the child client. They "ensure that the child's independent voice is heard" by advocating the child's position or the child's expressed wishes. Opponents of the client-directed approach argue that children do not have capacity to form an attorney-client relationship or to


275. Elrod, supra note 272, at 906.

276. Id. at 905.
direct the representation. However, proponents argue that whether a child has the capacity to form an attorney-client relationship and thereby direct the attorney should be determined on a case by case basis relying on the attorney’s sound discretion under Rule 1.14 of the Model Rules of Professional Conduct. Some even think that the presumption of incapacity should be reversed and that one should start with a presumption that minor children have capacity to direct their attorney.

Determining an attorney’s role when the child is too young to direct representation can be very challenging. Advocates suggest that the “key to child-centered representation is to understand the wishes and needs of a particular child in the context of the child’s family and the type of litigation.” However, this issue can be difficult to resolve because “in contrast to parents, attorneys are unlikely to share the same socio-economic background, [or] cultural values . . . as the children they represent; nor are they likely to know the children better than the children’s parents.” Children’s attorneys need to continuously consult with their clients on important decisions regarding their client’s express wishes and “keep their clients apprised of case developments.”

B. Best Interest Representation

“Best interest attorneys” advocate for the child’s best interests and, unlike client-directed attorneys, they can reveal confidential information that the child discloses. The most common criticism of the best interests attorney, including a lawyer who is acting as GAL, is that “the attorney can substitute his or her view of what is in the child’s best interest.” “[I]f the attorneys are inserting or substituting their own substantive values into the representation,” they need to be careful not to displace “the values of the child or the parents, who are the traditional arbiters of children’s lives and values.”

278. Id.
279. Elrod, supra note 272, at 912.
280. Appell, supra note 274, at 598.
281. Elrod, supra note 272, at 915.
282. Appell, supra note 274, at 595; see generally Guggenheim, A Paradigm for Determining the Role of Counsel for Children, supra note 270.
283. Appell, supra note 274, at 598, 633.
284. Elrod, supra note 272, at 910–11.
285. Id. at 911.
286. Appell, supra note 274, at 596.
C. Recent Colloquia and Model Acts

In 1995, Fordham Law School convened a conference entitled “Ethical Issues in the Legal Representation of Children.”287 The Conference made numerous recommendations with respect to child representation.288 In 2006, the Law School at the University of Nevada, Las Vegas (UNLV) hosted a conference entitled “Representing Children in Families: Children’s Advocacy and Justice Ten Years After Fordham,” which reexamined the recommendations of the Fordham Conference.289 The recommendations from the UNLV Conference reaffirmed the Fordham Conference’s core principles. All children in child welfare proceedings should be represented by client-directed attorneys.290

A review of two Model Acts in the field support the proposition that attorneys should represent the legal interests of children in all dependency and TPR proceedings.291 The ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings provides that a “[c]hild’s lawyer—or lawyer for children—means a lawyer who provides legal services for a child and who owes all of the same duties that are due an adult client, including loyalty, confidentiality, diligence, client direction, communication, duty to advise . . . , and competent representation.”292 A second model law, the Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act (URCANCPCA or The Uniform Act), which was adopted by the Uniform Law Commission in 2007, uses a dual


288. Id.


290. Id. at 611.


approach. It establishes two categories of attorneys for children—the child’s attorney and a best interests attorney. The Uniform Act “does not endorse the hybrid category of attorney/GAL.” The child’s attorney is described as having a traditional lawyer-client relationship rather than advocating what the attorney decides is in the child’s best interests. However, The Uniform Act provides for a limited setting in which the lawyer may exercise “substituted judgment” when the child client is “incapable of directing or refuses to direct representation as to a particular issue.” In addition, in the situation where “a child’s expressed goals would put the child at risk of substantial harm, and the child persists in that position despite the attorney’s advice and counsel,” The Uniform Act requires that the attorney “request a best interests advocate or best interests attorney for the child or withdraw from representation and request the appointment of a best interests attorney.”

VI. MAKING THE CASE FOR INDEPENDENT LEGAL REPRESENTATION IN FLORIDA

There are many reasons why a child needs an independent attorney assigned to represent the child in Florida. First, there are practical reasons. The attorney should commence representation as soon as the child welfare proceeding begins because the adverse effect upon the child, other than the alleged abuse or neglect in the home, is greatest at the point of the initial disruption in the child’s life by way of possible removal from the home. The injury to the child caused by removal from the home can be irreversible, according to a substantial body of professional literature and case law.

295. Id.
296. Id.
297. Id.
298. Comm. on Early Childhood, Adoption and Dependent Care, American Academy of Pediatrics, Abstract, Developmental Issues for Young Children in Foster Care, 106 PEDIATRICS 1145 (2000); Joseph J. Doyle, Jr., Children Protection and Child Outcomes: Measuring the Effects of Foster Care, 95 AM. ECON. REV 1589 (2007).
On the other hand, just the opposite may be true. A child’s attorney is necessary at the outset to make certain that initial intervention and removal by the State is required as tested against Chapter 39. The child’s position as to removal should be presented by the child’s attorney using the skills of examination and cross examination of witnesses based upon a level of understanding of the child’s situation that can only be gained through a confidential relationship. Children often spend long periods of time out of home care while in the child welfare system. Substantial literature and studies recognize this fact. This is a particularly serious problem because, among other things, children’s understanding of time is different than that of adults. Thus, having an independent attorney to test the need for continued removal from the vantage point of the child is very important. The attorney has the ability to conduct discovery and then file motions with the court seeking expedited rulings. The child’s attorney can also collect information that no one else can and maintain the child’s right to privacy, as well as build a unique relationship of trust with the child.

Unlike volunteer GALs, who in Florida receive thirty hours of training, attorneys for children are regulated by the ABA Model Rules and Florida Rules of Professional Responsibility must have the requisite skill and competence to represent children in cases that involve, among other matters, complex, sensitive, and diverse cultural, racial, moral, and religious issues.

300. See In re N.M.W., 461 N.W.2d 478, 482 (Iowa Ct. App. 1990) (Sackett, J. dissenting).
301. DCF Launches Probe Into Death of Child Found in Cooler, supra note 4.
303. See Fostering the Future DVD, supra note 273.
305. See S.C. v. Guardian Ad Litem, 845 So. 2d 953, 956–57 (Fla. 4th Dist. Ct. App. 2003); see also E.C. v. Guardian Ad Litem Program, 867 So. 2d 1193, 1194 (Fla. 4th Dist. Ct. App. 2004) (recognizing that a child who is the subject of a dependency proceeding has the right to assert the psychotherapist/patient privilege pursuant to Fla. Stat. § 90.503 “to prevent a court-appointed [GAL] from having access to records covered by the privilege”).
306. See M.W. v. Davis, 756 So. 2d 90, 108 (Fla. 2000) (discussing treating children with dignity so that they are listened to and their opinion is taken into account).
307. STANDARDS OF OPERATION supra note 140, at 12; see also Hilary Baldwin, Termination of Parental Rights: Statistical Study and Proposed Solutions, 28 J. LEGIS. 239, 240 (2002).
308. KAREN AILEEN HOWZE, MAKING DIFFERENCES WORK: CULTURAL CONTEXT IN ABUSE AND NEGLECT PRACTICE FOR JUDGES AND ATTORNEYS 7–8 (1996); Martin Guggenheim, Texas
In addition, the child’s attorney has ongoing responsibilities to protect the child client’s interests while the child is in and out of the home care. A detailed discussion of the quality of attorney representation of children in dependency proceedings is beyond the scope of this article. It is, nonetheless, a very important issue that has been the subject of analysis in other states.

Second, the introduction of attorneys for particularly young children can have significant benefits beyond the technical contours of the dependency proceeding. There is substantial evidence of benefits that accrue to young children from investment in early education occurring as a result of stable and supportive parenting that can be enabled by effective children’s attorneys. Third, if attorneys for the other parties and the judge fail to properly discharge their responsibilities, the solution lies in improving their performance, not in twisting out of shape their roles and ethical responsibilities, as this article suggests is happening in Florida. Moreover, independent attorneys for children need to hold CLS, parents’ attorneys and their clients, as well as the CBC’s accountable. CLS attorneys and parents’ attorneys, while they may have opposing positions, do not fully protect children either on the question of whether there is proof of dependency or TPR or on questions of services and safety to children once they are in state care. DCF and CLS do not always properly carry out their parens patriae role, and even when they do, their obligation, both legally and ethically, is not to represent the child’s position. And parents’ attorneys have a singular obligation to their client, not to the child. Indeed, “if the strength of the adversary process lies in the full presentation and consideration of different points of view, then

---


309. See 31 Foster Children v. Bush, 329 F.3d 1255, 1270-71 (11th Cir. 2003); see also supra note 28 and accompanying text; 1 Michael J. Dale, Representing the Child Client, ¶ 2.03(2)(a) (Matthew Bender 3d ed. 2010) [hereinafter 1 Dale, Representing the Child Client]. Conditions in and out of home care, for Florida’s children specifically and children in general, have been the subject of numerous lawsuits.

310. See generally Johnston-Walsh et al., supra note 28; Erik S. Pitchal et al., supra note 66.

311. See Maze, supra note 258.


313. See supra Part I (discussing the historical inadequacies in the Florida child welfare system).

314. Santosky v. Kramer, 455 U.S. 745, 760 (1982). The Supreme Court of the United States said that “[a]t the factfinding, the State cannot presume that a child and his parents are adversaries.” Id.
giving a greater voice to the child should not impair either fact-finding or decision-making.' 315 GAL Program attorneys represent the Program.316 They have no attorney-client relationship with the child. Their ability to even speak with the child, as an unrepresented party, is limited by ethical constraints.317 The same, of course, is true for CLS attorneys and parents' attorneys. Thus, the child should have the right to be heard and be present in court with and through his or her own attorney.318

Fourth, children have basic state and federal constitutional rights that require enforcement. Their constitutional rights emanate from the Due Process and Equal Protection Clauses of the Fourteenth Amendment and Article I, Sections 21 and 23 of the Florida Constitution. This article posits that children possess these separate constitutional rights entitling them to attorneys in dependency and TPR cases: A right of privacy in their home, a liberty interest in their freedom from or while in state care and control, and the equal right of access to court.

On the one hand, it may be difficult to make out a federal constitutional claim under the Due Process Clause of the Fourteenth Amendment for children because the Supreme Court of the United States in Lassiter, held that, despite the significance of the interest at stake, parents did not have an absolute and categorical right to counsel in a TPR case.319 The Supreme Court has never ruled on whether or not children have a federal due process right to counsel in dependency and TPR cases. The right to an attorney for a child under the Due Process Clause of the Fourteenth Amendment would be based upon the privacy right of the child, similar to the privacy right of the parent, which is only penumbral in nature under the federal constitution.320

However, on the other hand, the argument under the Florida Constitution is different and persuasive as to the right to privacy. The Florida electo-

316. See supra notes 165–167 and accompanying text. The positions of the GAL and the child may also be adversarial.
317. RULES REGULATING FLA. BAR R. 4-4.3(a) (2006).
320. Id. at 24. “For all its consequence, ‘due process’ has never been, and perhaps can never be, precisely defined. ‘[U]nlike some legal rules,’ this Court has said, due process ‘is not a technical conception with a fixed content unrelated to time, place and circumstances.’” Id. (quoting Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 895 (1961)).
rate in 1980 voted for a constitutional amendment—Article I, Section 23—which provides that all natural persons in Florida have a right of privacy. The Supreme Court of Florida has interpreted this provision on a number of occasions in a way that supports the argument that children in dependency proceedings in Florida are entitled to an attorney. In *In re T.W.*, the Supreme Court of Florida ruled that, as a matter of constitutional law under Article I, Section 23, a parental consent statute governing a minor’s right to obtain an abortion in Florida was unconstitutional. In so doing, the Court held that it need not apply the federal Constitution, that the Florida constitutional provision regarding the right of privacy was more expansive than the federal right of privacy, and most importantly, that the right applied to minors because the Florida Constitution referenced all natural persons as within its ambit. At least in the context of the right to make a decision regarding pregnancy, the court found, “In proceedings wherein a minor can be wholly deprived of authority to exercise her fundamental right to privacy, counsel is required under our state constitution.” The court then added: “Requiring an indigent minor to handle her case all alone is to risk deterring many minors from pursuing their rights because they are unable to understand how to navigate the complicated court system on their own or because they are too intimidated by the seeming complexity to try.”

The analysis is comparable to the dependency and TPR setting. The Supreme Court of Florida has applied the expanded right of privacy in several other contexts, including the grandparent visitation statute. As the Court

322. 551 So. 2d 1186 (Fla. 1989).
323. Id. at 1188.
324. Id. at 1192.
325. Id. at 1193.
326. Id. at 1196.
327. *In re T.W.*, 551 So. 2d at 1196 (quoting Ind. Planned Parenthood Affiliates Ass’n v. Pearson, 716 F.2d 1127, 1138 (7th Cir. 1983)).
RIGHT TO COUNSEL FOR CHILDREN

said in one of a series of cases addressing this issue, in Von Eiff v. Azicri, 330 "The potential harm to a child flowing from the death of a parent does not constitute the kind of harm this Court has previously found to authorize government[al] intervention." 331 Thus, in the absence of harm to the child, the State cannot intervene against the wishes of a parent. 332 Similarly, the child has a right to privacy within his or her natural home that is protected by the Florida Constitution. 333

A child also possesses a second separate and independent liberty interest under the Florida Constitution that requires protection by an attorney. That second liberty interest is the right to freedom from unnecessary and harmful confinement in out of home care. 334 In M.W. v. Davis, 335 the Supreme Court of Florida did not decide the issue, but after discussing the statutory framework in the context of placement of a dependent child in a residential institution, stated in dicta:

We are thus concerned that, although there are various procedures in Chapter 39 that could be construed to require a hearing before a trial court orders a commitment, neither Chapter 39 nor our own procedural rules adequately address whether an attorney for the child should . . . have the right to put on evidence before the court orders a placement in a residential psychiatric facility. 336

The second due process claim arises from the Supreme Court of the United States opinions in Estelle v. Gamble 337 and Youngberg v. Romeo. 338 In these cases the Court recognized the state's obligation to grant people held against their will—incarcerated prisoners in Estelle and involuntarily committed patients in Youngberg—some adequate assurance of safety. 339 This right is premised upon the concept that when individuals are taken into state custody and thus lose liberty, 340 they are entitled to reasonably safe condi-

330. 720 So. 2d 510 (Fla. 1998)
331. Id. at 515.
332. Id. at 514.
333. In re T.W., 551 So. 2d 1186, 1193 (Fla. 1989).
335. 756 So. 2d 90 (Fla. 2000).
336. Id. at 106-07, not deciding the issue of the right to counsel in the context of a dependent child committed to a residential facility because counsel was appointed to represent the child in that case; see also Parham v. J.R., 442 U.S. 584, 600, 611 n.18 (1979).
339. Youngberg, 457 U.S. at 309; Estelle, 429 U.S. at 102-05.
340. An argument may also be made that when a father’s parental rights are terminated, the child loses a due process property interest—as in the estate of the parent—as a result of
tions and general freedom from undue bodily restraint. In a number of cases involving children in the foster care system, federal courts have extended the right to these children including those in Florida. There is ample evidence that conditions in foster care in Florida can constitute a deprivation of liberty, create harm for young people, and thus may violate children's Fourteenth Amendment and Article I, Section 23 due process rights.

A subpart of the due process constitutional right to freedom from harm at issue here is the right to family integrity. The federal court in Marisol A. ex rel. Forbes v. Giuliani said:

Plaintiff's family integrity claims are closely related to those pertaining to the duration of foster care and, by extension, [are found] within the concept of harm for substantive due process purposes. Indeed, [P]laintiffs suggest that [D]efendants unnecessarily place[d] children in foster care and allow[ed] children properly in foster care to languish without taking steps to reunite them with their biological famil[i]es where appropriate.

Because two liberty interests are at stake, the question becomes what procedures are necessary to protect that child. The analysis of what procedures are necessary in a proceeding in Florida under the State Constitution is evaluated using the well-known tripartite test that originated in the Supreme Court of the United States in 1976 in Mathews v. Eldridge. The Supreme Court recognized that procedural due process imposes constraints on decisions by governments that deprive individuals of liberty interests within the Due Process Clause. The Florida state courts have followed this think-

341. Youngberg, 457 U.S. at 318.
343. See supra notes 1, 309.
345. Id. at 677.
So did a federal court in Georgia which employed the Mathews analysis in finding that dependent children in that state were entitled to counsel. The three elements of the Mathews test are:

[T]he private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government’s interest, including the function involved and the fiscal and administrative burdens that [an] additional or substitute procedural requirement would entail.

First, the degree of potential deprivation is obvious here. The loss to a child of a parent is immeasurable; the professional literature in support of that proposition is voluminous. The length of the possible loss can be a lifetime. The loss of freedom occasioned by placement in foster care, group homes, or institutions, is clear beyond peradventure. Second, the fairness and reliability of the procedures involved are significant, and the best possible safeguard known in the American system is the right to an attorney. While one may argue that the CLS attorney and the attorney for the parent together with the GAL Program adequately protect the child’s legal and best interest, the evidence in Florida, as described in this article, is to the contrary.

Holdings in two cases involving class action challenges to the Florida child welfare system, and a state appellate case in dicta also support the proposition that lawyers for children are necessary and that the other lawyers in the case will not adequately protect the child. In 31 Foster Children v. [Footnotes]

---

353. Conditions of out-of-home care have been the subject of substantial litigation and literature. 1 DALE, REPRESENTING THE CHILD CLIENT, supra note 309, at ¶ 2.03(2); see generally supra notes 177, 342.
354. W.G. v. S.A. (In re A.G.), 40 So. 3d 908, 910 (Fla. 3d Dist. Ct. App. 2010) (providing an attorney to a non-offending parent in a dependency proceeding and stating that “a ‘non-offending’ indigent, non-attorney parent can hardly be expected to navigate through such proceedings without counsel.”).
Bush\textsuperscript{355} and Ward v. Kearney\textsuperscript{356} the Court of Appeals for the Eleventh Circuit and the District Court for the Southern District of Florida abstained from class action challenges to the conditions in out of home care for Florida's foster children.\textsuperscript{357} The courts did so, in major part, upon the ground that the children had an adequate remedy in the dependency court.\textsuperscript{358} The children, the Eleventh Circuit held in 31 Foster Children and the District Court held in Ward, could get relief for their claims in a dependency court.\textsuperscript{359} Although the plaintiffs' counsel in both cases argued that relief in a dependency court was illusory, the plaintiff children were denied the right to proceed in class action form in the federal courts.\textsuperscript{360} Included in the arguments made by counsel in these cases was the fact that the children did not have lawyers in the dependency court.\textsuperscript{361} Thus, to protect the children before the dependency court, as the federal courts said could be done, lawyers are necessary to independently represent the children. No other form of third party "representation" is viable.

Finally, Florida's Constitution specifically guarantees a citizen's access to courts.\textsuperscript{362} The purpose of this section is to give vitality to the maxim that "for every wrong there is a remedy."\textsuperscript{363} Indeed, the Supreme Court of Florida has a duty to ensure access to the courts for every citizen\textsuperscript{364} and has itself made clear that "[t]he right to access is specifically mentioned in Florida's constitution. Therefore, it deserves more protection than those rights found only by implication."\textsuperscript{365} The right to go to court to resolve a dispute is a fun-

\begin{itemize}
\item \textsuperscript{355} 329 F.3d 1255 (11th Cir. 2003).
\item \textsuperscript{356} Settlement Agreement at 3, Ward v. Kearney, No. 98-7137-CIV-MORENO (S.D. Fla. 26, 2000) [hereinafter Ward Settlement Agreement].
\item \textsuperscript{357} 31 Foster Children v. Bush, 329 F.3d 1255, 1274 (11th Cir. 2003); Ward Settlement Agreement, supra note 356, at 3.
\item \textsuperscript{358} 31 Foster Children, 329 F.3d at 1279; Ward Settlement Agreement, supra note 356, at 3.
\item \textsuperscript{359} Id. at 1-15.
\item \textsuperscript{360} Id.
\item \textsuperscript{361} Id. at 1.
\item \textsuperscript{362} FLA. CONST. art. I, § 21; Mitchell v. Moore, 786 So. 2d 521, 527 (Fla. 2001) (per curiam).
\item \textsuperscript{363} Holland v. Mayes, 19 So. 2d 709, 711 (Fla. 1944).
\item \textsuperscript{364} Lussy v. Fourth Dist. Court of Appeal, 828 So. 2d 1026, 1027 (Fla. 2002) (per curiam); Peterson v. State, 817 So. 2d 838, 840 (Fla. 2002) (per curiam); State v. Spencer, 751 So. 2d 47, 48 (Fla. 1999); Rivera v. State, 728 So. 2d 1165, 1166 (Fla. 1998); Henriquez v. State, 774 So. 2d 34, 35 (Fla. 3d Dist. Ct. App. 2000) (per curiam).
\item \textsuperscript{365} Mitchell, 786 So. 2d at 527 (citation omitted).
\end{itemize}
damental right, and access to the courts guaranteed to every person must not be unreasonably burdened.

Florida’s “courts are generally opposed to any burden being imposed on the rights of aggrieved persons to enter the courts because of the constitutional guaranty of access.” In accordance with this opposition, any restrictions on the constitutional right of access “should be construed so as to favor the constitutional right.” Before access to the courts may be restricted by the state legislature, “a reasonable alternative remedy or commensurate benefit” must be provided; otherwise, the legislature “must make a showing of an overpowering public necessity justifying a restriction with a finding that there is no alternative method of meeting such public necessity.”

Article I, Section 21 is violated if a “statute obstructs or infringes that right to any substantial degree.” To find that the right of access has been violated, it is not necessary for a statute to present an impossible procedural obstacle—just a significantly difficult one. If a statute significantly infringes upon the right of access to courts, it is in violation of the state constitutional mandate.

Article I, Section 21 also severely curtails the state’s ability to impose financial obstacles to the assertion of claims in court. Although reasonable financial requirements, such as filing fees, have been upheld, Florida courts frown upon financial prerequisites that amount to a substantial financial burden on a person’s right to have his case heard. Likewise, certain procedural hurdles may violate the constitutional guarantee of access. For example, a dismissal with prejudice as a result of a failure to comply with discovery orders burdens the right of access in nearly all cases, unless egregiousness is present; because of this, explicit findings of willful or flagrant disregard are requisite.

---

369. Westside EKG Assoc's. v. Found. Health, 932 So. 2d 214, 218 n.2 (Fla. 4th Dist. Ct. App. 2005), aff'd by 944 So. 2d 188 (Fla. 2006) (citing Hicks v. Hicks, 715 So. 2d 304, 306 n.2 (Fla. 5th Dist. Ct. App. 1998)).
370. Westside EKG Assoc's., 932 So. 2d at 218 n.2.
373. Id.
375. Id., quoted in T.A. Enters., 931 So. 2d at 1018
376. Mitchell, 786 So. 2d at 527.
However,

"a classification having some reasonable basis does not offend [the state constitution simply because] . . . it is not made with mathematical nicety or because in practice it may result in some inequality; also, one who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."³⁷⁸

"[I]f the classification being challenged is based on a suspect classification . . . , then the means or method employed by the statute to remedy the asserted problem must meet not only the rational basis test, but also the strict scrutiny test."³⁷⁹

The third Mathews element is societal costs and administrative burdens.³⁸⁰ The financial cost of providing attorneys is not insignificant, although money is available.³⁸¹ For example, as noted earlier, the State of Florida spends over $30 million on the GAL Program, which includes paying 145 lawyers to represent the Program³⁸² at the trial and appellate level, with no objective proof that this approach successfully protects children. These GAL attorneys could represent children as their attorneys at a comparable cost to the amount spent by the State to pay for CLS and regional counsel attorneys.³⁸³ While the Court in Mathews recognized that "[a]t some point the benefit of an additional safeguard to the individual affected by the administer[ed] action and to society in terms of increased assurance that the action is just, may be outweighed by the cost,"³⁸⁴ the Court also said that "[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision."³⁸⁵ Thus, the balancing test applied in Mathews, as the material found throughout this article demonstrates, weighs heavily in favor of attorneys for the child in these proceedings. A careful reading of Lassiter suggests that under the Fourteenth Amendment due process clause, a parent at least was entitled to an attorney on a case-by-case basis in a TPR case, indicating the strong interest at stake and the balance of costs. Where, here in Florida, the constitutional provision is explicit, more expansive than the fed-

³⁷⁹. Mitchell, 786 So. 2d at 527.
³⁸¹. Id.
³⁸². See supra notes 129, 130 and accompanying text.
³⁸³. See CHILDREN & YOUTH CABINET BUDGET REPORT, supra note 175. The CLS budget for 2010 is $43,397,059.00. Id.
³⁸⁴. Mathews, 424 U.S. at 348.
³⁸⁵. Id.
eral provision which is unstated in the federal Constitution, and which has
been explicitly applied to children, the right to an attorney should be recog-
nized.

It should be noted that, in *M.W. v. Davis*, the case in which the Sup-
reme Court of Florida established evidentiary obligations where a child was
to be placed in a closed mental health setting as part of a dependency pro-
ceeding, the Court did not reach the question of the right to an attorney for
the child. It failed to do so because, while it was asserted that the child
had a right to privacy, the right to an attorney argument was not raised in the
petition for a writ of habeas corpus and thus was not preserved for review.
In the *M.W.* opinion, the Court did recognize that “[a]lthough in *D.B.* [in-
deed] we discussed the constitutional rights of parents whose parental rights
the Department sought to terminate, we did not discuss the nature and extent
of the child’s constitutional rights in a dependency proceeding except to find
that there was ‘no constitutional right to counsel.’” The Court also noted
in a footnote that “[t]he issue of whether a child who was being committed to
a residential facility would be entitled to counsel is not before us because in
this case counsel was appointed to represent *M.W.*’s ‘express preferences’
and ‘actual positions.’”

While neither *T.W.* nor *M.W.* involved the question of a right to an at-
torney for children whose parental rights were being terminated, or for chil-
dren who were being taken away from their parents in a dependency proceed-
ing, the right of privacy, given the explicit nature of the Florida Constitution,
is the signal factor that mandates an attorney for children in these cases.
Adding the constitutional rights of freedom from harm and loss of liberty in
the child welfare system as well as equal access to the court only magnifies
the child’s right to counsel.

386. 756 So. 2d 90 (Fla. 2000).
387. *Id.* at 97 n.18.
388. *Id.* at 97 n.17.
389. *Id.* at 97 (quoting *In re D.B.*, 385 So. 2d 83, 91 (Fla. 1980)). In making this state-
ment and citing *In re D.B.*, the court made no referral to Article I, Section 23. See *id.*
390. *M.W.*, 756 So. 2d at 97 n.18.
391. Such children have explicit statutory rights that require enforcement. See *Individuals
1901–63 (2006)).
Child advocates continue to debate the most appropriate form of representation for children in dependency and TPR proceedings. The majority favors client-directed attorneys who represent the child’s expressed wishes under an attorney-client relationship and are bound by ethical rules. Others argue for a form of best interest representation, whether it is by an attorney or a traditional GAL standing in the child’s shoes. Florida uses none of these approaches. It employs a convoluted GAL model of representation that meets no constitutional, pragmatic, best thinking, or ethical standard. Florida’s system does not even comply with federal and state mandates that each child in dependency proceedings be represented by a GAL, despite expenditures in excess of $30 million per year. Florida’s system is in need of immediate and fundamental reform. The authors of this article propose the following:

1. That Chapter 39 be amended to provide that every child in every dependency and TPR proceeding have an independent attorney acting in the role of a traditional attorney from inception to completion of the case.

2. That the GAL Program no longer be a party in dependency or TPR proceedings, but may be appointed by the court as a non-party advisor to assist the court in determining the child’s best interests and that almost all GAL Program attorneys be separately housed in an organization similar to the Civil Regional Counsel and independently represent the legal interests of children.

3. That Florida’s Rules of Professional Conduct, particularly 4-1.14 and 4-1.6, be amended to conform to the ABA Model Rules, so that children are entitled to ethical protection as clients with diminished capacity and that lawyers for children may reveal information to prevent substantial harm to the child client.

4. That CLS lawyers represent their client, DCF, as a party in a civil proceeding, and not in the role of a clientless quasi-prosecutor.
IT'S NEVER TOO LATE TO MAKE AMENDS: TWO WRONGS DON'T PROTECT A VICTIM'S RIGHT TO RESTITUTION

WOODY R. CLERMONT*

BASSANIO
Why dost thou whet thy knife so earnestly?

SHYLOCK
To cut the forfeiture from that bankrout there. +

I. INTRODUCTION.......................................................................................... 363
II. THE HISTORY OF CRIMINAL RESTITUTION AND THE FEDERAL
    PROBATION ACT OF 1925 ................................................................... 369
III. THE CHANGING NEEDS OF AMERICAN SOCIETY AND RESTITUTION
    IN FEDERAL SENTENCING ................................................................... 374
IV. Dolan v. United States ........................................................................ 381
V. WHO SAID THERE WAS NO SUCH THING AS
    "DEBTOR'S PRISON"? ......................................................................... 385
VI. CONCLUSION ...................................................................................... 391

I. INTRODUCTION

The Mandatory Victims Restitution Act (MVRA), 1 which took effect on April 24, 1996, requires a sentencing court to order a defendant to make restitution to victims of crimes for the full amount of their losses, without consideration of the defendant's economic circumstances. 2 On June 14, 2010, the Supreme Court of the United States rendered its decision in Dolan

---

* Assistant General Counsel, Office of the General Counsel, J.D., University of Miami School of Law, 2002. It is with warm sentiment that I express that this article be dedicated to the late Professor John Arthur, whose teachings left an indelible mark on me, to this day. Having taught for 30 years prior to his death, not only was he a highly respected professor of philosophy at Binghamton University, State University of New York, he served for 18 years as its Director of the Program in Philosophy, Politics, and Law. He is an immortal among great minds and teachers.


v. United States,\(^3\) deciding five to four, in favor of allowing MVRA restitution to be imposed, even after the expiration of 90 days, in federal criminal cases.\(^4\) One might have expected to see a split of justices, along the lines of the conservative wing against the liberal wing. That would result in a theoretical majority of Chief Justice Roberts, and Justices Scalia, Thomas, Alito, and Kennedy. The corresponding minority would have been Justices Breyer, Stevens, Ginsberg, and Sotomayor. However, anyone harboring such expectations would have been soundly disappointed, as the actual majority opinion was written by Justice Breyer, joined by Justices Thomas, Ginsberg, Alito, and Sotomayor.\(^5\) The dissenting opinion was written by Chief Justice Roberts, joined by Justices Stevens, Scalia, and Kennedy.\(^6\)

The split represented a divergence in views that could not be easily reconciled by a simplistic rank and file orientation of ideology. Rather, the conflict drew lines as to those members of the Court willing to impose a flexible interpretation of the federal statute, versus those who refused to deviate even an iota from the plain text. Another way to frame the divisions is between those who felt the statute removed restitution from the general rule of sentencing finality, versus those who did not.

The MVRA, codified largely at 18 U.S.C. §§ 3663A and 3664, requires the court, with few exceptions, to enter an order of restitution to the victims of certain crimes.\(^7\) "If the law permits restitution, the probation officer must conduct an investigation and submit a report [containing] sufficient information for the court to order restitution."\(^8\) Section 3663A(a) provides, in pertinent part, that:

(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense . . . .

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspira-
cy, or pattern of criminal activity, any person directly harmed by
the defendant's criminal conduct in the course of the scheme [or] conspiracy . . . .

Hence, because of the narrow definition of who constitutes a “victim,”
section 3663A(a)(1) does not authorize a court to order a defendant to pay
restitution to any person not a victim of the offense to which the defendant is
ultimately convicted of.10 However, should the parties so choose to enter
into a plea agreement, restitution may be ordered to be paid to persons other
than the victim of the offense.11

Subsection (c)(3) also provides, however, that:

[t]his section shall not apply in the case of an offense described in
paragraph (1)(A)(ii) if the court finds, from facts on the record, that—

. . . .

(B) determining complex issues of fact related to the cause or
amount of the victim's losses would complicate or prolong the
sentencing process to a degree that the need to provide restitution
to any victim is outweighed by the burden on the sentencing
process.12

The restitution order “shall be issued and enforced in accordance with
section 3664.”13 The burden is on the government to identify the victims of
the defendant’s offense.14 Additionally, “The burden of demonstrating the
amount of the loss sustained by a victim as a result of the offense shall be on
the attorney for the Government.”15 The sentencing court is required to “or-
der the probation officer to obtain and include in its presentence report, or in
a separate report, as the court may direct,” among other things, “to the extent
practicable, a complete accounting of the losses to each victim.”16 The pro-
bation officer must obtain victim information from the prosecuting attor-
The prosecuting attorney is required to consult with all identified victims and "promptly provide the probation officer with a listing of the amounts subject to restitution." If it is clearly impracticable to satisfy or comply with this requirement, the probation officer "shall so inform the court." If the victim's losses cannot be determined by ten days before sentencing, "the attorney for the Government or the probation officer shall so inform the court," and the court shall set a date for a final determination, the date of which is "not to exceed 90 days after sentencing." The summary determination proceeding should not constitute a full blown evidentiary hearing. A private settlement of an involved or related amount will not bar restitution, but restitution must be offset against the civil settlement amount. When determining restitution, regardless of the defendant's financial circumstances, section 3664 provides that the court "shall order restitution to each victim in the full amount of each victim's losses as determined by the court."

Criminal restitution under the MVRA differs from other forms of sentencing, particularly in that, judges—not juries—make factual determinations as to the amounts imposed. Many unsuccessful defendants have brought challenges that determinations of this nature, as opposed to those based on findings by a jury beyond a reasonable doubt or on the defendants' own admissions, violate Sixth Amendment principles as spelled out in Blakely v.
Further, considering the Supreme Court's 2005 holding in *United States v. Booker*, there have been a number of arguments brought to the courts calling for the application of *Booker* to orders of restitution. The gist of these arguments is that entering restitution orders solely based on judicial findings constitutes sentencing error violating the Sixth Amendment, as enunciated in *Apprendi v. New Jersey*, the predecessor to *Blakely* and *Booker*.

One circuit court of appeals in the decision of *United States v. George*, which rejected such an *Apprendi-Blakely-Booker* challenge to the process of a bench determination of restitution, described criminal restitution as "a civil remedy administered for convenience by courts that have entered criminal convictions." Other courts of appeal have similarly observed that there is no Sixth Amendment right to a jury trial, likewise describing criminal restitution as either being civil or not constituting criminal punishment. However, these opinions would appear to be treating wording to the contrary in *Pasquantino v. United States* as dicta, in so doing. The Supreme Court of the United States opined, "The purpose of awarding restitution . . . [is] to mete out appropriate criminal punishment for that conduct." Nonetheless, the circuit courts of appeal have uniformly decided that there is no right to a jury trial, not only in restitution proceedings under the MVRA, but also under other similar restitution statutes.

27. See e.g., *United States v. King*, 414 F.3d 1329, 1330 n.1 (11th Cir. 2005) (per curiam) (citing *United States v. George*, 403 F.3d 470, 473 (7th Cir. 2005)) ("Every circuit that has addressed this issue directly has held that *Blakely* and *Booker* do not apply to restitution orders.").
29. 403 F.3d 470 (7th Cir. 2005).
30. *Id.* at 473 (citing *United States v. Bach*, 172 F.3d 520, 523 (7th Cir. 1999); *United States v. Newman*, 144 F.3d 531, 542 (7th Cir. 1998)).
31. U.S. CONST. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . ").
32. *United States v. Visinaiz*, 428 F.3d 1300, 1316 (10th Cir. 2005) (holding restitution is not criminal punishment for purposes of the Sixth Amendment); *United States v. Carruth*, 418 F.3d 900, 904 (8th Cir. 2005) ("[It] is essentially a civil remedy created by Congress and incorporated into criminal proceedings for reasons of economy and practicality.").
34. *Id.* at 365.
Moreover, the degree of proof in MVRA criminal restitution is less than for a criminal conviction; the latter requires proof beyond a reasonable doubt, whereas the former does not.\textsuperscript{36} Like the degree of proof in a civil matter, "[t]he burden is on the government to prove the amount of restitution based on a preponderance of the evidence."\textsuperscript{37} Such a standard has been summarized, as when the finder of fact believes it is more probable that a fact exists, than the fact not existing.\textsuperscript{38} If an order of a district court determining the amount of restitution is challenged on appeal, the standard is whether the determination amounts to clear error.\textsuperscript{39} Although one could argue that an order to pay restitution is a financial burden constituting a restraint on liberty, restitution has no effect on a defendant’s custody status, and courts have not permitted the use of the writ of habeas corpus to challenge a restitution order.\textsuperscript{40}

Additionally, even in cases where restitution under the MVRA was imposed, where the crime had been committed under prior versions of the federal statute, such impositions did not violate the Ex Post Facto clause of the Constitution because restitution did not constitute criminal punishment.\textsuperscript{41} Despite the mandatory nature of this restitution, and the financial burden it imposes on defendants, MVRA restitution is not considered "cruel and unusual punishment" and does not violate the Eighth Amendment of the Constitution.\textsuperscript{42}

\textsuperscript{37} United States v. DeRosier, 501 F.3d 888, 896 (8th Cir. 2007).
\textsuperscript{39} United States v. Statman, 604 F.3d 529, 535 (8th Cir. 2010).
\textsuperscript{40} See, e.g., Amaiz v. Warden, Fed. Satelite Low, 594 F.3d 1326, 1329–30 (11th Cir. 2010) (per curiam); see also Mamone v. United States, 559 F.3d 1209, 1211 (11th Cir. 2009) (per curiam) (holding that a section 2255 motion could not be used to collaterally attack a noncustodial part of a sentence like restitution).
\textsuperscript{41} United States v. Wells, 177 F.3d 603, 610 (7th Cir. 1999); United States v. Nichols, 169 F.3d 1255, 1280 (10th Cir. 1999).
\textsuperscript{42} United States v. Arledge, 553 F.3d 881, 899–900 (5th Cir. 2008); United States v. Lessner, 498 F.3d 185, 205–06 (3d Cir. 2007); United States v. Newsome, 322 F.3d 328, 342 (4th Cir. 2003); United States v. Williams, 128 F.3d 1239, 1242 (8th Cir. 1997).
This article will initially focus on the development of the concept of restitution historically, leading to the eventual development Federal Probation Act of 1925. The next part of this article will explain the changes in the law of restitution with the enacting of the VWPA and the subsequent MVRA. The fourth part will describe the course of the Dolan v. United States appeal, the majority decision, and the dissent. Then in the fifth and final part, the article will explore the effect of the case outcome, and any potential future implications.

II. THE HISTORY OF CRIMINAL RESTITUTION AND THE FEDERAL PROBATION ACT OF 1925

Criminal restitution, which focuses on the recovery of losses attributable to criminal conduct, dates as far back as biblical times, if not further. In fact, the rules given in these times "resulted in one of the first moral statutes of criminal restitution." These rules additionally served to appease the victim and helped to prevent retaliation by the victim or victim's family against the criminal defendant. Biblical traditionalists for centuries embraced "a premodern notion of natural law molded by Biblical scripture and Judeo-Christian doctrine." Under the traditionalist approach, restitution was very

43. 130 S. Ct. 2533 (2010).
44. See Leviticus 6:1-5 (NIV). The following appears in the Book of Leviticus:
   The LORD said to Moses: "If anyone sins and is unfaithful to the LORD by deceiving his neighbor about something entrusted to him or left in his care or stolen, or if he cheats him, or if he finds lost property and lies about it, or if he swears falsely, or if he commits any such sin that people may do—when he thus sins and becomes guilty, he must return what he has stolen or taken by extortion, or what was entrusted to him, or the lost property he found, or whatever it was he swore falsely about. He must make restitution in full, add a fifth of the value to it and give it all to the owner on the day he presents his guilt offering."
   Id. (internal cross references omitted).
   The harsh and destructive blood-feud eventually gave way to a process known as composition, with the offending group paying the victim pursuant to an agreement produced by negotiations between the two groups. The advent of economic stability has been credited with spanning the transition from blood-feud to composition. The system of composition, said to have begun in the Middle Ages primarily in Germanic areas, marked the beginning of restitution in a proper sense, that is, as being closely related to the concept of punishment.
   Id.
47. Vivian Hamilton, Principles of U.S. Family Law, 75 FORDHAM L. REV. 31, 33 (2006); see also 2 THE SUMMA THEOLOGICA OF ST. THOMAS AQUINAS 174 (Fathers of the English
closely intertwined with retribution because by paying for one’s crime, “the suffering experienced via the infliction of criminal punishment acts as a penance which helps the wrongdoer atone for his or her crime, thereby becoming morally reformed.”\(^{48}\) With time, however, secular philosophy would come to replace religion; as religions clashed, the safer course, was to isolate morality from the plurality of belief systems:

In *Cosmopolis: The Hidden Agenda of Modernity*, Stephen Toulmin argues that the Enlightenment (usually seen as the beginning of Modernity) had two beginnings. The Renaissance humanists from Erasmus on, who are too often ignored, constituted the first beginning. He characterizes the humanists as embracing a more modest understanding of reason (thought and conduct must be reasonable rather than certain) that is more tolerant of “social, cultural, and intellectual diversity.” The seventeenth century rationalists constituted the second beginning of the Enlightenment as a “Quest for Certainty.” Contrary to conventional accounts of rationalists as engaged in pure abstract thought, Toulmin maintains that the rationalist theories of 17th-century philosophers were “a timely response to a specific historical challenge—the political, social, and theological chaos embodied in the Thirty Years' War.” For example, René Descartes gave up on the modest skepticism of the 16th century humanists and attempted to provide “clear, distinct, and certain” foundations for knowledge that provided “a new way of establishing . . . central truths and ideas: one that was independent of, and neutral between, particular religious loyalties.” Similarly, Grotius “reorganized the general rules of practical law into a system whose principles were the counterparts of Euclid's axioms” and in the *Leviathan*, Thomas Hobbes tried to establish political theory on principles established with the same kind of geometrical certainty.\(^{49}\)

However, restitution and retribution became increasingly discrete concepts, which were rarely intermingled by this point; retribution often exceeded civil restitution, and by imposing additional concerns such as deterrence, criminal punishment sought to protect society.\(^{50}\) While Utilitarians

Dominican Province, trans., Benzinger Bros. 1918) [hereinafter 2 SUMMA THEOLOGICA] (“On the contrary, Restitution belongs to justice, because it re-establishes equality.”).\(^{48}\)


such as Jeremy Bentham argued against the distinction, Lord Mansfield contended "that there is no distinction better known, than the [difference] between" criminal and civil redress. The focus shifted away from remedies like restitution, and torture, humiliation, and death, became common forms of punishment within the penal system, particularly in early America.

Incarceration was becoming increasingly popular as well, and reformer John Howard, wrote chilling details about the horrors he encountered during his 1777 tours of various British prisons. America responded by moving towards the development of solitary cells for serious offenders, and larger cells for other inmates to avoid overcrowding conditions. John Augustus, in the mid-19th century, promoted rehabilitation rather than jail, and was able to convince a number of courts to release first-time offenders capable of being reformed, into his custody to be supervised. Probation as a criminal sentence was the product of a movement in America to find alternatives to incarceration for those who were confined. Though arguably, the new placement of emphasis on the offender shifted the focus away from the victim.

57. Kelly, supra note 47, at 686. "History suggests that growing interest in the reformation of the criminal is matched by decreasing care for the victim." Id. (quoting STEPHEN SCHAFER, COMPENSATION AND RESTITUTION TO VICTIMS OF CRIME 12 (2d ed. 1970)).
The notions of probation and rehabilitation became popular and spread across the states. In the late 1800's, many federal courts were resorting to the use of a suspended entry of sentence, which led to a legal issue that would be decided after the turn of the century. Congress had attempted to pass a probation statute in 1916, but met great difficulties:

Establishing probation as a sentencing option in the federal courts did not happen quickly or easily. Opinion on the wisdom of doing so was sharply divided. Some federal judges were for probation, seeing it as an alternative to the sometimes harsh penalties they were compelled to impose. Other federal judges were against probation, finding it too lenient. Congress could not reach agreement on a national plan. The first bills for a federal probation law had been introduced in Congress in 1909. But it was not until 1925—and after more than [thirty] bills had been introduced—that one such bill became law.

In 1916, in the decision of Ex Parte United States, the Supreme Court of the United States, in addressing a writ of mandamus brought by both the U.S. Attorney General and the U.S. Solicitor General, held that a district court judge named John M. Killits was without power to suspend a sentence indefinitely. This ruling became more commonly known as the "Killits decision" and became the impetus for the enactment of the Federal Probation Act of 1925 (FPA), which allowed the courts to suspend the imposition of a sentence and place an offender on probation. District courts were now free to place offenders on probation up to an amount of time not to exceed five years "upon such terms and conditions as they . . . deem[ed] best" when the

59. Id. ("Increasingly, however, the U.S. Department of Justice disapproved of the use of the suspended sentence, believing that it infringed upon executive pardoning power and therefore was unconstitutional.").
60. Id.
61. 242 U.S. 27 (1916).
62. Id. at 51–52 (1916), superseded by statute, Federal Probation Act of 1925, ch. 521 § 1, 43 Stat. 1259 (codified as amended at 18 USC § 3651) (repealed 1987), as stated in Af前方 v. U.S., 350 U.S. 79 (1955) ("W)e can see no reason for saying that we may now hold that the right exists to continue a practice which is inconsistent with the Constitution, since its exercise, in the very nature of things amounts to a refusal by the judicial power to perform a duty resting upon it, and, as a consequence thereof, to an interference with both the legislative and executive authority as fixed by the Constitution.").
64. Id.
court was satisfied that "the ends of justice and the best interests of the public, as well as the defendant," would be served thereby.65

The discretionary power of this new law also "permitted federal courts to issue restitution orders as a condition of probation."66 To be sure though, there was no specific mention of restitution or reparation on the statute books of most laws of many states or in the federal code, even going into the late 1930s. Nonetheless, the power to grant restitution had been implicitly read into the statutory provisions permitting suspended sentence and probation conditions, notwithstanding silence on the issue.67 Subsequent amendments to section 3651 would change this condition from an implied one to an expressed one, as it provided that a probationer "[m]ay be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had."68 Also, by implication, a district court was not authorized to order restitution while a defendant was incarcerated since "the FPA authorizes a district court to impose restitution only as a condition of [a] defendant's probation."69

However, the judicial determination of the offender's ability to pay compensation was a requirement of any imposition of restitution.70 Also it was impermissible to order compensation in excess of the actual loss.71 The Government could qualify as a victim where the offense involved defrauding the Internal Revenue Service, but the restitution still had to be limited to only that which stemmed from the offenses for which the defendant was actually convicted.72 If a district court ordered restitution for amounts which were not determined to be due and owing, that order would not only be premature, but in excess of the statutory authority.73 The ability to impose restitution also

---

65. Id.
66. Kelly, supra note 47, at 691.
67. Id.; see also Federal Probation Act of 1925, § 1.
69. United States v. Angelica, 859 F.2d 1390, 1392 (9th Cir. 1988).
70. United States v. Boswell, 605 F.2d 171, 175 (5th Cir. 1979); United States v. Wilson, 469 F.2d 368, 370 (2d Cir. 1972); United States v. Taylor, 321 F.2d 339, 341 (4th Cir. 1963).
71. See Karrell v. United States, 181 F.2d 981, 987 (9th Cir. 1950).
73. United States v. Stoehr, 196 F.2d 276, 284 (3d Cir. 1952).
extended to probation sentences under the Federal Youth Corrections Act.\(^\text{74}\) The district courts had the discretion to impose restitution in combination with probation as a sentencing alternative to juveniles.\(^\text{75}\) Probation with restitution was even extended in a case involving criminal liability of a corporation.\(^\text{76}\)

However, as to most, it was infrequently used as a tool between 1925 and 1982, and a clarion call for change would revolutionize this cumbersome approach that dominated the early to mid-twentieth century.\(^\text{77}\) Margery Fry, a criminal justice reformer and one of the first women in Britain to become a magistrate, championed the cause of restitution and brought it to the forefront of both English and American thinking.\(^\text{78}\)

III. THE CHANGING NEEDS OF AMERICAN SOCIETY AND RESTITUTION IN FEDERAL SENTENCING

Centuries before the dialogue on restitution came to penal law in America, Bentham, in his work, *Theory of Legislation*, laid the groundwork for restitution within the criminal justice system.\(^\text{79}\) It, therefore, is ironic that he is cited as having laid the foundations for the shift towards a greater retributive model and that Fry had to re-raise the dialogue about victim compensation.\(^\text{80}\) Fry was aided by two other proponents, Stephen Schafer and Albert Eglash, who also suggested newer paradigms for a model of criminal jus-

\(^{74}\) United States v. Hix, 545 F.2d 1247, 1247 (9th Cir. 1976) (per curiam) ("Although a fine is inherently punitive, restitution is not. So long as repayment is made to the victim and does not exceed the damage caused by the offense, restitution is essentially rehabilitative, and hence consistent with the purpose of the Youth Corrections Act.").

\(^{75}\) United States v. Buechler, 557 F.2d 1002, 1007 (3d Cir. 1977). In any event, the youth will have learned the first lesson that society—in its effort to rehabilitate all offenders—tries to teach: society, whenever it can help it, will not allow crime to pay. In view of substantial scholarly support for the proposition that restitution may be rehabilitative in certain cases, we decline the invitation to read the Federal Youth Corrections Act as proscribing it. 

\(^{76}\) Id. (footnote omitted).

\(^{77}\) See S. REP. No. 97-532, at 30 (1982) ("As simple as the principle of restitution is, it lost its priority status in the sentencing procedures of our federal courts long ago.")).

\(^{78}\) See THE VICTIM IN INTERNATIONAL PERSPECTIVE 12 (Hans Joachim Schneider ed., 1982).

\(^{79}\) JEREMY BENTHAM, THEORY OF LEGISLATION 288 (R. Hildreth trans., Trubner & Co. 2d ed. 1864).

\(^{80}\) See Thad H. Westbrook, Note, At Least Treat Us Like Criminals!: South Carolina Responds to Victims' Pleas for Equal Rights, 49 S.C. L. REV. 575, 578 n.23 (1998).
The ensuing victims' rights movement began to alter the role of the victim, as follows:

The goal of the movement was to force the justice system to realign itself to better represent the interests of victims. As part of that overall goal, the movement urged several substantive changes, including that offenders be required to make full monetary restitution to the victims of their criminal acts. The movement's success and influence was evidenced by the formation of a task force on crime authorized by President Reagan, which, in its final report in 1982, echoed the desires of most victims: increased significance of victims' rights in the administration of criminal justice.

Thus, in the decade prior to the Reagan task force on crime, the movement reflected public sentiment that the criminal justice system had become overly focused on the offender and not focused enough on the victim. With the Supreme Court handing down decisions in *Mapp v. Ohio*, *Gideon v. Wainwright*, and *Miranda v. Arizona*, the public feared for its protection because it perceived that the law had made it easier for criminals to escape on legal technicalities. As a response, the President's Task Force conducted a national study of the plight of crime victims and proposed recommendations in the improvement of compensation to ameliorate their condition. Taking this advice, Congress passed legislation—which had been sorely needed—granting direct authority to federal courts to order restitution.
to victims of crime in the Victim and Witness Protection Act.\textsuperscript{89} Congress intended with the Act to make restitution an integral part of the federal sentencing process.\textsuperscript{90}

By both authorizing courts to impose restitution independent of probation, the VWPA was a groundbreaking alteration of the federal restitution framework. However, there were many opposed to it that challenged its constitutionality because of the lack of a provision providing for a jury trial complying with the Seventh Amendment.\textsuperscript{91} As one commentator opined:

The restitution provisions of the Victim and Witness Protection Act will in some cases violate the seventh amendment right of the offender to a civil jury trial. Where the restitution amounts to first category relief under the VWPA, it may constitutionally be ordered without a jury trial. Courts ordered this type of relief without a separate civil action in England in 1791 and the seventh amendment, being historically grounded, permits actions to be tried without a jury when they were so tried at the time of the amendment's ratification. Where, however, the restitution amounts to compensatory damages, awarding it without a jury trial violates the seventh amendment. The structure of the VWPA and its legislative history reflect that the restitutionary remedy was intended to replace the civil remedy; given this, the protections attached to that civil remedy must attach to any replacement of it. Moreover, restitution awards under the VWPA cannot be viewed as the adjudication of a public right, which would render the seventh amendment inapplicable.\textsuperscript{92}

The circuit courts rejected Seventh Amendment challenges.\textsuperscript{93} The VWPA was also attacked on Fifth Amendment grounds\textsuperscript{94} that it did not pro-

\begin{itemize}
\item \textsuperscript{90} See S. Rep. No. 97-532, at 30 (1982) ("The principle of restitution is an integral part of virtually every formal system of criminal justice, of every culture and every time. It holds that, whatever else the sanctioning power of society does to punish its wrongdoers, it should also insure [sic] that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being.").
\item \textsuperscript{91} The Seventh Amendment states that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const. amend. VII.
\item \textsuperscript{92} Margaret Raymond, Note, The Unconstitutionality of the Victim and Witness Protection Act Under the Seventh Amendment, 84 Colum. L. Rev. 1590, 1615 (1984).
\item \textsuperscript{93} See United States v. Keith, 754 F.2d 1388, 1391–92 (9th Cir. 1985); United States v. Watchman, 749 F.2d 616, 617 (10th Cir. 1984); United States v. Brown, 744 F.2d 905, 908
\end{itemize}
vide adequate due process. Such due process challenges have also been disallowed. The VWPA was also attacked under Fourteenth Amendment grounds that it did not provide equal protection under the law. This ground was rejected because it is necessarily the case that individualized circumstances pertaining to victims and defendants will result in different treatment, and mere disparity alone is insufficient to violate equal protection. Likewise, Sixth Amendment criminal jury trial and Eighth Amendment cruel and unusual punishment challenges were also largely unsuccessful.

Though the VWPA greatly enhanced federal courts’ discretionary power to order restitution, there were drawbacks. Under section 3664(a), when deciding whether to impose restitution and the amount of restitution, courts were required to consider the amount of the loss sustained by any victim as a result of the offense, as well as “the financial resources of the defendant, ... financial needs and earning ability of the defendant and the defendant's dependents, and such other ... factors as the court deems appropriate.” As the court in United States v. Copple observed, this provision had the practical effect of ensuring that restitution judgments did not exceed offenders’ ability to pay. Defendants could not be set up to fail, so to speak. The

(2d Cir. 1984); United States v. Satterfield, 743 F.2d 827, 836–37 (11th Cir. 1984); United States v. Florence, 741 F.2d 1066, 1067–68 (8th Cir. 1984).

94. “No person shall ... be deprived of life, liberty, or property, without due process of law ...” U.S. CONST. amend. V.

95. Under the Fifth Amendment, “A criminal defendant must be afforded ... due process at a sentencing proceeding.” United States v. Palma, 760 F.2d 475, 477 (3d Cir. 1985) (citing Townsend v. Burke, 334 U.S. 736 (1948)).

96. Id.

97. See United States v. Satterfield, 743 F.2d 827, 841 (11th Cir. 1984). It is not constitutionally impermissible to treat similarly situated defendants differently. Id.

98. Palma, 760 F.2d at 478–79.

99. See, e.g., United States v. Keith, 754 F.2d 1388, 1390–92 (9th Cir. 1985).


101. 74 F.3d 479 (3d Cir. 1996).

102. Id. at 485.

Even if the government is correct that Copple has retained $623,334 in assets, under the court's order Copple must come up with over $3.6 million in five years to satisfy the restitution order, plus an additional $665,859 to pay off back taxes. Copple is currently incarcerated, has a wife and two children to support after he completes his term, and faces his employment prospects with fraud and tax evasion convictions in tow. The value of a college degree notwithstanding, we cannot say—in the absence of the factual findings discussed—that on substantive review we could conclude the court's order to be factually supportable.

Id.

103. See id.

The relevant determination in favor of an order of restitution, therefore, is not a court's vague appreciation of a defendant's "potential to succeed" financially at some point in the undefined future, but, rather, its finding by a preponderance of the evidence that there exists a realistic prospect that defendant will be able to pay the required amount within five years.
Copple court understood that crafty offenders might well be very good at hiding the ill-gotten proceeds:

We do not suggest that a defendant who has become expert at secreting the proceeds of the crime can avoid the obligation to disgorge them. The proceeds from a defendant's illegal conduct that the defendant still retains or can recoup are certainly encompassed within the "financial resources of the defendant," 18 U.S.C. § 3664(a), that the district court should consider in fashioning a restitution order. Of course, the continued existence of such proceeds is a factual issue that should be accompanied by "specific findings.

Although we have not seen it applied elsewhere, we believe there is a method by which the court can fashion a restitution order that accounts for the court's reasonable belief that there are secreted assets and that satisfies the court's obligation to make the necessary supporting findings. Under 18 U.S.C. § 3664(d), the sentencing court has broad discretion to assign to either party "[t]he burden of demonstrating such other matters as the court deems appropriate" in the course of its fact-finding. It would be sufficient for a district court that believes, based on the record, that such proceeds are still available to determine the amount properly attributable to the defendant with reasonable precision.\textsuperscript{104}

Therefore, the court of appeal believed that the district court could not skirt its burden to specifically demonstrate how it believed the defendant could pay, notwithstanding the defendant's resourcefulness at concealing his assets.\textsuperscript{105} Still, in some cases, this could pose some difficulty in doing.\textsuperscript{106}

\textsuperscript{104} Id.
\textsuperscript{105} Id. Judge (now Justice) Alito's concurrence is of great interest, in that, while he concurred with the majority, he suggested that the burden of proof be on the defendant, and not the Government. See id. at 485–86 (Alito, J., concurring). He wrote:

Defendants convicted of fraud offenses are sometimes masters at hiding assets. Therefore, if the government bore the burden of proving that such defendants still possess illegally obtained assets, the government would be unable to locate hidden assets, those assets would not be taken into account in framing the restitution orders, and the defendants would continue to profit at the expense of the innocent victims. This would be unconscionable.

\textsuperscript{106} Id. at 486. The solution is to place the burden of proof on the defendant to show what has happened to all of the illegally obtained assets. See 18 U.S.C. § 3664(d)(3) (2006). All the assets for which the defendant cannot account may be included in the amount of restitution ordered. See id. To the extent that records are unavailable, the risk of inaccuracy should be borne by the defendant rather than the victims. See id. As the MVRA was enacted the same year as the Copple decision, Congress saw fit to do that: The change placed the entirety of the...

https://nsuworks.nova.edu/nlr/vol35/iss2/1
Another further issue that also posed some difficulty with interpretation of the VWPA was that “[t]he statutes did not further define what constituted the financial resources of the defendant.” Additionally, most governmental agencies can qualify as victims under the VWPA to whom restitution must be paid. However, a governmental agency could not be a victim under the VWPA when it actively created the conditions leading to the loss, due to a law enforcement sting operation.

With the exception of several minor amendments, the federal restitution structure remained relatively intact until Congress passed the Mandatory Victims Restitution Act (MVRA) in 1996. The MVRA made restitution mandatory in almost all cases where the victim suffered an identifiable monetary loss from an enumerated crime. The MVRA removed from the district courts the ability to fashion restitution orders based on an offender's ability to pay. The MVRA was and now remains “all about mandating restitution” and removing the power to decide otherwise from a district

burden on ability to pay on offenders, by eliminating it as a consideration altogether from the amount determination. Compare id. (placing the entirety of the burden on ability to pay on offenders), with United States v. St. Gelais, 952 F.2d 90, 98 (5th Cir. 1992) (holding Defendant fully responsible for entire amount of substantiated loss, where court attempted to ascertain Defendant’s ability to pay, but Defendant was uncooperative and not forthcoming).

I had the experience of prosecuting a defendant in a Florida state circuit court for first-degree felony grand theft exceeding $100,000. While in the middle of a lengthy evidentiary hearing to determine the amount of restitution and the repayment schedule, during cross-examination, I posed a question to the defendant concerning the whereabouts of the proceeds from her home. The home had been sold for more than $400,000. Florida law required that the state establish the defendant’s financial resources and ability to pay when ordering a schedule of repayment. The defendant promptly and incredulously replied that she had squandered the money, and was now living in poverty. She then gratuitously injected, “Being poor isn’t something people like you would ever understand.” The court admonished the defendant, directing her to better spend her time answering the questions, and to avoid answers attacking the prosecutor. Suffice it to say, based on the many theft and fraud cases that I previously prosecuted, I am quite aware of just how difficult many offenders can be, and the lengths of evasiveness they will go to in avoiding revealing the extent of their financial affairs.


See § 3664(i); see also United States v. Lincoln, 277 F.3d 1112, 1114 (9th Cir. 2002) (noting that the language of § 3664(i) refers to cases in which the government is a victim).

United States v. Gibbens, 25 F.3d 28, 35–36 (1st Cir. 1994) (holding the VWPA applies to passive victims, not active ones, and that the ambiguity had to be resolved in favor of the offender under the rule of lenity).


See United States v. Lessner, 498 F.3d 185, 201 (3d Cir. 2007) (finding that a restitution order in the amount of $938,965.59 was mandatory where defendant is convicted of a Title 18 offense against property and the victim has suffered pecuniary loss).

United States v. Williams, 612 F.3d 500, 509 (6th Cir. 2010).
court.\textsuperscript{113} "No longer is the decision whether to order restitution for certain crimes left to the discretion of the district court."\textsuperscript{114}

A district court is now required to "order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant."\textsuperscript{115} However, the MVRA does require judges to consider the defendant's financial resources when putting together a schedule of repayment.\textsuperscript{116} There had been the belief that the prior VWPA had often times left victims with an incomplete recovery of their losses.\textsuperscript{117} By removing judicial discretion and mandating that judges order restitution in the full amount of victims' losses, Congress attempted to ensure adequate compensation.\textsuperscript{118} While it might be argued that restitution served other purposes, such as rehabilitation of the offender,\textsuperscript{119} this was not the primary purpose of the MVRA. The MVRA reflected a shift towards a more victim-centric system of justice, one that was well received by the public, and which remains to this day the law of restitution in federal sentencing.\textsuperscript{120} However, the drawback with the wording of the statute is that it has been difficult to determine whether the MVRA is a crim-
inal punishment or civil compensation for purposes of many of the challenges that were mounted against it.\textsuperscript{121}

Nonetheless, aside from the previously mentioned attacks on the constitutionality of the MVRA, a new issue would unfold: the statute’s proscription that restitution should be imposed at the time of sentence, or no later than 90 days thereafter.\textsuperscript{122} Even where additional losses become ascertainable at a later date, section 3664(d)(5) provides for an amended order of restitution within 60 days after discovery of the losses.\textsuperscript{123} What would happen in those restitution cases, where adhering to this time deadline would not be possible?

IV. \textit{Dolan v. United States}

In September of 2006, Brian Russell Dolan, a member of the Mescalero Apache Indian Tribe, while intoxicated, severely injured a fellow tribe member, Evan Ray Tissnolthos, in a fight which took place on tribal reservation grounds.\textsuperscript{124} When Dolan’s sister learned of the fight, she contacted the local police who discovered Tissnolthos bleeding on the side of the road.\textsuperscript{125} Tissnolthos was transported by helicopter to a hospital and treated for his injuries.\textsuperscript{126} His medical bills were paid by the Indian Health Service medical program, a governmental agency.\textsuperscript{127} Dolan was charged federally\textsuperscript{128} with

\begin{flushleft}
\textsuperscript{122} See United States v. Stevens, 211 F.3d 1, 4–5 (2d Cir. 2000) (addressing whether a restitution order issued 117 days after sentencing was invalid).
\textsuperscript{123} 18 U.S.C.§ 3664(d)(5) (2006); see also United States v. Minneman, 143 F.3d 274, 284 (7th Cir. 1998).
\textsuperscript{125} Brief for Petitioner, supra note 125, at 5.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\end{flushleft}

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country,
assault resulting in serious bodily injury, and was prosecuted in the United States District Court of New Mexico.\textsuperscript{129} Dolan pled guilty on February 8, 2007.\textsuperscript{130} In May of 2007, the Office of Probation filed its Presentence Investigation Report (PSR), but was unable to provide any amounts for restitution pertaining to the victim's medical bills, because the Indian Health Service failed to respond timely to their requests for documentation.\textsuperscript{131}

The district court attempted to set the matter for sentencing on June 28, 2007, but on June 27, 2007, the Government requested a continuance of the sentencing.\textsuperscript{132} The sentencing was reset and eventually took place on July 30, 2007.\textsuperscript{133} The district court sentenced Dolan to twenty-one months in prison followed by three years supervised release, but was unable to determine the amount of restitution\textsuperscript{134} because the Government was still unable to provide documentation of victim restitution.\textsuperscript{135}

The district court first gave the impression that it wanted to reset the matter for another 90-days, but then proceeded to verbally order restitution on the date of sentencing, but left the matter open due to insufficient information before it.\textsuperscript{136} On August 8, 2007, the district court entered judgment, using the standard Administrative Office form but left the restitution amount blank and indicated the following in the section regarding payment schedule: "'Pursuant to the Mandatory Restitution Act, restitution is applicable; however, no information has been received regarding possible restitution payments that may be owed. Therefore, the Court will not order restitution at this time.'"\textsuperscript{137}

On October 5, 2007, the probation office created an addendum to the PSR indicating that the total of the victim's medical bills was $105,559.78.\textsuperscript{138} The 90-day deadline from the sentencing hearing date expired on October 28, 2007.\textsuperscript{139} The district court did not hold a hearing to determine restitution shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

\textit{Id.}

\begin{itemize}
  \item \textsuperscript{129} Dolan v. United States, 130 S. Ct. 2533, 2537 (2010).
  \item \textsuperscript{130} \textit{Id.}
  \item \textsuperscript{131} \textit{Id.; Brief for Petitioner, supra note 125, at 6.}
  \item \textsuperscript{132} Brief for Petitioner, \textit{supra} note 125, at 6.
  \item \textsuperscript{133} Dolan, 130 S. Ct. at 2537.
  \item \textsuperscript{134} \textit{Id.} The Government's victim advocate indicated the victim allegedly had an outstanding bill of $80,000, but was unable to obtain confirmation or reach the victim. Brief for Petitioner, \textit{supra} note 125, at 6.
  \item \textsuperscript{135} Dolan, 130 S. Ct. at 2537.
  \item \textsuperscript{136} \textit{Id.; Brief for Petitioner, supra note 125, at 7.}
  \item \textsuperscript{137} \textit{Dolan, 130 S. Ct. at 2537.}
  \item \textsuperscript{138} Dolan, 571 F.3d at 1024.
  \item \textsuperscript{139} \textit{Id.} at 1025.
\end{itemize}
until February 4, 2008. At the time, Dolan objected on grounds of jurisdiction, as more than six months had elapsed since sentencing. The court requested the parties submit briefs on the 90-day limitation provision, and later held oral argument on the jurisdiction issue.

The district court determined that it retained jurisdiction and entered an opinion and restitution order requiring Dolan to pay the Indian Health Service $104,649.78, with scheduled payments of $250 per month. Dolan timely appealed the restitution order to the Tenth Circuit Court of Appeals, arguing *inter alia*, that the district court erred in imposing a void order. The court of appeals affirmed on the grounds that the congressional intent of section 3664 would be frustrated if jurisdiction could be lost due to timing. Thus, it held that because section 3664 is in the nature of a claims processing rule, it was never intended that somehow an offender’s due process rights and need for sentencing finality could outweigh the victim’s right to restitution. Dolan filed a writ for petition of certiorari; the Supreme Court granted the petition.

The Tenth Circuit was not alone in its line of thinking at the time. The Sixth Circuit held that the 90-day provision is not a jurisdictional limitation, because this would be inconsistent with the 60-day provision for an amended order at a later date. The Second and Third Circuits permitted tolling of the 90-day provision, where the reason for delay is occasioned by the offender. The First and Fourth Circuits also held the passing of the 90-day deadline did not divest the district court of further subject matter jurisdiction. The Ninth Circuit further held that violation of the timing requirements of section 3664 did not result in a loss of jurisdiction to order restitution.

140. *Id.*
141. *Id.*; *Brief for Petitioner, supra* note 125, at 8.
142. *Dolan*, 571 F.3d at 1025.
143. *Id.*; *Brief for Petitioner, supra* note 125, at 8–9.
144. *Dolan*, 571 F.3d at 1025.
145. *Id.* at 1029–30.
146. *Id.* at 1031.
149. *United States v. Terlingo*, 327 F.3d 216, 222–23 (3d Cir. 2003) (allowing for time greater than the 90-day time period, where the defendant’s actions are cause for the delay); *United States v. Stevens*, 211 F.3d 1, 6 (2d Cir. 2000) (also tolling 90-day deadline for defendant’s delay); *see also United States v. Douglas*, 525 F.3d 225, 252–53 (2d Cir. 2008).
151. *United States v. Cienfuegos*, 462 F.3d 1160, 1162–63 (9th Cir. 2006).
However, the Sixth Circuit decided the matter differently in another opinion. The Seventh Circuit also held that a late entered restitution order was void for failing to observe the 90-day requirement. The Eleventh Circuit likewise found that a restitution order violating the deadline was without jurisdiction. There was a true split within the circuits.

On review, Justice Breyer delivered the majority opinion, holding that even when a sentencing court misses MVRA’s 90-day deadline to make final determination of victim’s losses and impose restitution, it retains jurisdiction over restitution, where that court made clear prior to the deadline’s expiration that it would order restitution. The Court seeks to strike a balance, but admits that the victim’s right to mandatory restitution outweighs the offender’s need for finality. The Court advises that an offender can use mandamus as a remedy for any transgressions by the district court, where the sentencing court has truly failed to observe the requirements of section 3664. Finally, the Court dismisses the “rule of lenity” argument, finding that there is no ambiguity within the MVRA in need of resolution.

Chief Justice Roberts delivered a powerful dissent. He cautioned that Rule 35 of the Federal Rules of Criminal Procedure do not permit the indefinite extension of time to comply with ordering restitution under the MVRA, which the majority ignores. He reminded the majority, that all sentencing must be completed on the date of sentencing; any extension of time beyond that must be specifically provided for by rule. He scathingly summarized


Accordingly, we hold that when the 90-day clock runs out, the judgment of conviction and sentence, including the restitution provision, becomes final by operation of the statute. We therefore have jurisdiction to review the judgment of conviction and sentence. It follows that because there was no timely judicial determination of the restitution amount, the judgment contains no enforceable restitution provision.

Id. at 584-85.

153. United States v. Farr, 419 F.3d 621, 625–26 (7th Cir. 2005) (invalidating restitution order for lack of jurisdiction. However, the court noted that had the government proposed theories for the delay, the result may have been different).

154. United States v. Maung, 267 F.3d 1113, 1122 (11th Cir. 2001) (finding no authority to enter a restitution order beyond the ninety days).


156. Id.

157. Id.

158. Id. at 2544.

159. Id. “[T]wo wrongs do not make a right, and that mistake gave the court no authority to amend Dolan’s sentence later, beyond the 90 days allowed to add a sentencing term requiring restitution.” Dolan, 130 S. Ct. at 2549 (Roberts, C.J., dissenting).

160. Id. at 2545 (Roberts, C.J., dissenting).

161. Id. at 2546 (“Section 3664(d)(5) is self-executing: It grants authority subject to a deadline, and if the deadline is not met, the authority is no longer available.”).
the rule announced by the majority: "[O]nce the camel’s nose of some permitted delay sneaks under the tent, any further delay is permissible."\textsuperscript{162} He cautioned that the majority does not seem "to need [section] 3664(d)(5) at all."\textsuperscript{163} He concluded, if there is any balancing to be done, the job belongs to Congress, not to the Court.\textsuperscript{164} Although he never referenced the term, it is clear that Chief Justice Roberts’ impression of the majority decision is that it is a dangerous move of judicial activism.

V. WHO SAID THERE WAS NO SUCH THING AS “DEBTOR’S PRISON”?

The obvious effect of the \textit{Dolan} decision is that less offenders will be able to escape the imposition of restitution based on legal technicality. Considering the Congressional intent behind the MVRA, this serves its purpose because the MVRA was a reactionary measure to the public backlash against those Supreme Court decisions that afforded greater protections to the criminal accused in America. However, one has to question the wisdom of a rule, which allows a district court to suggest that it is thinking about ordering restitution, to sufficiently serve to toll the 90-day deadline. The offender has little expectation of finality.

The decision seemed more of a Solomonic compromise, rather than a true reading of the statute in question. If the government were right, then it should not matter whether the district court announces on the record, to alert an offender that it wants to impose restitution in the future. The deadline should not apply at all. Restitution should be ordered, when the Government has sufficient information to bring the matter before the court. However, it is said that the 90-day suggestive deadline is for the benefit of the victim, in that it encourages the courts to address these matters sooner than later.

If the defendant were right, then the 90-day deadline should be strictly adhered to, as restitution is purely a creature of statute. Failure to observe the statute should result in the court lacking jurisdiction over the defendant because the court’s authority cannot exceed what is provided for in the statute.

The Supreme Court, in supplanting its own directive, appears to be legislating what Congress did not provide for.\textsuperscript{165} If Congress wanted to devise

\textsuperscript{162}. \textit{Id.}

\textsuperscript{163}. \textit{Id.} at 2548.

\textsuperscript{164}. \textit{Dolan}, 130 S. Ct. at 2549.


Indeed, there is reason to believe that some legislative bodies have welcomed judicial activism with respect to a subject so inherently difficult and so politically sensitive that the prospect of
such a convoluted rule, it would have provided for it directly in the MVRA. The Dolan decision, read in the negative, stands for the proposition that the district court loses jurisdiction if it fails to announce at any time during sentencing, or the 90 days thereafter, that it intends to impose restitution.\textsuperscript{166} Therefore, offenders have some right to insist upon escaping restitution if the district court fails to make at least some type of signal of how it intends to proceed prior to the deadline expiration.\textsuperscript{167} Two cases that were decided after Dolan have tried to clarify what is sufficient enough to constitute that signal.

In Fu Sheng Kuo v. United States,\textsuperscript{168} the Supreme Court reviewed on petition for writ of certiorari the court of appeals’ affirming decision of the timing of a district court’s restitution order exceeding the 90-day deadline.\textsuperscript{169} The Court vacated the judgment and remanded the case for consideration in light of its prior decision in Dolan.\textsuperscript{170} On remand, the Ninth Circuit in United States v. Fu Sheng Kuo,\textsuperscript{171} held that even where the written order did not reflect that the district court ordered restitution, the transcript reflected that the district court orally pronounced this and that the oral pronouncement controlled.\textsuperscript{172}

Shortly prior to the Fu Sheng Kuo decision, the Second Circuit Court of Appeals reviewed a district court’s imposition of a restitution amount eight days after the expiration of the 90-day deadline in United States v. Pickett.\textsuperscript{173} Referring to the decision of the Supreme Court in Dolan, the court of appeals affirmed, pointing to the record which reflected that the district court intended to order restitution, but delayed only as to the determination of the amount.\textsuperscript{174} “Those statements, each of which was made before the expiration of the ninety-day period, left no doubt that restitution would be imposed.”\textsuperscript{175} More likely than not though, absent total misstep and silence, it does not

\textsuperscript{166} See Dolan, 130 S. Ct. at 2537.
\textsuperscript{167} Id. at 2541 (“Though a deliberate failure of the sentencing court to comply with the statute seems improbable, should that occur, the defendant can also seek mandamus.”).
\textsuperscript{168} 130 S. Ct. 3458 (2010).
\textsuperscript{169} Id. at 3458.
\textsuperscript{170} Id.
\textsuperscript{171} 620 F.3d 1158 (9th Cir. 2010).
\textsuperscript{172} Id. at 1163.
\textsuperscript{173} 612 F.3d 147, 148 (2d Cir. 2010) (per curiam).
\textsuperscript{174} Id. at 149.
\textsuperscript{175} Id.
seem likely that there will be an occasion where a district court will fail to be deemed as ordering restitution.

Moving away from subsequent decisions, to more carefully explore the implications of *Dolan*, one has to look towards failure: What happens when the offender fails to pay restitution imposed? While there are a variety of recourses, the most common and harsh sanction is to revoke probation and sentence the offender to incarceration. The Supreme Court in *Bearden v. Georgia*\(^{176}\) outlined the test district courts are to follow in considering revocation based on violation of repayment conditions of supervised release.\(^{177}\) Justice O'Connor delivered the majority opinion of the Court.\(^{178}\) Reviewing such cases under a due process “fundamental fairness” analysis under the Fourteenth Amendment,\(^{179}\) the Court held that “if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he [or she] lacked the resources to pay it.”\(^{180}\) However, should a district court find that the failure to repay has been willful, then the court need not take into consideration whether the defendant lacks the resources or not.\(^{181}\) Making it abundantly clear that a defendant’s poverty status in no way protects him or her from punishment the Court concluded:

We hold, therefore, that in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused

---

177. See id. at 666–67.
178. Id. at 661.
179. The Fourteenth Amendment provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.
181. Id. at 668.

This distinction, based on the reasons for nonpayment, is of critical importance here. If the probationer has willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection. Similarly, a probationer's failure to make sufficient bona fide efforts to seek employment or borrow money in order to pay the fine or restitution may reflect an insufficient concern for paying the debt he owes to society for his crime. In such a situation, the State is likewise justified in revoking probation and using imprisonment as an appropriate penalty for the offense. But if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available.

Id. at 668–69 (citation omitted).
to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment. Only if alternative measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.\textsuperscript{182}

The Court reversed the revocation of probation, holding that the trial court’s finding that the defendant knew for a long time what he had to do, and failed to do so, was insufficient to demonstrate how the defendant failed to make bona fide efforts to repay.\textsuperscript{183}

Yet contrast the result in the \textit{Bearden} decision with the outcome of the offender in \textit{United States v. Montgomery}.\textsuperscript{184} The defendant had pled to “four counts of using the mails to defraud charitable organizations [that assisted] victims of the September 11, 2001, terrorist attacks.”\textsuperscript{185} After serving a 21-month prison sentence, the defendant started her 3-year term of supervised release, the conditions of which involved keeping a steady job and repayment of $63,817.94 in restitution, at the rate of $300 a month.\textsuperscript{186} After two years, she had only paid $474.16, failed to keep a steady job, and told her probation officer that she could not keep applying for a job because she was seeking Social Security benefits.\textsuperscript{187}

\textit{Montgomery} introduced testimony that she had made repeated efforts to keep steady employment, and a mental health counselor testified to the extent of her mental illnesses.\textsuperscript{188} When the Government’s vocational rehabilitation counselor was asked about Montgomery’s employability, he responded he had “some concerns.”\textsuperscript{189} The district court found, based on a preponderance of the evidence, that Montgomery had engaged in a pattern of manipu-
lation and did not find her efforts to be bona fide, reverting supervised release and sentencing her to an additional eleven months of incarceration.

The Eighth Circuit Court of Appeals affirmed the revocation, finding the district court did not commit clear error. The circuit court applied the Bearden analysis but found that the district court had found Montgomery willfully failed "to acquire the resources to pay" and, in light of such willfulness, did not need to consider fundamental fairness or "alternative measures of punishment," as argued by her counsel. The question is, however: Should someone suffering from mental illness be factually found to be willfully not attempting to make bona fide efforts? In a factual close call, the circuit courts of appeal are in no position to disturb the rulings of a district court judge based on a cold record.

Are we moving in the right direction? "If poverty tends to criminalize people, it is also true that criminalization inexorably impoverishes them." Professors Baird and Jackson described the laws of early English history as "viciously punitive from the perspective of the debtor." History has not been kind to deadbeats, as:

---

190. Id. at 814. Particularly of note to the district court was the fact that she had found work at varying times, but then lost her jobs subsequently thereafter. Id.
191. Id.
192. Id. at 815.
193. Montgomery, 532 F.3d at 814.
195. See, e.g., United States v. Morin, 889 F.2d 328, 331 (1st Cir. 1989) (stating decision revoking probation "will not be reversed absent a clear showing of an abuse of discretion").
English law was not unique in its lack of solicitude for debtors. History's annals are replete with tales of draconian treatment of debtors. Punishments inflicted upon debtors included forfeiture of all property, relinquishment of the consortium of a spouse, imprisonment, and death. In Rome, creditors were apparently authorized to carve up the body of the debtor, although scholars debate the extent to which the letter of that law was actually enforced.\textsuperscript{198}

History indicates that in the United States, imprisonment for debt was abolished at the federal level in 1833.\textsuperscript{199} However, the decisions of the Supreme Court in \textit{Tate}, \textit{Williams}, and \textit{Bearden} suggest that it was not, where the offender is morally culpable and where sentenced to probation or supervised release, willfully fails to satisfy repayment orders, as determined by the district courts.\textsuperscript{200} The decisions in \textit{Dolan}, \textit{Fu Sheng Kuo}, and \textit{Pickett} suggest that mandatory restitution means no less than mandatory restitution, regardless of due process concerns.\textsuperscript{201} It would seem the direction we are moving in is the direction of our past.

Incarceration, followed by supervised release, followed by incarceration upon failure to pay, seems to be perpetuating a jailhouse cycle.\textsuperscript{202} Moreover, the presumption that jailing a probationer for nonpayment of debt is the best way to ensure repayment falls short when as Justice O'Connor suggests in \textit{Bearden}, that to avoid more prison, the probationer may well resort to criminal activity to repay his or her obligations.\textsuperscript{203} The "tough on crime" selling point of the victims' rights movement and the statutes enacted in response,

\textsuperscript{198} Tabb, \textit{supra} note 198, at 7. "Imprisonment for debt was the order of the day, from the time of the Statute of Merchants in 1285, until Dickens' time in the mid-nineteenth century." \textit{Id.}

\textsuperscript{199} \textit{Id.} at 16.

\textsuperscript{200} \textit{See} Bearden v. Georgia, 461 U.S. 660, 670 (1983); Tate v. Short, 401 U.S. 395, 400–01 (1971); United States v. Williams, 128 F.3d 1239, 1241 (8th Cir. 1997).

\textsuperscript{201} \textit{See} Dolan v. United States, 130 S. Ct. 2533, 2539 (2010); United States v. Fu Sheng Kuo, 620 F.3d 1158, 1163 (9th Cir. 2010); United States v. Pickett, 612 F.3d 147, 149 (2d Cir. 2010).

\textsuperscript{202} \textit{See} Wendy McElroy, \textit{The Return of Debtors' Prison?}, \textit{Freeman} Apr. 2008, at 30, 34. Imprisonment is an unnecessary and dangerous exception to the due process to which every individual is entitled both by the Constitution and by natural right. It also involves a confusing, inconstant maze of laws that collapse the traditional distinction between criminal and civil courts. As Justice Black observed, "It would be no overstatement . . . to say that the offense with the most ill-defined and elastic contours in our law is now punished by the harshest procedures known to that law."

\textit{Id.}

are questionable at best. "The most salient points of this statement should be underscored—America has increased its incarceration rate 500% in twenty-five years, it has 5% of the world's population but 25% of its prisoners, and it competes only with Russia for world leadership in putting people in prisons and jails." This may well cast a dystopian shadow on the efficacy of the MVRA itself, despite the well wishes of the public.

VI. CONCLUSION

When the public considers the damage and harm caused by white collar criminals such as Martin Frankel—looted more than $200 million from the insurance industry, Kenneth Lay—participated in Enron's fraud of more than $1 billion from its shareholders, Bernard Ebbers—complicit with WorldCom's accounting practices, which resulted in the theft of $3.8 billion from its shareholders, and Bernard Madoff—ordered to pay $170 million in restitution of the $64.8 billion in investment fraud he orchestrated, then the MVRA seems like a blessing and a godsend, and the decision of the Supreme Court in Dolan seems like a wise and proper outcome. However, few offenders have a decent enough education to commit large-scale sophisticated crimes dreamt up in the confines of remote ivory towers.

For the rest of society, consider that mandatory restitution has placed a Herculean burden on many offenders, particularly the indigent ones. This actually discourages offender rehabilitation, and the "corresponding economic hardship can directly and indirectly cause recidivism." A policy of admittedly acquiescing to a jailhouse cycle surely implicates whether our constitution protections of fundamental fairness have been stripped to the bone. Additionally, are we doing ourselves any favors when we turn prisons into warehouses for the sick and indigent, at a heavy price, that we all bear?

Therefore, the outcome of Dolan is another victory for victims, but a substantial loss for the rehabilitation movement once led by reformers like Augustus. Augustus was careful to only choose those offenders he felt had a chance to turn their lives around and make a difference. Augustus never chose people that arguably would be set up for failure. If we intend to pur-

204. Matthew Dickman, Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996, 97 CALIF. L. REV. 1687, 1689, 1704 n.119 (2009) (discussing that Congress was made aware that recidivism would increase, but declined to address it).
207. Dickman, supra note 205, at 1707.
sue the slippery slope of the redolent path returning to victim-centric approach of yore, where will we stop? The Constitution will become meaningless if Congress lacks the political courage to draw the line when remedies like restitution erode the protections of the Bill of Rights as well as the Due Process Clause. The High Court does no better when it engages in activism. If we are going to move towards the past, perhaps it is time we start to carefully scrutinize which past we choose.
THE LAW AND ECONOMICS OF MUTUAL FUND INVESTMENT-ADVISER FIDUCIARIES:
JONES v. HARRIS ASSOCIATES L.P.

GEORGE STEVEN SWAN, S.J.D.*

I. INTRODUCTION ................................................................. 394
II. GARTENBERG v. MERRILL LYNCH ASSET MANAGEMENT, INC. ............... 396
III. INTERLUDE: EASTERBROOK AND FISCHEL ON FIDUCIARY DUTY ............. 401
IV. JONES v. HARRIS ASSOCIATES L.P. ........................................ 405
V. THE GHOST OF JONES WALKS .................................................. 412
   A. The Law and Economics of Executive Compensation ...................... 412
      1. The Shareholders Snooze ........................................... 413
      2. The Directors Doze ................................................... 416
      3. The Ideal of Fiduciary Duty ........................................ 419
   B. The Law and Economics of the Harris Associates Fees .................... 422
      1. The Competition Conundrum ......................................... 423
      2. Price Discrimination ................................................ 426
      3. Informational Disclosure ........................................... 429
   C. The Citizenry Seethed While the Judiciary Pondered ........................ 432
VI. THE ORAL ARGUMENT OF NOVEMBER 2, 2009 .................................. 435
VII. INTERLUDE: COMMISSIONER PAREDES ON JONES ............................ 437
   A. The Securities and Exchange Commission Guards America .................. 437
   B. Washington Guards America ............................................ 443
VIII. JUSTICE ALITO’S GARTENBERG-PLUS OPINION ................................ 445
   A. Jones Ratifies Gartenberg .............................................. 445
   B. The Jones Additions to Equal a Gartenberg-Plus ........................... 447
   C. The Law and Economics of the Thomas Concurrence ....................... 451
IX. THE FINANCIAL PRESS GREETS GARTENBERG-PLUS ............................ 452
X. WHY THE CRY FOR A GARTENBERG-PLUS OPINION? ............................. 455
   A. The Substance of Things Hoped For .................................... 455
   B. The Substance of Things Not Seen ...................................... 458
XI. THE LAW AND ECONOMICS OF JONES ......................................... 461
   A. Flannigan on Fiduciary Duty ........................................... 461

* George Steven Swan is an Associate Professor, Department of Management, School of Business and Economics, North Carolina Agricultural and Technical State University, Greensboro, NC 27411. He holds the B.A. from The Ohio State University, J.D. from the University of Notre Dame School of Law, and the LL.M. and S.J.D. from the University of Toronto Faculty of Law. He is a member of the Massachusetts Bar, and is a Certified Financial PlannerTM.
I. INTRODUCTION

The following pages assess the widely-anticipated March 30, 2010, opinion of the Supreme Court of the United States in *Jones v. Harris Associates L.P.* That opinion by Justice Samuel Alito widened the door for future litigation brought by, e.g., mutual fund shareholders challenging the fees accorded to the investment advisers of their funds. Such investment advisers of mutual funds typically create the funds they thereupon advise and dominate—hence, captive mutual funds. The Investment Company Act of 1940, as amended in 1970, attached upon an investment adviser of a registered investment company a fiduciary duty respecting that adviser’s compensation for services paid by such company. The *Jones* controversy reached the Supreme Court only after its turbulent vetting in the United States Court of Appeals for the Seventh Circuit by such notables of the scholarly field of law.


2. 130 S. Ct. 1418 (2010).


and economics as the Seventh Circuit’s Chief Judge Frank H. Easterbrook and Judge Richard A. Posner.

*Gartenberg v. Merrill Lynch Asset Management, Inc.*, a 1982 opinion out of the United States Court of Appeals for the Second Circuit, so construed the fiduciary duty element of the 1970 amendments to the 1940 Act that litigation thereafter in excessive fee cases dispensed judgments virtually uniformly for defendants. Subsequently would experts in the economic analysis of law, Easterbrook and Daniel R. Fischel, pronounce that nothing special inheres in fiduciary relationships. Fiduciary duty, rather, is a function of transaction costs. In *Jones*, Chief Judge Easterbrook replied to an attack under the amendments to the Investment Company Act by shareholders in captive mutual funds against their funds’ investment adviser’s remuneration. Easterbrook broke with *Gartenberg* in an opinion pitched almost entirely to the element of the fiduciary-investment adviser’s disclosure to its captive mutual fund’s own board. Both the appellate-level opinions in *Gartenberg* and in *Jones* brushed aside plaintiff bids to benchmark the investment advisory fees charged to their captive mutual funds against fees charged independent clients like pension funds. In his dissent from the denial of rehearing en banc in *Jones*, Judge Posner contrariwise dwelt on the *Jones* investment adviser’s charging captive funds more than twice what it charged to independent funds.

Justice Alito’s opinion tracked less the Easterbrook reasoning in *Jones* than the Gartenberg path: To risk liability for breach of its fiduciary duty, an investment adviser must collect compensation so disproportionately great as to bear no reasonable relation to the rendered services and as cannot be an outcome of an arm’s-length bargain. But Alito submits a Gartenberg-plus opinion in *Jones*. It expressly disavows any categorical rule forestalling comparisons between those fees an adviser charges a captive mutual fund and those it levies upon independent clients. Unsettlingly, perhaps, for mutual fund investment advisers, economics scholarship immediately post-*Jones* reported on the cost structure and performance of a large sampling of America’s pension funds. It disclosed that mutual fund fees substantially exceed pension fund costs, possibly due in part to pension funds’ greater

---

5. 694 F.2d 923 (2d Cir. 1982).
6. Id. at 925; Jones, 527 F.3d at 631.
sizes, which could entail enhanced bargaining power. The performances of defined benefit contribution funds outdo those of defined contribution pension funds. This suggests that monitoring external managers and invoking bargaining muscle to drive down costs is more efficient in the former, potentially due to improved incentives. And Alito adds that fees can be excessive even when negotiated by a board possessing all relevant information.

Immediately apprehended in numerous quarters was the potential thrust of the Jones Gartenberg-plus opinion. That tendency could be pressure on the investment advisers of captive mutual fund boards to justify in detail, and perhaps to reduce, their investment advisory charges. This pressure would conduce to the financial benefit of retail—not institutional—investors. Unfortunately, the salutary payoffs hopable from Jones had not already been conjured for investors by the Securities and Exchange Commission.

This 2010 Jones opinion closely comports with the law and economics propounded neither by Easterbrook—with his linkage of fiduciary duty to transaction costs—nor by Posner, who links fiduciary duty with the unequal information costs problem. It squares with the thought of Nobel laureate economist Sir James A. Mirrlees, and of fiduciary law specialist Tamar Frankel of Boston University. Mirrlees perceives the distinguishing feature of principal-agent relationships to be asymmetry in responsibilities, with the principal as first mover and agent as the second. Frankel teaches that first mover-mutual fund investors (principals) can be hostages of vulpine second mover-investment advisers (agents).

II. Gartenberg v. Merrill Lynch Asset Management, Inc.

In the United States Court of Appeals for the Second Circuit case of Gartenberg v. Merrill Lynch Asset Management, Inc., two shareholders (Irving L. Gartenberg and Simone C. Andre) of a money market fund (Merrill Lynch Ready Assets Trust) “appeal[ed] from a judgment of the Southern District of New York.” That judgment had dismissed their consolidated derivative actions against Merrill Lynch Ready Assets Trust and its affiliates, Merrill Lynch Asset Management, Inc., the adviser and manager thereof, and Merrill Lynch, Pierce, Fenner & Smith, Inc. The principal claim on appeal was that the fees paid by Merrill Lynch Ready Assets Trust to Merrill Lynch

Section 36(b) in pertinent part provides:

For the purposes of this subsection, the investment adviser of a registered investment company shall be deemed to have a fiduciary duty with respect to the receipt of compensation for services, or of payments of a material nature, paid by such registered investment company or by the security holders thereof, to such investment adviser or any affiliated person of such investment adviser. An action may be brought under this subsection by the Commission, or by a security holder of such registered investment company on behalf of such company, against such investment adviser . . . . With respect to any such action the following provisions shall apply:

(1) It shall not be necessary to allege or prove that any defendant engaged in personal misconduct, and the plaintiff shall have the burden of proving a breach of fiduciary duty.

(2) In any such action approval by the board of directors of such investment company of such compensation or payments, or of contracts or other arrangements providing for such compensation or payments, and ratification or approval of such compensation or payments, or of contracts or other arrangements providing for such compensation or payments, by the shareholders of such investment company, shall be given such consideration by the court as is deemed appropriate under all the circumstances.\footnote{Id. § 36(b).}

Appellants contended that the district court had erred in its rejection of a reasonableness standard toward determining whether Merrill Lynch Asset Management, Inc. had executed its fiduciary duty in compliance with section 36(b).\footnote{Gartenberg, 694 F.2d at 927.} Additionally, they urged district court error in determining whether
there had been a fiduciary duty breach in primary reliance upon other money market funds’ management fees level, and also on the costs to Merrill Lynch, Pierce, Fenner & Smith, Inc.  

They argued that the proper test must be the rate resultant from “arm’s-length negotiations in light of the services to be rendered.”

They argued further (as to such arm’s-length negotiated rate) that a fee percentage, which might have proved reasonable when Merrill Lynch Ready Assets Trust had been newly-launched, proved unreasonable once that trust had swelled to its then-huge size. Merrill Lynch Asset Management, Inc. charged the Merrill Lynch Ready Assets Trust an advisory fee hinging upon a proportion of the Fund’s net assets’ daily value. That fee graduated downward as the asset total waxed. Director of Mutual Fund Research for Morningstar, Russel Kinnel, acknowledged in 2010, in context of Jones, that a higher-cost fund might correspond with a higher-quality fund. Yet Kinnel so stipulated solely in terms of dollars expended upon managing, and not in terms of fees as a proportion of assets:

For example, Pimco Total Return, run by the estimable Bill Gross, charges annual management fees of 0.25%. But because the fund, the nation’s largest, holds some $200 billion in assets, Pimco clears about $500 million a year. Meanwhile, the middling Federated Bond charges a yearly management fee of 0.75%, which, on $1.1 billion in assets, generates fees of $8.3 million. So, does Federated charge triple Pimco’s management fee because its bond pickers are three times better than Pimco’s, or are the Federated folks less talented, as the huge gap between Pimco’s and Federated’s revenues implies? I’d say it’s the latter.

The fund industry says, rightly, that you can’t compare the fees of funds and separate institutional accounts because retail investors require more servicing. In many instances, however, a mutual fund’s management fee includes a kitchen sink’s worth of other charges, such as distribution costs, that aren’t used to pay investment professionals. Thus, investors and fund directors alike are in the dark when they compare fees, both between mutual

18. Id.
19. Id. at 928.
20. Id.
21. Id. at 926.
22. Gartenberg, 694 F.2d at 926.
23. Russel Kinnel, Fund Fees on Trial, KIPLINGER’S PERSONAL FIN., Feb. 2010, at 50.
funds and institutional accounts and among different mutual funds. 24

Bear in mind that the fund management group Vanguard, alone among the biggest fund managers, is a mutual company. 25 Thereby, that management company belongs, itself, to the funds it manages. 26 Mutual funds are technically owned by the individual shareholders investing in them. 27

All parties recognized, as had the district court, that the test essentially was to be whether the fee schedule instituted a change beyond the ambit of that which would have been reached—in light of all surrounding circumstances—via arm’s-length negotiation. 28 The Gartenberg panel held that to be guilty of a section 36(b) violation “the adviser-manager must charge a fee... so disproportionately large that it bears no reasonable relationship to the ser-

24. Id. When weighted by mutual fund assets, the average fund’s expense ratio between 1951 and 2009 rose from 60% to some 87%. JOHN C. BOGLE, DON’T COUNT ON IT!: REFLECTIONS ON INVESTMENT ILLUSIONS, CAPITALISM, “MUTUAL” FUNDS, INDEXING, ENTREPRENEURSHIP, IDEALISM, AND HEROES 75 (2011). Fund managers arrogated to themselves the payoffs from the “economies of scale in managing other people’s money.” Id. at 150. There has been a central trio of corporate organization types in the financial services industry: public companies, the partnership, and the mutual. Ironically, supposedly was mutuality a structure finely-suited to providing common services and to the policing of self-regulation. Such a business was the more capable of eliciting and retaining a small customer’s trust. John Kay, How Trust in Finance Was Carried Off by the Carpetbaggers, FIN. TIMES (London), Jan. 19, 2011, at 11.


26. Id.

Despite the “mutual fund” label attached to US investment funds, Vanguard is the only true mutual fund group, owned by investors in its funds. Naturally, Mr. [John] Bogle, [Vanguard founder], regards this as the best form of ownership. He claims support in this view from David Swensen, chief investment officer of Yale University’s endowment. He quotes Mr. Swensen: “Investors fare best with funds managed by not-for-profit organisations [sic], because the management firm focuses exclusively on serving investor interests.”

It is true in theory, but not always in practice, as investors in products managed by mutual life assurance companies discovered in the UK. That Vanguard has maintained its investor focus and stuck it its core principles probably has as much to do with Mr. Bogle’s strong views as with the mutual set-up. But more mutually run institutions would not go amiss.

Mr. Bogle’s prescription for a better system is relatively simple: to demand proper fiduciary management from money managers. They must prioritise [sic] client interests, act as responsible corporate citizens, charge reasonable fees, and eliminate conflicts of interest. Pauline Skypala, A Vital Remedy for Capitalism’s Ills, FIN. TIMES (London), Jan. 10, 2011, at 6; Paul Menchaca, Big Losses Prompt Fresh Look at Investment Model, FIN. TIMES (London), Jan. 10, 2011, at 16 (“The approach pioneered by Yale’s David Swensen is under scrutiny.”).


28. Gartenberg v. Merrill Lynch Asset Mgmt., Inc., 694 F.2d 923, 928 (2d Cir. 1982).
vices rendered and could not have been the product of arm’s-length bargain-

All pertinent facts were to be assessed. Not pertinent was the appel-
lants’ proposal that a criterion for ascertaining fair advisory fees for money
market funds (the captive funds) should be the lower fees levied by invest-
ment advisers upon large pension funds (independent clients):

The nature and extent of the services required by each type of fund
differ sharply. As the district court recognized, the pension
fund[s] do not face the myriad of daily purchases and redemptions
throughout the nation which must be handled by the Fund, in
which a purchaser may invest for only a few days.

During 2009, a panel for the United States Court of Appeals for the
Eighth Circuit would suppose that this language constituted a Gartenberg
disclaimer against comparing money market mutual funds (apples) against
equity pension funds (oranges). And the Second Circuit panel concluded
that the plaintiffs had failed to meet their burden of proving that the fees le-
vied had been so extreme or unjust as to equal a breach of fiduciary duty
under section 36(b).

Our affirmance is not a holding that the fee contract between the
Fund and the Manager is fair and reasonable. We merely conclude
that on this record appellants failed to prove by a preponderance of
the evidence a breach of fiduciary duty. Whether a violation of
[section] 36(b) might be established through more probative evi-
dence of (1) the Broker’s processing costs; (2) the offsetting com-
mission benefits realized by the Broker from non-Fund securities
business generated by Fund accounts; and (3) the “float” interest
income gained by the Broker from its method of handling payment
on Fund redemptions, must therefore remain a matter of specula-
tion. Indeed, the independent trustees of the Fund might well be
advised, in the interests of Fund investors, to initiate such stu-
dies.

Hence, the judgment of the district court was affirmed.

29. Id.
30. Id. at 929.
31. Id. at 930 n.3.
32. Gallus, 561 F.3d at 823–24.
33. Gartenberg, 694 F.2d at 930.
34. Id. at 933.
35. Id. at 934.
Passage of the Investment Company Amendments Act of 1970, with its section 36(b), had little impact on the mutual fund industry. Section 36(b) spawned numerous lawsuits, but these met with piddling success. And into 2009, not only had the judiciary applied Gartenberg thinking for upwards of three decades, but the Securities and Exchange Commission had incorporated Gartenberg into its own rulemaking.

III. INTERLUDE: EASTERBROOK AND FISCHEL ON FIDUCIARY DUTY

A seminal article on fiduciary duty in general is Contract and Fiduciary Duty by Frank H. Easterbrook and Daniel R. Fischel. Previously, they had indicated that the duty of loyalty is a response to the impossibility of writing a contract specifying entirely the parties' obligations. One contracting party might “desire an objective . . . but have neither an idea nor much concern” about how her end be attained. In place of specified undertakings, an agent shoulders a loyalty duty respecting reaching the goal, plus a duty of care in performance. An expertise-hiring principal is reluctant to expose herself to the mercy of an agent whose inputs and outputs are difficult to monitor. This demarcates the fiduciary package.

Since Ronald H. Coase published his studies The Federal Communications Commission and The Problem of Social Cost in 1959 and 1960 re-

---

38. Gartenberg, 694 F.2d at 933.
39. Id.
43. Id. at 426.
44. Id.
45. Id.
46. Id.
47. Easterbrook & Fischel, supra note 42, at 426.
respectively, it has been grasped that the legal rules can minimize the challenges of fragmentary information and weighty transaction costs, via prescribing results contracting parties would have selected in a world of abundant information and costless negotiations. Transaction costs are those costs connected with utilizing a specific governance means to conduct transactions, e.g., the negotiation of, the formation of, and the monitoring of contracts, and enforcing performance. Coase first introduced into economics the transaction cost concept. Indeed, companies themselves arise when and where hierarchies provide superior to markets. A reason therefor is the expense in delineating and overseeing specific contracts. Rather than “detailed contracts, long-term relationships [built upon] trust need to emerge [within] businesses, and between businesses and suppliers.”

Fiduciary duties—Easterbrook and Fischel aver—are not a species apart from other contractual undertakings. Fiduciary obligations vary across different underlying transactions, just as do actual contracts vary across markets. Undeniably, fiduciary duties substantially deviate from one agency relationship to another: e.g., trustee/beneficiary, pension trustee/beneficiary, guardian/ward, attorney/client, partner/partner, corporate manager/investor, majority or inside investor/client, labor union/employee, lender/borrower, and franchisor/franchisee. On the other hand, Professor Robert Flanni-

50. See Easterbrook & Fischel, supra note 42, at 426. But, Easterbrook and Fischel cite only to the Coase article of 1960, not of 1959. See id. at 426.
52. Id.
54. Easterbrook & Fischel, supra note 42, at 427.
55. Id.
56. Id. at 432–34.
JONES V. HARRIS ASSOCIATES L.P.

— the Canadian expert on the law and economics of fiduciary duty— argues that Easterbrook and Fischel err in asserting that fiduciary duty attributes so deviate among agency relationships. Constantly evolving is the fiduciary principle.

Scholars of noneconomic bent lack “a unifying approach to fiduciary duties because they” seek something special in fiduciary relationships; but, there is naught special—Easterbrook and Fischel aver—to be unearthed. Once transactions costs prove steep, somebody calls some contractual relations fiduciary; nevertheless, it is a continuum as Easterbrook and Fischel allege. (On the other hand, Flannigan points out regarding contract and the general law of fiduciary obligation: “There is no connection at all where they do not overlap (open access contractual arrangements, non-contractual fiduciary obligations).”)

Contract law encompasses the principle of good faith in implementation, and good faith blurs into fiduciary duties. For the respective good faith, and fiduciary duty, concepts are alike a stab at approx-

---


58. Robert Flannigan, The Economics of Fiduciary Accountability, 32 DEL. J. CORP. L. 393, 421 (2007) [hereinafter Flannigan, The Economics of Fiduciary Accountability]. "Context determines whether opportunism is actionable as a fiduciary breach.” Id. at 394. “No authorities are offered for the supposed attributes and many of those attributes are misleading or irrelevant.” Id. at 421 n.121. The 1993 article was produced by, and was responsive to, discussions running throughout the 1980s over the suitability and relative efficacy of fiduciary and contract/market machinery to control managerial behavior. Id. at 422.


60. Easterbrook & Fischel, supra note 42, at 438.

61. See id.


63. Easterbrook & Fischel, supra note 42, at 438.
imating those terms parties would have negotiated had they anticipated the circumstances engendering their dispute.\textsuperscript{64}

Homilizing language in judicial opinions must not divert anyone\textsuperscript{65} from the hypothetical bargain insight.\textsuperscript{66} True, the remedy for violation of the fiduciary duty of loyalty—disgorgement of all profit obtained thereby—appears distinctly anti-contractual.\textsuperscript{67} Throughout contract law, the presumptive remedy is premised upon a promisee's loss.\textsuperscript{68} On the other hand, today disgorgement remedies likely award a "promisee only the profit net of the opportunity cost incurred," i.e., gross profits minus what the promisee could have obtained chasing alternative opportunities with equal time and effort. This is not "gross profits [minus] out-of-pocket expenses."\textsuperscript{69} In short, if an actual contract is made, a judge enforces it.\textsuperscript{70} If actual contracts are feasible, then courts induce bargaining.\textsuperscript{71} If transaction costs weigh too heavily, then judges establish presumptive rules toward maximizing the parties' joint welfare.\textsuperscript{72} Contract and fiduciary duties align along a continuum.\textsuperscript{73}

On the other hand, Flannigan points out that while default rules are public goods accessible to the citizenry to cut transaction costs generally, all default rules share this public good character.\textsuperscript{74} The function of fiduciary responsibility as a provision of a standard form set of terms to curtail transaction costs therefore presents a generic function, connecting to default status per se and with no specific content at any given form of legal regulation.\textsuperscript{75} So such function cannot constitute a "unique substantive rationale for fiduciary accountability."\textsuperscript{76}

\textsuperscript{64} Id. at 438 n.28.

\textsuperscript{65} See id. at 439–40.

\textsuperscript{66} Id. at 438.

\textsuperscript{67} Id. at 441.

\textsuperscript{68} Easterbrook & Fischel, supra note 42, at 441.

\textsuperscript{69} Id. (citing E. Allan Farnsworth, Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract, 94 YALE L.J. 1339, 1370–82 (1985)).

\textsuperscript{70} Id. at 446.

\textsuperscript{71} Id.

\textsuperscript{72} Id.

\textsuperscript{73} Easterbrook & Fischel, supra note 42, at 446. It is especially in the last thirty or forty years that transaction-cost economics has informed the investigation of multiple salient topics. See, e.g., THE ELGAR COMPANION TO TRANSACTION COST ECONOMICS (Peter G. Klein & Michael E. Sykuta eds., 2010).

\textsuperscript{74} Flannigan, The Economics of Fiduciary Accountability, supra note 58, at 417.

\textsuperscript{75} Id.

\textsuperscript{76} Id. In any case, "[t]ransaction cost methodology [demands] the evaluation of relative costs. Economists [still] have yet to operationalize that methodology for" fiduciary duty law. Id. at 402–03 n.33 (citing Oliver E. Williamson, The Economics of Governance, 95 AM. ECON. REV. 1, 3–7 (2005)).
And the musings of Frank H. Easterbrook over fiduciary duty would later loom large over the *Jones* saga.

IV. *Jones v. Harris Associates L.P.*

In a May 19, 200877 opinion for a unanimous panel, including Circuit Judges Kanne and Evans,78 United States Court of Appeals for the Seventh Circuit Chief Justice Frank H. Easterbrook reviewed a district court conclusion that Harris Associates, adviser to the Oakmark complex of mutual funds, had not violated section 36(b) of the Investment Company Act, and the court grant summary judgment in Harris Associates, favor.79 The Oakmark complex's open-end funds had grown in recent years because the net returns thereof had surpassed the market average, and the investment adviser's remuneration had grown apace.80 In the *Jones v. Harris Associates L.P.*81 controversy, the plaintiffs—who held shares in several Oakmark funds, captive mutual funds—contended that Harris' investment advisory fees were excessive.82

What Chief Judge Easterbrook styled "the main event"83 of the appeal was these "plaintiffs' contention that the adviser's fees [had been] excessive."84 The district court had followed *Gartenberg*, concluding that Harris "must prevail because its fees are ordinary."85 Plaintiffs first asserted that *Gartenberg* should not be heeded because the Second Circuit depends too much upon market prices as its reasonable fees benchmark86—for plaintiffs averred that fees are denounced incestuously instead of via competition. Second, plaintiffs proposed that should any market be invoked as a fee benchmark, it is the one for advisory services to unaffiliated institutional clients: independent clients.87 Plaintiffs asserted that Harris, like many in-

---

78. *Id.* at 629.
80. *Id.*
81. 527 F.3d 627 (7th Cir. 2008).
82. *Id.* at 629.
83. *Id.* at 630.
84. *Id.*
85. *Id.* at 631.
86. *Jones*, 527 F.3d at 631.
87. *Id.*
vestment advisers, boasts institutional clients—e.g., pension funds—charged the less. 88

Judge Easterbrook retorted that "just as plaintiffs are skeptical of Gartenberg because it relies too heavily on markets, we are skeptical about Gartenberg because it relies too little on markets." 89 Essentially, Jones disapproved the Second Circuit’s Gartenberg arm's-length negotiated rate approach. 90

A fiduciary duty differs from rate regulation. A fiduciary must make full disclosure and play no tricks but is not subject to a cap on compensation. The trustees (and in the end investors, who vote with their feet and dollars), rather than a judge or jury, determine how much advisory services are worth. 91

After all, to conjure with the fiduciary duty term is to summon up the law of trusts, 92 “[a]nd the rule in trust law is straightforward: A trustee owes an obligation of candor in negotiation, and honesty in performance, but may negotiate in his own interest and accept what the settlor or governance institution agrees to pay.” 93 On the other hand, Flannigan teaches:

[I]t is a policy assertion that opportunism is sufficiently controlled by various markets. There is nothing intrinsically “economic” about that argument, or, to put it another way, nothing turns on the fact of its economic character or presentation. It is simply a policy argument about how we might regulate opportunism. 94

Judge Easterbrook in Jones elaborates:

Things work the same way for business corporations, which though not trusts are managed by persons who owe fiduciary duties of loyalty to investors. This does not prevent them from demanding substantial compensation and bargaining hard to get it. Publicly traded corporations use the same basic procedures as mutual funds: A committee of independent directors sets the top managers’ compensation. No court has held that this procedure implies judicial review for “reasonableness” of the resulting salary,

88. Id.
89. Id. at 632.
90. Jones, 527 F.3d at 632.
91. Id.
92. Id.
93. Id. (citing RESTATEMENT (SECOND) OF TRUSTS § 242 cmt. f (2009)).
94. Flannigan, The Economics of Fiduciary Accountability, supra note 58, at 394.
bonus, and stock options. These are constrained by competition in several markets—firms that pay too much to managers have trouble raising money, because net profits available for distribution to investors are lower, and these firms also suffer in product markets because they must charge more and consumers turn elsewhere. Competitive processes are imperfect but remain superior to a “just price” system administered by the judiciary. However weak competition may be at weeding out errors, the judicial process is worse—for judges can’t be turned out of office or have their salaries cut if they display poor business judgment.95

Bluntly: “Judicial price-setting does not accompany fiduciary duties.”96

Prior to the development of economic science, people searched for the “just price” criterion.97 Only “gradually it came to be realized that there is no...
objectively determinable quantitative criterion of justice." Hence, Easterbrook’s scorn of a “just price” system administered judicially. During 2011, practically nobody explicitly searches for the so-called just price. Price as reflection of fair value is mythical. It generally is recognized that any ethical attack must be one against the consumers’ values; it is not to be leveled “against the quantitative price-structure [which] the market establishes on the basis” thereof. Given a pattern of consumer preferences, the just price is the market price. Economics cannot be value-free. However, once subjective values have been agreed upon, specific public policies can be pursued.

The incest protest of plaintiffs stemmed from the fact that an investment adviser creates the mutual fund, which the adviser then dominates despite “the statutory requirement[s] that 40% of trustees be disinterested.” Over the lifetime since the passage of the Investment Company Act of 1940, fund directors almost never fired their fund advisers. Hence Warren Buffett “scoffed at fund directors” at least as early as 1993. Few mutual funds ever change advisers, and [the Jones] plaintiffs conclud[ed] from this that the

Hayek and the Austrian [S]school of [E]conomics might better be seen as the Austrian school of social and political theory. The Austrian vision of distributed knowledge is consistent with John Stuart Mill’s grounding for his principle of liberty, that individuals have the best knowledge of what their interests are.


Future Soviet dissident Andrei Sakharov’s father, a physics teacher, JAY BERGMAN, MEETING THE DEMANDS OF REASON: THE LIFE AND THOUGHT OF ANDREI SAKHAROV 8 (2009), explained experiments to his son on the basis of scientific laws: “This was an idée fixe for Sakharov as a physicist and later as a dissident, when he believed that political problems were just as amenable as scientific ones to rational analysis.” Id. at 10. But rational analysis in politics, unlike physics, draws upon subjective, value-judgment premises. And are these likewise drawn upon in legal-economic theory, see, e.g., JAMES R. HACKNEY JR., UNDER COVER OF SCIENCE: AMERICAN LEGAL-ECONOMIC THEORY AND THE QUEST FOR OBJECTIVITY (2006), and in economics itself? See, e.g., JULIE A. NELSON, FEMINISM, OBJECTIVITY AND ECONOMICS (1996).

98. ROTHBARD, supra note 97, at 168–69.
99. Id. at 169.
100. See generally WILLIAM POUNDSTONE, PRICELESS: THE MYTH OF FAIR VALUE (AND HOW TO TAKE ADVANTAGE OF IT) (2010).
101. ROTHBARD, supra note 97, at 169.
102. Id.
105. FINK, supra note 37, at 188–89.
106. Id. at 189.
market for advisers is not competitive." However, Chief Judge Easterbrook countered that a fund’s investors themselves effectively fire advisers by shifting their money elsewhere. This they do once advisory fees become too onerous relative to results available from alternative investment vehicles: “It won’t do to reply that most investors are unsophisticated and don’t compare prices. The sophisticated investors who do shop create a competitive pressure that protects the rest.”

Does Easterbrook mean that an investment adviser as in Jones is off the hook because sophisticated outsiders who recognize that excessive adviser fees burden a captive mutual fund would accordingly withhold their own potential purchases, and thereby protect incumbent investors in that particular captive mutual fund via a threatened decline in the price of that captive mutual fund’s shares? The threatened decline in share price is, presumably, seen by Easterbrook as deterring excessive adviser fees. Assuredly, the law of large numbers so functions in democratic voting that even if some uninformed voters opt for incorrect choices, there obtains but slight prospect that the ultimate majority will opt otherwise than to a perfectly-informed majority’s result. Contrariwise, commercial comparisons cause complications, finds Donald A. Wittman:

The law of large numbers may explain the puzzle that the Bill of Rights protects free speech but not commercial advertising. False political advertising may fool a minority, yet it will have no harmful effect since votes for the minority will not be translated into political power. In contrast, a business does not have to persuade a majority of consumers, only a few, to have any sales. So the majority may want to protect a minority in the commercial arena.

107. Jones, 527 F.3d at 631.
108. Id. at 634.
109. Id.
110. Id. (citing Alan Schwartz & Louis L. Wilde, Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests, 69 VA. L. REV. 1387 (1983)).
111. DONALD A. WITTMAN, THE MYTH OF DEMOCRATIC FAILURE: WHY POLITICAL INSTITUTIONS ARE EFFICIENT 16 (1995). Wittman’s example assumes voters’ errors to be uncorrelated. Id. However, similar results are yielded by more complex models. Id. (citing Krishna K. Ladha, Condorcet’s Jury Theorem in Light of de Finetti’s Theorem: Majority-Rule Voting With Correlated Votes, 10 SOC. CHOICE & WELFARE 69 (1993); Sven Berg, Condorcet’s Jury Theorem, Dependency Among Jurors, 10 SOC. CHOICE & WELFARE 87 (1993)).
112. WITTMAN, supra note 111, at 16–17. Again, why the difference in harmful effect between political and commercial markets? “The reason for the difference is that consumers get what they buy, but voters get what the majority ‘buys.’” POSNER, LAW, PRAGMATISM, AND
That is, a business—captive mutual fund—need not fool a majority of consumers—potential investors that include sophisticated outsiders—to profitably make its sales of sufficient fund-shares. So the majority of voters acting through Congress could want to protect from harmful effects uninformed consumers who buy shares of captive mutual funds in the commercial arena. That voter-majority’s protective shield would be section 36(b).

Flannigan points out as to fiduciary issues that a manager cannot credibly argue that her opportunistic benefits prove unobjectionable because the firm has implicitly consented thereto via accepting an opportunism discount.\textsuperscript{113} Such a discount “reflect[s] only the risk of opportunism,” i.e., reflecting expanded monitoring costs.\textsuperscript{114} It is not justification of actual opportunism.\textsuperscript{115} The law can scarcely swallow the defense that liability is eliminated because the mischief could be foreseen.\textsuperscript{116}

\textsuperscript{113} Flannigan, \textit{The Economics of Fiduciary Accountability}, \textit{supra} note 58, at 406.
\textsuperscript{114} \textit{Id.}
\textsuperscript{116} \textit{Id.} “In the narrow sense, agency costs are the costs of opportunism and the costs of controlling opportunism.” \textit{Id.} at 397 n.12. In the United Kingdom as of 2011, the ease of giving away capital bases had actually shrunk the mutual sector among the forms of economic organization. For large loom the intimately-connected institutional issues of governance and of capital structure:

The public limited company is the dominant form of economic organisation because, imperfect though the resolution of these issues within that framework may be, they are nevertheless resolved. Most other organisational forms do not achieve scale or permanence because they lack capital and often have poor governance and less effective management. Mutu- als, which may seem to offer the best solution to these questions, have frequently experienced difficulties from either overcapitalisation or undercapitalisation; and the mutual sector has shrunk because legislation made it too easy to give capital bases away. The John Lewis Partnership, the poster child of the sector today, survives because John Spedan Lewis, its founder, was shrewd enough to make this virtually impossible.

John Kay, \textit{Time for the Big Society to Get Down to the Nitty-Gritty}, \textit{FIN. TIMES} (London), Feb. 23, 2011, at 9. Plain is the crux of the problem:

The critical governance requirement is to devise supervisory structures that include a sufficiently wide enough range of stakeholders to prevent capture by any particular interest. One common problem that hybrid organisations, including public companies, face is that they end up run mainly for the benefit of some particular group—employees, financiers, local politicians, or incumbent management.

\textit{Id.} Does this special interest capture idea sound familiar?
The unaffiliated institutional clients’ fee benchmark proposal of plaintiffs, Chief Judge Easterbrook also swept aside:

Harris Associates charges a lower percentage of assets to other clients, but this does not imply that it must be charging too much to the Oakmark funds. Different clients call for different commitments of time. Pension funds have low (and predictable) turnover of assets. Mutual funds may grow or shrink quickly and must hold some assets in high-liquidity instruments to facilitate redemptions. That complicates an adviser’s task. Joint costs likewise make it hard to draw inferences from fee levels. Some tasks in research, valuation, and portfolio design will have benefits for several clients. In competition those joint costs are apportioned among paying customers according to their elasticity of demand, not according to any rule of equal treatment.\(^\text{117}\)

Such was the avalanche-momentum of the disclosure element in Judge Easterbrook’s opinion that, the Harris fees being unhidden from investors, and there being no allegation “that Harris Associates pulled the wool over the eyes of the disinterested trustees” nor hindered trustees’ capacity to negotiate a favorable advisory services price, the judgment of the district court was affirmed.\(^\text{118}\) To be sure, the Easterbrook repudiation of an arm’s-length negotiated rate standard acknowledged imaginable compensation—e.g., by a university’s board of trustees to its president—“so unusual”\(^\text{119}\) as a 25 to 1 multiple of that paid to other presidents that a court would infer either deceit, or abdication of responsibility.\(^\text{120}\) Yet no court inquires whether salaries ordinary among comparable institutions mark excess.\(^\text{121}\)

\(^{118}\) Id. at 635.
\(^{119}\) Id. at 632.
\(^{120}\) Id.
V. THE GHOST OF JONES WALKS

An August 8, 2008,122 per curiam opinion from the Easterbrook, Kanne, and Evans panel announced that panel’s unanimous denial of a rehearing petition.123 A judge in active service had called for a vote on a suggested rehearing en banc.124 No Seventh Circuit majority had favored such en banc rehearing.125 Consequently, the rehearing petition was denied.126 Nevertheless, Circuit Judge Richard A. Posner, with whom Circuit Judges Rovner, Wood, Williams, and Tinder joined, dissented from the denial of rehearing en banc:127 “Jones is the only appellate opinion noted in Westlaw as disagreeing with Gartenberg; there is a slew of positive citations.”128 Indeed:

It’s not as if Gartenberg has proved to be too hard on fund advisers. “Subsequent litigation [after Gartenberg] in excessive fee cases has resulted almost uniformly in judgments for the defendants . . . although there have been . . . notable settlements wherein defendants have agreed to prospective reduction in the fee schedule.”129

A. The Law and Economics of Executive Compensation

Posner observes that the Easterbrook panel premised its repudiation of Gartenberg mainly upon an economic analysis ripe for reexamination.130 Scholarship probes the law and economics of corporate governance.131 Dissected is governance and executive compensation.132 Upon the long genera-

123. Id. at 729.
124. Id.
125. Id.
126. Id.
127. Jones, 537 F.3d at 729 (Posner, J., dissenting). “Circuit Judge Ripple did not participate in the consideration or decision of this case.” Id.
128. Id. at 729 (Posner, J., dissenting) (citing, inter alia, nine opinions).
129. Id. at 730 (Posner, J., dissenting) (quoting JAMES D. COX ET AL., SECURITIES REGULATION: CASES AND MATERIALS 1211 (3d ed. 2001)).
Gartenberg held that suits can succeed only if the fee is so high that it is outside the range of what parties might reasonably negotiate in an arm’s-length transaction (a fair transaction in which buyers and sellers have no relationship with one another). In nearly three decades under this standard, no fund company has ever lost a suit over fees.
Russel Kinnel, The High Court on Fees, KIPLINGER’S PERS. FIN., June 2010, at 49.
tion of 1980–2010, the free enterprise system bestowed a prosperity beyond any level hitherto seen. The market encouraged innovation and dazzled consumers with options. Nevertheless, the market for chief executives appeared dysfunctional. And the latest academic research indicates that at the margin those investing in start-ups ought to lay more weight on the business itself than its management team.

1. The Shareholders Snooze

Executives' remunerations fattened whatever the welfare or setbacks of their companies. The Posner dissent explains that indications accumulate that “executive compensation in large, publicly-traded firms often is excessive.” Elsewhere Posner had recounted how corporate legal theory posits that a controlling shareholder owes a fiduciary obligation to minority shareholders. Meritorious is this theory in the case of conflict of interest emerging between the shareholder majority and the minority. Such, many agree, is the better view. Can a standard compensation-model explain the compensation of America's corporate CEOs? For they attract, on average, approximately double the compensation of their foreign counterparts.

134. Id.
135. Id.
136. Steven N. Kaplan et al., Should Investors Bet on the Jockey or the Horse? Evidence from the Evolution of Firms from Early Business Plans to Public Companies, 64 J. FIN. 75, 75 (2009).
140. Id.
143. Id. In 2009, according to Income Data Services, the chief executives of the United Kingdom's 100 biggest companies earned eighty-one times the pay average of fulltime workers. John Plender, To Avoid the Backlash, Executives Need to Act on Pay, FIN. TIMES (London), Apr. 3, 2010, at 7. In 2008, according to the Institute for Policy Studies, U.S. top executives earned 319 times more than did America's average worker. Id.
Yes, there is such an explanation: Stock ownership is less concentrated in the United States than it is abroad. Shareholders diversifying their portfolios—and able to sell their shares in liquid markets—sense slight impulse to assess or monitor company behavior. For the more money she has at stake, the weightier the incentive a shareholder perceives to monitor the performance of her firm’s management. And the more effective proves shareholder monitoring (the stick), the less the call for incentive-based compensation (the carrot) for a CEO. In widely-held public companies, failures of corporate governance inevitably crop up. It is in the United States where traditionally corporate governance has been weak, given denial of effective voice to shareholders and an unhealthy domination of boards by a combined chairman/CEO. Thereby could American CEO incomes grow porkier than would prove the case in a more competitive market for corporate managers.

For the burden on a major company of even gross overpayments to a CEO falls so lightly once spread across the shareholders—supposing a dispersed stock ownership—that no one shareholder has any incentive to react. And it is well-known that the strategy for the individual small inves-

144. POSNER, ECONOMIC ANALYSIS OF LAW, supra note 139, at 447. Nevertheless, an ownership market (wherein individuals owned over ninety percent of the stock of U.S. corporations) is eclipsed by an agency market (wherein individuals hold but a quarter of such stock). JOHN C. BOGLE, COMMON SENSE ON MUTUAL FUNDS 352 (10th anniv. ed. 2010). Mutual funds, endowment funds, corporate, state and local pension funds, and other funds managed by professional investment organizations control about seventy-five percent of all U.S. corporate stock. Id. This contrasts with only twenty percent in 1968. Id.

145. Martin Wolf of the Financial Times states:

Shareholders enjoy limited liability. As a result, the responsibility they bear for the malfeasance or incompetence of management is highly circumscribed. The claim of shareholders is solely on the residual income of the company. But, since shareholders can diversify their portfolios with ease, their exposure to the risks generated by an individual company is far less than the exposure of workers with firm-specific knowledge and skills. Shareholders lack the ability to assess or monitor a company’s performance. If they are able to sell their shares in liquid markets, they do not have incentives to do so either. Failures of corporate governance in widely-held public companies are, it follows, inevitable.

Wolf, supra note 53.

146. POSNER, ECONOMIC ANALYSIS OF LAW, supra note 139, at 447.

147. ld.

148. Wolf, supra note 53.


150. POSNER, ECONOMIC ANALYSIS OF LAW, supra note 139, at 447 (citing LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION 2 (2004)).

151. ld. at 448.

Obviously no economist in the great classical tradition can either regret or deny profit maximization. And none can suppose that it is other than a deeply personal motivation, some-
tor of investing in index mutual funds indexed to, for example, the Standard & Poor's 500 Stock Index, has been extolled during the whole generation past.\footnote{152} That strategy's merits were sung even after the anguishing October 2007-March 2009 U.S. stock market bust.\footnote{153} Even in ideal times, successful shareholder protests are problematic.\footnote{154} Moreover, should someone own personally, not through a mutual fund, one-hundred dollars of stock in each of 500 corporations, even a CEO stuffing himself with a titanic one percent of that enterprise's wealth costs that shareholder but a single dollar.\footnote{155} So what happens to such a stockholder's reactive incentive?

Worse, should activist stockholders unite to rein their excessively generous board of directors, the proximate result could be an intracorporate succession crisis. Thereby are the intrepid shareholder-revolutionaries likely to be out of pocket for their insurrection. In the meantime, the stockholders in other corporations can benefit. For their own boards might witness that stockholder uprising, and therefore cinch their own belts a bit.\footnote{156} No good deed goes unpunished.

\footnote{155} Id.
\footnote{156} Id. at 108. Sure enough, mutual funds investing in corporate stock seemingly understand that stockholder activism to rein in an excessively generous board can backfire. For under the "Wall Street rule" a mutual fund merely sells its shares if that sophisticated investor dislikes a company's management. Editorial, \textit{Advisers Will Have Their Hands Full with the Reform Law}, Inv. News, July 26, 2010, at 11.

On the other hand, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010,157 executed by President Barack H. Obama on July 21, provided of the Securities and Exchange Commission:

The Commission may issue rules permitting the use by a shareholder of proxy solicitation materials supplied by an issuer of securities for the purpose of nominating individuals to membership on the board of directors of the issuer, under such terms and conditions as the Commission determines are in the interests of shareholders and for the protection of investors.158

Thus, the Commission became empowered to allow investor nomination of directors, on corporate proxies mailed to shareholders, solely the companies’ own nominees appearing on such theretofore.159

2. The Directors Doze

The ordinary reactive incentive of the board of directors is weak if that board is dominated by heavily-remunerated business executives, including CEOs.160 According to Commissioner Troy A. Paredes of the Securities and Exchange Commission—speaking on his own behalf and not that of the Securities and Exchange Commission nor of his fellow Commissioners:

Boards of directors are expected to improve decision making by spurring deliberation. In acting as a body, the promise is that boards will draw on the distinct perspectives, experiences, sensitivities, and expertise that different directors offer. The expectation is that as the group works through a range of ideas and arguments, the ultimate decision will be better as a result of the directors’ collective efforts.

The active engagement of directors is a lynchpin of meaningful deliberation. Decision making should improve when directors—whether interacting with each other or with management—engage in open and frank discussions, even if it means being critical. When assessing some course of action, directors should ask probing questions and follow-ups of each other and of manage-

158. Id. at § 971(b).
160. POSNER, ECONOMIC ANALYSIS OF LAW, supra note 139, at 448.
ment; should challenge key assumptions; should offer competing analyses; and should develop competing options to ensure that alternatives are considered and not cast aside too readily. Put differently, directors should be willing to dissent, and disagreement from others should not be discouraged or suppressed. When it leads people to engage rigorously, disagreement helps ensure that the unknown is identified, that information is uncovered, and that challenges and opportunities are assessed in a more balanced way. Indeed, a board may want to consider designating one or two directors whose express charge is to be skeptical and to press when needed.161

Paredes’ notion of directors being expressly charged to be skeptical was popularly bandied during the Jones Supreme Court of the United States litigation.162 And, for megabanks commanding more than $100 billion in assets, accountable boards of super-directors have been proposed to implement customized executive compensation systems.163 Such a little knot of inde-
dependent directors would be added according to a model loosely founded upon the boards of companies under the control of private equity funds. For inherently feeble are broadly-based bars against executive compensation. So ingenious are lawyers in circumventing such restrictions that these seldom prove effective and occasionally prove counterproductive.

During 2010, Stanford University’s Kenneth J. Arrow—who in 1972 was awarded the Alfred Nobel Memorial Prize in Economics—judged that the most important innovation in economic theory during the two 1960–2010 generations had been its emphasis upon asymmetric information. Unfortunately, boards of directors are opaque entities, even to many institutional investors and corporate executives. Individual shareholders holding small positions know little who board members are. Too many board members, beholden to the CEO ship-captain who piped them aboard, fail to represent shareholder interests for that reason. The United Kingdom imposes nine-year term limits upon independent directors, to force board turnover. The value in reducing cronyism can outweigh the price in lost experience.

Moreover, a board employing a second-best CEO candidate—on the ground she would serve far more cheaply than would the foremost candidate—must expose itself to criticism should she come a cropper. Whereas the board covers its own assets by paying top dollar for the very best. Should that CEO fail, the directors will appear less blameworthy. Even competition in a corporation’s product and capital markets cannot constrain even managerial misconduct, which increases corporate costs. The prob-

164. Id. at 285.
165. Id. at 284.
166. POZEN, supra note 163, at 276.
167. Id.
169. Kenneth J. Arrow, Economic Theory and the Financial Crisis, in THE IRRATIONAL ECONOMIST: MAKING DECISIONS IN A DANGEROUS WORLD 187 (Erwann Michel-Kerjan & Paul Slovic eds., 2010). “Insurance companies had long understood the consequences of asymmetry of information under such headings as moral hazard and adverse selection.” Id. at 188 (Arrow’s emphasis).
171. Id.
172. Id. at 5.
173. Id. at 263.
174. Id.
175. POSNER, ECONOMIC ANALYSIS OF LAW, supra note 139, at 448.
176. Id.
177. Id.
178. Id.
lem of agency costs inheres in the structure of any big enterprise, and is not eliminable through competition.\textsuperscript{179}

3. The Ideal of Fiduciary Duty

Nevertheless, Duke University economist Rachel E. Kranton and George A. Akerlof, who in 2001 was awarded the Alfred Nobel Memorial Prize in Economics, propound that the foremost consideration in an executive’s incentives could be her role as a fiduciary.\textsuperscript{180} Given limited liability, an incentive to indulge in excess risk arises at once. The heavier a gamble, the more stockholders look to gain should the roulette wheel rest upon their color. Should their bet fail, the larger losses accrue to their corporation’s creditors alone once shareholders’ equity is exhausted.\textsuperscript{181} And a pay for performance scheme attracts, ominously, risktakers.\textsuperscript{182} Self-sorting alters the ratios of various personality types found in various activities. Businessper-
sons are more probably optimists than are librarians. Inside an investment company, traders tend to be the optimists but risk managers the pessimists.

A firm might be bankrupted, and an executive can be—at worst—dismissed if she has committed no fraud. Extra bonuses rewarding her for performance during the sunny days go unrepaid during subsequent wintery times. Therefore, risky investments which are profitless socially—i.e., of a negative anticipated value, or of a positive anticipated value inadequate to recompense for a market-determined risk value—can be privately rational for a decision maker: She need not bear the entirety of those negative consequences she lays upon others. Fact-patterns wherein marketplace rational self-interest elicits socially irrational outcomes are termed cases of “rational irrationality.”

Also, during a classic bubble, an asset can command a price steeply above its fundamentals—e.g., the discounted present value of the imputed rents of a house—for so long as that price is anticipated to soar the higher.

183. Posner, Law, Pragmatism, and Democracy, supra note 151, at 296.
184. Id. Cf. Nick Tasler, The Impulse Factor: Why Some of Us Play It Safe and Others Risk It All (2008). Sure enough, when head of risk at Lehman Brothers Madeline Antoncic in 2006 suggested that declining housing prices could mean the balance sheet should come down, President and Chief Operating Officer, Joseph M. “Joe” Gregory, told her she was not only too fussy but out of line. Vicky Ward, The Devil’s Casino: Friendship, Betrayal, and the High Stakes Games Played Inside Lehman Brothers 159 (2010). The general directive from Gregory was “do as much business as you can; take risk.” Id.

It is hard to think of business activities with cultures as different as those of retail and investment banking. The former is intrinsically bureaucratic and hierarchical, relying on the accurate processing of millions of transactions every day with an infinitesimal proportion of errors. It is done best by people who empathise with their customers. The latter is naturally buccaneering and entrepreneurial; the people who do it best are aggressive and self-centered. Successful retail banking is based on relationships; modern investment banking is based on transactions.

John Kay, We Must Press on with Breaking up Banks, Fin. Times (London), Sept. 15, 2010, at 11.
185. Arrow, supra note 169, at 190. In the view of George Mason University economist Russell Roberts:

The expectation by creditors that they might be rescued allows financial institutions to substitute borrowed money for their own capital even as they make riskier and riskier investments. Because of the large amounts of leverage—the use of debt rather than equity—executives can more easily generate short-term profits that justify large compensation. While executives endure some of the pain if short-term gains become losses in the long run, the downside risk to the decision-makers turns out to be surprisingly small, while the upside gains can be enormous. Taxpayers ultimately bear much of the downside risk. Until we recognize the pernicious incentives created by the persistent rescue of creditors, no regulatory reform is likely to succeed.

But as prices zoom ever higher beyond their asset’s fundamentals, investors—to make sense of increasingly-crazy prices—expect them to inflate at still speedier rates. 187 Competitive pressures in a bubble impel a financier to bet rationally—particularly while gambling her diversified investors’ money. 188 Short term business horizons translate into the NIMTOF attitude: Not In My Term of Office. Before 2008, the temptation of hefty annual bonuses deterred persons from hedging their bets or weighing the chances of a financial meltdown, such as that transpiring in October 2008. 189

In one reading, pay for performance demonstrates mala fides. It informs the employee that she is not trusted to choose the right thing. Anyway, undiscovered remains the equation for quantifying bonuses and stock options to correspond with the correct incentive. There is no crystal ball. 190 Do not CEOs manipulate matters like inventories, collections, or payments, to monkey with quarterly earnings, and so manipulate their stocks’ price, whereby to see options issued at bargain-basement prices? 191 The proper incentive, conclude Kranton and Akerlof, should be to live up to her respon-


188. See POSNER, THE CRISIS OF CAPITALIST DEMOCRACY, supra note 151, at 32.


190. Akerlof & Kranton, supra note 182.


More than anything else, stock-based incentive compensation is responsible for short-termism in the modern corporation and the shrinking average tenure of today’s chief executives. It is an incentive for manipulating expectations rather than improving real performance. The solution is to replace stock-based compensation with incentives that affect underlying value—whether that is increasing revenues, profitability, market share, customer service or, optimally, a combination of all of these. And for longer-term incentives based on the actual market not the expectations market, use royalties on real results, as are given to designers, inventors and musicians. The bottom line is that if you want to skew reality, use stock-based compensation. But if you want to build the real company, use incentive compensation anchored in reality-based measures.

Roger Martin, Reward Real Growth, Not Expectations, FIN. TIMES (London), Aug. 3, 2010, at 10. Comparably, Graef Crystal, the compensation consulting pioneer, “ recommends awarding stock options with a strike price that’s the average of the last 90 days and can’t be exercised for five years to avoid ‘opportunistc’ pricing.” Jessica Silver-Greenberg and Alexis Leondis, How Much Is a CEO Worth?, BLOOMBERG BUSINESSWEEK, May 10–16, 2010, at 70.
sibilities. To be sure, entirely self-interested behavior can be abjured in lieu of a sense of fiduciary responsibility, even independently of a sense of identification with others. Opines Amartya Sen:

It must, of course, be recognized that the rejection of purely self-interested behavior does not indicate that one’s actions are necessarily influenced by a sense of identity with others. It is quite possible that a person’s behavior may be swayed by other types of considerations, such as her adherence to some norms of acceptable conduct (such as financial honesty or a sense of fairness), or by her sense of duty—or fiduciary responsibility—toward others with whom one does not identify in any obvious sense. Nevertheless, a sense of identity with others can be a very important—and rather complex—influence on one’s behavior which can easily go against narrowly self-interested conduct.

Affirmatively, as framed by Kranton and Akerlof: “In the financial world, it is called fiduciary duty. It is an obligation to serve the client and the larger good of an organization.” Negatively: “Acting in your own interest and not in the interest of clients is a failure to carry out the duties of office, to fulfill one’s fiduciary duty.”

And the language of fiduciary duty is the language of the Harris Associates fees.

B. The Law and Economics of the Harris Associates Fees

In 2009, the distinguished economist Thomas Sowell fumed that many intellectuals:

find it a weighty consideration that they do not understand how corporate executives can be worth such high salaries as they receive—as if there is any inherent reason why third parties should

192. Akerlof & Kranton, supra note 182. Whatever the incentive, some people are self-motivated. Or, as articulated in a didactic novel by Ralph Nader, the famed consumer protection lawyer: “That’s what successful, self-made people of wealth are like . . . . They are chronically averse to procrastination—one definition of an entrepreneur is someone who never does anything today that could have been done yesterday—and that trait alone gives them a major advantage over their competent but slower-paced peers.” RALPH NADER, ONLY THE SUPER-RICH CAN SAVE US! 79 (2009).


194. Id. Amartya Sen was awarded the Alfred Nobel Memorial Prize in Economics in 1998.

195. Akerlof & Kranton, supra note 182.

196. Id.
be expected to understand, or why their understanding or acquiescence should be necessary, in order for those who are directly involved in hiring and paying corporate executives to proceed on the basis of their own knowledge and experience, in a matter in which they have a stake and intellectuals do not. 197

Supposing that Sowell’s belittling of intellectuals’ digs against corporate executives’ salaries is meritorious, this line of thought cannot be dispositive of the legal profession’s scrutinizing of the compensation collected by the advisers of registered investment companies. For Section 36(b) lays a special fiduciary duty upon such advisers. And Section 36(b) further depurizes the security holders of such registered investment companies (“third parties”) to litigate against said investment advisers. Section 36(b) endures in a financial-regulatory world rocked by the first great recession of the twentieth century. 198 Therein do fiduciary finance institutions of 2011 like collective investment vehicles emerge beside insurers and banks as a pillar of the world’s financial system. 199

1. The Competition Conundrum

Truly, the functioning of investment firms entailing information asymmetries might evoke regulation insulating investors from incompetence and fraud. 200 In such respect the regulation of portfolio management displays affinity with regulation of the free professions. 201 Specifically, opportunistic behavior often being facilitated through asymmetric information, regulators avowedly defend consumers from excessive prices extracted by financial

198. See, e.g., THE FIRST GREAT RECESSION OF THE 21ST CENTURY (Oscar Dejuán, Eladio Febrero, & Maria Christina Marcuzzo eds., 2011); THE FINANCIAL CRISIS AND THE REGULATION OF FINANCE (Christopher J. Green, Eric J. Pentecost & Tom Weyman-Jones eds., 2011); FINANCIAL STABILITY (Charles A.E. Goodhart & Dimitrios P. Tsomocos eds., 2011); THE FINANCIAL AND ECONOMIC CRISIS: AN INTERNATIONAL PERSPECTIVE (Benton E. Gup ed., 2010). The 2007–09 Great Recession exposed more than the fragility in the financial markets. See, e.g., FINANCIAL MARKETS AND FINANCIAL FRAGILITY (Jan Toporowski ed., 2010). For, as scholars hearkened, it likewise evoked questions about the adequacy of modern macroeconomic theory and about a seeming parallel incapacity to establish the requisite theoretical basis underlying financial regulation. See, e.g., MACROECONOMIC THEORY AND ITS FAILINGS: ALTERNATIVE PERSPECTIVES ON THE GLOBAL FINANCIAL CRISIS (Steven Kates ed., 2010).
201. Id.
service producers and other financial market participants. And in this regard regulation addresses not systemic stability, but the efficiency and integrity of the financial markets. In sum, the central notions are opportunism, asymmetric information problems, agency problems, and fiduciary duty.

Anyway, "[c]ompetition in product and capital markets can't be counted on to solve" compensation challenges. Both legal scholars and economists feel aversion to monopoly and so favor competition, generally. However, exactly why is competition welcomed and monopoly scorned? Because competition guarantees alternatives, whereas monopoly precludes alternatives. Presence of alternatives checks competitive market firms from gross misallocation of resources, while monopolistic exploitation of resources waxes inefficient. Remember that regulators address the efficiency of financial markets.

Still, competition in product and capital markets falters since an identical structure of incentives emerges in all big corporations and similar entities, e.g., mutual funds. Long preceding the February 27, 2007, District Court opinion in Jones had the mutual fund industry been dominated by a handful of corporations. And does the bracing discipline of additional competitors trigger more intensive competitor-effort and improved service? Surprisingly, in at least some contexts the reply is not congruent with the professional intuition. The impact of competition proves an unsettled topic even regarding pricing.

202. Id. at 965.
203. Id.
206. Id.
207. Id.
208. Id.
209. Jones, 537 F.3d at 730.
213. Id.
214. Id. It was the University of Hamburg's Institute of Law and Economics' Ingo C. Fiedler whose scholarship most recently probed the merits of two-sided competition. See Ingo
Notably, Posner’s special concern in Jones lies in Harris’ charging captive funds over double its charges to independent funds.\textsuperscript{215} “The panel opinion throws out some suggestions on why this difference may be justified, but the suggestions are offered purely as speculation, rather than anything having an evidentiary or empirical basis.”\textsuperscript{216} Judge Posner sarcastically could have quoted to Easterbrook from the Epistles of Saint Paul: “Now faith is the substance of things hoped for, the evidence of things not seen.”\textsuperscript{217}

For eye-popping was a 2009 study by the New York University Stern School of Business’ Thomas Phillippon and Ariell Reshef of the University of Virginia’s Department of Economics.\textsuperscript{218} They utilized detailed data about wages, education and occupations toward explaining the U.S. financial sector.\textsuperscript{219} Wages in finance were excessive from the mid-1990s until 2006.\textsuperscript{220} For that interval, rents accounted for an estimated thirty to fifty percent of the wage differential between the financial sector and the balance of the private sector.\textsuperscript{221} Rentseeking is inter alia, a socially costly wealth transfer.\textsuperscript{222} Posner’s dissent cites Professor Camelia M. Kuhnen’s observation that “‘[w]hen directors and the management are more connected, advisers capture more rents and are monitored by the board less intensely.’”\textsuperscript{223} Kuhnen might bitingly have quoted from the Gospel of Saint Matthew: “Consider the lilies of the field, how they grow; they toil not, neither do they spin: And yet I say unto you, That even Sol’o-mon in all his glory was not arrayed like one of these.”\textsuperscript{224} To the extent they reap rents, nattily clad advisers toil not.

---

\textsuperscript{215} Jones v. Harris Assocs. L.P., 537 F.3d 728, 731 (7th Cir. 2008) (Posner, J., dissenting) (per curiam).
\textsuperscript{216} Id.
\textsuperscript{217} Hebrews 11:1 (King James).
\textsuperscript{219} Id. at 6.
\textsuperscript{220} Id. at 5.
\textsuperscript{221} Id. at 30.
\textsuperscript{224} Matthew 6:28–29 (King James).
2. Price Discrimination

Too, Posner elsewhere had addressed the seriousness of information deficiencies in ordinary markets.\(^\text{225}\) Most consumers prove to be uncareful shoppers. Some even suppose price a sign of quality.\(^\text{226}\) If half of consumers are well-informed but half not, then the latter will make numerous errors and suffer loss of utility.\(^\text{227}\) Yet these errors are minimized because the uninformed are somewhat protected by the informed. This latter phenomenon emerges because a seller usually cannot easily discriminate between these two blocs.\(^\text{228}\) Recall how Chief Judge Easterbrook reassured one that sophisticated investors shopping among alternative investment vehicles generate competitive pressure protective of the less sophisticated investors.\(^\text{229}\)

Several conditions must obtain for price discrimination to prove profitable. Initially, there must be such market segregation as to preclude arbi-

\(^{225}\) POSNER, LAW, PRAGMATISM, AND DEMOCRACY, supra note 97, at 192.
\(^{226}\) Id. at 219. Scholars of everyday applied-economics, see, e.g., TIM HARFORD, THE UNDERCOVER ECONOMIST: EXPOSING WHY THE RICH ARE RICH, THE POOR ARE POOR—AND WHY YOU CAN NEVER BUY A DECENT USED CAR! (2006), descry a method in such consumer madness: Price changes the very experience of quality. “Neuro-economists have found, for instance, that while placebo painkillers work, they work best if the subject thinks they are expensive. Energy drinks give you less energy if you buy them at a discount. And wine tastes better if you believe that it is expensive.” Tim Harford, Dear Economist: Resolving Readers’ Dilemmas With the Tools of Adam Smith, FIN. TIMES (London), Jan. 30, 2010, at 2. How might these neuro-economic findings be explicable? Yale psychologist Professor Paul Bloom propounds essentialism as the notion that what truly counts is the underlying (not superficial) reality of a thing. PAUL BLOOM, HOW PLEASURE WORKS: THE NEW SCIENCE OF WHY WE LIKE WHAT WE LIKE 9 (2010). It consequently matters whether artwork is an original Picasso. Id. at 119-20. Human beings are born-essentialists. Id. at xii. For typically do art, sports, games, music, etc., display such reproductively-relevant capacities as intelligence. People’s essentialism could emerge as their attraction to a performance’s underlying history, due to their pleasure derivative from its display of natural gifts. Id. at 154.

\(^{227}\) POSNER, LAW, PRAGMATISM, AND DEMOCRACY, supra note 97, at 192. In the appraisal of S.C. Johnson Distinguished Professor of International Marketing Philip Kotler at Northwestern University’s Kellogg School of Management:

Most economists emphasise the role of price in determining choice, to the neglect of other major forces such as advertising, sales promotion and sales personnel that shape and motivate consumer and business behaviour. My argument has been that besides macro and micro economics, economists must add “market economics” (ie, marketing) to the study of how the market place actually works. This advance is already being reflected in the rise of “behavioural economics.”


\(^{228}\) POSNER, LAW, PRAGMATISM, AND DEMOCRACY, supra note 97, at 192 n.86, 219.
\(^{229}\) Jones v. Harris Assocs. L.P., 527 F.3d 627, 634 (7th Cir. 2008), vacated by 130 S. Ct. 1418 (2010).
trage—i.e., buyers in one market cannot resell into another. Second, a seller must command some monopolistic power in a minimum of one market because, given competition, prices will be pressed to the cost-level. Third, buyers in different markets must evince different elasticities of demand. Sales rise to the higher prices in markets wherein elasticity is low. The latter explains the willingness of consumers in a first market to pay more than the consumers in a second market without the seller losing sales in that second market. Under perfect price discrimination, a different price is chargeable to each customer.

More specifically, under what is denominated third degree price discrimination, sellers allot buyers into classes in accordance with those buyers’ demand for elasticity, a different price being extracted from each group. Implausible though it might sound, the real world is abrim with discounted-price products which actually were more expensive to manufacture than their full-price counterparts. This dual-marketing nevertheless makes sense insofar as it smoothes a producer’s targeting of its price-increases at a block of consumers most willing to pay, i.e., for those full-price counterparts.

231. See id.
232. See id.
233. See id.
235. NEMMERS, supra note 234, at 324. According to one law and economics expert, Emory University economist Paul H. Rubins: “The welfare implications of discriminatory pricing in general are ambiguous. But if price discrimination makes it possible for firms to provide goods and services that would otherwise not be available (which is common for virtual goods and services such as software, including cell phone apps) then consumers unambiguously benefit.” Paul H. Rubin, Op-Ed., Ten Fallacies About Web Privacy, WALL ST. J., Aug. 30, 2010, at A13.
237. Id. Yet, starting with the publication, Fisher Black and Myron S. Scholes, The Pricing of Options and Corporate Liabilities, 81 J. POL. ECON. 637 (1973), finance turned from common sense to abstraction and self-referentiality. JOHN LANCHESTER, I. O. U.: WHY EVERYONE OWES EVERYONE AND NO ONE CAN PAY 45 (2010). Understandably did economist Lawrence H. Summers acidly distinguish general economists in the Department of Economics from the ketchup economists (finance economists) in the Department of Ketchup (Department of Finance). The former ask the right questions: “General economists are concerned with the fundamental determinants of prices and quantities in the Ketchup market.” Lawrence H. Summers, On Economics and Finance, 40 J. FIN. 633, 633 (1985). But those sorry ketchup economists? “They have shown that two quart bottles of ketchup invariably sell for twice as
Most enterprises set prices to attract customers and goose the bottomline; it is traditional to gouge the loyal customers. The solitary recognized justification for rewarding fealty is to create it where previously it was nonexistent.\footnote{238} Such is the lesson of elasticity.

Apply to Jones the three conditions for profitable price discrimination. Are the effective buyers of Jones independent funds unable to arbitrage—viz., to resell to the captive funds’ effective buyers? Yes. Second, does Harris Associates command some monopolistic power in one market? Yes, evidence suggests. The Seventh Circuit panel merely speculated over why Harris charges captive funds over twice its charges to independent funds. Third, do different Harris customers evince different elasticities of demand? Yes, evidence might suggest. Posner muses over the Jones panel assurance that advisers cannot harvest money from captive funds if Himalayan fees drive off investors: “That’s true; but will high fees drive investors away?”\footnote{239}

More specifically, respecting this third condition for price discrimination, customers cannot for fear of the higher price be expected to volunteer their low elasticity. Consequently, sellers seek something observable and correlated with this hidden demand characteristic, low elasticity\footnote{240} Sure enough, experimentation has tested why individuals invest in high-fee index funds—there being a broad variation of fees in the universe of S&P 500 index funds. It reveals that even if such funds are reduced to commodities—i.e., stripped of non-portfolio services—subjects overwhelmingly fail to minimize fees, due to their own financial illiteracy.\footnote{241} It proves this “individual,” by contrast with “institutional” feature of investors in a captive mutual fund, demarcates in itself a financially illiterate and thus easily-fleeced flock with low elasticity of demand. So how protected are the less-informed consumers of investment products by the better-informed investors’ competitive pressure? Imaginably, less-informed consumers are so ill-protected by com-

petitive pressure that the majority of voters summoned the section 36(b) protection of the ill-informed (as suggested in Sec. IV, supra), such are the vagaries of contract law and economics.242

3. Informational Disclosure

Nor are the perplexities of befuddled mutual fund investors necessarily to be resolved by informational disclosure. In the assessment of Loyola Law School of Los Angeles Professor Lauren E. Willis:

In addition to arithmetic manipulation of data, determining the expected value of many financial choices requires assessing information reliability and interpreting results. The skills needed to take data about the past and information about the future and predict the probabilities of future events and confidence intervals for those probabilities are elusive for even sophisticated consumers. Becoming a Certified Financial Planner therefore requires a program of study that includes financial planning, risk management and insurance, estate planning, retirement planning, employee benefits, investments and individual income tax, three years of relevant experience, a ten-hour exam that requires an integrated application of skills and knowledge to particular client situations, and thirty hours of continuing education every two years to maintain the credential. Consumers must acquire not only the particular knowledge and skills described above, but also the ability to employ all of them at once.243

Human capital resources most efficiently are exploited when persons perform tasks for which they are best-fitted by predilection or training. People generally decline to serve as their own attorneys or physicians and for division of labor efficiency alone should decline, generally, from serving as

243. Lauren E. Willis, Against Financial-Literacy Education, 94 IOWA L. REV. 197, 224 (2008) (footnotes omitted). Willis' proves a “powerful” article. See Michael Skapinker, Finance Could Benefit from People's Trust, FIN. TIMES (London), May 25, 2010, at 11. Sure enough, a mid-2010 review of Australia’s 17 year-old mandatory defined contribution pension system declared that "member-driven competition through choice of fund has struggled to deliver a competitive market that reduces costs for members." Pauline Skypala, How to Put Scheme Members First, FIN. TIMES (London), July 12, 2010, at 6 (quoting a recent review of the Australian system). The report discovered participants to be less rational or informed than had been assumed. Id. Hence, regulators cannot depend on disclosure and market pressures to control that costly, inefficient system. Id.
their own financial planner.\footnote{244} The staggering expenditure of energy and time required for someone of average literacy to strive seriously to become her own financial planner could easily yield a grander welfare return when invested elsewhere.\footnote{245}

Or, in the words of Commissioner Paredes:

It also is possible for there simply to be too much information for investors and others to work through constructively. The risk of “information overload,” in other words, is a cost of mandatory disclosure. Investors today are inundated with volumes of information, so much so they sometimes are unable to distinguish what is important to their decision making from what is not. As a result, investors too frequently do not bother carefully studying the information that is available and get overwhelmed or distracted, misplacing their focus on less important matters. In short, the sheer amount of information can frustrate its effective use. The trouble is that when information is not processed and interpreted effectively, disclosure does not translate into better decision making. Ironically, if investors are overloaded, more disclosure actually can result in less transparency and worse decisions.\footnote{246}

\footnote{244. Willis, supra note 243, at 263–64. David Hume wrote maladroitly: “By the partition of employments, our ability encreases: . . . .” \textbf{David Hume}, \textit{Treatise of Human Nature} 485 (1992). Hume consequently lost paternity for the modern division of labor phraseology to Adam Smith. \textbf{Hardin}, supra note 97, at 10 n.5. The division of labor prevails because it uncages the economy of scale. \textbf{Harford}, supra note 154, at 81. “It is a harsh truth about the world of work that for many professionals, the more work you have done in the past, the more productive each additional working hour becomes: a perfect example of economies of scale.” \textit{Id}. The division of labor mandates professional financial planners, not self HELPERS. \textit{See id.}}


\footnote{246. Troy A. Paredes, Comm’r, U.S. Sec. & Exch. Comm’n, Remarks Before the Symposium on “The Past, Present, and Future of the SEC” (Oct. 16, 2009), (transcript available at

https://nsuworks.nova.edu/nlr/vol35/iss2/1}
As more theoretically clarified by Herbert A. Simon—who in 1978 was awarded the Alfred Nobel Memorial Prize in Economics:\(^{247}\)

[Given] an information-rich world, the wealth of information means a dearth of something else: a scarcity of whatever it is that information consumes. What information consumes is rather obvious: it consumes the attention of its recipients. Hence a wealth of information creates a poverty of attention and a need to allocate that attention efficiently among the overabundance of information sources . . . \(^{248}\)

The genuine bottleneck is the attention-time of human decision makers using incoming data.\(^{249}\) The authentic design difficulty is not providing people with more information. It is allotting the time people have available for digesting data so decision makers will consume only such data as is most relevant and important to their decisions.\(^{250}\) For attention, being scarce, is

---


Plato has Socrates tell the story of Egyptian god Theuth inventing letters and displaying his feat to Theban King Thamus. Thamus remonstrates:

> To your students you give an appearance of wisdom, not the reality of it; thanks to you, they will hear many things without being taught them, and will appear to know much when for the most part they know nothing, and they will be difficult to get along with because they have acquired the appearance of wisdom instead of wisdom itself.

PLATO, *PHAEDRUS* 62 (Christopher Rowe trans., 2005). Or: “Where is the wisdom we have lost in knowledge? Where is the knowledge we have lost in information?” VERNAL ALEEN, *THE KNOWLEDGE EVOLUTION: EXPANDING ORGANIZATIONAL INTELLIGENCE* 16 (1997) (quoting T.S. ELIOT, *The Rock* (1934)).


\(^{250}\) Id. at 144. “Time is our most valuable nonrenewable resource, and if we want to treat it with respect, we need to set priorities.” ALBERT–LÁSZLÓ BARABAŠI, *BURSTS: THE HIDDEN PATTERN BEHIND EVERYTHING WE DO* 125 (2010).
precious: 251 “Scarcity of attention in an information-rich world can be measured in terms of a human executive’s time.” 252 Hence, the well-known disutility of data dumps.

Posner did recognize the Easterbrook “so unusual” compensation level triggering a judicial inference of deceit, or of abdication. 253 Unfortunately, “The panel’s ‘so unusual’ standard is to be applied solely by comparing the adviser’s fee with the fees charged by other mutual fund advisers.” 254 Understand: “The governance structure that enables mutual fund advisers to charge exorbitant fees is industry-wide, so the panel’s comparability approach would if widely followed allow those fees to become the industry’s floor.” 255

C. The Citizenry Seethed While the Judiciary Pondered

Especially because of Judge Posner’s connection of mutual fund adviser fees to executive compensation, his dissent was attended-to in corporate

251. Simon, supra note 248, at 48. Is there any escape from informational pitfalls menacing even the most sophisticated investors riding the most elaborate computational machinery? A study by Snajeev Arora and Boaz Barak both of the Princeton U. Computer Science Department and Center for Computational Intractability, Markus Brunnermeier of Princeton’s Department of Economics and Bendheim Center for Finance, and Rong Ge of the Department of Computer Science and Center for Computer Intractability realized that most analyses of the 2007-2009 financial crises blamed faulty models in pricing derivatives. Yet that evokes the question of whether a more precise model would prove prophylactic against future problems. Seemingly, will such pricing problems endure even given superior models? The pricing problem should grow more difficult for more complicated models.

Traditional economics argues that financial derivatives ameliorate the costs inflicted by asymmetric information: Alas, using theoretical computer science modes, these authors argue that derivatives actually can amplify asymmetric information costs. Sanjeev Arora et al., Computational Complexity and Information Asymmetry in Financial Products 12 (Oct. 19, 2009) (unpublished working paper), available at www.cs.princeton.edu/~rongge/derivative.pdf. “Note that computational complexity is only a small departure from full rationality since even highly sophisticated investors are boundedly rational due to a lack of requisite computational resources.” Id. at 1.


254. Id.

255. Id. “And in this case there was an alternative comparison, rejected by the panel on the basis of airy speculation—comparison of the fees that Harris charges independent funds with the much higher fees that it charges the funds [that] it controls.” Id.
America.\textsuperscript{256} The Jones controversy came to a boil amidst national debate\textsuperscript{257} over whether the market can be entrusted with naming the pay rates of corporate executives.\textsuperscript{258} And excesses in compensation of the financial executives crucially inflamed the populace after the stock market meltdown climaxing in March, 2009.\textsuperscript{259} A political tempest concerning Goldman Sachs' 2009 compensation\textsuperscript{260} preceded a still-roiling public ire over executive compensation in 2010.\textsuperscript{261} Between the Supreme Court oral argument in Jones and the issuance of the Supreme Court's opinion in Jones, President Obama remarked in an interview on February 9, 2010, concerning Goldman Sachs CEO Lloyd Blankfein and J.P. Morgan CEO Jamie Dimon:

Let's talk bonuses for a minute. Lloyd Blankfein: $9 million. Jamie Dimon: $17 million. Now, those were in stock and less than what some had expected. But are those numbers O.K.? First of all, I know both those guys. They are very savvy businessmen. And I, like most of the American people, don't begrudge people[']s success or wealth. That is part of the free-market system.

I do think that the compensation packages that we have seen over the last decade, at least, have not matched up always to performance. \textit{I think that shareholders oftentimes have not had any significant say in the pay structures for CEOs.}

Seventeen million is a lot for Main Street to stomach. Listen. $17 million is an extraordinary amount of money. Of course, there are some baseball players who are making more than that and don't get to the World Series either, so I am shocked by that as well.

I guess the main principle we want to promote is \textit{safe say on pay, that shareholders have a chance to actually scrutinize what CEOs are getting paid,} and I think that serves as a restraint and helps align performance with pay. The other thing we do think is the more that pay comes in the form of stock that requires proven

\begin{itemize}
\item \textsuperscript{256} Ameet Sachdev, \textit{Mutual Fund Fee Case Tests What Is a Reasonable Charge}, CHI. TRIB., Nov. 3, 2009, at 19.
\item \textsuperscript{257} See, e.g., Deborah Solomon & Serena Ng, \textit{Fresh Pay Skirmish Erupts at AIG}, WALL ST. J., Dec. 7, 2009, at A1.
\item \textsuperscript{258} Adam Liptak, \textit{Justice Scrutinize Adviser Fees}, N.Y. TIMES, Nov. 3, 2009, at B1.
\item \textsuperscript{259} POZEN, \textit{supra} note 163, at 291.
\item \textsuperscript{260} POSNER, \textit{The Crisis of Capitalist Democracy}, \textit{supra} note 151, at 148–49.
\item \textsuperscript{261} \textit{id.} at 111.
\end{itemize}
performance over a certain period of time, as opposed to quarterly earnings, is a fairer way of measuring CEO success and, ultimately, will make the performance of American businesses better.\textsuperscript{262}

Conspicuously does President Obama not signal—as might Chief Judge Easterbrook—that no corporate executive compensation issue arises if shareholders can always sell their stock, and thus invest elsewhere? Are corporate executive tip-top earners truly worth their keep?\textsuperscript{263}

And Jones caught the eye of the Supreme Court partly because Jones entailed an unusual clash between Chief Judge Easterbrook and Judge Posner.\textsuperscript{264} Those jurists number among the American judiciary’s foremost law and economics thinkers.\textsuperscript{265} Each man generally sympathizes with letting legal questions be settled through marketplace values.\textsuperscript{266} Certainly one learns that legal issues are analyzable from varied angles, many such angles enabling the harvesting of bountiful yields.\textsuperscript{267} That the subdiscipline of law and economics—roughly a subdiscipline of microeconomics’ marketplace values—thrives is demonstrable because, \textit{inter alia}, scholars of that area not merely publish academically, but as United States federal judges can influence the legal system firsthand.\textsuperscript{268} When Professor Bingyuan Hsiung of the National Taiwan University Department of Economics made this latter point, Hsiung cited as exemplars both and only Easterbrook and Posner.\textsuperscript{269} The Supreme Court granted a petition for issuance of a writ of certiorari in Jones

\begin{thebibliography}{9}
\bibitem{264} Sachdev, \textit{supra} note 256.
\bibitem{265} When the full court split on whether to rehear the case, Posner penned a dissent that read like an invitation to the Supreme Court, writing that the notion that the market can police excessive compensation is “ripe for reexamination.”
\bibitem{267} Robert Barnes, \textit{Justices Tackle Case on Investment Fees}, \textit{Wash. Post}, Nov. 3, 2009, at A11 [hereinafter Barnes, \textit{Investment Fees}]. “The case was set up for the high court by competing opinions of two of the appeals courts’ leading thinkers on economics and the law.”
\bibitem{268} Barnes, \textit{Mutual Fund Fees}, \textit{supra} note 264.
\bibitem{269} Sachdev, \textit{supra} note 256.
\bibitem{267} Hsiung, \textit{supra} note 205, at 10.
\bibitem{268} \textit{Id.} at 2.
\bibitem{269} \textit{Id.} at 2 n.3.
\end{thebibliography}
on March 9, 2009,\textsuperscript{270} to resolve a split over the proper section 36(b) standard among the Courts of Appeals.\textsuperscript{271}

VI. THE ORAL ARGUMENT OF NOVEMBER 2, 2009

During the November 2, 2009, oral argument over Jones in the Supreme Court, Chief Judge Easterbrook's new understanding of the limits upon those fees that investment advisers can charge mutual funds\textsuperscript{272} went undefended by anyone concerned.\textsuperscript{273} Some among the Justices suggested that a regulatory body might be better-positioned than is the judiciary to ascertain whether fees are not appropriate.\textsuperscript{274} Conservative Justices, shying from the Easterbrook logic, appeared skeptical of arguments that investors are in need of court intervention to defend them from the gravid fees that a fund manager might cut with a board, with which he or she enjoys a chummy relationship.\textsuperscript{275} Chief Justice John G. Roberts, Jr. and Justice Antonin Scalia were the most outspoken in positing that government regulators, or consumers, were the preferable monitors of these fees.\textsuperscript{276}

In an exchange of Chief Justice Roberts, Justice Scalia, and Justice Ruth Bader Ginsburg with Assistant to the Solicitor General Curtis E. Gannon—arguing on behalf of the United States, as amicus curiae, supporting the Jones petitioners—Roberts and Scalia referred to the Securities and Exchange Commission as if to imply Congress ought never have attached the Investment Company Act section 36(b) fiduciary duty at all:

CHIEF JUSTICE ROBERTS: Counsel, if we are going to have regulation of what fees can be charged, you cite in your brief the various regulations the SEC has issued. It makes a lot more sense to have the SEC regulate rates than to have courts do it, doesn't it?

\textsuperscript{271} Jones v. Harris Assocs. L.P., 130 S. Ct. 1418, 1422 (2010). "The [Seventh Circuit panel] opinion [in Jones] is recognized to have created a circuit split, although the panel did not acknowledge this or circulate its opinion to the full court in advance of publication, as is required when a panel creates a circuit split." Jones v. Harris Assocs. L.P., 537 F.3d 728, 732 (7th Cir. 2008) (Posner, J., dissenting) (per curiam).
\textsuperscript{273} Liptak, supra note 258.
\textsuperscript{274} See id.
\textsuperscript{275} Bravin, supra note 272.
\textsuperscript{276} Barnes, Investment Fees, supra note 265.
MR. GANNON: Well, in the abstract, it might make more sense, Mr. Chief Justice. I think the choice that Congress made here was to counterbalance the—

CHIEF JUSTICE ROBERTS: You are not suggesting the SEC wouldn't have authority to do that, are you?

MR. GANNON: Well, even under this statute, the SEC has the authority to file suits under section 36(b).

JUSTICE GINSBURG: Has it filed any?

MR. GANNON: It hasn't filed any since—since 1980, Justice Ginsburg. I think that the SEC in this context—it has—it has primarily directed its resources and energies into encouraging there to be better disclosure of fees, both the disclosure of information to the board, disclosure to investors, better education to shareholders so that they would be able to go—

JUSTICE SCALIA: Well, it must be aware of the—of the divergence between the fees that investment advisers charge to these companies and what they charge to other clients. Isn't the SEC aware of that?

MR. GANNON: It is aware of that.

JUSTICE SCALIA: And yet has brought no suits against this industry?

MR. GANNON: Since 1980 it hasn't used section 36(b). It has used less formal mechanisms in the context of examinations and investigators—

JUSTICE SCALIA: For disclosure, just for disclosure. But that suggests to me that the SEC may think that this is indeed a self-contained industry and that the comparison with investment advice given to other entities is—is not a fair one.277

Yet Justices Stephen G. Breyer and Sonia Sotomayor questioned whether a free market could be relied upon to police fees.278 Justice Breyer

evinced concern over the cozy relationship with the fee-setting board of directors. Justices Breyer, Sotomayor, and Ruth Bader Ginsburg appeared to support the notion that mutual fund boards ought to utilize as their benchmarks those fees that asset managers levy upon institutional investors, according to Chicago-Kent College of Law Assistant Professor William A. Birdthistle, who attended the hearing. Birdthistle had filed a brief in support of investors on behalf of over twenty law professors.

Commentators presciently supposed that the Easterbrook opinion was unlikely to survive the forthcoming Supreme Court opinion in Jones. Questioning seemed to signal that the bench was inclined to decide Jones narrowly. It was unclear whether the Justices would return Jones to the lower courts to forge a new standard, or would tackle that job themselves. Liberal Justices, including Breyer and Ginsburg, appeared disposed toward the remand of Jones for further proceedings to flesh out disputed fee arrangement facts. It remained unclear how substantial a role the Supreme Court might assign to the comparison with fees charged institutional investors.

VII. INTERLUDE: COMMISSIONER PAREDES ON JONES

A. The Securities and Exchange Commission Guards America

On May 4, 2009, Commissioner Paredes addressed Jones’ issues on his own behalf, and not that of the Securities and Exchange Commission or of his fellow Commissioners:

279. Barnes, Investment Fees, supra note 265.
282. Liptak, supra note 258.
283. Barnes, Investment Fees, supra note 265.
284. Liptak, supra note 258. “Despite a line of questioning that seemed to suggest that the Supreme Court justices are leery of getting into the business of setting standards, however, it is hard to tell what the court will ultimately determine.” David Hoffman, Advisers: SEC, Not Courts, Should Set Standards for Mutual Fund Fees, Inv. News, Nov. 9, 2009, at 20.
286. See Liptak, supra note 258.
Section 36(b) of the Investment Company Act, adopted in 1970, provides that the “investment adviser of a [mutual fund] shall be deemed to have a fiduciary duty with respect to the receipt of compensation . . . .” Section 36(b)’s adoption was driven by the view that the investment adviser’s fee negotiation with the fund is not at arm’s length, but tilts in the adviser’s favor, because the fund, in practice, is captured by the adviser.288

Yes, the captive mutual fund. At this juncture, Paredes added that the relevant legislative history sustained his view, quoting a Senate Report:

Since a typical fund is organized by its investment adviser which provides it with almost all management services and because its shares are bought by investors who rely on that service, a mutual fund cannot, as a practical matter sever its relationship with the adviser. Therefore, the forces of arm’s-length bargaining do not work in the mutual fund industry in the same manner as they do in other sectors of the American economy.289

This Maytime Paredes here sounded receptive to protection of consumers by the Supreme Court in Jones. Nevertheless, as oral argument in Jones loomed, the Commissioner on September 24, 2009, seemed to have changed his tune. Paredes then related—on his own behalf—of Jones:

Much could be said about the case. Indeed, the briefs are extensive. I will limit myself to highlighting two core points, leaving the details to others.

First, adequate market discipline can obviate the need for more exacting and burdensome regulation, including demanding judicial scrutiny of advisory fees. One can conceive of the section 36(b) fiduciary duty as compensating for a lack of competition in the mutual fund industry. Put differently, the legal accountability of section 36(b) can be thought of as substituting for a lack of market-based accountability. The industry, however, has changed since section 36(b) was adopted in 1970 and Gartenberg was decided in 1982. To the extent the industry has become more competitive, it may argue for greater judicial deference to the bargain the adviser and the fund strike. In the face of sufficient market


forces that constrain advisory fees, the need for courts to monitor as strictly the adviser/board fee negotiations is mitigated.

Second, courts are not well-positioned to second-guess the business decisions that boards and others in business make in good faith. Judges may exercise expert legal judgment, but not expert business judgment. A judge may be equipped to monitor a board’s decision-making process, but should steer clear of the temptation to override substantive outcomes. These sensibilities cut against reading section 36(b) as implementing a sort of substantive limit on fees and instead recommend that courts focus on the process by which the fees were determined.

An especially large advisory fee that appears to be “disproportionate” would seem to evidence that the decision-making process that produced the fee was inexcusably tainted, giving rise to a section 36(b) fiduciary duty breach. However, if on further scrutiny a court determines that careful, conscientious, and disinterested mutual fund directors agreed to the fee, little, if any, room is left for the court to declare that the fee is nonetheless so large that it could not be the result of an arm’s-length bargain. To the contrary, if a faithful, diligent board decided that the fee was appropriate, it would seem to rebut any preliminary determination that the fee ran afoul of section 36(b). The prospect that perhaps a better bargain could have been driven is a slim justification for allowing judges—who have no comparative expertise negotiating or setting advisory fees—to substitute their judgment for the collective judgment of independent directors acting in good faith. 290

Paredes’ language signaling that market discipline obviates the need for demanding judicial scrutiny, that courts are ill-positioned to second-guess boards, and board diligence would rebut pro-consumer determinations, seemed language pro-boards in Jones.

For years observers moaned, even during the Jones Supreme Court litigation, 291 that the Securities and Exchange Commission had more and more


291. See, e.g., Jim McTague, The GOP Gets Wired, BARRON’S, Jan. 25, 2010, at 48, 49 (“I don’t share his faith in the SEC. It became a captive of the industry under previous administrations. As for Chairman [Mary] Schapiro, she headed the self-regulatory arm of the Nasdaq exchange during the time that Nasdaq member Bernie Madoff pulled of the biggest Ponzi scheme since the launch of Social Security.”). On the other hand, additional voices hurrahed a supposed Securities and Exchange Commission revitalization through, for example, its reor-
waxed sympathetic to the pleading of potent corporations at cost to its protection of the public.292 By 2009, when Mary Shapiro assumed the captaincy of the SEC, it was a laughingstock.293 By 2010, something of a litany of Commission limitations, and Commission regulatory failings could be recited. A substantial cause of the mid-September 2008 financial collapse294


292. See, e.g., Swan, supra note 222, at 123. Who ultimately is responsible for SEC lapses? The Supreme Court’s June 28, 2010, opinion in Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010) explained that the parties therein had agreed that the SEC Commissioners cannot be removed Presidentially, but for cause. Id. at 3148.

Yet Justice Breyer’s dissent, joined by Justices Stevens, Ginsburg and Sotomayor, highlights “[t]he fact that Congress did not make the SEC Commissioners removable ‘for cause.”” Id. at 3183 (Breyer, J., dissenting).


Do you have the staff and budget to protect investors?

We clearly don’t in order to do the job I want to be done. We are 3,800 people total, and we regulate 35,000 public entities: 12,000 public companies for their disclosure, 11,300 investment advisers, 8,000 mutual funds, 5,000 broker-dealers, 600 transfer agents, exchanges, clearinghouses.

And we are smaller than we were in 2005. We got our budget increased [23%, to $1.1 billion] for fiscal 2010, and we’re working hard with Congress and the administration to increase it much more substantially in upcoming years.

Id.

294. Posner, The Crisis of Capitalist Democracy, supra note 151, at 41. A Commission sin of omission was its failure to break the longrunning, high-profile Bernard Madoff Ponzi scheme: “In fact, after Madoff was arrested, his secretary revealed that the few times SEC investigators had come to the firm most of them had asked for employment applications. That was typical.” HARRY MARKOPOLOS, NO ONE WOULD LISTEN: A TRUE FINANCIAL THRILLER 63 (2010). “My error was in believing the SEC actually was capable of protecting investors.” Id. Madoff case- whistleblower Markopolos even shares his 2005 submission, concerning that Ponzi scheme, to the SEC. See generally id. at 297–338 (App. B).

Credible is the secretary’s report. For: “The revolving door can turn swiftly at the Securities and Exchange Commission.” Tom McGinty, Staffer One Day, Opponent the Next, WALL ST. J., Apr. 5, 2010, at C1. Sixty-six of its former employees filed 168 letters with the
was that regulators slept at the switch.\textsuperscript{295} The Securities and Exchange Commission brandished all of the statutory authority required to forestall broker-dealers from shouldering more risk than was prudent for the economy.\textsuperscript{296} But according to Judge Posner, the agency completely dropped the ball.\textsuperscript{297} After all, the Commission is the shop with the attorneys who do their own photoduplicating, filing, and mail-sorting.\textsuperscript{298} Such budgetary strategizing begets thriftily-hired lawyers but gives birth to dearly-hired clerical staff. The sole practical means of averting an overly large housing bubble—aside from hiking interest rates—would have been rigorous enforcement by, \textit{inter alia}, the Commission of its authority over shadow banks.\textsuperscript{299} Most of these

are SEC regulated. Yet, according to Judge Posner, the Commission lacks expertise in systemic risk matters.

In all events, such has proceeded the rise of mutual funds that Commissioner Paredes wondered whether industry evolution since the 1970 enactment of the Investment Company Act justifies an expanded judicial deference to the adviser-fund bargain. Moreover, after the November second oral argument in Jones, the Commissioner—on his own behalf—cautioned concerning comparing retail fund advisory fees against fees levied against institutional funds:

I would add that if the Court were to require a comparison of fees, judges still should not second-guess the substance of the independent directors' good faith evaluation of the fees charged different funds and the reasons justifying any fee differences. To say that the board is to consider a particular factor should not dictate how that factor is considered and how it impacts a final fee determination. Simply put, fee comparisons should not morph into fee caps.

Is a watchdog against fee caps the more defending the fund—i.e., investors—from the adviser, or the more protecting the monied adviser from its fund? Fittingly was the concept of the Securities and Exchange Commission as chief defender of mutual fund shareholders fully developed for the Supreme Court in Jones in an amicus curiae brief filed by the Mutual Fund

---

The events of 2007 are essentially a repeat of the 19th century bank runs, only in 2007 some firms ran on other firms. What has become known as the "shadow banking system" is, in fact, genuine banking and, it turns out, was vulnerable to the same kind of bank runs as in previous U.S. history.


If it quacks, it is a duck. If it borrows short and lends (or invests) long, it is a bank. Officially, Bear Stearns and Lehman Brothers were investment companies; Washington Mutual was a savings & loan; AIG was an insurance company, GMAC and GE Capital were subsidiaries of industrial corporations; the Reserve Fund was a money market mutual fund. In reality, all of them were handing out money, or near money, and accumulating illiquid assets. Any such institution is vulnerable to a run by creditors and regulators should treat them alike—as banks. Failure to adhere to this principle will result in regulatory arbitrage and more blow-ups.

Id.

300. See POSNER, THE CRISIS OF CAPITALIST DEMOCRACY, supra note 151, at 38, 56.
301. Id. at 352.
302. See, e.g., FINK, supra note 37.
303. Paredes, supra note 40.
304. Id.
Directors Forum on behalf of Harris Associates. One recollects Assistant to the Solicitor General Gannon's report to Justice Ginsburg that the Securities and Exchange Commission had filed no suits under section 36(b) since 1980.

B. Washington Guards America

To be sure, Washington might showcase over a half-dozen avowedly-consumer financial protection bureaus. Who else other than the Securities and Exchange Commission champions the mass of investors confronting monied opportunists? The Congressional Oversight Panel was created in 2008 to monitor the Department of the Treasury's bank-bailout, and to review financial market regulation. Harvard Law School Professor Elizabeth Warren chairs that Panel. In a March 3, 2010 interview, Chair Warren held:

Someone said monetary policy was in the penthouse and consumer protection was in the basement.

It's the stepchild nobody wants. There's nobody in Washington focused on the economics of the family, focused on the consumer products—credit cards, mortgages, car loans, overdraft fees. All the stuff you have to do in your daily life to survive economically.

Chair Warren could expatiate:


306. See Transcript of Oral Argument, supra note 277, at 20–21 and accompanying text.


A whole new bureaucracy even though the Fed has the tools to start doing it tomorrow?

There are seven bureaucracies in Washington right now that each own a piece of consumer financial protection. Bloated, inefficient, and either ignored and ineffective or captured by the large financial institutions. [This is] the regulatory system we've got now. It works very well for the large financial institutions because it means no effective regulation.  

Familiar to students of law and economics is the capture theory of the regulatory agency. Regulated firms capture their own regulators via lobbying to promote parochial, not economy-wide, business interests. The capture theory of the regulatory agency proves applicable particularly in the financial sector. Was it not relevant in Jones?

---


311. See Swan, supra note 222, at 120–22. “In the regulatory minuet, the consumer interest and the producer interest are opposed.” Id. at 129. The relationship between the Interior Department’s Minerals Management Service and BP proved “a striking example of regulatory capture.” Gerald P. O’Driscoll, Jr., The Gulf Spill, the Financial Crisis and Government Failure, WALL ST. J., June 14, 2010, at A17.

One place we’ve already begun to take action is at the agency in charge of regulating drilling and issuing permits, known as the Minerals Management Service. Over the last decade, this agency has become emblematic of a failed philosophy that views all regulation with hostility—a philosophy that says corporations should be allowed to play by their own rules and police themselves. At this agency, industry insiders were put in charge of industry oversight. Oil companies showered regulators with gifts and favors, and were essentially allowed to conduct their own safety inspections and write their own regulations.


312. Heremans, supra note 220, at 951.

313. Id. at 952.
VIII. JUSTICE ALITO’S GARTENBERG-PLUS OPINION

A. Jones Ratifies Gartenberg

Justice Samuel Alito’s opinion in Jones for the Supreme Court attracted a concurrence from Justice Clarence Thomas. Jones met with no dissents. Justice Alito explained that the Court therein measured what mutual fund shareholders must prove to show that their mutual fund adviser has breached its fiduciary duty under section 36(b). The Court, as mentioned in Section V C, supra, had granted certiorari to resolve a division among the Courts of Appeals over that appropriate section 36(b) standard.

In Section I of Jones, Justice Alito acknowledged that a typical arrangement is that a mutual fund, which might have no employees of its own, is created by a separate entity denominated as an investment adviser. This adviser not only manages the fund investments and delivers other services, but also selects the fund’s directors. Due to this intimate investment adviser-mutual fund symbiosis, a fund oftentimes practically cannot sever the relationship. This walls-off the normal forces of arm’s-length bargaining. Here, Alito echoes the Commissioner Parades of May 24, 2009. Because of Congressional concern over the potential for abuse consequently inhering in the investment companies’ structure, the Investment Company Act of 1940 was adopted. In a further response to difficulties relative to investment company board independence, and to investment adviser compensation, Congress amended that Act in 1970. Thereby was reinforced the independence of the mutual fund board of directors, which scrutinizes and negotiates the adviser’s compensation. Also, section 36(b) then imposed both the fiduciary duty upon the investment adviser respecting its income from the “mutual fund, and granted [the] individual investor[] [the]
private right of action for breach of [such] duty."327 Once more, Alito channels the May 24 Parades. The fiduciary duty did not, however, permit a court review for the reasonableness of the compensation agreement.328

Justice Alito related that the Jones petitioners were "shareholders in three different mutual funds managed by respondent Harris Associates L.P., the investment adviser."329 Petitioners had sought damages, an injunction, and the rescission of advisory agreements between their funds and Harris Associates.330 Their complaint had alleged the violation of section 36(b) in Harris Associates' charging of fees "disproportionate to the services rendered" and beyond the ambit of what would have been reached via arm's-length negotiations "in light of all of the surrounding circumstances."

The District Court had granted summary judgment for Harris Associates by applying the Gartenberg standard332 "The District Court assumed that it was relevant to compare the challenged fees with those that Harris Associates charged its other clients."333 Justice Alito recalled that the Seventh Circuit panel in Jones had affirmed, but had based its affirmance upon its own Easterbrook reasoning, disavowing Gartenberg.334 That panel's reasoning, as indicated in Section IV, supra, focused nearly wholly upon the disclosure element.335 Yet Alito's opinion likewise recalled that upon that Circuit's denial of rehearing en banc, Judge Posner dissented that this rejection of Gartenberg was premised on "economic analysis . . . ripe for reexamination."

In Section II of Jones, Justice Alito's Jones discussion of Gartenberg was somewhat detailed:

[W]e conclude that Gartenberg was correct in its basic formulation of what § 36(b) requires: to face liability under § 36(b), an investment adviser must charge a fee that is so disproportionately large that it bears no reasonable relationship to the services ren-

328. Jones, 130 S. Ct. at 1423.
329. Id. at 1424.
330. Id.
331. Id.
332. Id.
333. Jones, 130 S. Ct. at 1424.
334. Id.
335. Id.
336. Id. (quoting Jones v. Harris Assocs. L.P., 537 F.3d 728, 730 (7th Cir. 2008) (Posner, J., dissenting) (per curiam)).
337. Id. at 1425–28.
Correct in its basic formulation. The Gartenberg approach adheres to the correct comprehension of fiduciary duty and the section 36(b)(1) imposition of the burden on the plaintiff. Approval of the adviser’s fee by the board of directors is to be awarded as much consideration by the judiciary as appropriate given all of the circumstances; and the benchmark for reviewing challenged fees is the range possibly emergent from an arm’s-length bargain. The Gartenberg approach also adheres to the requisite role of the fully-informed mutual fund board encompassing its statutorily-prescribed disinterested directors: “First, a measure of deference to a board’s judgment may be appropriate in some instances. Second, the appropriate measure of deference varies depending on the circumstances.”

Gartenberg, being thus established as correct in its basic formulation, what adds Jones to this Gartenberg foundation, sculpting Jones into a Gartenberg-plus?

B. The Jones Additions to Equal a Gartenberg-Plus

In Section III—the main event of Jones—Justice Alito, without dissent, adds these Supreme Court teachings: “The first concerns comparisons between the fees that an adviser charges a captive mutual fund and the fees that it charges its independent clients.” Gartenberg, as related in Section IV, supra, rejected the comparison of fees the adviser in Gartenberg had charged a money market fund (captive mutual fund) and those it had charged a pension fund (independent client). Alito contrariwise determined that, inasmuch as the statute mandates considering every relevant factor: “[W]e do not think there can be any categorical rule regarding the comparisons of

339. Id. at 1427. It is axiomatic in economics that choice proves beneficial (although the empirical accuracy of the axiom is debatable). BARRY SCHWARTZ, THE PARADOX OF CHOICE: WHY MORE IS LESS 19 (2004). Supposedly choice bears little relevance to someone’s rationality. RENATA SALECL, CHOICE 143 (2010).
341. Id.
342. Id. at 1428.
343. Id.
344. Id. at 1429–30.
345. Jones, 130 S. Ct. at 1428.
the fees charged different types of clients." His explicit preclusion of any
categorical rule marks an Alito addition to Gartenberg:

Instead, courts may give such comparisons the weight that they
merit in light of the similarities and differences between the ser-
VICES that the clients in question require, but courts must be wary
of inapt comparisons. As the panel below noted, there may be sig-
ificant differences between the services provided by an invest-
ment adviser to a mutual fund and those it provides to a pension
fund which are attributable to the greater frequency of shareholder
redemptions in a mutual fund, the higher turnover of mutual fund
assets, the more burdensome regulatory and legal obligations, and
higher marketing costs. . . . If the services rendered are sufficiently
different that a comparison is not probative, then courts must reject
such a comparison. Even if the services provided and fees charged
to an independent fund are relevant, courts should be mindful that
the Act does not necessarily ensure fee parity between mutual
funds and institutional clients contrary to petitioners' conten-
tions.

This explicit preclusion of any categorical rule respecting comparing
fees charged to different types of clients developed the law in a pro-plaintiff
direction—fee parity between mutual funds and institutional clients being not
necessarily guaranteed by the Act.

The Alito opinion continues: “By the same token, courts should not re-
ly too heavily on comparisons with fees charged to mutual funds by other
advisers. These comparisons are problematic because these fees, like those
challenged, may not be the product of negotiations conducted at arm’s
length.”

346. Id. According to one emphatic report: “Next, however, unlike the 2nd Circuit in
Gartenberg, the Supreme Court asserted that ‘comparisons between the fees that an adviser
charges a captive mutual fund and the fees that it charges its independent clients’ are rele-
vant.” Jennifer S. Taub, Jones v. Harris Associates: Let the First Lawsuit Bloom, RACE TO
jones-v-harris-associates-let-the-first-lawsuit-bloom.html (emphasis in original).
347. Jones, 130 S. Ct. at 1428–29 (citation omitted).
348. Id. at 1429. Likewise had reasoned Circuit Judge Mansfield for the Second Circuit
panel. Gartenberg v. Merrill Lynch Asset Mgmt., Inc., 694 F.2d 923, 925 (2d Cir. 1982).
Appallingly, comparison of an investment adviser’s fee against fees charged to mutual funds
by other advisers are problematic on additional grounds:

Remarkably, most boards allow the fund company to define the peer group. In the Oak-
mark case, for example, Oakmark Fund’s fees were compared with those of just nine other
funds. By my count, there are [fifty-one] no-load, actively managed, large-blend funds with
more than $1 billion in assets. So what happened to the other [forty-one] funds that didn’t
make the peer analysis?
Carefully apprehend precisely why courts should not rely too heavily upon comparisons against fees charged mutual funds by other advisers. The problem is that those fees, themselves, might not be the outcome of arm's-length negotiation. Expressly, the Supreme Court grasps that the feared problem is that such comparison-fees are therefore excessive, and so would be comparative evidence too pro-defendant-adviser.

Justice Alito instructs: "Finally, a court's evaluation of an investment adviser's fiduciary duty must take into account both procedure and substance." Understand:

Thus, if the disinterested directors considered the relevant factors, their decision to approve a particular fee agreement is entitled to considerable weight, even if a court might weigh the factors differently. . . . This is not to deny that a fee may be excessive even if it was negotiated by a board in possession of all relevant information, but such a determination must be based on evidence that the fee "is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's-length bargaining."

In contrast, where the board's process was deficient or the adviser withheld important information, the court must take a more rigorous look at the outcome.

The board of directors' procedures, which Alito here exacts, demand that the board endorsing a particular fee arrangement not merely have possessed "all relevant information," but actually have "considered the relevant factors" behind a fee approval for said approval to merit a "considerable weight." As for substance, explicitly, "a fee may be excessive even if it was negotiated by a board in possession of all relevant information." And remember that Jones already declares that since the statute requires board consideration of all relevant factors even the courts applying the statute, to say nothing of boards, can balance an adviser's captive fund fees against its

Kinnel, supra note 129, at 49. In its evaluation of charges, a board of directors starts with the 15(c) report, measuring its own fund's fees against those charged to competitors. Id. Investment Company Act of 1940, 15 U.S.C. § 15(c) (mandating such reports) is further discussed in the text in Section XA, infra. Whom do captive mutual fund boards of directors really serve? "No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other." Matthew 6:24; Luke 16:13 (King James).
independent client fees. Hence, should the board’s process—assessing the relevant factors—prove deficient, the judge can move the more rigorously in testing the challenged fee.

It is at this juncture that Justice Alito reminds: “It is also important to note that the standard for fiduciary breach under [section] 36(b) does not call for judicial second-guessing of informed board decisions.” A trifling shortcoming of this Jones opinion emergent from Justice Alito’s pen, or at least from his chambers, lies in its treatment here, of its Daily Income Fund, Inc. v. Fox precedent. Prior to the 1970 statutory amendments, the Securities and Exchange Commission proposed that Congress empower the agency to launch actions challenging an unreasonable fee, and to intervene in similar actions brought by, or on the behalf of, an investment company. Justice Alito accurately recounts how industry representatives successfully resisted such proposal, for fear it “‘might in essence provide the Commission with ratemaking authority.” Yet the Alito opinion later erroneously cites Daily Income Fund for the proposition that Congress repudiated a reasonableness requirement under fire for “charging the courts with rate-setting responsibilities,” as distinguished from thus charging the Commission.

Such a slip might be anyone’s in more than a single sense. In the twenty-first century, a Supreme Court Justice who chooses competent clerks, or merely chooses for herself a capable selector of her judicial clerks, can churn out impressive opinions absent her personal efforts. Today, the service of

353. Id. at 1430. In a sermon unearthed a few months back, Saint Augustine confessed: “‘We who preach and write books . . . write while we make progress. We learn something new every day. We dictate at the same time as we explore. We speak as we are still knocking for understanding.’” Lucy Beckett, The Question of What You Love, TIMES LITERARY SUPPLEMENT (London), Apr. 2, 2010, at 7 (quoting Henry Chadwick, Augustine of Hippo: A Life xv (2009)). Do jurists write opinions to second-guess others, while those daily-learning jurists themselves still explore for their own understanding?

357. Id. at 1430. Innocently does Alito alchemize “Commission” into “courts.” Notoriously did Justice Harlan Stone demote rights “delegated” to rights “surrendered”: “‘The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.’ The amendment states but a truism that all is retained which has not been surrendered.” United States v. Darby, 312 U.S. 100, 123-24 (1941) (quoting U.S. Const. amend. X).
law clerks in opinion drafting is openly discussed.\textsuperscript{359} The tendency has been increasingly to delegate opinion-drafting responsibilities to the clerks.\textsuperscript{360} The jurist herself transmutes from the drafter into an editor.\textsuperscript{361} In the Supreme Court, this evolution is all but completed—at least as is determinable from the length and from the scholarly apparatus of its Justices' opinions.\textsuperscript{362} Of course, to the extent that Alito's slip evidences a misdirected judicial modesty in erroneously supposing that the 1970 Congress chose then to constrict the leeway—"second guessing" of "the courts"—consequent interpretive counterbalancing of that misguided judicial modesty facilitates readings of \textit{Jones} the yet more expansively pro-judicial authority under the 1970 enactment.

In all events, not to be second-guessed board decisions look to be those "informed" by not merely a knowledge of, but by the assessment of—"[i]f disinterested directors consider all of the relevant factors"\textsuperscript{363}—the captive fund fee/independent client fee comparison. A "court must take a more rigorous look at the outcome"\textsuperscript{364} should a board-blessed fee appear born of a board not "informed," or even just behaving as if uninforme "'bears no reasonable relationship to the services rendered'".\textsuperscript{365} The judgment of the Court of Appeals was vacated.\textsuperscript{366} \textit{Jones} was remanded.\textsuperscript{367}

\subsection*{C. The Law and Economics of the Thomas Concurrence}

According to Vanderbilt political scientist Pamela C. Corley, the expert on concurrences in the Supreme Court, only some concurrences in the Supreme Court support the majority's opinion.\textsuperscript{368} A concurrence can detract from the majority opinion's impact by disagreeing with its reasoning. Yet it

\textsuperscript{359} POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM, supra note 358, at 143.
\textsuperscript{360} Id.
\textsuperscript{361} See id. at 141.
\textsuperscript{364} Id. at 1430.
\textsuperscript{365} Id. at 1429 (quoting Gartenberg v. Merrill Lynch Asset Mgmt., Inc., 694 F.2d 923, 928 (2d Cir. 1982)).
\textsuperscript{366} Id.
\textsuperscript{368} PAMALA C. CORLEY, CONCURRING OPINION WRITING ON THE U.S. SUPREME COURT 97 (2010).
also can clarify the outcome of a case and strengthen it. The latter it is with Justice Clarence Thomas' concurrence in Jones. For Justice Thomas briefly concurred to explain that he understood that the Alito opinion does not countenance the free-floating judicial fairness review of fees which Thomas feared Gartenberg could be read to authorize. Thus is the judiciary instructed by Thomas—in so many words—that the Jones enrichment of Gartenberg is not to be confused with the banned free-ranging judicial review of the fairness of fees. The stance against expanding the fiduciary jurisdiction, into deciding what is fair, is apparent. Flannigan stated, “Attempting to determine whether decisions are fair or reasonable is very different from attempting to ensure that they are made in good faith without the distortion of self-regard.”

Sure enough, Flannigan, the law and economics expert, like Justice Thomas cautions against a judicial prescriptive construction of fiduciary obligations (positive performance) instead of a proscriptive construction (of personal abnegation): “Loyalty in the conventional fiduciary sense is the specific obligation to eschew unauthorized conflicts or benefits.” The former (conflicts) are permitted and, in the captive mutual fund circumstances, virtually prescribed under section 36(b). But, the latter (unauthorized benefits) are proscribed. Hence, the Jones controversy: In such a case is an investment adviser’s conflict of interest perhaps inevitable, but an adviser-abnegation is statutorily incumbent. Flannigan, like Justice Thomas, disclaims a judicial free-ranging fairness review in favor of judges, instead, ensuring that a fiduciary’s actions are taken sans any distorting self-regard. Jones, of course, actually exemplified the charge of a fiduciary investment adviser’s fee-taking having been distorted by its self-interest. Flannigan articulates the implicit premises impelling Thomas’ seal of approval on Alito’s Gartenberg-plus opinion.

IX. The Financial Press Greets Gartenberg-Plus

The Jones ruling was hailed alike by fund industry representatives and by investors’ advocates. Sure enough, one report on the morning of Jones

---

369. Id. at 14. What Corley calls an emphatic concurrence emphasizes an aspect of the Court’s holding, and largely functions as a clarification. Id. at 18.
371. Id.
373. Id. at 444–45.
374. Id. at 444.
375. Id. at 451.
was headed: *Jones v. Harris Associates: Let the First Lawsuit Bloom.*\(^{376}\) The *Wall Street Journal* at once emphasized that the Supreme Court had granted “leeway” for fund fee lawsuits.\(^{377}\) Shortly thereafter, it quoted Professor Birdthistle: “‘This isn’t just *Gartenberg*, this is *Gartenberg*-plus . . . . The [C]ourt has reconstructed *Gartenberg* to emphasize the discrepancy between retail [individual-investor-oriented] and institutional fees.’”\(^{378}\) Heading its story *Lower Fees, Courtesy of Supreme Court,*\(^{379}\) the *Journal* submitted: “The new, *Gartenberg*-plus standard may require firms to inform fund boards how much they charge other clients and explain the difference in fees—something critics claim will be hard to do.”\(^{380}\) Indeed, *Jones “added a wrinkle that will put more pressure on fund companies to justify charging individual investors more than big institutional clients.”*\(^{381}\) Rob Silverblatt reported that in Alito’s opinion “there’s a bit of a twist.”\(^{382}\) *Jones* delivers “some wiggle room to investors who claim that certain fee differentials are abusive.”\(^{383}\) Wrinkle. Twist. Pressure. *Investment News* headed its page-one news story *High Court Ruling Opens Door for More Lawsuits Over Mutual Fund Fees.*\(^{384}\) It opened:

> While the Supreme Court’s ruling last week on a controversial lawsuit over mutual fund fees was viewed as a huge win by the mutual fund industry, the decision will likely put more pressure on the boards and managements of fund companies to defend their fees and could open the door to even more litigation.\(^{385}\)

*Pressure. Hard to do.* And *Investment News* editorialized: “*Jones v. Harris*, though a loss for the plaintiffs, might well result in a long-term win for all mutual fund shareholders, if, as seems likely, it leads fund directors to

---

376. Taub, supra note 346.
379. *Id.*
380. *Id.*
381. *Id.*
383. *Id.*
385. *Id.*
exercise their independence more fully, and this leads to better fund governance and perhaps lower fees."

According to Gregory Ash, chairman of the Employee Retirement Income Security Act litigation group at Spencer Fane Britt & Browne LLP:

Now, when these cases are filed, courts are going to have to do a lot more digging to see if the board of directors and fund management fulfilled their fiduciary duties . . . If a plaintiff is able to draft a complaint carefully enough to follow what is essentially a blueprint laid out in this opinion on how to establish a [legally viable] claim, they will at least get to summary judgment.

Offers Barry Barbash, a partner in Willkie Farr & Gallagher LLP and former director of the Securities and Exchange Commission Division of Investment Management: "Fund companies are going to need to be a lot more analytical with looking at their accounts and fees . . . A data dump isn’t going to work." Bear in mind the wisdom of Nobel Laureate Simon: A data dump conceals, not reveals, an investment adviser’s dirty laundry.

Morningstar’s Russel Kinnel perceived that the Jones understanding of critical facets of Gartenberg might hand shareholders a tad more power: “The [C]ourt also said that boards should examine whether the fees paid are comparable to those paid by other clients when the services and investment strategy are comparable.” On the other hand, the independent chair of Investco Ltd.’s mutual fund line, Bruce Crockett, asserted that the contention that Jones would change the industry presumes that fund boards have not been looking at different fees, but they have: “I don’t see how this changes much . . . Plaintiff’s bar will continue to try and find areas to test and fees will be one of them.”

After the Supreme Court granted certiorari in Jones to resolve a split among the Courts of Appeals concerning what a mutual fund shareholder must prove to demonstrate that a mutual fund investment adviser had

387. Marquez, supra note 384. "With this ruling, a higher standard of conduct has been placed on mutual fund investment advisers, who help millions of people manage their retirement income." says Jay Sushelsky, attorney for AARP.” John Waggoner, Mutual Fund Fees Case Goes Back to Lower Court, USA TODAY, Mar. 31, 2010, at B1.
389. Kinnel, supra note 129, at 49.
390. Mamudi, supra note 378.
breached its fiduciary duty as to compensation for services, the United States Court of Appeals for the Eighth Circuit adopted the Gartenberg standard in *Gallus v. Ameriprise Financial, Inc.* 391 On April 5, 2010, the Supreme Court granted certiorari in *Gallus*, remanding *Gallus* to the Eighth Circuit for further consideration in view of *Jones*. 392 As Professor Birdthistle interpreted this remand, “It’s still difficult to be a plaintiff, but it’s easier today that [sic] it was seven days ago.” 393 Then, General Counsel Karrie McMillan of the Investment Company Institute, a mutual fund industry trade group, opined, “I don’t think the Supreme Court . . . really changed the way the boards do things as a practical matter.” 394 On the other hand, the *Wall Street Journal* reporting on *Gallus* subheaded its news story: *Decisions May Be Making Suits Easier.* 395

What gap was filled by Justice Alito’s Gartenberg-plus opinion in *Jones*?

X. WHY THE CRY FOR A GARTENBERG-PLUS OPINION?

A. The Substance of Things Hoped For

The Investment Company Act of 1940 provides in relevant part in section 15(a):

> It shall be unlawful for any person to serve or act as investment adviser of a registered investment company, except pursuant to a written contract, which contract, whether with such registered company or with an investment adviser of such registered company, has been approved by the vote of a majority of the outstanding voting securities of such registered company, and—

391. 561 F.3d. 816, 817–18, 822 (8th Cir. 2009), vacated by 130 S. Ct. 2340 (2010).

392. Ameriprise Fin., Inc. v. Gallus, 130 S. Ct. 2340 (2010). “In a case that American Funds won in a lower court and that is now on appeal, evidence showed that for at least two years American refused to tell directors about portfolio managers’ incentives.” Kinnel, *supra* note 129, at 49.


394. *Id.*

(1) **precisely describes all compensation** to be paid thereunder;

(2) shall continue in effect for a period more than two years from the date of its execution, only so long as such continuance is specifically approved at least annually by the board of directors or by vote of a majority of the outstanding voting securities of such company; . . .

That Act further provides, in relevant part, in section 15(c), that:

> [I]t shall be unlawful for any registered investment company having a board of directors to enter into, renew, or perform any contract or agreement, written or oral, whereby a person undertakes regularly to serve or act as investment adviser of or principal underwriter for such company, unless the terms of such contract or agreement and any renewal thereof have been approved by the vote of a majority of directors, who are not parties to such contract or agreement and any renewal thereof, and interested persons of any such party, cast in person at a meeting called for the purpose of voting on such approval. *It shall be the duty of the directors of a registered investment company to request and evaluate, and the duty of an investment adviser to such company to furnish, such information as may reasonably be necessary to evaluate the terms of any contract whereby a person undertakes regularly to serve or act as investment adviser of such company.*

The Securities and Exchange Commission has prepared Form N-1A, Registration Statement Under the Securities Act of 1933/Registration Statement under the Investment Act of 1940. Generally, Form N-1A is for the use of open-end management companies to register under the Investment Company Act of 1940 and to offer shares under the Securities Act of 1933. The S.E.C. designed it to afford investors information, aiding them to decide concerning investing in such an investment company. The Registrant is mandated to reveal the Form N-1A information, which the SEC makes public. The Commission also may exploit this information "in its regulatory, disclosure review, inspection, and policy making [functions]."

---

398. See generally id.
399. Id. at 1.
400. Id. at 2.
401. Id. at 1.
Item 27 of Form N-1A is found in Part B thereof: "INFORMATION REQUIRED IN A STATEMENT OF ADDITIONAL INFORMATION"\(^\text{402}\) i.e., information additional to that required in a prospectus. The Form N-1A Item 27 language addressed herein was prepared as a mandatory language in 2004.\(^\text{403}\) The SEC was then conscious of specific factors invoked in the Gartenberg Second Circuit opinion toward determining whether an investment adviser meets section 36(b) fiduciary obligations, including "the adviser-manager's cost in providing the service, the nature and quality of the service, the extent to which the adviser-manager realizes economies of scale as the fund grows larger, and the volume of orders which must be processed by the manager."\(^\text{404}\) In the Gartenberg shareholder derivative challenge to fees paid a fund adviser, the District Court declared of the unsuccessful challengers of their fund and its adviser: "Plaintiffs offer as an apt comparison for the compensation payable by the Fund, the compensation (unspecified) that pension fund managers are paid which plaintiffs say is only a fraction of the compensation which the Fund pays."\(^\text{405}\) So, given the 1940 Act's section 15(c) duty of directors to solicit such data as is reasonably necessary to evaluate their investment adviser's contract, and given that the ill-starred Gartenberg plaintiffs had been unarmed with data comparing their adviser's fee against fees rendered pension fund managers, what disclosures demand the Commission's Form N-1A?

Item 27(d)(6)(i) provides:

If the board of directors approved any investment advisory contract during the Fund's most recent fiscal half-year, discuss in reasonable detail the material factors and the conclusions with respect thereto that formed the basis for the board's approval. Include the following in the discussion:

(i) Factors relating to both the board's selection of the investment adviser and approval of the advisory fee and any other amounts to be paid by the Fund under the contract. This would include, but not be limited to, a discussion of the nature, extent, and quality of the services to be provided by the investment adviser; the invest-

\(^{402}\) SEC, FORM N-1A, supra note 397, at Part B.

\(^{403}\) Id. at Item 27.


ment performance of the Fund and the investment adviser; the
costs of the services to be provided and profits to be realized by
the investment adviser and its affiliates from the relationship with
the Fund; the extent to which economies of scale would be realized
as the Fund grows; and whether fee levels reflect these economies
of scale for the benefit of Fund investors. Also indicate in the dis-
cussion whether the board relied upon comparisons of the services
to be rendered and the amounts to be paid under the contract with
those under other investment advisory contracts, such as contracts
of the same and other investment advisers with other registered in-
vestment companies or other types of clients (e.g., pension funds
and other institutional investors). If the board relied upon such
comparisons, describe the comparisons that were relied on and
how they assisted the board in concluding that the contract should
be approved . . . . 406

Such revelations of factors forming the basis for board endorsement of
an investment advisory contract are the things hoped for.

B.  The Substance of Things Not Seen

Dissenting from the denial of rehearing en banc in Jones, Judge Posner
cited scholarship indicating that the foremost reason for aggravated differ-
ences in advisory fee-levels between equity mutual fund portfolio managers,
and equity pension fund portfolio managers, is that it is in the latter field that
the advisory fees are subject to marketplace arm’s-length bargaining.407
Reassuringly then does Item 27(d)(6)(i) appear, at first glance, geared to post
fund shareholders of how their fund’s advisory contract fee measures against
fees paid to the same investment adviser by pension funds or by other institu-
tional advisers: “indicate [in the discussion] whether the board relied upon
comparisons.”408 At first blush, Item 27(d)(6)(i) seems engineered to notify
fund shareholders of how their fund’s board assessed such comparisons “de-
scribe . . . how they assisted the board.”409 Indeed, the Supplementary In-

406. SEC, FORM N-1A, supra note 397, at Item 27(d)(6)(i) (emphasis added).
senting) (per curiam) (citing John P. Freeman & Stewart L. Brown, Mutual Fund Advisory
Fees: The Costs of Conflicts of Interest, 26 J. CORP. L. 609, 634 (2001)).
408. Disclosure Regarding Approval of Investment Advisory Contracts by Directors of
pts. 239, 240, 274); SEC, FORM N-1A, supra note 397, at Item 27(d)(6)(i).
409. Disclosure Regarding Approval of Investment Advisory Contracts by Directors of
Investment Companies, 69 Fed. Reg. at 39,802; SEC, FORM N-1A, supra note 397, at Item
27(d)(6)(i).
formation with the 2004 Release of the amendatory Final Rule recorded of this comparison of fees and services provided by the adviser.\textsuperscript{410}

Several commenters supported the proposed requirement, arguing that any responsible board would at least seek to compare the terms of the contract under consideration with relevant terms for similar funds, and that by encouraging boards to compare the compensation funds pay to their advisers with the compensation that other institutional investors pay, there may be a downward pressure on fund advisory fees.\textsuperscript{411}

Why then all the shouting in \textit{Jones}? Remember Investco’s Crockett, who declined to shout, “I don’t see how this changes much.”\textsuperscript{412}

The \textit{Jones} fluster arose because real-world boards are not so adequately responsible as to compare the terms of their own adviser’s contract with the compensation other institutional investors render to that same adviser. These boards do not so post investors, regarding these matters, in Form N-1A, which ostensibly is Commission-designed to provide investors data toward deciding about investing. Therefore, there is no resultant downward pressure on fund advisory fees. And boards get away with this. How? The cheery, superficial hints of disclosure by Item 27(d)(6)(i) are belied by the artful double-negative language of the Commission in its Supplementary Information. That passage was drafted to be read by the legal cognoscenti and not the hapless investors:

\begin{quote}
As adopted, the amendment requires a description of the comparisons upon which the board relied and how they assisted the board in concluding that the contract should be approved, and does not require an enumeration of the types of comparisons that the board did not use.\textsuperscript{413}
\end{quote}

Item 27(d)(6)(i) does \textit{not} require the enumeration of those comparisons a board did \textit{not} use.

Shareholders outside the legal or the financial industry, cognoscenti-perusers of the Federal Register, are \textit{not} alerted to data \textit{not} employed to those shareholders’ benefit by their boards: “Little of what the management com-

\footnotesize
\begin{itemize}
  \item \textsuperscript{410} Disclosure Regarding Approval of Investment Advisory Contracts by Directors of Investment Companies, 69 Fed. Reg. at 39,801.
  \item \textsuperscript{411} \textit{Id.} at 39,802.
  \item \textsuperscript{412} Mamudi, \textit{supra} note 378.
  \item \textsuperscript{413} Disclosure Regarding Approval of Investment Advisory Contracts by Directors of Investment Companies, 69 Fed. Reg. at 39,802.
\end{itemize}
pany tells a fund’s board or how the board determines fees is in the public record until a lawsuit is filed. Consequently, investors have to sue first to find out whether they have a case.\textsuperscript{414} The retail investors in mutual funds are not rallied to squeeze fund advisory fees south.

Certain data—assisting investment decision making—which innocent investors might expect the Securities and Exchange Commission to publish in Form N-1A exemplify, as St. Paul might preach, things hoped for. True, some funds such as index funds are comparatively cheaply managed, whereas others such as international funds are comparatively costly due to unique hassles or demands for special expertise.\textsuperscript{415} Nevertheless, the respective investment advisory fees for mutual funds and for corporate accounts with identical investments ought to prove identical—whatever the nature of those potentially diverse underlying investments.\textsuperscript{416} This is because investment advisory fees are distinct from those other mutual fund “expenses” properly charged to the fund shareholders.\textsuperscript{417} But a cynical Commission blesses Form N-1A statements wherein the enumeration of comparisons a board did not use remain Paul’s things not seen. Remember Assistant to the Solicitor General Gannon’s pronouncement to Justice Ginsberg that the post-1980 SEC “has primarily directed its resources and energies into encouraging there to be better disclosure of fees, both the disclosure of information to the board, disclosure to investors, better education to shareholders.”\textsuperscript{418} Well, did it?

Coro: from the Latin, \textit{fiducia}, for trust.\textsuperscript{419} “Trust can be misplaced.”\textsuperscript{420} Quis custodiet ipsos custodes?\textsuperscript{421}

\begin{itemize}
\item \textsuperscript{414} Kinnel, \textit{supra} note 129, at 49.
\item \textsuperscript{415} Paul S. Atkins, \textit{Tort Lawyers Target Mutual Funds}, \textit{WALL ST. J.}, Nov. 2, 2009, at A19.
\item \textsuperscript{417} \textit{Id.}
\item \textsuperscript{418} Transcript of Oral Argument, \textit{supra} note 277, at 21. The escalating domination over productive activities in an economy by financial services is dubbed financialization. \textit{Nina BANDEU & ELIZABETH SOWERS, ECONOMY AND STATE: A SOCIOLOGICAL PERSPECTIVE} 78 (2010). Financial services have skyrocketed to prominence within the American economy. \textit{Id.} at 79. And economists concur that the defense of rights in private property is a government’s duty. \textit{Id.} at 53. For a free market, unvexed by governmental impediment, ranks among the most familiar of economic tropes. \textit{Id.} at 1. Nevertheless, a major device whereby governments do regulate firms is that of consumer protection. \textit{Id.} at 130. Given this, under standably might America’s consumers trust Congress and its Securities and Exchange Commission to insulate private-property owning investors from the avarice of mutual fund investment-advisers? Well, do they?
\item \textsuperscript{419} \textit{WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY} 845 (2002).
\item \textsuperscript{420} Stewart Macaulay, \textit{An Empirical View of Contract}, 1985 \textit{WIS. L. REV.} 465, 471.
\item \textsuperscript{421} Who shall guard the guards themselves? \textit{JUVENAL, THE SATIRES OF JUVENAL} 247 (London, MacMillian & Co. 1897). The SEC touts a new brain trust focusing on, inter alia,
XI. THE LAW AND ECONOMICS OF JONES

A. Flannigan on Fiduciary Duty

Generally, “[E]conomic analysis . . . holds little utility for the lex lata” as understood strictly.422 It reveals little of how to interpret the law.423 Yet in some areas economic analysis might be a portion of the lex lata because legal rules can be understood to refer to economic concepts.424 The economic literature concerning agency has swelled phenomenally since the early 1970s.425 And economists assess opportunism in its every single incarnation.426 The analysis of opportunism by economists is associated, in the legal community, with principal/agent commentary.427 Still, very few economists have dared the economic analysis of fiduciary obligation. Their profession’s accomplishments are yet to shed much fresh light upon fiduciary accountability. Economists prodigally have lavished research on economic mechanisms to control opportunism, yet been skittish in evaluating the primary legal device.428 Also, there remains no consequential empirical data measuring whether, as to fiduciary accountability, the conventional loyalty duty is efficient.

investment emphasis and investment advisers. Ortiz, supra note 388. This unit, to be headed by Robert Kaplan, once an assistant director of the Commission’s enforcement division, and Bruce Karpati, once the assistant regional director for the Commission’s New York regional office, was born of frequent criticisms that the SEC lacks adequate mutual fund industry knowledge and experience to regulate that business. Id.

423. Id.; See, e.g., MARIA MANZANO, MODEL THEORY (Ruy J.G.B. de Queiroz trans., 1999). “Law is, indeed, applied history. It is not applied economics . . . .” George Steven Swan, The Law and Economics of State-Sanctioned Medical Marijuana: Gonzales v. Raich, 7 FLA. COASTAL L. REV. 473, 548 (2006). However, the economic analysis of law can cast “light upon the inchoate thinking of our forebears.” Id.
425. Casadesus-Masanell & Spulber, supra note 51, at 87 n.132.
426. Flannigan, The Economics of Fiduciary Accountability, supra note 58, at 401–02.
427. Id. at 401.
428. Id. at 409 (citing Oliver Hart, An Economist’s View of Fiduciary Duty, 43 U. TORONTO L.J. 299, 299 (1993)).
1. Production Opportunism

Surely is the loyalty duty, fiduciary accountability, not in opposition to economic principles. It transpires that the economic perspective only replicates ancient principle. Context determining whether opportunism equals fiduciary breach, Flannigan explains that the context of production is applied “in its widest sense of shaping human or physical capital for any end.” It encompasses production of exchange just as some firms exist to broker exchanges. Actors undertaking to serve others acquire access to assets and opportunities connected with their service. They can abuse such access to advance self-interest. Mischief is controlled by fiduciary accountability.

2. Exchange Opportunism

Contrast this production opportunism against exchange opportunism. This opportunism occurs between production units at the exchange interface. Actors originally agreeing to launch production processes negotiate the terms of their contributions. For example, a captive mutual fund is developed by an investment adviser. These firms can permit party actions affecting renegotiation—i.e., the renewal of the investment adviser’s contract by the captive mutual fund’s board of directors. Then may one side be armed to extract concessions from the other. Hypothetically, an investment adviser bleeds its captive mutual fund. For exchange opportunism arises when actors bargain over their future relationship. Opportunistic contracting in the exchange context is generally nonactionable. This permissible exchange opportunism is expectable, essentially being competitive be-

429. Id. at 428.
430. Id. at 393.
431. Flannigan, The Economics of Fiduciary Accountability, supra note 58, at 394.
432. Id. at 395 n.5.
433. Id.
434. Id. at 394.
435. Id.
436. Flannigan, The Economics of Fiduciary Accountability, supra note 58, at 394.
437. Id. at 395.
438. Id.
439. Id.
440. Id.
441. Flannigan, The Economics of Fiduciary Accountability, supra note 58, at 395.
442. Id. at 396.
443. Id.
behavior at the negotiation stage.\textsuperscript{444} This might sound heartening for an investment adviser like Harris Associates L.P.

Why is this exchange opportunism negotiation to be permitted competitive behavior? Flannigan stated, "As such, it is acceptable for all [of] the reasons that competition is generally acceptable in market economies."\textsuperscript{445} So in turn, why is competition generally acceptable in market economies? Competition guarantees alternatives. Those alternatives curb the gross misallocation of resources by competitive market firms.\textsuperscript{446} Sure enough, Justice Alito in \textit{Jones} discerned that section 36(b) obtains in light of long term Congressional worry over investment board independence and investment adviser recompense.\textsuperscript{447} The competitive market’s alternatives being \textit{suppressed} in the captive mutual fund context, the preclusion of fiduciary duty—a preclusion typical of exchange opportunism—proves inapropos. Instead, the attachment of fiduciary duty regarding compensation logically emerges. Sure enough, Congress in 1970 deputized the individual investor to enforce the investment adviser’s fiduciary duty as in \textit{Jones}.\textsuperscript{448}

\textbf{3. Consent}

Flannigan further explains that opportunism does not equate with actionable breach of fiduciary duty if there obtains consent.\textsuperscript{449} For instance, parties might consent to the existence of a conflict of interest, although never to actual self-dealing.\textsuperscript{450} Compare the situation wherein a manager’s firm might accept an opportunism discount reflective of the risk of opportunism—so corresponding to the firm’s heavier costs of monitoring the shifty manager—but never accept his actual opportunism. This means the parties are allowed to act notwithstanding the managerial conflict of interest, but \textit{cannot} allow the conflict to impinge upon managerial decisions. For example, directors oftentimes are allowed to name their own pay rates.\textsuperscript{451} Compare the sway of the investment adviser hypothetically dominating its captive mutual fund board as to compensation. The upshot will be actionable as a fiduciary breach if it be proved that the conflicting party \textit{did} succumb to impermissible self-regard.\textsuperscript{452}

\textsuperscript{444.} \textit{Id.}
\textsuperscript{445.} \textit{Id.}
\textsuperscript{446.} Hsiung, \textit{supra} note 205, at 15.
\textsuperscript{448.} \textit{See id.}
\textsuperscript{449.} Flannigan, \textit{The Economics of Fiduciary Accountability}, \textit{supra} note 58, at 399.
\textsuperscript{450.} \textit{Id.} at 399–400.
\textsuperscript{451.} \textit{Id.} at 400.
\textsuperscript{452.} \textit{Id.}

\textbf{Published by NSUWorks, 2011}
Consider the post-Jones liability of an investment adviser charging a fee so outsized as to bear no reasonable relation to services rendered. Flannigan noted, "Because the existence of [a] conflict is permitted, the burden on the beneficiary changes from proving the conflict to proving actual self-interested conduct." Sure enough, it is ordained in section 35(b)(1) that the plaintiff carries the burden of proving investment adviser breach of fiduciary duty.

4. Limited Access Arrangements

Again, how is the law and economics logic of the Alito opinion such that Thomas could concur? Flannigan found that various conceptions of fiduciary responsibility bewilder jurisprudence. And Flannigan cautioned that one snare is the view that fiduciary regulation reaches assessing the fairness of an exercise of "authority, notwithstanding the absence of . . . self-dealing." Such befuddlement plagues this corner of the law. Sure enough, the unbefuddled Justice Alito in Jones recalled that in concocting the 1970 amendments, Congress rejected an investment adviser compensation reasonableness standard. And the unbefuddled Justice Thomas concurred to revile a freewheeling judicial fairness review of fees.

Make no mistake: "The conventional function of fiduciary regulation is [controlling the] opportunism [to be found] in limited access arrangements." Such an arrangement obtains if one party acquires access to another’s assets toward a defined or limited goal. The backdrop to conventional fiduciary duty is such arrangement of limited access. In agency, the fiduciary-agent’s duty to forgo her self-interest in exploiting the aforementioned limited access is a duty required by definition: For it is this shunning self-interest that limits the access. Recall Flannigan’s insistence re-

453. Id. at 400 n.23.
456. Id.
457. Id.
459. See id. at 1431 (Thomas, J., concurring).
461. Flannigan, *Fact-Based Fiduciary Accountability in Canada*, supra note 57, at 432 n.3.
462. Id. at 443.
463. Id. at 440. “The duty of loyalty is the distinctive feature of fiduciary law—the ent- tailment of the vulnerability of the beneficiary to the fiduciary’s discretion in using or working with a critical resource (such as information) belonging to the beneficiary.” HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION 236 (2004) (emphasis added) (citing D. Gordon Smith,
counted in Section VIII C, supra, upon fiduciary duty as a proscription. Prescribed is exploiting limited access in self-interest.

Flannigan's insight—that the conventional function of fiduciary regulation is the control of limited access arrangement-opportunism—isolates the implicit logic of Alito and Thomas in comprehending the captive mutual fund-investment adviser duet. Advisers wield discretionary power in an access sense, in certain aspects.\textsuperscript{464} Crucially, they enjoy access to the beneficiary’s judgment—for nurturance of the beneficiary’s judgment is the nature of advice.\textsuperscript{465} That function may be exploitable.\textsuperscript{466} Therein arises the capacity to exercise a discretion to extract gain beyond that authorized—a de facto power.\textsuperscript{467} In this sense proves discretionary power manifestly one of limited access.\textsuperscript{468}

More specifically and crucially, the investment adviser enjoys access to a captive mutual fund board’s judgment at least by hypothesis. Therein arises the investment adviser’s capacity to extract profit beyond that authorized to a fiduciary—a de facto power at least by hypothesis. Such was the sin alleged in Jones against Harris Associates L.P.\textsuperscript{469} Therefore could Alito and Thomas in Jones fuel the enforcement of the investment adviser’s fiduciary duty while heartily disclaiming judicial enforcement of any nebulous reasonableness/fairness standard.

B. \textit{MIRRLEES AND FRANKEL ON AGENCY/FIDUCIARY DUTY}

In his capacity as a juridical scientist, Judge Easterbrook and his co-author Fischel fancy the rationale for fiduciary duty as judicial finessing of impossibly onerous transaction costs\textsuperscript{470} (as indicated in Section III, supra). Disavowed was the proposition that fiduciary duty redresses informational or power inequalities between contracting parties.\textsuperscript{471} Nevertheless, in his own capacity as a juridical scientist, Judge Posner doggedly insists that the fiduciary principle indeed is the law’s reply to the problem of unequal information costs.\textsuperscript{472} On the other hand, Flannigan points out that opportunism just

\textsuperscript{464} Flannigan, \textit{Fact-Based Fiduciary Accountability in Canada}, supra note 57, at 454.
\textsuperscript{465} \textit{Id}.
\textsuperscript{466} \textit{Id}.
\textsuperscript{467} \textit{Id} at 455.
\textsuperscript{468} \textit{Id}.
\textsuperscript{469} \textit{Jones v. Harris Assocs. L.P.}, 130 S. Ct. 1418, 1424 (2010).
\textsuperscript{470} Easterbrook & Fischel, supra note 42, at 438, 444–46; see also supra Section III
\textsuperscript{471} \textit{Id} at 436.
\textsuperscript{472} \textit{Posner, Economic Analysis of Law}, supra note 139, at 114.
cannot be stamped out through complete contracting with full information. Expected repeat interactions dampen opportunism. But agents pursue self-interest when they spontaneously opt to treat their relation as an end game. And markets prove inadequate in addressing end game interactions.

1. The Theory of First-Mover Vulnerability

Sir James A. Mirrlees, in 1996, was awarded the Alfred Nobel Memorial Prize in Economics "for his work on economic behavior [where] there is incomplete information." The Royal Swedish Academy of Sciences honored Mirrlees, and William Vickery, "for their fundamental contributions to the economic theory of incentives under asymmetric information." Mirrlees' approach notably had proved meritorious in moral hazard situations like that of principal-agent. Therefore might one presume some Mirrlees sympathy for Posner's unequal information costs rationale for fiduciary duty, whether or not one presumed a Mirrlees sympathy for the Easterbrook-Fischel transaction costs version of the rationale.

However, Mirrlees declares, "It is not so much the asymmetry of information that is special about principal-agent relationships, but the asymmetry of responsibilities, with the principal moving first, the agent following." Might this Mirrlees principal-agent finding feed into Jones? True, while each agent is a fiduciary, not every fiduciary is an agent. The Mirrlees principal first-move insight well might nourish the understanding of Jones. Boston University School of Law Professor Tamar Frankel is an expert in fiduciary law, in the regulation of money managers, mutual funds, and

473. Flannigan, The Economics of Fiduciary Accountability, supra note 58, at 407. After all, opportunism ordinarily erupts in violation of the contract. Id. at 406.
474. Id. at 407 n.55.
475. Id. at 407.
476. Id. at 415.
480. Id.
482. Casadesus-Masanell & Spulber, supra note 51, at 68 (citing Easterbrook & Fischel, supra note 42).
483. See, e.g., TAMAR FRANKEL, FIDUCIARY LAW: ANALYSIS, DEFINITIONS, RELATIONSHIPS, DUTIES, REMEDIES OVER HISTORY & CULTURES (2008); Tamar Frankel, Fidu-
advisers,\textsuperscript{484} and in investment management regulation.\textsuperscript{485} In August 2009, Professor Frankel explained that fiduciaries may dispose of, as they like, the compensation they win for their services.\textsuperscript{486}

The problem arises when fiduciaries have significant influence on the amount that they receive as compensation for their services. This situation occurs when client-entrustors are incapable of freely and independently agree to the commissions or the fees for the services. In such cases these commission payments are an exchange in form but not in substance. The greater the entrustment, the more numerous are the entrustors, the less free bargaining power the entrustors may have. In such cases the law might interfere in containing the fiduciaries’ compensation. This is especially so when the entrustors will sustain costs in severing the relationship, for example, pay taxes on amounts that would otherwise be tax deferred.\textsuperscript{487}

At this juncture, Frankel adds a footnote: “For example, mutual fund investors are numerous and have no opportunity to negotiate the fees they charge. Redemption of mutual fund shares invested in a pension fund may involve for entrustors high taxes."\textsuperscript{488}

Frankel’s mutual fund investors, having—as Mirrlees would say—moved first by entrusting their retirement money to a mutual fund, experience no opportunity themselves to negotiate over fees charged. Worse, they also are hostages vulnerable to costs entailed—e.g., taxes on sums otherwise tax-deferred—in an escape from their agent. Remember Flannigan’s insistence, recounted in Section XI A, supra, that fiduciary regulation checks the opportunism embedded in limited access arrangements. Not only is an adviser’s discretionary power manifestly a power of limited access abstractly, but also Mirrlees’ first-mover mutual fund investors hostage—as Frankel suggests—to the second-mover adviser, are extraordinarily exposed to opportunism.

\textsuperscript{485} See, e.g., TAMAR FRANKEL & CLIFFORD E. KIRSCH, INVESTMENT MANAGEMENT REGULATION (3d ed. 2005).
\textsuperscript{487} Id. (footnote omitted).
\textsuperscript{488} Id. at 8 n.29.
2. The Practice of First-Mover Vulnerability

How closely might the Mirrlees-Frankel logic parallel the facts of *Jones*? In the November 2nd oral argument, Chief Justice Roberts shared this exchange with David C. Frederick, appearing on behalf of the *Jones* petitioners:

MR. FREDERICK: Here what is happening is that an arm's-length transaction for the same services—the same manager is going out and touting his services to the institutional investor, but simply charging them half as much money for providing the same portfolio of management.

CHIEF JUSTICE ROBERTS: Do technological changes make a difference in terms of disclosures required? These days all you have to do is push a button and you find out exactly what the management fees are. I mean, you just look it up on Morningstar and it's right there and you can make—as an investor you can make whatever determination you'd like, including to take your money out.

MR. FREDERICK: The fact that an investor may know going in what the fee is does not address the problem Congress was intending to address, which is that *as larger and larger sums of assets were accreted to the mutual fund, the investor was not obtaining the benefits of economies of scale.* And that's the central point—

CHIEF JUSTICE ROBERTS: So we could look at—you know, as the fund grows bigger and he doesn't get those benefits he can go look at another fund. It takes 30 seconds.

MR. FREDERICK: And that again doesn't address the problem Congress was trying to get at, which is to protect the company, not the individual investor. *The individual investor might lessen the damages that that investor suffers, but the fund, the people remaining, continue to pay excessive fees.*

JUSTICE SCALIA: No, but he protects the company ultimately, because when investors leave the company that is charging excessive fees to go to other companies, the company that they are leaving sees that something's wrong and has to lower its compensation to its adviser. Why doesn't that affect the company at issue?

MR. FREDERICK: A large number of assets under management in mutual funds, something like 26 to 35 percent according to ma-
terials that are in the record, are from 401(k) plans, where the in-
vestor is essentially locked into the fund that his or her company
chooses to make that investment. And even as to investors who are not locked in, there are significant tax consequences where
over time an investor might be in the Oakmark Fund and have to
suffer large tax consequences in order to get the benefit of the sta-
tute—489

The mutual-fund, the individual investors therein, moves first. Inves-
tors invest in their mutual fund, which hires an investment-adviser. Thereaf-
ter, those investors fail to net the benefits as increasingly heftier sums accrete
to their fund. The investment-adviser, moving second, now charges these
mutual fund investors double its price to institutional investors, for a compa-
rable portfolio of management. The agent-adviser would lack the funds to
manage had investors not moved first. The Jones facts fit like a glove with
the Mirrless-Frankel logic. Understandably, Frankel responded to Jones,
"'If the industry doesn't do anything in response to this ruling,'” then plain-
tiff investors in captive mutual funds "'will have a better time.'"490

True, individual investors who recoil from being burned can abandon
their flaming investment. Nonetheless, the fund and investor-principals per-
severing in the relationship, who supposedly are legally protected from ad-
viser predation by their adviser’s fiduciary duty relative to compensation,
continually pay extreme fees. Correspondingly, when Mirrlees identified the
special component of principal-agent relationships as the principal moving
first and the agent following, Mirrlees emphasized that many economic prob-
lems and possibilities involve the relationship such as taxation, contracts,
bargains, and thefts.491

C. Jones on Fiduciary Duty

Was it in the spirit of the Ninetieth Congress, delivering investors the
section 36(b) guarantee of security from adviser predation through that ad-
viser’s fiduciary duty as to compensation, that the traduced investor should

489. Transcript of Oral Argument, supra note 277, at 12-14 (emphasis added).
490. Mamudi, supra note 378.
491. MIRRLEES, supra note 481, at 21.
simply sell out? In fact, there is some indication that Congress in the Investment Company Act endeavored to secure the investor-mutual fund relationship from predatory advisers who could leave scorched investors nothing but retreat from their mutual fund.\(^{492}\) Such retreat would mean a kind of marketplace waiver of their statutorily-guaranteed right to their mutual fund adviser’s fiduciary duty in regard to their compensation. Section 47 of the Act ordains:

(a) Waiver of compliance as void

Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or with any rule, regulation, or order thereunder shall be void.

(b) Equitable results; rescission; severance

(1) A contract that is made, or whose performance involves, a violation of this subchapter, or of any rule, regulation, or order thereunder, is unenforceable by either party (or by a nonparty to the contract who acquired a right under the contract with knowledge of the facts by reason of which the making or performance violated or would violate any provision of this subchapter or of any rule, regulation, or order thereunder) unless a court finds that under the circumstances enforcement would produce a more equitable result than nonenforcement and would not be inconsistent with the purposes of this subchapter.

(2) To the extent that a contract described in paragraph (1) has been performed, a court may not deny rescission at the instance of any party unless such court finds that under the circumstances the denial of rescission would produce a more equitable result than its grant and would not be inconsistent with the purposes of this subchapter.

(3) This subsection shall not apply (A) to the lawful portion of a contract to the extent that it may be severed from the unlawful portion of the contract, or (B) to preclude recovery against any person for unjust enrichment.\(^{493}\)

Focusing as Congress did upon equity, did Congress disdain the investor alternative of selling away her right to her fund adviser’s performance of fiduciary duty? In Jones, the Supreme Court responded to a fiduciary rela-


tionship wherein the first-moving investors could be held hostage—e.g., through a threatened taxation of money otherwise tax-deferred—by an incestuous, second-moving mutual fund-investment adviser dyad. Comparison of the advisory fees charged to captive mutual funds against fees charged to independent clients had been a concept belittled in the influential Gartenberg precedent. The Securities and Exchange Commission ostensibly is deputized to effectuate the Congressional will through championing investors against investment adviser breach of fiduciary duty. That commission engaged in double-negative nods and winks to satisfy investment advisers that mutual fund boards were neither tasked with the study of any captive mutual fund/independent client fees contrast nor tasked with informing those boards’ own innocent investors that their board had failed to make such comparison.

The Alito opinion in Jones sagely reacted to this pronounced vulnerability of the first mover to the second. It fortified the 1970 Act by confirming that the investment adviser’s fiduciary duty therein proves of such import that Jones: (1) foreclosed the categorical denial of the captive mutual fund/independent client fees comparison; (2) backed courts away from over-reliance upon those fees charged to mutual funds by other advisers—the imperative behind their warning, spelled out by the Supreme Court advancing without a single dissent, is that to do so could tend to overly-insulate investment advisers from section 36(b) liability—and; (3) summoned judicial evaluation of a mutual fund board’s consideration of the relevant factors behind the investment advisory fee it approves, the more aggressively for courts to examine the outcome should a board’s consideration be deficient (procedure); and (4) further affirmed the role of the judge in repudiating a fee as uncalled-for even when negotiated by a board possessed of all relevant information (substance). \[494\] Jones holds that the section 36(b) standard of fiduciary breach excludes the judiciary’s second-guessing of informed board decisions, apparently to be distinguished from simply those decisions delivered by a board advised of the relevant data. \[495\] Atop this, Justice Thomas’ concurrence stipulates that the Jones opinion incarnating these features “does not countenance the free-ranging judicial ‘fairness’ review,” \[496\] which Congress definitively discarded in 1970.

---

495. Id. at 1430–31.
496. Id. at 1431 (Thomas, J., concurring).
XII. CONCLUSION

A. The Law and Economics of Litigation

The preceding discussion has reviewed the 2010 Jones v. Harris Associates L.P. Supreme Court opinion by Justice Alito. It beckoned future lawsuits brought by mutual fund shareholders challenging the fees paid to the investment advisers of their funds. Such advisers erect the captive mutual funds they then advise and dominate. The Investment Company Act of 1940, as amended in 1970, laid upon the investment adviser of a registered investment company a fiduciary duty as to that adviser’s services compensation laid out by such company. The extent, or even the existence, of private, plaintiff-driven litigation to enforce federal enactments is in great measure the outcome of Congressional choice among options of statutory design.497

Large-scale Congressional interventions into the marketplace can pivot, instead, upon bureaucratic enforcement regimes, entailing administrative investigations, hearings, and issuance of orders.498

The model of rational litigant behavior as developed in the literature of law and economics hearkens to a plaintiff’s expected monetary benefit (EB), expected litigation costs (EC), probability of victory (p), and the perceived claim’s consequent monetary value (EV).499 These variables impinge likewise, of course, upon her for-profit sector attorney’s evaluation of his case.500 Exploiting this law and economics formula for the litigation decision (EV = EB(p) - EC) illuminates systematically the means whereby Congress can regulate the volume of private enforcement litigation. Congress twists the volume-dials by manipulating the anticipated dollar payoff from lawsuits.501

498. FARHANG, supra note 497, at 3.
499. Id. at 22.
500. See id. at 23–24.
501. Id. at 25. Farhang analyzes from the perspective of new institutionalism in political science, in his stress upon political/strategic/policy forces impelling statutory design outcomes. Id. at 24. These variables can explain the resultant nativity of a statute that is quite inefficient economically. FARHANG, supra note 497, at 24. In any event, the new institutionalism emergent a generation ago, see, e.g., James G. March and Johan P. Olsen, THE NEW INSTITUTIONALISM: ORGANIZATIONAL FACTORS IN POLITICAL LIFE, 78 AM. POL. SCI. REV. 734 (1984), the dominant political science approach since 1990, MARK BEVIR & R.A.W. RHODES, THE STATE AS CULTURAL PRACTICE 25 (2010), and now the leading expression of modernist-
And *Jones* arrived at the Supreme Court only following dueling in the United States Court of Appeals for the Seventh Circuit by such swashbucklers of law and economics as Chief Judge Frank H. Easterbrook and Judge Richard A. Posner.

B. *Jones Steers America Aright*

*Gartenberg*, an opinion from the United States Court of Appeals for the Second Circuit, so read the fiduciary duty feature of the 1970 amendments that subsequent litigation in exorbitant fee controversies elicited judgments nearly uniformly for defendants. Thereafter, economic analysis of law heavyweights Easterbrook and Daniel R. Fishel propounded that naught special adheres to the fiduciary relationship. Fiduciary duty is instead a transaction-cost function. In *Jones*, Chief Judge Easterbrook reacted to an attack under the amendments to the Investment Company Act from shareholders in mutual funds against their captive funds’ adviser’s recompense. His opinion hearkened virtually altogether to the feature of the fiduciary adviser’s disclosure to its captive mutual fund’s board. Both the intermediate-court appellate opinions in *Gartenberg* and *Jones* snorted at respective plaintiff pushes to benchmark investment advisory fees levied upon their captive mutual funds against fees imposed on independent clients, e.g., pension funds. In dissenting from a *Jones* denial of a rehearing en banc, Judge Posner concentrated rather upon an adviser’s charging its captive funds over twice what it charged to independent funds.

The Alito opinion opted less for the Easterbrook rationale in *Jones* than for the *Gartenberg* route. To run the risk of liability for its breach of fiduciary duty, the investment adviser must amass compensation so disproportionately great as to entail no reasonable relation to the rendered services: the fee cannot be the fruit of an arm’s-length bargain. Yet Alito gives birth to a *Gartenberg*-plus opinion. *Jones* disavows any categorical rule bar against comparisons between those fees an adviser levies upon a captive mutual fund and fees it charges its independent clients. Justice Alito expounds that fees can be excessive even when negotiated by a board in possession of all relevant information.

Comprehended at once by numerous commentators was the potential impact of Alito’s *Gartenberg*-plus opinion in *Jones*. The bottom line: There might be mounting pressure on the investment advisers of captive mutual

---

fund boards to make detailed accountings of, and perhaps reductions of, their investment advisory charges. Any such pressure would redound to the financial benefit of retail rather than to institutional investors. Disappointingly, such salutary payoffs as might be hoped-for from *Jones* had not already been laid on the table for investors by the Securities and Exchange Commission. The naïve might believe themselves watched-over by a benign, guardian-angel S.E.C. But that blind administrative-watchdog slumbers.

This Alito opinion in *Jones* snugly squares with the law and economics thinking posited neither by Easterbrook—with a linking of fiduciary duty with transaction costs—nor by Posner, who ties the fiduciary duty to the unequal information costs problem. It rather comports with contributions of Nobel laureate economist Sir James A. Mirrlees, and of the fiduciary law scholar Tamar Frankel of Boston University. The former comprehends the distinguishing element of principal-agent relationships to be asymmetry in responsibilities, with the principal as first mover and the agent as the second. Frankel perceives that first mover-mutual fund investors (principals) might become hostages of the lupine second mover-investment advisers (agents).

The *Jones* advance beyond *Gartenberg* is probably, if tenuously, for the best from a libertarian perspective. As the law and economics scholar and expert in the law of fiduciary duty Nicholas L. Georgakopoulos502 frames it:

> [C]ontracting parties cannot create levels of fiduciary obligations outside the two choices: arm’s-length or fiduciary relations. That is, parties cannot agree to give the investor fewer opportunities than a pure arm’s-length relationship or more opportunities than a pure fiduciary relationship. The farther apart the legal system keeps the definitions of the two, the more latitude parties have to fine-tune their relationships. In order to expand contracting choices, the two levels of loyalty available must be kept as far apart as possible.503

At least as a general principle, free market contracting must welcome strong enunciations of fiduciary duty.504


503. *Id.* at 153.

504. Also, even acclaimed scholars of law and economics can assert that a widely-sensed impulse of conscience, and not merely some presumably-widespread application of cost-benefit analysis, see, e.g., Matthew D. Adler & Eric A. Posner, Implementing Cost-Benefit Analysis When Preferences Are Distorted, 29 J. LEGAL STUD. 1105 (2000), properly is to be heeded by the architects of legal frameworks. See generally LYNN STOUT, CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE (2011).
TAKING ON BIG MONEY: HOW CAPERTON WILL CHANGE JUDICIAL DISQUALIFICATION FOREVER

SCOTT B. GITTERMAN*

I. INTRODUCTION........................................................................................................475
II. BACKGROUND INFORMATION ..............................................................................476
III. BEFORE CAPERTON v. A.T. MASSEY COAL CO. ............................................478
   A. When Disqualification is Necessary .................................................................478
      1. Grounds for Disqualification .................................................................483
         a. Actual Bias or Prejudice .................................................................480
         b. Pecuniary Interest ........................................................................482
      2. Landmark Decisions .............................................................................483
         a. Tumey v. Ohio ..............................................................................483
         b. Withrow v. Larkin .........................................................................484
         c. Ward v. Village of Monroeville .....................................................485
         d. Aetna Life Insurance Co. v. Lavoie .............................................486
         e. In re Murchison ............................................................................486
         f. Mayberry v. Pennsylvania .............................................................487
     B. The Lead-Up to Caperton .........................................................................488
IV. THE INTEGRATION OF CAPERTON ..................................................................491
    A. The Purpose of the Opinion ..................................................................491
    B. The Court's New Financial Outlook .........................................................491
V. THE POSSIBLE IMPLICATIONS ........................................................................492
    A. The Potential Consequences of the Decision ..........................................492
    B. The Dissenters .....................................................................................493
       1. Justice Roberts ..............................................................................494
       2. Justice Scalia ..................................................................................497
VI. CONCLUSION .......................................................................................................498

I. INTRODUCTION

In Caperton v. A.T. Massey Coal Co.,¹ the Supreme Court of the United States handed down a decision expressly mandating that judges disqualify

* Scott B. Gitterman earned his J.D. from Nova Southeastern University, Shepard Broad Law Center and his Bachelors in Political Science from Florida Atlantic University. The author would like to thank his parents, Neil and Michele, for all their guidance and support they have shown throughout his entire life and to his big sister, Liz, for always being there for him. And to Fred A. Schwartz who has been a great mentor along the way and to the staff of the Nova Law Review for all their hard work in preparing this article.

¹ 129 S. Ct. 2252 (2009).
themselves when a case involves their big donors. The Supreme Court held that a judge must be disqualified when an interested party's spending created actual bias because it had a "disproportionate influence" on the ruling judge. The focal point of the decision is to show how campaign contributions can create grounds for necessary disqualification for elected judges—not just bias, prejudice, or pecuniary gain any more.

This article will provide an overview of the recent Supreme Court decision in Caperton. Section II will showcase background information that led to the decision in Caperton. Section III will review the grounds that require a judge to be disqualified; and will discuss what led to the recent decision in Caperton. Section IV will begin by highlighting the purpose of the opinion; it will discuss the Court's new financial outlook toward mandatory disqualification. Section V will discuss the possible future consequences of the decision. The latter part of Section V will review the dissenting opinions that were entered in the decision. Section VI will discuss the writer's conclusion as to whether this decision will put an end to any sort of bias or prejudice that a litigant might have to face and whether this decision will do more harm than good.

II. BACKGROUND INFORMATION

The initial cost of judicial elections has continued to rise for years, and contributors are donating more than ever to try to gain favor among judges. The costs of running or keeping a judicial office has increased to such a degree that a judge must take donations or take the chance of losing. Therefore, more judges are susceptible to being bought by contributors giving large campaign contributions. The question of whether judges must disqualify themselves when a case involves one of their big donors is one that has been left unanswered for years. Hugh M. Caperton, the owner of various mining industries in West Virginia, sued A.T. Massey Coal Co. for tortious interference in 1998. The suit was brought because Mr. Caperton felt Mr. Don L. Blankenship, the chief executive officer of A.T. Massey Coal Co.,
interfered with his existing contracts and tried to devalue his mine in order to cause him to go into bankruptcy. 9 A circuit court in West Virginia found A.T. Massey Coal Co. liable for tortious interference and awarded Caperton $50 million in punitive and compensatory damages. 10

Coincidently, the race for West Virginia State Supreme Court of Appeals occurred in 2004. 11 The incumbent Justice Warren McGraw was being challenged by Brent Benjamin. 12 Mr. Blankenship opposed Justice McGraw being reelected because he felt McGraw was not the right person for the job. 13 Blankenship spent $3 million trying to get Justice McGraw off the bench and replaced with Benjamin. 14 The race was won by Benjamin, and after the victory, Blankenship immediately filed his petition to have the State Supreme Court of Appeals re-hear his punitive damages case. 15 Caperton moved to disqualify Justice Benjamin and two of the other sitting Justices under the Due Process Clause because of Blankenship’s campaign involvement. 16 Photographs of Chief Justice Maynard had been leaked to the public showing him vacationing with Blankenship in the French Rivera during the time the case was still pending. 17 Chief Justice Maynard immediately disqualified himself from the proceedings after the pictures surfaced. 18 Also, Justice Starcher granted Massey’s disqualification motion because of the public criticism Justice Benjamin had received due to his involvement with Blankenship. 19 However, Justice Benjamin dismissed the motion and commented that there was no sort of bias involved in the suit. 20

9.  Id. at 232–33.
10. Id. at 233.
12. Id.
13. See id.
14. Id.
15. Id. at 2258.
17. Id. at 2258.
18. Id.
In 2007, the West Virginia Supreme Court of Appeals reversed the $50 million verdict against Blankenship and his company. 21 Caperton wanted another hearing and moved to disqualify three of the five justices that sat for the prior trial. 22 All but Justice Benjamin recused themselves, and the hearing was held; however, the verdict was reversed once again. 23 Justice Benjamin filed a concurring opinion in the Caperton case, where he defended his decision not to disqualify himself as well as the majority opinion. 24 Justice Benjamin, in his concurring opinion, stated he had no “‘direct, personal, substantial, [or] pecuniary interest’” in the result of the case. 25 Caperton then applied for and was granted certiorari to the Supreme Court of the United States. 26

III. BEFORE CAPERTON v. A.T. MASSEY CO.

A. When Disqualification is Necessary

Judicial disqualification has been around longer than the Constitution itself. 27 Disqualification procedures were derived from English common law; however, the United States has developed the procedures into what they are now. 28 The Roman Code of Justinian and Jewish law also had provisions for the disqualification of judges based on the suspicion of bias or pecuniary gain. 29 In English common law, the “rule of necessity” required a judge to hear a case even if there was direct pecuniary gain, if there was no sufficient

21. Id. at 2258.
22. Id.
23. Id. “Not only is the majority opinion unsupported by the facts and existing case law, but it is also fundamentally unfair. Sadly, justice was neither honored nor served by the majority.” Caperton v. A.T. Massey Coal Co., 679 S.E.2d 223, 284 (W. Va. 2008) (Albright, J., dissenting), rev’d by 129 Ct. 2252 (2009).
25. Id. at 301. Justice Benjamin further noted that by adopting “a standard merely of ‘appearances,’ [he concluded], seems little more than an invitation to subject West Virginia’s justice system to the vagaries of the day—a framework in which predictability and stability yield to supposition, innuendo, half-truths, and partisan manipulations.” Id. at 306.
27. John A. Meiser, Note, The (Non)Problem of a Limited Due Process Right to Judicial Disqualification, 84 NOTRE DAME L. REV. 1799, 1803 (2009). “[D]isqualification’ describes the statutorily or constitutionally mandated removal of a judge (typically on motion by one of the parties), whereas ‘recusal’ refers to a judge’s voluntary decision to step down from a case . . . .” Id. at 1802 n.29 (emphasis omitted).
28. Id. at 1803.
29. Id. at 1803–04.
substitute available. Therefore, judges in early common law were only required to disqualify themselves in the slimmest of situations. All judges are different in their concepts of ethical conduct and in their motivations. Judicial disqualification matters will probably continue to be decided mainly on a case-by-case basis, and many additional decisions are likely to be essential in fleshing out the components of mandatory disqualification. There are rules set in place to ensure judges uphold a level of impartiality when ruling in any type of case. "[T]he importance of maintaining the appearance of impartiality in the judiciary" has always been at the heart of the American system. The right to be heard in a neutral tribunal before an impartial judge is guaranteed in the Due Process Clause in the Constitution of the United States.  

31. Meiser, supra note 27, at 1804.  
33. Id.  
34. See, e.g., MODEL CODE OF JUDICIAL CONDUCT, R. 2.11 (2007); see also Cnty. of Santa Clara v. Superior Court, 235 P.3d 21, 35 (Cal. 2010). "It is well established that the disqualification rules applicable to adjudicators are more stringent than those that govern the conduct of prosecutors and other government attorneys." Cnty. of Santa Clara, 235 P.3d at 35 n.12 (citing People v. Freeman, 222 P.3d 177, 178 (Cal. 2010)).  
35. Wersal v. Sexton, 613 F.3d 821, 846 (8th Cir. 2010) (en banc) (Bye, J., dissenting). Alexander Hamilton captured this need for an impartial judiciary when he wrote: The benefits of the integrity and moderation of the judiciary have already been felt in more States than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men of every description ought to prize whatever will tend to beget or fortify that temper in the courts; as no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today. And every man must now feel, that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence and to introduce in its stead universal distrust and distress. Id. (quoting THE FEDERALIST NO. 78, at 454 (Alexander Hamilton) (Am. Bar Ass'n ed., 2009)).  
36. See Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 798–99 (1987) (citing In re Oliver, 333 U.S. 257, 273 (1948)). "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.
1. Grounds for Disqualification

Judges are not afforded the same kind of "across-the-board 'out'" that lawyers receive, even when they elect to join the judiciary. Taking on the role of a judge could entail being an "impartial umpire" or a "trustee of the common law," but whatever role the judge has, he cannot let individual moral judgment get in the way of applying just the law. "The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment. . . . An important safeguard against such merely individual judgment is an alert deference . . . ."

Under the 2007 ABA Model Code of Judicial Conduct, a judge has an obligation to disqualify himself "in any proceeding in which the judge's impartiality might reasonably be questioned." The grounds for which a judge is to be disqualified from hearing a case include when there is actual bias or prejudice against an interested party. Another ground for disqualification is when the judge has a pecuniary interest in the outcome of the case.

a. Actual Bias or Prejudice

A judge must be disqualified in cases where actual bias or prejudice can be shown. However, this is a hard burden to prove because there is a presumption that judges are impartial whenever trying a case. In Black's Law

37. Sarah M. R. Cravens, In Pursuit of Actual Justice, 59 Ala. L. Rev. 1, 28 n.133 (2007). For instance, a judge cannot avoid ruling on a mass tort case "just because she thinks it would be too time consuming or" inject personal feelings while he is involved in a case. Id. at 20 n.93. This ought to mean not only that he will not decline the case, but that he will not let his personal views into the rationale and decision of the case to affect the outcome of the proceeding. Id. This is all part of the duty of being a judge. Id.

38. Id. at 28 n.133.


41. Id. R. 2.11(A)(1). A judge shall disqualify himself if he has "a personal bias or prejudice concerning a party or a party's lawyer." Id.

42. Id. R. 2.11(A)(2)(c). A judge shall disqualify himself when the judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is a person who has more than a de minimis interest that could be substantially affected by the proceeding.


44. See id.
Dictionary, the phrase “actual bias” is defined as “[g]enuine prejudice that a judge, juror, witness, or other person has against some person or relevant subject.”45 Also, the word “prejudice” is defined in Black’s Law Dictionary as “[d]amage or detriment to one’s legal rights or claims.”46 Judges are not perfect; prejudice and bias cannot always be kept out of court.47 “Judges are human beings, and so they can never completely transcend the limits of their own experiences and perspectives.”48 In Public Utilities Commission of the District of Columbia v. Pollak,49 Justice Frankfurter commented:

The judicial process demands that a judge move within the framework of relevant legal rules and the covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted.50

Actual bias and prejudice really matter “when it moves the decision[maker] away from reasoning or outcomes that are in accordance with the law and towards those that are in accordance with something else (e.g., personal, non-legal reasons).”51 The burden to show that a judge is biased for or against a party, or that prejudice has been shown, is on the shoulders of the petitioners.52 In order for a judge to be disqualified, the bias or prejudice must also be personal rather than judicial.53 An interested party is “entitled to a judge who will hear both sides and decide an issue on the merits of the

45. BLACK’S LAW DICTIONARY 145 (9th ed. 2009). The term “bias” is defined as: “[i]ncination; prejudice; [or] predilection.” Id.
46. Id. at 1018. Legal prejudice is defined as: “A condition that, if shown by a party, will usu[ally] defeat the opposing party's action; esp[ecially], a condition that, if shown by the defendant, will defeat a plaintiff's motion to dismiss a case without prejudice.” Id.
47. See Bracy v. Schomig, 286 F.3d 406, 426 (7th Cir. 2002).
48. Id.
50. Id. at 466 (Frankfurter, J.) (explaining nonparticipation in decision).
51. Cravens, supra note 37, at 29.
52. See Bracy, 286 F.3d at 411.
However, an interested party is not guaranteed a judge with a clean slate. Each judge brings to the bench the experiences of life, both personal and professional. A lifetime of experiences that have generated a number of general attitudes cannot be left in chambers when a judge takes the bench. An interested party seeking judicial disqualification must visibly and affirmatively prove bias or prejudice.

In order to succeed on a motion to disqualify under the general rule, an interested party must demonstrate that conditions "exist which reflect pre-judgment of the case by the judge or a leaning of his mind in favor of one party to the extent that his decision in the matter is based on grounds other than the evidence placed before him." Also, the bias or prejudice must stem from an extrajudicial basis in order to be disqualifying. If the bias or prejudice does not stem from an extrajudicial source, the judge is not required to disqualify himself unless his behavior demonstrates "pervasive bias" against a litigant.

b. Pecuniary Interest

Impartiality is missing when judges have a pecuniary interest in the result of the case. The Supreme Court has held that judges must disqualify themselves in situations where they have a pecuniary interest in fees, forfeitures, or fines payable by parties before them. Additionally, federal law requires judges be disqualified if they or any member of their family have a pecuniary interest in the result of a case.

54. Madsen v. Prudential Fed. Servs. & Loans Ass'n, 767 P.2d 538, 546 (Utah 1988); see Alley, 882 S.W.2d at 819.
55. Madsen, 767 P.2d at 546.
56. Id.; see also Dep't of Revenue v. Golder, 322 So. 2d 1, 6 (Fla. 1975) (citing Laird v. Tatum, 409 U.S. 824, 835 (1972)).
58. TZ Land & Cattle Co. v. Condict, 795 P.2d 1204, 1211 (Wyo. 1990) (quoting Pote v. State, 733 P.2d 1018, 1021 (Wyo. 1987)). The Due Process Clause frequently requires judges to disqualify "themselves when they face possible temptations to be biased, even when they exhibit no actual bias against a party or a case [sic]." Bruce A. Green, May Judges Attend Privately Funded Educational Programs? Should Judicial Education be Privatized?: Questions of Judicial Ethics and Policy, 29 FORDHAM URB. L.J. 941, 946 (2002) (quoting Del Vecchio v. Ill. Dep't of Corr., 31 F.3d 1363, 1372 (7th Cir. 1994) (en banc)).
59. See Liteky v. United States, 510 U.S. 540, 564 (1994) (Kennedy, J., concurring). The term "extrajudicial" is defined as: "Outside court; outside the functioning of the court system." BLACK'S LAW DICTIONARY 521 (9th ed. 2009).
60. See Liteky, 510 U.S. at 551.
TAKING ON BIG MONEY  

pecuniary interest in the outcome of the proceeding.\textsuperscript{63} No amount of money received by a judge is minor enough to fall within the maxim "de minimis non curat lex."\textsuperscript{64} Furthermore, in no case has the Court ever found any amount of money to be so trifling as to be overlooked, and it has been stated that any pecuniary interest of a judge in a case heard by the judge, however isolated, may disqualify the judge.\textsuperscript{65}

2. Landmark Decisions

There are a plethora of cases that helped shaped what modern disqualification law is today. However, \textit{Caperton} has stepped in and changed the landscape of judicial disqualification forever.\textsuperscript{66} The \textit{Caperton} Court held that there were two instances where disqualification was necessary that place the facts of \textit{Caperton} in perspective.\textsuperscript{67} The first instance is where a judge has a pecuniary interest in the result of the proceeding.\textsuperscript{68} The second instance is in criminal contempt hearings, where a judge has ruled in an earlier proceeding then went on to try and convict the same litigant.\textsuperscript{69} These six landmark decisions illustrate these two distinct types of instances where judicial disqualification was required.

a. Tumey v. Ohio

The Court in \textit{Tumey v. Ohio}\textsuperscript{70} held that the Due Process Clause requires a judge to disqualify himself when he has "a direct, personal, substantial, [or]
pecuniary interest" in the outcome of the proceeding. In *Tumey*, the defendant was arrested, charged, and convicted with unlawfully possessing intoxicating liquor by a mayor of a village. Ed Tumey was fined $100 and ordered to stay in jail until the time he could pay the fine. Tumey moved to disqualify the Mayor because the Mayor had a pecuniary interest in sentencing him, thus requiring disqualification under the Fourteenth Amendment’s Due Process Clause. The Mayor received a portion of his salary from performing judicial duties that were funded by the fines collected, and the monies collected from the fines went to the village treasury. The Court held disqualification was necessary under the principle:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law.

Therefore, the *Tumey* Court held the Due Process Clause of the Fourteenth Amendment required disqualification “both because of [the judge’s] direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village.”

b. *Withrow v. Larkin*

The Supreme Court in *Withrow v. Larkin* held disqualification is required in circumstances where “the probability of actual bias on the part of

---

71. *Id.* at 523; see John P. Frank, *Disqualification of Judges*, 56 *Yale L.J.* 605, 609 (1947). “The common law of disqualification... was clear and simple: a judge was disqualified for direct pecuniary interest and for nothing else.” *Id.* at 609. The Due Process Clause “may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.” *In re Murchison*, 349 U.S. 133, 136 (1955).


73. *Id.*

74. *Id.*

75. *Id.* at 517, 520.

76. *Id.* at 532.

77. *Tumey*, 273 U.S. at 535. “A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.” *Id.* at 534 (citing City of Boston v. Baldwin, 1 N.E. 417, 418 (Mass. 1885); State *ex rel. Colcord v. Young*, 12 So. 673, 676 (Fla. 1893)).

78. 421 U.S. 35 (1975).
TAKING ON BIG MONEY

the judge or decisionmaker is too high to be constitutionally tolerable."79 Some of those circumstances include: when the adjudicator has a pecuniary interest in the result80 and when the judge has been a personal target of abuse or criticism from the parties.81 Furthermore, the Withrow Court held disqualification is necessary if "under a realistic appraisal of psychological tendencies and human weakness" the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."82

c. Ward v. Village of Monroeville

The Court, in Ward v. Village of Monroeville,83 addressed whether a mayor's court decision was allowable, even though the fines levied went to the town rather than to the mayor himself.84 In Ward, the defendant was convicted of two traffic offenses and was assessed a fine.85 The defendant argued his due process rights were infringed upon because the judge was not impartial.86 Although the Mayor did not receive direct compensation from the fines imposed, the town received a monetary benefit from the fines.87 The Court held that "the mere union of the executive power and the judicial power in him cannot be said to violate due process of law..."88 The test to decide whether disqualification is necessary in situations such as the mayor's is one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused."89

79. Id. at 47.
82. Id.
83. 409 U.S. 57 (1972).
84. Id. at 59–60.
85. Id. at 57.
86. Id. at 58.
87. Id.
88. Ward, 409 U.S. at 60 (quoting Tumey v. Ohio, 273 U.S. 510, 534 (1927)).
89. Id. (quoting Tumey, 273 U.S. at 532).
d. Aetna Life Insurance Co. v. Lavoie

In *Aetna Life Insurance Co. v. Lavoie*, the Court required the disqualification of a state Supreme Court Justice where the Justice casts the deciding vote in a punitive damages award, while being the main witness in a very similar case in a lower court. The *Lavoie* Court further articulated:

> The Due Process Clause "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.'"

Additionally, the *Lavoie* Court emphasized that "what degree or kind of interest is sufficient to disqualify a judge from sitting 'cannot be defined with precision.'" Furthermore, the Court felt having an objective component in the test was essential.

e. In re Murchison

The *In re Murchison* Court addressed instances where a judge shall be disqualified when they have no pecuniary interest, but a conflict still arises because the judge participated in an earlier proceeding. The judge examined the petitioners to determine if charges of bribery and gambling should be assessed. The first petitioner answered the judge’s questions, but the judge found the petitioner’s answers untruthful and charged him with perjury. The second petitioner refused to answer the judge’s questions because he did not have counsel, which was required by state law. The judge

90. 475 U.S. 813 (1986).
91. *Id.* at 828.
92. *Id.* at 825 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).
93. *Id.* at 822 (quoting *In re Murchison*, 349 U.S. at 136).
94. *See id.* "The Due Process Clause demarks only the outer boundaries of judicial disqualification. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification . . . ." *Lavoie*, 475 U.S. at 828; *see also* State v. Harris, 786 N.W.2d 409, 424 (Wis. 2010). "[T]he difficulties of inquiring into actual bias . . . simply underscore the need for objective rules.” *Id.* (quoting Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2263 (2009)).
95. 349 U.S. 133 (1955).
96. *Id.* at 134.
97. *Id.*
98. *Id.*
99. *Id.* at 134–35.
proceeded to charge the second petitioner with contempt. The judge then tried and convicted both petitioners. The Court set aside the criminal convictions because the judge had a conflict of interest due to the fact he participated in the trial and sentencing stage.

The Court explained the general rule that "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." Therefore, disqualification was required by the judge in this situation because "[h]aving been a part of [the entire] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused." The Court concluded this point because "[a]s a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his 'grand-jury' secret session."

f. Mayberry v. Pennsylvania

In Mayberry v. Pennsylvania, the petitioner was tried for attempting to break out of prison and holding hostages inside a prison. Mayberry represented himself in the proceedings. The trial concluded with a verdict of guilt against Mayberry. When the petitioner was brought in for sentencing the judge found him guilty of criminal contempt and sentenced him to a term of eleven to twenty-two years. The Court dismissed the criminal contempt charges because a litigant "should be given a public trial before a judge other than the one reviled by the contemnor." Therefore, the Court articulated the question to be asked when trying to decide whether disqualification is necessary is not whether the judge was biased, but whether the typical judge is going to be neutral, because if not, there will be an unconstitutional "potential for bias."

100. In re Murchison, 349 U.S. at 135.
101. Id.
102. Id. at 138–39.
103. Id. at 136.
104. Id. at 137.
106. 400 U.S. 455 (1971).
107. Id. at 455.
108. Id.
109. Id.
110. Id.
111. Mayberry, 400 U.S. at 466.
Similarly, in *Offutt v. United States*, the defendant was charged and convicted of criminal contempt because he showed countless displays of disrespect to the judge during his trial for abortion. The Court held that a judge who had become personally involved in an antagonistic relationship with the litigant before him should have transferred the case to another judge based on the concept of justice.

B. *The Lead-Up to Caperton*

The issue of whether large campaign contributions can constitute grounds for disqualification of a judge is a question that has been left unanswered for years. A large number of state court judges are elected and count on campaign contributions to help them win over the public and get elected. More likely than not, once such judges are elected, a case will come before them involving a person who donated to their judicial campaign. Once this happens, the opposing party will often file a motion to disqualify the judge based on lack of impartially because of campaign contributions, but oftentimes these motions fail. The courts argue a reasonable person would not interpret a judge as being biased simply because a person has contributed to the judge’s campaign. Also, it would be unrealistic to

---

114. Id. at 11–12.
115. Id. at 17–18.
116. James Sample & Michael Young, *Invigorating Judicial Disqualification: Ten Potential Reforms*, 92 JUDICATURE 26, 26 (2008). """The improper appearance created by money in judicial elections is one of the most important issues facing our judicial system today. A line needs to be drawn somewhere to prevent a judge from hearing cases involving a person who has made massive campaign contributions to benefit the judge.""" Id. at 29. (quoting Theodore B. Olson, former U.S. Solicit. Gen.).
118. Id.
expect to never see a campaign contributor, because it is an inevitable consequence to judicial elections.\textsuperscript{121}

One court made a noteworthy statement when it wrote, "[t]he overriding priority . . . is to assure that our courts are impartial, and that they have the appearance of impartiality."\textsuperscript{122} This sentiment alone should be the overriding factor in any case before any judge.\textsuperscript{123} The problem of campaign contributions potentially creating bias is growing more and more, as elections become more expensive.\textsuperscript{124} When judges refuse to disqualify themselves in situations where "their campaign finances reasonably call into question their impartiality," the ABA has suggested the disqualification of any judge who accepted a large campaign contribution from a litigant appearing before them.\textsuperscript{125}

The ABA drafted a rule for campaign contributions: Disqualification is mandatory when a party, a party’s lawyer, or a party’s law firm has provided the judge aggregate contributions above a certain amount, within a certain amount of time.\textsuperscript{126} One problem with the ABA rule is that, in states with reasonable restrictions, the possibility for apparent or real corruption is addressed by the restrictions, which no one may legally go beyond.\textsuperscript{127} Another problem this rule invites is that gamesmanship could defeat its purpose.\textsuperscript{128} "If the contribution threshold were set at a reasonable level, parties or lawyers could disqualify an unfavorable judge by making contributions . . .

\textsuperscript{121} See Rocha v. Ahmad, 662 S.W.2d 77, 78 (Tex. App. 1983).

A candidate for the bench who relies solely on contributions from nonlawyers must reconcile himself to staging a campaign on something less than a shoestring. If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in perhaps a majority of the cases filed in their courts.

\textsuperscript{Id.}

\textsuperscript{122} Breakstone v. Mackenzie, 561 So. 2d 1164, 1172 (Fla. 3d Dist. Ct. App. 1989) (en banc), aff’d in part, quashed in part sub nom. MacKenzie v. Super Kids Bargain Store, 565 So. 2d 1332, 1340 (Fla. 1990); see also Wersal v. Sexton, 613 F.3d 821, 844 (8th Cir. 2010) (en banc).

\textsuperscript{123} Breakstone, 561 So. 2d at 1172. See Wersal, 613 F.3d at 844 (Bye, C.J., dissenting).

\textsuperscript{124} Sample & Young, supra note 116, at 29.

\textsuperscript{125} Deborah Goldberg et al., The Best Defense: Why Elected Courts Should Lead Recusal Reform, 46 WASHBURN L.J. 503, 528–29 (2007). See Sample & Young, supra note 116, at 26; RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL DISQUALIFICATION OF JUDGES § 3.8 (3d ed. 1996). The concept that a party should be allowed "to peremptorily challenge a judge suspected of bias formed the basis for the . . . judicial disqualification statutes that" are still in place in most countries. \textit{Id.}

\textsuperscript{126} Sample & Young, supra note 116, at 29. "Aggregate contributions’ are meant to include both direct and indirect gifts made to a candidate.”\textit{Id.} (quoting MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(4) (2007)).

\textsuperscript{127} Goldberg et al., supra note 125, at 529.

\textsuperscript{128} \textit{Id.}
above that amount to her campaign committee. These are the main reasons no state has adopted the per se ABA rule. The states with reasonable limits to campaign contributions would be better off making a rule that requires disqualification after the acceptance of aggregate contributions of a set amount—not from a sole donor but jointly from all donors related to a litigant. Almost every court has discarded the thought that campaign contributions require judicial disqualification. Thus, the respondents in Caperton felt that if the Court imposed a “probability of bias” standard, it would also apply to other types of support [that] a judge receives—including endorsements from newspapers, trade and labor organizations, and civic groups. The respondents in Caperton further argued that a “probability of bias” standard is unfeasible, because “it fails to propose ‘any test for distinguishing what the Constitution prohibits from what it permits.’” The respondents felt as though these types of judicial disqualification motions would encourage more unnecessary litigation.

Justice Benjamin’s behavior is nothing new to the Court. Supreme Court Justice Hugo Black did not disqualify himself in a case involving his former law partner, which drew criticism from his fellow Justices. Supreme Court Justice William Rehnquist drew harsh criticism for ruling in a case about a federally funded surveillance program that was started while he was still employed at the United States Department of Justice. Additionally, Supreme Court Justice Antonin Scalia received harsh criticism from his fellow Justices and the legal community for taking part in a case involving then Vice President Dick Cheney, with whom he had recently gone hunting. The legal community has high hopes that the Caperton decision has finally put to rest the issue of whether judicial disqualification is necessary in

129. Id.
130. See id. Before the decision in Caperton, Alabama was the only state that clearly required elected judges to disqualify themselves when major contributors were before them. Peter A. Joy, A Professionalism Creed for Judges: Leading by Example, 52 S.C. L. Rev. 667, 675 n.28 (2001) (citing Ex parte Kenneth D. McLeod, Sr., Family Ltd. P'ship XV, 725 So. 2d 271, 274 (Ala. 1998) (per curiam)) [hereinafter Ex Parte McLeod Family P'Ship].
131. See Goldberg et al., supra note 125, at 529.
132. Conrad C. Daly & Evan Ennis, Supreme Court Previews: Caperton v. Massey Coal Company 08-22, FED. LAW, May 2009, at 62, 64 (Carrie Evans ed.).
133. Id.
134. Id.
135. Id.
136. See Meiser, supra note 27, at 1800–01.
137. Id. at 1801–02.
138. Id. at 1802.
139. Id.
cases involving a “probability of bias” when judges are hearing cases involving their big donors.

IV. THE INTEGRATION OF CAPERTON

A. The Purpose of the Opinion

The Court in Caperton held that a judge must now disqualify himself in cases involving big donors where there is a “probability of bias.” Judicial autonomy “declines in direct proportion to a judge’s [reliance] on others for [monetary] support” in order to get and keep judicial office. A judge’s need to gain or keep judicial office is at the “heart of judicial corruption.” Anecdotal evidence suggests that judicial candidates believe that being able to outspend opponents is critical to winning elections. Thus, this decision has determined that a judge must disqualify himself in cases involving the judge’s big donors to avoid ruining the judge’s own reputation, as well as the integrity of the judgment and the court system as a whole. However, the Court has stipulated that not every campaign contribution by an interested party or the party’s attorney creates a probability of bias that requires a judge’s disqualification.

B. The Court’s New Financial Outlook

The inquiry into whether a judge must now disqualify himself depends on the contribution’s relative amount compared to the total sum of money given to the campaign, the entire amount spent in the election, and the obvious effect the contribution had on the result of the election. The Caperton Court noted that:

141. Barnhizer, supra note 5, at 370.
142. Id. at 394.
144. Daly & Ennis, supra note 132, at 63.
145. Caperton, 129 S. Ct. at 2263. The Court in Lavoie determined that some pecuniary interests are “too remote and insubstantial” to be disqualifying. Id. (quoting Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 826 (1986)).
146. Id. at 2264.
There is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.\textsuperscript{147}

"The temporal relationship between the campaign contributions, the justice's election, and the pendency of the case is also critical" when determining whether a campaign contribution should disqualify a judge.\textsuperscript{148} Judicial integrity is an essential state interest.\textsuperscript{149} Therefore, it is of the upmost importance to make sure every case comes before an impartial judge.\textsuperscript{150} The Court reiterated the point that states may decide to "'adopt recusal standards more rigorous than due process requires.'"\textsuperscript{151} The Court further commented that "the codes of judicial conduct provide more protection than due process requires" and that the majority of disputes over judicial disqualification could be solved without turning to the Constitution.\textsuperscript{152}

V. THE POSSIBLE IMPLICATIONS

A. The Potential Consequences of the Decision

The decision in Caperton will have a drastic impact on elected judges who receive campaign contributions from supporters.\textsuperscript{153} The decision further changes the grounds for disqualification to include a benefit a judge receives, rather than a payment.\textsuperscript{154} From this point on, judges must disqualify themselves in cases involving their big donors if a motion for disqualification is filed in a timely fashion.\textsuperscript{155} This new standard of necessary disqualification for judges could cause federalism problems because this new rule requires all states to throw away their disqualification procedures and to adopt a universal standard.\textsuperscript{156} The federal government has put its foot down when it comes to disqualification when there is a "probability of bias," thereby invading

\begin{itemize}
  \item \textsuperscript{147} Id. at 2263–64; Wersal v. Sexton, 613 F.3d 821, 839 (8th Cir. 2010) (en banc).
  \item \textsuperscript{148} Caperton, 129 S. Ct. at 2264.
  \item \textsuperscript{149} Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring).
  \item \textsuperscript{150} See Caperton, 129 S. Ct. at 2265–66.
  \item \textsuperscript{151} Id. at 2267 (quoting White, 536 U.S. at 794 (Kennedy, J., concurring)).
  \item \textsuperscript{152} Id.
  \item \textsuperscript{153} Daly & Ennis, supra note 132, at 63.
  \item \textsuperscript{154} Id.
  \item \textsuperscript{155} See id.
  \item \textsuperscript{156} Meiser, supra note 27, at 1831.
\end{itemize}
TAKING ON BIG MONEY

states rights that were supposed to be protected by the idea of federalism.\textsuperscript{157} The Court has even commented that federalism problems might limit the power the federal government has over the state courts.\textsuperscript{158}

In \textit{Gregory v. Ashcroft},\textsuperscript{159} the Court faced the issue of whether state-imposed age qualifications were constitutionally permissible.\textsuperscript{160} The Court held, “Congressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers. For this reason, ‘it is incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law overrides’ this balance.”\textsuperscript{161} This new disqualification standard should be interpreted as a means to force judges to disqualify themselves, not as a measure to give interested parties any new due process rights.\textsuperscript{162} Therefore, this new burden on judges to prove there is no bias for or against any litigant is in no way in line with the belief that judges are sworn to administer unbiased justice.\textsuperscript{163}

B. \textit{The Dissenters}

Justices Roberts and Scalia both authored dissenting opinions in \textit{Caperton} because they each felt the decision left too much open for discussion.\textsuperscript{164} They shared the view that this decision would come back and haunt the Court for years to come.\textsuperscript{165} Furthermore, both of the Justices share the prediction that this decision would clog up the judiciary with unnecessary dis-

\begin{itemize}
  \item \textsuperscript{157} \textit{Id.} at 1831–32. The Fourteenth Amendment was not supposed to weaken the idea of federalism, leaving states at the mercy of the federal government. \textit{See} Steven G. Calabresi, \textit{We Are All Federalists, We Are All Republicans: Holism, Synthesis, and the Fourteenth Amendment}, 87 GEO. L.J. 2273, 2301 (1999) (reviewing AKHIL REID AMAR, \textit{THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION} (1998)). The Fourteenth Amendment is an element of a bigger constitutional system that incorporates certain structural features, such as federalism, and it is through this light that it should be explained. \textit{Id.}
  \item \textsuperscript{159} 501 U.S. 452 (1991).
  \item \textsuperscript{160} \textit{Id.} at 455.
  \item \textsuperscript{161} \textit{Id.} at 460 (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 243 (1985), \textit{superseded by statute}, 42 U.S.C. § 2000d-7(a)(1)).
  \item \textsuperscript{162} Meiser, \textit{supra} note 27, at 1833.
  \item \textsuperscript{163} \textit{Id.}
  \item \textsuperscript{165} \textit{See id.} at 2274 (Roberts, C.J., dissenting); \textit{Id.} (Scalia, J., dissenting).
\end{itemize}
qualification motions and as a pitfall of this the American citizens would lose respect for the bench.166

1. Justice Roberts

Justice Roberts felt the majority’s decision will not promote the values of judicial impartiality, but rather undermine them.167 He viewed the Court’s interpretation that the Due Process Clause now requires judges to disqualify themselves because of a “probability of bias” as a misinterpretation.168 Justice Roberts urged that a “probability of bias” cannot always be looked at in a defined way.169 Justice Roberts felt the majority’s new rule requiring judicial disqualification provided no direction to judges and interested parties about when disqualification will be constitutionally necessary.170 He proposed forty fundamental questions that all federal and state court judges must answer if they are required to disqualify themselves in any matter before them.171 All members of the judiciary take an oath to apply the law

166. Id. at 2274 (Roberts, C.J., dissenting); id. (Scalia, J., dissenting); see also People v. Aceval, 781 N.W.2d 779, 782–83 (Mich. 2010); Marek v. State, 14 So. 3d 985, 1000 (Fla. 2009) (per curiam); Bradbury v. Eismann, No. CV-09-352-S-BLW, 2009 WL 3443676, at *3-4 (D. Idaho Oct. 20, 2009); aff’d by 395 F. App’x 410 (9th Cir. 2010); see generally State v. Allen, 778 N.W.2d 863 (Wis. 2010) (per curiam); U.S. Fid. Ins. & Guar. Co. v. Mich. Catastrophic Claims Ass’n, 773 N.W.2d 243 (Mich. 2009).


168. Id.

169. Id.

170. Id. The Court’s failure to express a “‘judicially discernable and manageable standard’ strongly counsels against the recognition of a novel constitutional right.” Id. at 2272 (quoting Vieth v. Jubelirer, 541 U.S. 267, 306 (2004)).

171. See Caperton, 129 S. Ct. at 2269–72 (Roberts, J., dissenting). Justice Roberts proposed these forty fundamental questions that state and federal judges will now have to determine:

(1) How much money is too much money? What level of contribution or expenditure gives rise to a “probability of bias”? (2) How do we determine whether a given expenditure is “disproportionate”? Disproportionate to what? (3) Are independent, non-coordinated expenditures treated the same as direct contributions to a candidate’s campaign? What about contributions to independent outside groups supporting a candidate? (4) Does it matter whether the litigant has contributed to other candidates or made large expenditures in connection with other elections? (5) Does the amount at issue in the case matter? What if this case were an employment dispute with only $10,000 at stake? What if the plaintiffs only sought non-monetary relief such as an injunction or declaratory judgment? (6) Does the analysis change depending on whether the judge whose disqualification is sought sits on a trial court, appeals court, or state supreme court? (7) How long does the probability of bias last? Does the probability of bias diminish over time as the election recedes? Does it matter whether the judge plans to run for reelection? (8) What if the “disproportionately” large expenditure is made by an industry association, trade union, physicians’ group, or the plaintiffs’ bar? Must the judge recuse in all cases that affect the association’s interests? Must the judge recuse in all cases in which a party or lawyer is a member of that group? Does it matter how much the litigant contributed to the
association? (9) What if the case involves a social or ideological issue rather than a financial one? Must a judge recuse from cases involving, say, abortion rights if he has received “disproportionate” support from individuals who feel strongly about either side of that issue? If the supporter wants to help elect judges who are “tough on crime,” must the judge recuse in all criminal cases? (10) What if the candidate draws “disproportionate” support from a particular racial, religious, ethnic, or other group, and the case involves an issue of particular importance to that group? (11) What if the supporter is not a party to the pending or imminent case, but his interests will be affected by the decision? Does the Court’s analysis apply if the supporter “chooses the judge” not in his case, but in someone else’s? (12) What if the case implicates a regulatory issue that is of great importance to the party making the expenditures, even though he has no direct financial interest in the outcome . . . ? (13) Must the judge’s vote be outcome determinative in order for his non-recusal to constitute a due process violation? (14) Does the due process analysis consider the underlying merits of the suit? Does it matter whether the decision is clearly right (or wrong) as a matter of state law? (15) What if a lower court decision in favor of the supporter is affirmed on the merits on appeal, by a panel with no “debt of gratitude” to the supporter? Does that “moot” the due process claim? (16) What if the judge voted against the supporter in many other cases? (17) What if the judge disagrees with the supporter’s message or tactics? What if the judge expressly disclaims the support of this person? (18) Should we assume that elected judges feel a “debt of hostility” towards major opponents of their candidacy? Must the judge recuse in cases involving individuals or groups who spent large amounts of money trying unsuccessfully to defeat him? (19) If there is independent review of a judge’s recusal decision, e.g., by a panel of other judges, does this completely foreclose a due process claim? (20) Does a debt of gratitude for endorsements by newspapers, interest groups, politicians, or celebrities also give rise to a constitutionally unacceptable probability of bias? How would we measure whether such support is disproportionate? (21) Does close personal friendship between a judge and a party or lawyer now give rise to a probability of bias? (22) Does it matter whether the campaign expenditures come from a party or the party’s attorney? If from a lawyer, must the judge recuse in every case involving that attorney? (23) Does what is unconstitutional vary from State to State? What if particular States have a history of expensive judicial elections? (24) Under the majority’s “objective” test, do we analyze the due process issue through the lens of a reasonable person, a reasonable lawyer, or a reasonable judge? (25) What role does causation play in this analysis? . . . (26) Is the due process analysis less probing for incumbent judges—who typically have a great advantage in elections—than for challengers? (27) How final must the pending case be with respect to the contributor’s interest? What if, for example, the only issue on appeal is whether the court should certify a class of plaintiffs? Is recusal required just as if the issue in the pending case were ultimate liability? (28) Which cases are implicated by this doctrine? Must the case be pending at the time of the election? Reasonably likely to be brought? What about an important but unanticipated case filed shortly after the election? (29) When do we impute a probability of bias from one party to another? Does a contribution from a corporation get imputed to its executives, and vice-versa? Does a contribution or expenditure by one family member get imputed to other family members? (30) What if the election is nonpartisan? What if the election is just a yes-or-no vote about whether to retain an incumbent? (31) What type of support is disqualifying? What if the supporter’s expenditures are used to fund voter registration or get-out-the-vote efforts rather than television advertisements? (32) Are contributions or expenditures in connection with a primary aggregated with those in the general election? What if the contributor supported a different candidate in the primary? Does that dilute the debt of gratitude? (33) What procedures must be followed to challenge a state judge’s failure to recuse? May Caperton claims only be raised on direct review? . . . (34) What about state-court cases that are already closed? . . . (35) What is the proper remedy? After a successful Caperton motion, must the parties start from scratch before the lower courts? Is any part of the lower court judgment retained? (36) Does a litigant waive his due process claim if he waits until after decision to raise it? Or would the claim only be ripe after decision, when the judge’s actions or vote suggest a probability of bias? (37) Are the parties entitled to discovery with respect to the judge’s recusal decision? (38) If a judge erroneously fails to recuse, do we apply harmless-
impartially and uphold the Constitution, and they should be trusted to live up to this standard.\textsuperscript{172} Furthermore, Justice Roberts felt there were only two situations where the Due Process Clause requires disqualification: 1) “when the judge has a financial interest in the outcome of the case” and 2) when a judge presides over certain types of criminal contempt hearings.\textsuperscript{173} In most instances, the Constitution of the United States leaves the issues of judicial disqualification and judicial ethics to be handled by state legislators.\textsuperscript{174} Justice Roberts further commented that questions of disqualification are regulated by statute, common law, and by the ethics boards of the bar and bench.\textsuperscript{175} In any particular case, a number of factors could lead to prejudice or the appearance of bias.\textsuperscript{176} Those factors could include: prior employment history, friendship with a party or the party’s lawyer, religious affiliation, and many more situations.\textsuperscript{177} Furthermore, never before has the Court ruled that the “probability of bias” required disqualification in any case.\textsuperscript{178}

Justice Roberts sees the majority’s decision leaving judges at the federal and state level “to act as political scientists (why did candidate X win the election?), economists (was the financial support disproportionate?), and psychologists (is there likely to be a debt of gratitude?).”\textsuperscript{179} He feels this decision will lead to a clogging of our judicial system with unnecessary Caperton motions.\textsuperscript{180} Justice Roberts is also of the opinion that opening the review? (39) Does the judge get to respond to the allegation that he is probably biased, or is his reputation solely in the hands of the parties to the case? (40) What if the parties settle a Caperton claim as part of a broader settlement of the case? Does that leave the judge with no way to salvage his reputation?\textsuperscript{Id.}\textsuperscript{172} Id. at 2267 (Roberts, J., dissenting) (citing Republican Party of Minn. v. White, 536 U.S. 765, 796 (2002)).

\textsuperscript{173} Id. at 2267 (Roberts, J., dissenting).

\textsuperscript{174} Green, supra note 58, at 947 (citing Del Vecchio v. Ill. Dep’t of Corr., 31 F.3d 1363, 1391 (7th Cir. 1994) (en banc) (Easterbrook, J., concurring)). “All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion.” Tumey v. Ohio, 273 U.S. 510, 523 (1927).

\textsuperscript{175} Caperton, 129 S. Ct. at 2268 (Roberts, J., dissenting) (citing Bracy v. Gramley, 520 U.S. 899, 904 (1997)). “[M]ost questions concerning a judge’s qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard.” Bracy, 520 U.S. at 904.

\textsuperscript{176} Caperton, 129 S. Ct. at 2268 (Roberts, J., dissenting).

\textsuperscript{177} Id.

\textsuperscript{178} Id.

\textsuperscript{179} Id. at 2272.

\textsuperscript{180} Id. at 2273; see Zurita v. Lombana, 322 S.W.3d 463, 470 n.1 (Tex. Ct. App. 2010). In Zurita, the appellants made a Caperton motion claiming that there was sufficient evidence to show actual bias by the trial judge. Id. The appellate court dismissed this motion and held the facts were not applicable to the Caperton holding. Id.; see also Fine v. Sheriff of L.A. Cnty., 356 Fed. App’x 998, 999 (9th Cir. 2009); Smith v. Bender, No. 09-1003, 2009 WL 496

**NOVA LAW REVIEW**

Nova Law Review, Vol. 35, Iss. 2 [2011], Art. 1

https://nsuworks.nova.edu/nlr/vol35/iss2/1

218
door to disqualification motions under the Due Process Clause brought under claims of "probability of bias" will "diminish the confidence of the American people in the fairness and integrity of their courts."\(^{181}\)

2. Justice Scalia

Justice Scalia points out the majority’s reasoning for implementing this new disqualification rule was to keep the public’s confidence in the judicial system.\(^{182}\) He urges that this ruling will have the opposite effect due to all the unnecessary *Caperton* motions that will be passing through the court system.\(^{183}\) Justice Scalia also feels a plethora of billable hours will be wasted by attorneys reading through countless volumes of campaign finance reports, and countless more in contesting non-disqualification decisions through every available means possible as a result of the *Caperton* decision.\(^{184}\)

Also, Justice Scalia poses the question: "[S]hould judges sometimes recuse even where the clear commands of our prior due process law do not require it?"\(^{185}\) He feels some imperfections and wrongs are nonjusticiable and that is why it is sometimes ineffective to try to right every wrong that comes before the Court.\(^{186}\) Therefore, Justice Scalia feels some problems with the Constitution cannot be fixed, and trying to fix them will only lead to more harm.\(^{187}\)
VI. CONCLUSION

The decision in Caperton will change the landscape of the legal community in more ways than one. Caperton will allow litigants to always have a fair tribunal before an impartial judge. However, I have to agree with the dissenting opinions in this case. Both of the dissenting Justices warn of the ramifications this case will bring because of unnecessary disqualification motions that will plague our judicial system as a result. The majority failed to set up any framework for state and federal judges to look at in order to determine if they should be disqualified.

Judicial autonomy is at the heart of the Constitution. The Framers gave federal judges life terms and protected their salaries from Congress to make them independent and not susceptible to outside influence. Therefore, taking away a judge's freedom to decide if he should be disqualified ultimately turns into an outcome-oriented affair. From this point on, or until the Caperton decision is modified, litigants, journalists, and other concerned individuals will search for grounds to challenge a judge's impartiality. There is also the pitfall of not having enough state or federal justices at the Supreme Court level to constitute a quorum to even hear the case. The biggest advantage of leaving the decision to judges to disqualify themselves was that it stopped "judicial forum shopping." The new Caperton disqualification standard will unavoidably encourage the concept. In the aftermath of the Caperton scandal, former Chief Justice Maynard lost his seat on the West Virginia Supreme Court of Appeals, and likely, Justice Benjamin will not be far behind him. West Virginia and many other states are

188. Id. at 2259 (citing In re Murchison, 349 U.S. 133, 136 (1955)).
189. Id. at 2274 (Roberts, C.J., dissenting); id. (Scalia, J., dissenting).
192. Id.; see also Cravens, supra note 37, at 18-21 (pointing out that stringent disqualification rules are not precise enough to figure out the often unapproachable question of what actual bias is and when it is present).
193. See Julie A. Robinson, Judicial Independence: The Need for Education About the Role of the Judiciary, 46 WASHBURN L.J. 535, 539 (2007). “[T]he founders, in their considered and educated judgment, determined that on [the] balance, the need for a judiciary free of political or undue influence necessitated a judiciary that could render decisions without allegiance to the popular opinions or the most vocal proponents in the community.” Id. at 540.
194. Meiser, supra note 27, at 1828.
195. See Lewis, supra note 30, at 385.
196. See Lochner, supra note 32, at 231-32.
197. Id.
198. Meiser, supra note 27, at 1834.
considering judicial reform to add on to the Caperton framework. No system can ever be perfect and not every decision can be free of any sort of bias or prejudice.

I wholeheartedly agree that a judge should be disqualified in cases where actual bias or prejudice exists due to campaign contributions. However, to assume that every judge will be biased is a plunge I am not willing to take. In order for this new judicial disqualification rule to succeed, the Court needs to provide more guidelines or a basic framework so the judiciary can be symmetrical and fair throughout. The way the new disqualification rule is written, judges might disqualify themselves when it is not needed or not disqualify themselves when it is needed. Furthermore, judges need to know how much a donor needs to contribute to the judicial campaign before the individual is considered a big donor and what exactly is considered a large campaign contribution. The forty fundamental questions Chief Justice Roberts proposed in his dissenting opinion will need to be addressed in later decisions by the Court because if judges have to consider these factors before even hearing any facts of a case, it might cause our judicial system to come to a complete standstill.

Currently, judges at the state or federal level are not required to provide any written or oral reasons as to why they are denying a litigant’s motion for disqualification. This has always been a major problem in our judicial system because it creates uncertainty and does not provide any clarity to the litigant who requested the disqualification. Thus, if the Supreme Court were to hand down a decision expressly requiring judges to give written or oral reasons as to why they are denying a litigant’s motion for disqualification, it could be a better solution than the one Caperton has surmised. The decision in Caperton was a good start in the right direction to finally put an end to any sort of judicial bias or prejudice that takes place, but since the Court failed to set up a workable framework for judges to follow, it might end up being a major setback. Therefore, I believe all the unnecessary Caperton disqualification motions that will be filed as a result of this decision will become a major epidemic in our country and one in which we certainly do not need.

199. Id.
200. Id.
202. Id. at 2269–72.
203. Cravens, supra note 37, at 29.
204. See id.
LEGAL SCHOLARSHIP INTRODUCTION

JOHN SANCHEZ*

In 1960, Daniel Bell wrote about the end of ideology. ¹ On April 8, 1966, the cover of Time Magazine asked, “Is God Dead?” ² In 1992, Francis Fukuyama pronounced the end of history. ³ The worst financial crisis since the Great Depression that occurred a couple of years ago brought forth eulogies for American-style capitalism. Grant Gilmore wrote of the death of the contract, ⁴ and my own favorite as a teacher of Remedies, Douglas Laycock announced the death of the irreparable injury rule. ⁵ Into this mix, we have Professor Pierre Schlag proclaiming that “legal scholarship is dead—totally dead.”

In 2006, Professors David Kennedy and William W. Fisher published a book, “The Canon of American Legal Thought,” in which they cite twenty law review articles they regard as the most influential in shaping American legal thinking and reasoning. ⁶ Twelve were published before 1964 and only one came out after 1988. ⁷ If this list is to be believed, 1974-75 would stand as the high water mark of legal scholarship since four of the top twenty articles were published in that short period of time. Perhaps this fact alone supports Professor Schlag’s claim that the golden era of legal scholarship is over.

Of course, debates over the end of ideology, history, capitalism, and of legal scholarship are parlor games played by intellectuals with perhaps too much time on their hands. In response to Professor Schlag’s bold pronouncement, Nova’s own David Cleveland and Olympia Duhart accepted the challenge and in the following pages put forth powerful arguments to the effect that rumors of the death of legal scholarship are vastly exaggerated.

---


⁷. See generally id.
My only hope is that this edition of the Nova Law Review comes out before December 21, 2012, which some say will mark the end of the world.
I. INTRODUCTION

I agree with Professor Schlag—and his unnamed colleague—that being a law professor is truly one of the last great jobs on earth. It is not quite, as one of my former fellow law firm associates called it, “the loophole in legal life,” but it is a grand vocation. Part calling and part privilege, the ability to...
think, write, and teach about whatever you want is the dream of many practicing lawyers and the joy of academics in America's legal academy. I also agree with Professor Schlag that legal academics ought to "do something intellectually edifying, politically admirable, or aesthetically enlivening." What I disagree with is his premise that nothing good is happening in legal scholarship, or, as he hyperbolically puts it, "legal scholarship today is dead—totally dead." If only that were true; my reading list would suddenly become manageable, people would stop provoking me with interesting new ideas, and I could tell my grand ideas about the law to my friends and colleagues without all the effort that goes into traditional scholarship. The "problem" is that there is a whole lot happening.

Reading Spam Jurisprudence and hearing Professor Schlag’s speech bemoaning the death of legal academic scholarship, I envision the legal academy cast in the role of the poor old man in Monty Python and the Holy Grail who is being carried off to be buried by medieval undertakers, proclaiming loudly that he’s not dead, only to be told, “yes you are,” and “shut up, you’ll be stone dead in a moment.” I assure you, I’m not dead. I’ve got things I want to say—more things than I have time to commit to writing—and while I’d admit my few articles are de minimus in the grand scheme of things, it seems unlikely that I’m the only one with something to say who is trying to say it. In fact, my reading list grossly exceeds my reading time, so there are certainly lots of interesting ideas being put forward. My first major point of disagreement with Professor Schlag then is that things are, indeed, happening—good things, interesting things, provocative things. I encourage everyone to go look and see if there aren’t a host of interesting articles on

2. Spam Jurisprudence, supra note 1, at 806. It seems a bit stilted to call a fellow academic “Professor Schlag,” particularly in so light-hearted an exchange, but alas the respectful and slightly formal Midwesterner in me would not permit me to call him “Pierre” as his colleagues who know him better have done. See supra note 2.

3. Spam Jurisprudence, supra note 2, at 804.


6. After you finish reading this piece and sending a note of praise and support to its author, of course.
your topic of choice, ranging from theoretical to empirical to practical. Though I give you this caveat: Toni Morrison has purportedly said, “If there’s a book you want to read, but it hasn’t been written yet, then you must write it,” and the same may be true of legal scholarship. Now, perhaps none of these articles are inventing the next Critical Legal Studies, Critical Race Theory, or Law and Economics model, but it is an unfair and unnecessary burden to put on every legal scholar the obligation to make every article a ground-breaking, paradigm-shifting, or field-creating piece. Rather, legal scholarship can, and regularly does, advance our knowledge and understanding in more modest, and frankly more useful, ways. This is truer than ever given the quantity of publications, breadth of subject matter, increased outlets for publication, and greater access to those publications.

This brings me to my second significant point of disagreement with Professor Schlag. Far from the Dark Age (or is it post-apocalypse?) he perceives us to be in, where our intellectual landscape is a mere echo of times gone by, littered only with the sun-bleached bones of past paradigms and rusted out husks of interpretive mechanisms of the past, I see an active, growing, and vibrant vista—a world where people really do “‘have things to say . . . and [are] going to say them.’” Many scholars are out there living the proposed utopia right now—they are writing where they have something to say, knowing it will be published, and they’re doing it in a way that is personally and professionally satisfying. The landscape you’ll find in legal scholarship is far more hospitable than ever before. This is a golden age of legal scholarship. The reasons are many, but perhaps I can artificially cabin them into three categories: freedom, access, and professionalism.


II. FREEDOM

There exists now an unprecedented freedom in legal scholarship. No one mode of legal thought holds sway. No one outlet of publication controls distribution of ideas. No one audience for legal scholarship must be catered to or appeased. Legal scholarship can be written to serve many different purposes, not just to establish doctrine and theory among scholars, but to improve the law by influencing courts, legislatures, and executives. Legal scholarship can also be written with an eye toward aiding and improving the practicing bar, informing law, and even pre-law, students. It can be aimed at making us better teachers, informing and influencing public and private policy decisions, and, yes, even for humor.


11. These can include things such as health benefit plans and the American with Disabilities Act. See generally Gwen Thayer Handelman, Qualified Medical Child Support Orders: Recent Developments, Am. Bar. Ass’n Section of Taxation Meeting Materials (2000); Gwen Thayer Handelman, Find the Client (with a Little Help from Your Friends in the Federal Courts), 26 J. Pension Plan & Compliance, 2000, at 1; Steven Wisotsky, Sounds and Images of Persuasion: A Primer, 84 Fla. B. J. 40 (2010).


But there is great freedom not only in why we write but in what we write. The current legal academy is perhaps more welcoming than ever of works that go beyond the traditional model of proposition of doctrine and theory and the recitation of history or arm-chair sociology. Legal scholarship today openly embraces empirical work on both the legal system itself and on the world in which it operates. It also encourages both interstate and international comparative law as well as inquiries into professional duties and ethics. As skills training and preparation for law practice becomes increasingly important to the profession, legal scholarship has expanded to include works on pedagogy, cognition and metacognition, integration of subjects across the curriculum, and related fields aimed at improving teaching of law students. There is even a body of scholarship aimed at demystifying the process of legal education for educators and law students alike.

This overwhelming freedom in why we write and what we write is matched also with a great deal of liberty in how we write. Both the written form that we give our thoughts and the process by which we get them there are less constrained than ever before. In regard to form, it is safe to say that legal scholarship takes more varied forms now than ever before. There is


still plenty of legal scholarship in the form of treatises distilling the mass of

case law into coherent rules and doctrinal law review articles arguing for a

legal result that fits the author's descriptive or normative view. But the
current landscape, lush and green with possibility, extends far beyond the
traditional confines. There is an expansion of empirical scholarship on both
the law's operations and its effects. There is an increase in interdisciplinary
work and collaboration. There is greater interest than ever in shorter, more
immediate, and more interactive scholarly commentary on current legal
events.

In addition, there are more numerous and more interesting outlets for
legal scholarship than ever before. Not only are there law reviews, but sub-
ject matter journals, journals published in other countries, online law jour-
nals, and even online versions and inter-issue updates to prestigious law re-
views. If one so desires, an author can circumvent the law review scene en-
tirely and self-publish on the Social Science Research Network (SSRN) or
BePress's online catalog. Those authors who want to write shorter written
pieces will find law reviews more accepting than ever of shorter pieces and
widely read blogs eager for interesting content of the shorter variety.

How we write has also become considerably less constrained. While
most scholars that I know still collect a box, pile, or file of research mate-
rials, the laptop computer and widely available internet access have made the
world our office. With adequate preparation, one can easily research and
write from anywhere. To the extent that one's work involves the input of
others, modern communications have made it easy to share entire works with
others instantly and over great distances.

Legal scholars in America seem incredibly, unprecedentedly free to
write about what they want in the way that they want from wherever they
want. In addition, access to both the sources of legal scholarship and to the
legal scholarship itself seems to be far greater than ever before.

III. ACCESS

This great freedom is matched by an unprecedented access to legal and
non-legal sources, colleagues, and, eventually, each scholar's work. What
used to be available only by visits to the physical home of the document are
increasingly available online. Not only through major information services

19. The author has written such an article but denies having been oppressed by the domi-
nant paradigm into doing so. See, e.g., Cleveland, Clear as Mud, supra note 6 (arguing for
uniform use of unpublished opinions in qualified immunity analyses, preferably by according
all such opinions full precedential value).
like Westlaw and Lexis, but also up free services like GPO Access.gov, Thomas, Google Scholar, and many others. Access to source materials is coupled with access to the ideas and thoughts of colleagues, even pre- or mid-drafting. First, the previously mentioned expansion of empirical and interdisciplinary work has opened the doors of the legal academy to greater collaboration with a wide variety of other professionals and academics in other disciplines. Whether the nature of the relationship is idea development, co-authorship, or review of your own written work, the body of legal scholarship is enriched and certainly enlivened by this cross-pollination. Second, technological advancements in communications such as email, internet document repositories, blogs, webpages, and the like, make instantaneous and detailed collaboration (and disputes) easier than ever before. Whether it’s running your work past other scholars you respect, or reading the thoughts of another scholar with whom you vehemently disagree that plants the seed for your scholarship in the first place, modern technology facilitates the scholarly dialog in way that used to be more time consuming and less common.

Finally, if you want your work to be read, access to published works has never been better. While electronic publication of law reviews is not new, it is worth noting the field-leveling effect this has. First, access is no longer limited to the top few law reviews that a given school, law firm, or court can afford. All the law reviews and journals are present in the commercial database for the same fixed fee. Second, articles in these databases are commonly located via word searches, which pull up all relevant articles, not just those in the top law reviews. Even within the traditional law review publication structure, this results in a significant increase in access to works not placed in a top law review. Even article authors who lack the proxies for qualities often used by top law reviews in selecting works can still expect their works to be read by interested parties given the database system. Outside the traditional law review form of publication lies a wide variety of other publication venues. These venues allow for publication of scholarship in forms both brief and long. Examples include, SSRN, BePress, AALS Section Newsletters, legal webpages, and legal blogs. These venues provide not only outlets for scholarly thoughts but access by a wide audience to those thoughts. What is even more exciting is the immediacy and ease with which these publication venues can be used and the way that they encourage feedback from readers.

IV. PROFESSIONALISM

While this added freedom and access is sufficient to convince me that it’s a good time to be reading and writing legal scholarship, there is one other issue that makes this a good time to be legal scholar. Professionalism of
legal scholarship is a beneficial movement, not an occurrence to be bemoaned. The legal academy has clearly resolved the scholarship vs. teaching debate in favor of requiring both. This puts added pressure on law professors, pressures that are lessened by formalized scholarship opportunities, mentoring, and clear, but flexible and inclusive, standards for publication expectations. Perhaps my experience is not representative, but I have found these forces to increase my ability to say what I want to say rather than, as Professor Schlag suggests, indoctrinating or limiting me to the reigning legal hegemony.\footnote{Spare Jurisprudence, supra note 1, at 806–07.} The proliferation of scholarship presentation opportunities, both targeted to junior faculty and otherwise, provide forums to express ideas not just in the written medium but conversationally. They allow an author to gauge the reactions of their audience and not only learn of specific criticisms or skepticism, but to address it on the spot. I cannot say enough about the benefit of the mentorship I have received from colleagues both here at Nova and elsewhere. To say that those folks have merely been perpetuating an oppressive or repressive entrenched paradigm is insulting to those efforts.

V. CONCLUSION

In sum, conditions seem right for a greater breadth and depth of legal scholarship than ever before. The landscape of legal scholarship seems to me anything but dead. To me, it appears wide-open, vibrant, and full of possibility.

Perhaps I am not the audience Professor Schlag is writing to, for, or about. I am not someone who has been around the academy a long time, which may disqualify me in his eyes to present a response. First, as a newer member of the academy, it may well be that I am writing merely to “make my bones” and will one day go quietly into the night of legal scholarship, never to be heard from again. Second, as a newer member of the academy, it may also be the case that nothing interesting is happening, but I just think that everything is interesting because it’s all new to me. But even if both of these are true, and I am not Professor Shlag’s target audience, I would still implore him to speak more plainly to those who are. His professed purpose: to provoke some sense that we legal thinkers can “turn [our] backs on the dominant paradigm” of legal scholarship and try to “do something intellectually edifying, politically admirable, or aesthetically enlivening,” needs elucidation.\footnote{Id. at 806.} What paradigm of legal scholarship are we shedding when the present paradigm is unfettered freedom, access, and support? What does this
avant-garde intellectually, politically, and esthetically advanced work look like? What benefit is obtained by producing more of it?

I am certainly not willing to say that this is the Golden Age or that legal scholarship has reached a pinnacle, but it seems clear to me to we are at a time in legal scholarship with great possibilities. Write about what you want, publish in your choice of formats, participate in a culture that encourages scholarship, both formally and informally. What is perhaps most interesting is that on his ultimate point, Professor Schlag and I agree: We should probe and examine and discuss those things about the law that trouble or fail to make sense to us and we should all think and write and explore.

Professor Schlag, inspired by the 1966 film Endless Summer, would tell putative scholars: "You guys reeeeeaaaaally missed it. You should have been here yesterday.

In contrast, the voice I hear and the message I would give you is that of Mickey from the 1976 film Rocky. I suggest to you that this is your moment and you’re going to be great: “You’re gonna eat lightnin’ and you’re gonna crap thunder!”

22. Id. at 835.
23. Id. at 804; see also THE ENDLESS SUMMER (Bruce Brown Films 1996).
REFLECTIONS ON ROTHKO AND WRITING: A RESPONSE TO PIERRE SCHLAG’S LECTURE ON THE STATE OF LEGAL SCHOLARSHIP

OLYMPIA DUHART*

I. INTRODUCTION ....................................................................................... 513
II. RESPONSE .................................................................................................. 514
III. CONCLUSION ............................................................................................ 522
IV. APPENDIX .................................................................................................. 523

I. INTRODUCTION

William Shakespeare wrote, “commit the oldest sins the newest kind of ways.”1 I believe that this adage is an appropriate way to frame the response that I will offer today. Shakespeare urges us to reinvigorate familiar terrain with a personal touch. To transform it with our own innovation. And I think it is highly applicable to the current state of legal scholarship. Professor Schlag is right; in many ways legal scholarship has become a bit of an artifact,2 it has become an old sin, and for a lot of us it can be exhaustive. More

+ Pierre Schlag, Professor, Univerisity of Colorado Law School, Lecture at Nova Southeastern University Shepard Broad Law Center (Mar. 12, 2010).

* Associate Professor of Law at Nova Southeastern University Shepard Broad Law Center. B.A. in English, University of Miami; J.D., Nova Southeastern University Shepard Broad Law Center. Thanks to Joshua Blasberg and Arlette Abdallah for their assistance with this essay. I also thank Professor John Sanchez and the Faculty Development Committee at Nova Southeastern University Shepard Broad Law Center for inviting me to engage with my colleagues in such an interesting discussion.


2. Professor Pierre Schlag, the Byron R. White Professor of Constitutional Law at University of Colorado Law School, was invited to speak at Nova Southeastern University Shepard Broad Law Center on March 12, 2010 based on his deliberately provocative essay about the “sorry” state of legal scholarship. See Pierre Schlag, Spam Jurisprudence, Air Law and the Rank Anxiety of Nothing Happening (A Report on the State of the Art), 97 Geo. L.J. 803, 804 (2009). In the essay, Professor Schlag announces emphatically the “death” of American legal scholarship. He writes: “American legal scholarship today is dead—totally dead, deader than at any time in the past thirty years.” Id. Specifically, Professor Schlag criticizes the frequent use of the dominant paradigm, asserts that the paradigm is uninteresting, and suggests that traditional law review paradigms are both “impoverished” and “impoverishing.” Id. at
than that, it can be irrelevant, it can be derivative, it can be reductive. But I am asserting that with fresh eyes, minds, and hands, we can bring it back from the brink and, in keeping with the “death” metaphor offered by Professor Schlag, we can perform a miracle and bring it back to life. Many of us have already been successful at resurrection.

II. RESPONSE

I agree with Professor David R. Cleveland that legal scholarship is alive, and the technological advances available to legal scholars in the twenty-first century can improve our writing. We can reach more people, and we can talk about more things. There is a very expansive definition about what constitutes legal scholarship. Today it includes pedagogy, practice, interdisciplinary work, and entertainment. Therefore, writing can be more relevant, it can be more accessible, it can be more responsive and exciting. It can be more alive and necessarily less “dead.”

In his lecture, Professor Anthony S. Niedwiecki addressed the issue of entrenched paradigms of legal scholarship and how we perpetuate those paradigms. I will, in full disclosure, announce that I particularly contribute to the problem because I am an LSV professor and a seminar instructor who

807–08. He also argues that “law review articles are causally and constitutively pretty far removed from any real stakes, save perhaps for the career of the author and a few other people.” Id. at 813. Professor Schlag’s criticism has been met with several responders, who have penned their own comments. See, e.g., Daniel R. Ortiz, Get a Life?, 97 GEO. L.J. 837 (2009); Richard A. Posner, The State of Legal Scholarship Today: A Comment on Schlag, 97 GEO. L.J. 845 (2009); Robin West, A Reply to Pierre, 97 GEO. L.J. 865 (2009). My own response published here represents the lecture I gave at Professor Schlag’s Nova appearance as one of three faculty “responders.” My colleagues, Professor David R. Cleveland, Associate Professor of Law at Nova Southeastern University Shepard Broad Law Center, and Professor Anthony S. Niedwiecki, formerly at Nova Southeastern University Shepard Broad Law Center and now Director of the Lawyering Skills Program at The John Marshall Law School, were also responders at the forum.

3. David R. Cleveland, Clarion Call or Sturm Und Drang: A Response to Pierre Schlag’s Lecture on the State of Legal Scholarship, 35 Nov. L. Rev. 503 (2011). Professor Cleveland’s essay response notes that modern technological advances in communication allow us to write from anywhere, collaborate with others over great distances, and “circumvent the law review scene entirely” by publishing on “the Social Science Research Network (SSRN)”.

4. Id. at 508. (“It can be aimed at making us better teachers, informing and influencing public and private policy decisions, and, yes, even for humor.”).

5. Anthony S. Niedwiecki, Professor, Nova Southeastern Univ. Shepard Broad Law Ctr., Lecture at Nova Southeastern University Shepard Broad Law Center (Mar. 12, 2010).

6. “LSV” refers to Lawyering Skills & Values, the first year, two-semester writing, research, and skills program for law students at Nova Southeastern University Shepard Broad
teaches students to use the CREAC formula. I enjoy highly routinized writing instruction for the benefit of others, but primarily, I think, for myself. So, I share blame in this, but I want to defend the structure I teach as an efficient vehicle and point out that it is just really one of the methods you can employ to make your writing clear and understandable. 7

In talking about our creative format, as always, exceptionality is in the eye of the beholder. Professor Schlag challenged us to become less traditional regarding the law review format, which in many ways imitates a judicial opinion or brief. 8 He warns that we should be less dependent on the legalist form. 9 However, when Professor Richard Delgado did just that in The Rodrigo Chronicles, 10 he was criticized by some of his colleagues for exploiting his status as a minority and being paid lots of money to write “childish stories” about minority groups. 11

Law Center. This course is an expansion of the traditional Legal Research and Writing class offered at most American law schools. 7 Of course I am not alone in my reliance and defense of the CREAC method for teaching students how to draft legal memoranda. Other writing experts advance the CREAC formula for legal memos. See generally Richard K. Neumann, Jr. & Sheila Simon, Legal Writing (2008). Of course there are countless ways to organize an effective legal memo. Adherence to the CREAC method in my writing courses helps me give the students a “default” organizational structure so that I can focus their attention on higher level skills such as analysis and synthesis. The CREAC structure also has an intuitive appeal for identifying a legal issue, stating the rule, applying the rule, and supporting a predictive or persuasive conclusion; in many ways, this structure mimics the way we solve problems outside of the law school classroom. Such elements have proven quite helpful to the first year writing student. See Camille Lamar Campbell, How to Use a Tube Top and a Dress Code to Demystify the Predictive Writing Process and Build a Framework of Hope During the First Weeks of Class, 48 DUQ. L. REV. 273, 309–310 (2010). As a former newspaper reporter, I confess that I was initially resistant to the formulaic writing style forced on most first year students, but after years of practice I am convinced it works—at least in this little arena. 8

8. Schlag, supra note 2, at 813. More to the point, Professor Schlag criticizes the law review format for being an “imitation of the legal brief and the judicial opinion.” Id.

9. See id.

10. See generally Richard Delgado, Rodrigo Chronicles: Conversations About America and Race (1995). In a ground-breaking departure from the traditional law review paradigm, Professor Delgado makes use of the narrative technique and employs the fictional character “Rodrigo”—the son of an African-American serviceman and an Italian mother—to engage with a fictional professor of color and have a series of discussions on law; the topics have included law and economics, civic republicanism, essentialism and anti-essentialism, and black crime, among other things. See id.; see also Richard Delgado, Rodrigo’s Final Chronicle: Cultural Power, Law Reviews, and Attack on Narrative Jurisprudence, 68 S. CAL. L. REV. 545, 546 n.3 (1995). The esteemed Professor Derrick Bell has also, of course, demonstrated the strength of legal storytelling. See generally Derrick Bell, The Power of Narrative, 23 LEGAL STUD. F. 315 (1999).

So do you fall into the paradigm or do you try something different? Basically, we are getting stuck with the battle of the experts. So the question still remains, what makes scholarship exceptional? How can we pull it out of mediocrity? Is it merely innovation—either substantively or in format? (You can debate about that all day.) Is it the controversy that it engenders? Is it compliance with normative expectations? Is it influence over the law? Is it the mentor that you are able to convince to review your article and who was conspicuously thanked in that little cover footnote with hopes of securing a higher placement? Is it how frequently you are cited? Is it the quality or the ranking of the law review that decides to publish you? Or is it something else? Is it intellectual rigor? Is it the aesthetic value?

Let's consider this picture from Mark Rothko, and if you could take a second to look at it I think that this picture from Rothko can give us a little guidance here. Just take a second and figure out what you truly think of this picture. Perhaps, like me, you believe this is an exceptional image and you feel transported by its simplicity. It looks vast, overwhelming, lonely, and

ASSAULT ON TRUTH IN AMERICAN LAW (1997)) ("Critical race theorists teach by example that the role of a member of a minority group is to be paid a comfortable professional salary to write childish stories about how awful it is to be a member of such a group."). See generally Daniel A. Farber & Suzanna Sherry, Telling Stories Out of School: An Essay on Legal Narratives, 45 STAN. L. REV. 807, 808–09 (1993) (critiquing the value of legal storytelling as legal scholarship). In their essay, Professors Farber and Sherry recognize the impact of narrative among members of minority groups, but challenge the status of such narrative as scholarship:

One frequent claim on behalf of storytelling is that stories build solidarity among the members of an oppressed group, thereby providing psychological support and strengthening community. We have no reason to question these effects, or to dismiss them as negligible. Nevertheless, we do not believe that these effects in themselves are sufficient to validate the stories as scholarship.

Id. at 824). But see Devon W. Carbado & Mitu Gulati, The Law and Economics of Critical Race Theory, 112 YALE L.J. 1757, 1784 (2003) (reviewing CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (2002)) (defending the use of narrative, especially in Critical Race Theory, as expanding a set of methodologies "to articulate concerns about race and equality.").

12. See sample work in Appendix, infra page 525 and accompanying notes.


14. The balance, texture and tonality of Rothko's work cement his exceptionality:

The artist invented his own rules as his creations emerged from within him. The combination of red and yellow generally produces orange, but when Rothko combined these two colors they
beautiful. Or maybe you are thinking “my kid can do that, it’s just a bunch of rectangles in a square.”  

Without a doubt, there is a real impossibility in ever trying to quantify quality. We will never all agree on this painting, but the value still remains undisturbed even if we don’t reach a consensus. This is true whether we are trying to evaluate the quality of writing  

or Rothko. This correlates with the message we heard today from Professor Schlag about Constitutional interpretation: Essentially it is entirely dependent on our preconscious conceptions of the Constitution. This is a message I have been trying to relay all semester to my first year Constitutional Law students: Constitutional interpretation is nothing new—see  

McCulloch v. Maryland— but our own perceptions, experiences, and judgments can make it so.

There is a point where I respectfully disagree with our guest today. Specifically, I dispute Professor Schlag’s assertions that our articles are

didn’t necessarily lead to orange as we know it. Instead, his colors—and therefore, his paintings—have their own emotion, sense of mystery, and meaning. Each of Rothko’s works is larger than the sum of its parts.

OTTMAN, supra note 13, at 105; see also DIANE WALDMAN, MARK ROTHKO 1903–1970: A RETROSPECTIVE 60 (Carol Fuerstein ed., 1978) (recognizing the effective use of “[s]patial illusionism” in Rothko’s work).

15. “Rothko had, and continues to have, his share of adverse criticism.” Rachel Barnes, Divine Art, Dark Souls, THE GUARDIAN (London), Jan. 27, 1993, at 5. Furthermore, I would not assert that my personal appreciation of Rothko’s work, nor his historical status among preeminent artists would place his work above criticism. Another writer adds: “Mark Rothko is awash in such contrast, contradiction and confusion.” Jonathan Mandell, Being and Nothingness/Mark Rothko’s Reputation Is Built on Work That’s at Once Quite Something and ‘Very Close to Nothing,’ NEWSDAY, Sept. 22, 1998, at B6. The characterization merely makes my point that both art and writing are what you make them or see them to be. Indeed, others with much more experience and expertise in assessing art have been dismissive of Rothko’s work. Former New York Times critic Edward Alden Jewell, for instance, deemed Rothko’s work “obscure,” and said the artist’s creations left him completely “befuddled.” Eva Hogan, Real Red: Art Critics and Mark Duel, Broadway, http://www.broadwaytv/broadway-features-reviews/real_red (last visited Apr. 20, 2011).

16. Back to writing, the attempt to evaluate or quantify legal scholarship is nothing new. See, e.g., Philip C. Kissam, The Evaluation of Legal Scholarship, 63 WASH. L. REV. 221, 221 (1988) (“Researchers, readers, academic committees, law school deans, research agencies, and editors of publications frequently evaluate works of legal scholarship.”).

17. See comments of Professor Pierre Schlag, Lecture at Nova Southeastern University Shepard Broad Law Center Symposium (Mar. 12, 2010) (unpublished manuscript on file with author). Professor Schlag addressed the inherent difficulty of Constitutional interpretation: What I got out of this is the recognition that the antagonists in the interpretation debates are not talking about the same thing. Their disputes are not about how to interpret the Constitution, but rather a much more fundamental and interesting dispute about what it is. For some, it is a unitary text, for others it is a structured charter, for others it is a political event, for some an originary source of meaning, for others a bridge to the past and so on.

Id.

“pretty far removed from any real stakes, save perhaps for the career of the author and a few other people.” 19 Here I’m going to rely on another quote, “if you miss your mark aim wider” 20 and at this point you should consider a bull’s-eye. Very narrowly, I think we sometimes measure the success of our scholarship by looking for that little circle in the middle of the bull’s-eye and I think we have to consider the whole target and look beyond the bull’s-eye to measure the value of our writing.

Our scholarship does matter to policy makers. We have colleagues in the room who have influenced policy makers both in Florida and in other states about the legitimacy and the need to preserve DNA evidence 21 to protect innocent people. We have colleagues who have influenced Congress over Forestry measures; 22 colleagues who have helped direct the path of the Environmental Protection Agency. 23 So, there is a very direct link between what we are writing and the influence we have. 24

19. Schlag, supra note 2, at 813.
20. The quote is inspired by Henry David Thoreau’s “In the long run, men hit only what they aim at. Therefore, though they should fail immediately, they had better aim at something high.” HENRY DAVID THOREAU, WALDEN AND OTHER WRITINGS 132 (Joseph Wood Krutch ed., 1981).
23. See, e.g., JOEL A. MINTZ, ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES (1995). Professor Mintz continues to publish numerous law review articles and book chapters that contribute significantly to the environmental law field. “His journal articles have repeatedly been considered to be among the 30 best articles of the year in the environmental law field by peer reviewers.” Joel A. Mintz, CTR. FOR PROGRESSIVE REFORM, http://www.progressivereform.org/MintzJoelBio.cfm (last visited Apr. 20, 2011). Professor Mintz has consulted with the EPA on environmental policy matters. Id.
24. In myriad ways, colleagues have used their law review articles as a tool for social justice work. Recently, a colleague highlighted defects in the criminal justice system. See generally Heather Baxter, Gideon’s Ghost: Providing the Sixth Amendment Right to Counsel in Times of Budgetary Crisis, 2010 MICH. ST. L. REV. 341 (2010) (discussing how attorneys who represent indigent criminal defendants are not getting the proper funding and, as a result, citizens are being deprived of their Sixth Amendment Right to Counsel). Others have used their law review platform to advance quality of life for people wading through the civil litigation process on personal matters. See generally Elena Langan, “We Can Work It Out”: Using Cooperative Mediation—a Blend of Collaborative Law and Traditional Mediation—to Resolve Divorce Disputes, 30 REV. LITIG. 245 (2011) (suggesting that a blended ADR method can be used to resolve high-conflict divorce cases extra-judicially as an alternative that allows
I want to point out that there really isn’t necessarily a linear path. Sometimes, it goes back and forth. Therefore, if we examine the bull’s-eye, our legal scholarship can have a very wide-reaching impact and my hope is that it does stretch beyond the Capitol and the courtroom. I’d like to think that some members of the legal academy actually wrote about something they didn’t understand and they were successful for it.

Here are a few examples I want you to consider: Professor Anne Enquist didn’t understand why her first year legal research and writing students did not know how to write. To help introduce them to the new world of writing at law school, she had to unpack for them how undergraduate writing is so radically different from legal writing, and she did so in an article.\(^25\) For example, she explains that undergraduate writers are typically rewarded for dressing up ideas, making them seem more sophisticated and making “simple things seem complex.”\(^26\) Professor Enquist contrasted this practice with the goal in most legal writing “to make complex things seem simple.”\(^27\) In short, she didn’t understand the dilemma she faced as she tried to help new law students make the transition into legal research and writing and she wrote an article about it.\(^28\)

Professors Cheryl Harris and Devon Carbado didn’t understand why black Hurricane Katrina survivors were termed looters and not treated fairly by the media following the storm; they wrote about it.\(^29\) They argued that Katrina provided insight into how social life is interpreted through various frames (both literally and figuratively).\(^30\) They wrote: “As a result of racial frames, black people are both visible (as criminals) and invisible (as victims).”\(^31\)

Professor Ediberto Roman and Christopher Carbot didn’t understand why there were so few Latino and Latina tenure-track faculty members at

\(^{25}\) Anne Enquist, *Talking to Students About the Differences Between Undergraduate Writing and Legal Writing*, 13 Persp. 104 (2005). Professor Enquist makes great uses the epistle form in this piece and offers her advice in the form of a “letter” to new law students. I thank my colleague Professor Camille Lamar for suggesting that I include this excellent article as mandatory day-one reading for my first semester LSV students.

\(^{26}\) *Id.*

\(^{27}\) *Id.*

\(^{28}\) *Id.*

\(^{29}\) See Cheryl I. Harris & Devon W. Carbado, *Loot or Find: Fact or Frame?*, in *AFTER THE STORM: BLACK INTELLECTUALS EXPLORE THE MEANING OF HURRICANE KATRINA* 87 (David Dante Troutt ed., 2006).

\(^{30}\) *Id.* at 103.

\(^{31}\) *Id.*
American law schools and they wrote an article about it. They used their article as a vehicle to raise the sometimes delicate issue of diversity and to enable other colleagues to do the same thing at their own schools. Specifically, Professor Roman and Carbot addressed the abysmal figures of Latino/Latina law professors, analyzed data measuring credentials and placement, and laid out a case for the benefits of diversity in the academy.

Professor Francisco Valdes didn’t understand why hierarchies are so difficult to overcome for “outsiders” and he wrote about it. He examined the culture wars, backlash jurisprudence and social retrenchment as a means of understanding the “jurisprudential follow-up” to “social and legal antidiscrimination legacies.”

Professors Keith Aoki and Kevin Johnson did not understand why, in their assessment, LatCrit did not focus more on “quality control” in its scholarship symposia. The two issued some tough love about LatCrit scholarship. Essentially, they argued that there wasn’t enough “Crit” in LatCrit and they wrote a law review article about it. And in response, of course, came a retort. Professors Valdes and Margaret Montoya didn’t understand why LatCrit’s scholarship project that reflected the “democratic” model of knowledge production wasn’t being recognized as another manifestation of its anti-subordination mission. They wrote an article about it. In their

32. Ediberto Roman & Christopher B. Carbot, Freeriders and Diversity in the Legal Academy: A New Dirty Dozen List?, 83 IND. L.J. 1235 (2008). The article built on the work of Professor Michael Olivas, who worked with the Hispanic National Bar Association, to produce the “List” of the top U.S. law schools located in high Latino/Latina area but had no Latino/Latina professors on faculty. Id. at 1238; see also Michael A. Olivas, The Education of Latino Lawyers: An Essay on Crop Cultivation, 14 CHICANO-LATINO L. REV 117 (1994).

33. Roman & Carbot, supra note 32, at 1238.

34. Id. at 1241. “Increasing Latina professor representation also stands to enrich the academic and scholarly exchange of ideas between colleagues, and to facilitate a more diverse learning experience for students.” Id.


36. Id.


38. Id. at 1159 (“Ultimately, we conclude that LatCrit has been relatively successful at establishing a community and at institution-building, but less successful with respect to the production of high quality scholarship.”).

39. See id.

40. See Margaret E. Montoya & Francisco Valdes, “Latinas/os” and The Politics of Knowledge Production: LatCrit Scholarship and Academic Activism as Social Justice Action, 83 IND. L.J. 1197, 1205 (2008). In response to the criticism of LatCrit scholarship in Profes-
 article, Professors Valdes and Montoya vigorously defended the LatCrit experiment as a conscious avoidance of the re-inscription of hierarchy found in some vanguardist models. 42

Professor Doug Colbert didn’t understand why we as law professors were not doing a better job of training young lawyers to honor their charge to serve the public good, and he wrote about it. 43 Professor Colbert called for law professors to take seriously the charge of the Preamble of the ABA’s Model Rules of Professional Conduct to enhance every person’s access to a lawyer. 44 He challenges law professors to train a generation of lawyers who will “embrace its duty to serve when entering the profession.” 45

The list could go on and on, but this is as good a starting place as any for us to examine the times and life of legal scholarship. And for more traditional authority here, you can always pick up a court opinion—clearly something that does have an impact on real, living people. At least one recent empirical study challenges the “conventional wisdom” that legal scholarship has lost its relevance to courts. 46 Over the past two decades, there has been a “marked increase in the frequency of citation to legal scholarship in the reported opinions of the circuit courts of appeals.” 47

sors Aoki and Johnson’s article, Professors Montoya and Valdes asserted the “lump-sum” treatment of entire body of published works was “intellectually irresponsible.” 41

41. See id.
42. Id. at 1229. Professors Valdes and Montoya argued that the LatCrit scholarship model fostered social justice action and change:

[T]his proactive engagement of difference in multiple ways across multiple axes of identification produces not only knowledge but also solidarity in the service of social justice action. These multiple forms and levels of engagement tend to cultivate the openness, understanding, and motivation necessary for antisubordination collaboration across multiple categories of identity—including across intra-“Latina/o” axes of difference; this attention to difference and diversity helps to set the stage for critical coalitions that stand on shared and enduring principles rather than temporarily converging interests. In our experience, the act and process of collaboration over time deepens levels of mutual understanding and trust that progressively enable greater intellectual and discursive risks, which oftentimes yield important epiphanies, and create bonds of mutual respect and engagement that can only enrich any kind of knowledge production activity both in the short and long term.

Id. at 1227–28.
44. See Colbert, supra note 43, at 33–34.
45. Id. at 7.
47. Id. (manuscript at 1). The study tracked trends in the citation of legal scholarship by United States circuit courts of appeals over the past 59 years. Id. A review of figures indi-
III. CONCLUSION

So we are going to aim wider and look beyond the bull’s-eye and hope that our scholarship is no longer limited in its ability to influence judges and courts of law? If we do this in a wider way we can reach the Courts, the Capitol, the students who read it, the colleagues who disagree with it, the researchers who review it, the committees who vet it, and some of our friends who we pull in to proof-read it for us.

All of these continued efforts will expand the universe of the people who can accept the challenge and press hard on those aspects of the law that don’t make sense to us. Such efforts will help us perform a few modern-day miracles and breathe new life into what has been called a dying breed. After all, these are the same people who are going to one day become policy makers, judges, attorneys, and law professors. And despite Professor Schlag’s dire pronouncements, these people will hopefully go out, change the world and maybe even one day write a law review article about it. As the great philosopher Yogi Berra said, “It’s déjà vu all over again!”

---

48. Baseball icon Yogi Berra is not only a member of the Baseball Hall of Fame, he is known off-the-field for his astute and amusing observations about life. *See generally Yogi Berra, The Yogi Book “I Really Didn’t Say Everything I Said”* 30 (1998).

49. *Id.* at 30.
No. 13 (White, Red, on Yellow) 1958

50. MARK ROTHKO, No. 13 (WHITE, RED, ON YELLOW), (1958). A black and white reproduction of a Mark Rothko painting could never do justice to this brilliant work. You have to imagine it in white, red and yellow color blocks, or find online a digital image of the painting at The Metropolitan Museum of Art's website. See Mark Rothko, METRO. MUSEUM OF ART, http://www.metmuseum.org/toah/works-of-art/1985.63.5 (last visited Apr. 20, 2011). But I do believe that even a black and white reproduction of the piece will illustrate the point I am making about the potential dismissal of the work for its sheer simplicity. Abstract expressionism, like much of what we write, is in the "eye of the beholder."
IS MIRANDA ON THE VERGE OF EXTINCTION? THE SUPREME COURT LOOSENS MIRANDA'S GRIP IN FAVOR OF LAW ENFORCEMENT

ILLAN M. ROMANO*

I. INTRODUCTION

In 1964, the Self-Incrimination Clause of the Fifth Amendment was held applicable to the States through the Due Process Clause of the Fourteenth Amendment. Just two years later, the Supreme Court of the United States would issue arguably the single most important opinion in criminal procedure in Miranda v. Arizona. This landmark case would go on to set the tone for criminal interrogations for the next half-century. Miranda was attempting to achieve a balance between the need to protect a suspect's privilege against self-incrimination and law enforcement's interests in interrogating criminals and legally obtaining a confession. In doing so, the Court

* The author is a J.D. Candidate, May 2011, Nova Southeastern University, Shepard Broad Law Center and a graduate of Florida State University. The author wishes to thank his family and friends for all of their encouragement and support, with a special thanks to Alyssa Posar for her love and motivation. The author extends special recognition to Professor Joseph Harbaugh and Professor Barbara Britzke for their continual advice and guidance over the years. He would also like to thank the members of Nova Law Review for their hard work.
3. Id. at 439, 441–42.
created what is now known as the *Miranda* warning to be given any time a suspect is brought into custody and interrogated.\(^4\) The warnings inform a suspect of his right to remain silent and his right to an attorney before and at any time during the interrogation.\(^5\) *Miranda* is now considered "one of the court’s best-known creations" and is constantly the subject of criminal procedure in the courtroom, interrogation room, and in TV crime dramas alike.\(^6\)

Over the years, *Miranda* has sustained subtle setbacks and restrictions to provide police with more leeway in seeking confessions and avoiding the suppression of evidence.\(^7\) However, *Miranda* fought, scratched and clawed its way to survival. But, it was not until this year when the Supreme Court issued a devastating three-punch combination of opinions which may have put *Miranda* out for good. *Florida v. Powell*,\(^8\) *Maryland v. Shatzer*,\(^9\) and *Berghuis v. Thompkins*\(^10\) all appear to demonstrate a trend toward an approach inconsistent with the principles outlined in *Miranda*. In the span of roughly six months, the Court has decided that a suspect’s rights now expire after fourteen days,\(^11\) an incarcerated inmate is no longer considered to be "in-custody,"\(^12\) police no longer need to expressly inform a suspect that he has the right to have an attorney present during the interrogation,\(^13\) and a suspect must speak in order to remain silent, or he risks waiving his right to remain silent.\(^14\)

This article will present a look at the cases which have come to shape the law of the United States and illustrate how the Court’s most recent opinions do or do not pose a threat to the viability of *Miranda*. Part II of this
article will present a brief history into the *Miranda* decision and provide its rationale and underlying purpose. Part III will discuss an important decision by the Supreme Court of the United States which essentially set the record straight and established *Miranda*’s constitutional underpinnings once and for all. Part IV of the article will look at three significant Supreme Court decisions rendered so far this year. It will present the facts, holdings and rationales given by the Court in *Florida v. Powell*, *Maryland v. Shatzer*, and *Berghuis v. Thompkins*. The article will illustrate how each of these cases dealt significant blows to the long standing *Miranda* warning requirements and its underlying purpose, with the bulk of the analysis pertaining to the *Berghuis* case. The *Berghuis* analysis will point out what has historically been required for a defendant to invoke and waive his right to remain silent and discuss how the decision defies the principals set forth in *Miranda*. Part V will present the arguments that *Berghuis* is inconsistent with *Miranda* and the Constitution by pointing out the flaws in the majority’s reasoning. This section will also present the views of supporters of the decision. Lastly, Parts VI and VII, respectively, will provide the author’s critical analysis of the *Berghuis* decision and reach an ultimate conclusion and recommendation going forward.

II. THE *MIRANDA* WARNING IS BORN

The rights and protections afforded to suspects have come a long way since the days of torture and third degree brutality as a customary method of extracting confessions. However, this created a shift to psychologically based interrogation tactics which can still lead to coercion. Regardless of which method of coercion may have been used, none of the cases prior to *Miranda v. Arizona* provided a suspect with “appropriate safeguards . . . to

15. *See* Wakat v. Harlib, 253 F.2d 59, 61–62 (7th Cir. 1958) (noting that the defendant was beaten by five police officers, sustaining multiple bruises and broken bones and spent eight months in the hospital); People v. Matlock, 336 P.2d 505, 511–12 (Cal. 1959) (finding that the defendant was interrogated under sleep deprivation tactics and placed on a cold board every time he became sleepy); Bruner v. People, 156 P.2d 111, 120 (Colo. 1945) (stating that the defendant was not allowed to eat for a period of fifteen hours, could not use the toilet without taking a lie detector test, and was held for over two months); Kier v. State, 132 A.2d 494, 496 (Md. 1957) (recognizing that the defendant was strapped naked to a chair and threatened to think police would take skin and hair scraping from anywhere on his body where blood or sperm could be found); People v. Portelli, 205 N.E.2d 857, 858 (N.Y. 1965) (noting that there was beating and torturing of the suspect to acquire incriminating statements).

insure that the statements were truly the product of free choice." The Miranda holding implemented those safeguards.

The seminal case of Miranda v. Arizona clarified and established the rights afforded to criminal suspects during police custodial interrogations. The Supreme Court of the United States cited a need for precise procedures and guidelines in order to guarantee and protect an individual’s Fifth Amendment privilege against self incrimination. In general, Miranda established the rule that before any custodial interrogation, the suspect must be made aware of his or her right to remain silent and right to have an attorney present. This warning provides the best avenue for protection of an individual’s privilege against self incrimination when being questioned in an inherently coercive environment under the pressure and intimidation of his adversary. Once provided, interrogation must cease “if the individual indicates in any manner . . . that he wishes to remain silent.” Any statement obtained without this warning or after the privilege has been invoked is considered compelled and may not be admitted into evidence.

III. ESTABLISHING THE CONSTITUTIONAL STATUS OF MIRANDA

Since the Miranda ruling, there has been widespread debate over whether the Miranda safeguard is a constitutional rule or just a regulation created under the Court’s supervisory authority. Some courts held firm that Miranda safeguards were merely prophylactic rules to protect the Fifth

17. Id. at 457. “[P]rivilege [against self-incrimination] is fulfilled only when the person is guaranteed the right ‘to remain silent unless he chooses to speak in the unfettered exercise of his own [free] will.’” Id. at 460 (quoting Malloy v. Hogan, 378 U.S. 1, 8 (1964)).
18. Id. at 479.
19. Id. at 439.
20. Miranda, 384 U.S. at 444. The Supreme Court defined custodial interrogation as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” Id.
21. Id. at 479. The Court specifically delineated the instructions needed to protect the suspect’s constitutional rights as follows:

[A suspect] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires.

Id.
22. Id. at 467.
24. Id.
Amendment privilege against self incrimination. Others have preached the constitutional roots of *Miranda* and its own distinct constitutional status. Much of the debate has stemmed from the language of the *Miranda* opinion itself. The Supreme Court of the United States settled the debate in *Dickerson v. United States* by expressly refusing to overrule *Miranda* and reiterating the *Miranda* warning’s status as “a constitutional rule that Congress may not supersede legislatively.”

*Dickerson* dealt with the issue of whether Congress had proper authority to statutorily overrule *Miranda*. Congress enacted 18 U.S.C. § 3501 two years after the *Miranda* decision. This statute would turn the analysis of admissibility of a statement on whether the statement was voluntary and ignore whether *Miranda* was satisfied. Experts debated that the statute should be upheld because the Constitution does not forbid the use of a voluntary statement in a federal case. However, the Court relied on *stare decisis* for support that *Miranda* is a constitutional decision and has been consistently applied to state court prosecutions. The Court officially dubbed *Miranda*’s warning requirement as Constitutional, stating that “Congress may not legislatively supersede [judicial] decisions interpreting and applying the

28. *Miranda*, 384 U.S. at 467 (stating that the *Miranda* decision “in no way creates a constitutional straitjacket” and “encourage[s] Congress and the States to . . . search for . . . effective ways of protecting [individual] rights.”). But see id. at 445 (referring to *Miranda* as a “constitutional issue”).
30. Id. at 444.
31. Id. at 437 (“Congress may not legislatively supersede [judicial] decisions interpreting and applying the Constitution.”).
32. Id. at 435.
33. Id. at 436.
35. *Dickerson*, 530 U.S. at 438. The Supreme Court does not have supervisory authority over state courts—it only has authority to enforce Constitutional requirements. Id.
Constitution." This decision "reject[ed] the only alternative that has been presented to [Miranda] for thirty years ... lock[ing] our country into this particular approach." 37

IV. LOOSENING _MIRANDA_'S GRIP ON CRIMINAL PROCEDURE

A. Florida v. Powell

_Florida v. Powell_ was the first of three cases this year to significantly loosen the long standing strictures of the _Miranda_ warning requirement. 38 Ignoring the _Miranda_ requirement that suspects be "clearly informed" of their rights before any custodial interrogation, 39 the Supreme Court of the United States allowed police officers in Tampa to vary the wording of the _Miranda_ warning despite the potential for confusion and misunderstanding. 40 So long as the warning "reasonable conveyed" the suspects rights, the Court would allow it. 41 The officers in _Powell_ gave the defendant the following warning:

> You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during the interview. 42

_Powell_ subsequently waived his rights and confessed. 43 On appeal, Powell argued that the warning he received was inadequate because it did not inform him of his right to an attorney during the interrogation. 44 The Su-

36. _Id._ at 437.
37. Cassell & Litt, _supra_ note 34, at 1189. "Nothing in the Constitution requires a draconian rule that a voluntary confession be suppressed whenever there has been some departures from the _Miranda_ procedures." _Id._ at 1172.
40. _Powell_, 130 S. Ct. at 1199. The Court itself noted that the warnings given to Powell "were not the clearest possible formulation" for informing a suspect of his rights. _Id._ at 1205.
41. _Id._
42. _Id._ at 1200 (emphasis added).
43. _Id._
44. _Powell_, 130 S. Ct. at 1200.
The Supreme Court of Florida agreed with Powell and held that the warning did not meet the "clearly informed" standard articulated in *Miranda*.

The Supreme Court of Florida further noted that this warning was misleading and indicated to the suspect that his right to an attorney only existed before questioning. The Supreme Court of the United States granted certiorari to resolve the issue.

The Court took the view that the *Miranda* warning, or its equivalent, only needs to reasonably inform suspects of their rights. Otherwise, a "suspect would have to imagine an unlikely scenario . . . [where] he would be obliged to exit and reenter the interrogation room after each query." However, this contradicts the notion that *Miranda* refuses to assume anything from the suspects. Further indicating a steer from requiring a suspect be "clearly informed," the Court expressly admits that the warning Powell received were not the clearest of warnings. The majority relied mainly on the catchall phrase given to Powell stating that he could invoke his rights "at any time"—including his right to an attorney before questioning. While some courts have accepted an altered reading of the *Miranda* warning, Powell marks "the first time the Court has approved a warning which . . . entirely omitted an essential element of a suspect's rights"—the right to have an attorney present during the interrogation.

The Powell decision wasted no time before flexing its muscle. *Rigterink v. State* was one of the earliest cases to be reconsidered in light of Powell. Rigterink, like Powell, dealt with a *Miranda* warning which failed to expressly inform the suspect of his right to counsel before and during the interrogation. The Supreme Court of Florida initially made its ruling that

---

46. Id.
47. Powell, 130 S. Ct. at 1201.
48. Id. at 1205.
49. Id.
50. Miranda v. Arizona, 384 U.S. 436, 471–72 (1966) ("[T]his warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead.").
51. Powell, 130 S. Ct. at 1205.
52. Id.
54. Powell, 130 S. Ct. at 1210–11 (Stevens, J., dissenting).
56. 2 So. 3d 221 (Fla. 2009) (per curium), vacated by 130 S. Ct. 1235 (2010).
57. Rigterink, 130 S. Ct. at 1235.
58. Rigterink, 2 So. 3d at 234.
the warning was constitutionally and materially defective based on what appeared to be the long standing rules illustrated in *Miranda*.\(^{59}\) Under the exact reading of the *Miranda* decision, anything that does not “clearly inform” a suspect of his rights “constitutes a narrower and less functional warning than that required by *Miranda*.”\(^{60}\) But, as illustrated above, these *Miranda* rules that have been applied for so long, are not as relevant in light of *Powell*.\(^{61}\)

**B. Maryland v. Shatzer**

Just a day after *Powell*, the Supreme Court continued to craft a more police-friendly version of *Miranda* in *Maryland v. Shatzer*.\(^{62}\) In this case, the Court held that police may re-interrogate a suspect who has previously invoked his *Miranda* right to counsel.\(^{63}\) While not expressly declaring it so, the ruling modified another long standing rule of criminal procedure that was articulated in *Edwards v. Arizona*.\(^{64}\) The *Edwards* rule created a perpetual ban in which police were barred from interrogating a suspect who invoked his Fifth Amendment *Miranda* right to counsel, until counsel is provided or the suspect initiates the conversation on his own volition.\(^{65}\) Shatzer based his argument to suppress his confession pursuant to *Edwards*.\(^{66}\)

In 2003, while incarcerated on an unrelated crime, Shatzer was questioned by police regarding a sex offense.\(^{67}\) Shatzer indicated that he would

\(^{59}\) *Id.* at 253–54.

This [holding] is not because Rigerink is innocent; rather, it is because the rules established to guard fundamental constitutional protections were not followed, and, under these facts, we cannot say that the videotape—which should have been suppressed based upon proper legal analysis—did not “contribute to” his convictions. The murders committed in this case were horrific, gruesome, and worthy of condemnation; moreover, there is evidence to support the verdicts returned by the jury. However, the rule of law must prevail and we must not allow the ends of punishment to trump the means that our state and federal Constitutions require.

\(^{60}\) *Id.* at 256.

\(^{61}\) *Id.* at 253.

\(^{62}\) *See* Rigerink, 130 S. Ct. 1235 (vacating the judgment of the Supreme Court of Florida and remanding the case in consideration of *Florida v. Powell*).

\(^{63}\) 130 S. Ct. 1213, 1218 (2010).

\(^{64}\) *Id.*

\(^{65}\) 451 U.S. 477, 484 (1981); see Shatzer, 130 S. Ct. at 1219 (refusing to extend Edwards and allowing a suspect who has previously invoked his right to counsel, to be questioning again despite counsel being unavailable).

\(^{66}\) Edwards, 451 U.S. at 484–85 (“[W]hen an accused has invoked his right to have counsel present during custodial interrogation, . . . [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication . . . with the police.”).

\(^{67}\) Shatzer, 130 S. Ct. at 1218.

\(^{68}\) *Id.* at 1217.
not talk without his attorney and invoked his right to counsel.\textsuperscript{68} The questioning ceased, and Shatzer was sent back into the prison’s general population.\textsuperscript{69} Two and a half years later, police returned to question Shatzer on the same offense.\textsuperscript{70} He was again read his \textit{Miranda} rights, but this time he waived them and began to talk.\textsuperscript{71} It was only until Shatzer made incriminating statements, which were later used to convict him, when he again requested his attorney.\textsuperscript{72} Shatzer argued to suppress his statements under the \textit{Edwards} rule.\textsuperscript{73} The \textit{Edwards} theory is that once a suspect invokes his Fifth Amendment right to counsel, a subsequent waiver of the right to counsel in another interrogation is presumed to be involuntary.\textsuperscript{74} The implicit assumption is that the second waiver was a result of police persistently attempting to get a waiver of rights and a subsequent confession.\textsuperscript{75} The Court held that the implicit dangers prevented by the \textit{Miranda} safeguards and the \textit{Edwards} rule were eliminated due to the extended interval between interrogation sessions and refused to extend \textit{Edwards} to an “eternal” ban on interrogation; instead the Court ruled that a break in \textit{Miranda} custody shall create an exception to the \textit{Edwards} rule.\textsuperscript{76}

The Court did not stop there. Refusing to leave any open ends, the next step was to determine how long of a break in \textit{Miranda} custody is sufficient to still meet the suspects constitutional guarantees and dissipate any presumption of coercion.\textsuperscript{77} With very little thought, the Court spit out a number and agreed that a fourteen day break in \textit{Miranda} custody is sufficient.\textsuperscript{78} “That provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.”\textsuperscript{79}

Lastly, the Court was left to determine if sending an inmate back into the prison from which he was retrieved, constitutes a break in custody to

\begin{itemize}
\item \textsuperscript{68} \textit{Id.}
\item \textsuperscript{69} \textit{Id.}
\item \textsuperscript{70} \textit{Id.}
\item \textsuperscript{71} \textit{Shatzer}, 130 S. Ct. at 1218.
\item \textsuperscript{72} \textit{Id.}
\item \textsuperscript{73} \textit{Id.}
\item \textsuperscript{74} \textit{Id.} at 1219–20.
\item \textsuperscript{75} \textit{Id.} at 1220.
\item \textsuperscript{76} \textit{See Shatzer}, 130 S. Ct. at 1219–22.
\item \textsuperscript{77} \textit{Id.} at 1223.
\item \textsuperscript{78} \textit{Id.}
\item \textsuperscript{79} \textit{Id.} \textit{But see} Minnick v. Mississippi, 498 U.S. 146, 156 (1990) (holding that the \textit{Edwards} rule preventing officers from reinitiating questioning with a suspect without counsel present once the suspect has previously requested counsel, exists even after the suspect has had a chance to consult with counsel).}

https://nsuworks.nova.edu/nlr/vol35/iss2/1
allow the Court to apply the newly created fourteen day rule.\textsuperscript{80} The Court went on to draw the connection that an incarcerated inmate now makes his home in the cell he has been assigned and that returning the inmate back to the general population only sends him back to the environment in which he has become most accustomed.\textsuperscript{81} "The majority ruled that a prison sentence was not custody in the relevant sense and that a return to the general prison population after questioning amounted to a break in custody for the purposes of \textit{Miranda} and \textit{Edwards}."\textsuperscript{82} While the dissent agrees in part that perhaps the Court ultimately reached the proper substantive conclusion, it criticizes the fourteen day period established by the majority and argues that the holding ignores the \textit{Edwards} rationale "that custodial interrogation is inherently compelling."\textsuperscript{83} The dissent uses the present facts of this case—"a suspect who is in prison"—to distinguish that a suspect who is returned back to his cell is hardly placed back into a situation where he "returns to his normal life" to the extent that all coercive pressures have been eliminated.\textsuperscript{84}

\textit{Shatzer} was another major limitation to the \textit{Miranda} protections afforded to suspects. The purpose of \textit{Miranda} is to protect a suspect’s constitutional privilege against self incrimination when exposed to inherently compelling pressures\textsuperscript{85} of a police-dominated atmosphere;\textsuperscript{86} pressures which can

\begin{itemize}
    \item \textsuperscript{80} \textit{Shatzer}, 130 S. Ct. at 1224; see also New York v. Quarles, 467 U.S. 649, 655 (1984) (stating \textit{Miranda} custody as "a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest").
    \item \textsuperscript{81} \textit{Shatzer}, 130 S. Ct. at 1224.
    \item Interrogated suspects who have previously been convicted of crime live in prison. When they are released back into the general prison population, they return to their accustomed surroundings and daily routine—they regain the degree of control they had over their lives prior to the interrogation. Sentenced prisoners, in contrast to the \textit{Miranda} paradigm, are not isolated with their accusers. They live among other inmates, guards, and workers, and often can receive visitors and communicate with people on the outside by mail or telephone.
    \item \textit{Id.}
    \item \textsuperscript{83} \textit{Shatzer}, 130 S. Ct. at 1231–32 (Stevens J., concurring) ("The Court ignores these understandings from the \textit{Edwards} line of cases and instead speculates that if a suspect is reinterrogated and eventually talks, it must be that ‘further deliberation in familiar surroundings has caused him to believe (rightly or wrongly) that cooperating with the investigation is in his interest.’").
    \item \textsuperscript{84} \textit{Id.} at 1221, 1232.
    \item A prisoner’s freedom is severely limited, and his entire life remains subject to governmental control. Such an environment is not conducive to "shak[ing] off any residual coercive effects of his prior custody." Nor can a prisoner easily "seek advice from an attorney, family members, and friends," especially not within [fourteen] days: prisoners are frequently subject to restrictions on communications. Nor, in most cases, can he live comfortably knowing that he cannot be badgered by police.
    \item \textit{Id.} at 1232.
    \item \textsuperscript{85} \textit{Miranda} v. Arizona, 384 U.S. 436, 467 (1966).
\end{itemize}
cause an individual to be compelled to speak rather than exercise his own free will. 87 However, Shatzer assumes all coercive pressures placed on an individual expire after fourteen days. 88 This holding expressly permits police to engage in a tactic where, once a suspect invokes his right to counsel, police simply release the suspect, wait fourteen days, and try again hoping this time the suspect is not intelligent enough to invoke his right to counsel, which may not have been provided to him the first time around. 89

C. Berghuis v. Thompkins

Berghuis v. Thompkins is the most recent Supreme Court of the United States case concerning Miranda warnings and arguably the most damaging to Miranda’s protection of a suspect’s Fifth Amendment rights. 90 The defendant, Thompkins, was arrested for suspicion of murder, placed in a small interrogation room, and made to sit in a make-shift school desk. 91 The officers handling the investigation then read Thompkins his Miranda rights, which he refused to sign. 92 The officer then proceeded to attempt to interrogate Thompkins for the next three hours. 93 Thompkins remained silent during the interrogation with the exception of “a few limited verbal responses.” 94 After nearly three hours, the officer asked Thompkins, “Do you believe in God?” 95 This question finally elicited a response from Thompkins who replied “Yes” as he began to cry. 96 He was then asked if he prayed to God, which he again replied, “Yes.” 97 The next question was, “Do you pray to God to forgive you for shooting that boy down?” to which Thompkins defeatly replied, “Yes.” 98 Thompkins refused to make a written confession,

86. Id. at 456.
87. Id. at 467.
88. Shatzer, 130 S. Ct. at 1223.
89. Id.
90. Barnes, supra note 6.
92. Id. (“[S]ign[ing] the form [would] demonstrate that [Thompkins] understood his rights.”). Cf: United States v. Plugh, 576 F.3d 135, 142 (2d Cir. 2009) (refusing to sign a waiver form is an unequivocal assertion that the suspect is not willing to waive his rights).
93. Berghuis, 130 S. Ct. at 2256.
94. Id. Thompkins remained silent during the interrogation, with the exception of declining a peppermint and making a comment “that the chair he was sitting in was hard.” Id. at 2256–57 (citation omitted) (internal quotation marks omitted).
95. Id. at 2257.
96. Id.
97. Berghuis, 130 S. Ct. at 2257.
98. Id. at 2258.
and the interrogation ended 15 minutes later. His limited responses were used to convict him. The issue for the Court was "whether an invocation of the right to remain silent can be ambiguous or equivocal." This requires a look as to whether Thompkins invoked his right to remain silent and whether he waived his right to remain silent.

1. Invoking the Right to Remain Silent

The Supreme Court has never specifically addressed the steps required of a suspect to invoke the right to remain silent. The ultimate precedent regarding the right to remain silent has always been Miranda, which states that when a suspect "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent . . . the interrogation must cease." Davis v. United States addressed the issue of whether an ambiguous or unequivocal statement could trigger Miranda protection. But, the Court did so in relation to an ambiguous request or invocation of the right to counsel subsequent to a valid express waiver. The Court held that after a suspect has waived his Miranda rights, the suspect may invoke his right to counsel only by making an unambiguous, unequivocal statement requesting counsel; otherwise, police are not required to honor the request or seek clarification. Davis expressly waived his rights under Miranda and then suggested that "maybe [he] should talk to a lawyer" during the interrogation. This statement was not sufficient to equate to an invocation of the right to counsel.

Unlike a request for counsel, an invocation of the right to remain silent does prevent the police from attempting to interrogate the suspect again after a period of time has elapsed. Nevertheless, other courts have still applied

99. Id. at 2257.
100. Id. at 2256.
101. Id. at 2260.
102. Berghuis, 130. S. Ct. at 2258.
103. Id. at 2260.
106. Id. at 456.
107. See id. at 455.
108. Id. at 459.
109. Id. at 455.
the *Davis* rule to the right to remain silent, although providing very little explanation on its reasons for doing so. Other courts have provided that *Davis* applies only when there is a request for counsel subsequent to a valid waiver. The *Davis* rule merely requires that a suspect clarify his desire to revive a privilege that has already been waived.

The Court in *Berghuis* rejected the argument that remaining silent was an invocation of the right, finding it to be unpersuasive. It chose to rely on *Davis* and treat the *Miranda* right to counsel exactly the same as the *Miranda* right to silence. The Court stated that requiring an express and unambiguous invocation of the right to remain silent creates an objective test and makes proving the voluntariness of a confession easier. The Court shifted the focus of the analysis from the individual suspect’s constitutional rights and placed an overriding importance on the burden society would face in prosecuting criminals. Two hours and forty-five minutes of silence was not enough for the Court to conclude that Thompkins wanted to remain silent during the interrogation and invoke his rights.

2. Waiving the Right to Remain Silent

The prosecution bears the high standard and heavy burden of proving a defendant knowingly, intelligently, and voluntarily waived his rights. The

112. See United States v. Plugh, 576 F.3d 135, 143 (2d Cir. 2009) ("*Davis* only provides guidance . . . [when] a defendant makes a claim that he subsequently invoked previously waived Fifth Amendment rights."); United States v. Rodriguez, 518 F.3d 1072, 1074 (9th Cir. 2008) ("[T]he 'clear statement' rule of *Davis* applies only after the police have already obtained [such a waiver], . . . however, an officer must clarify the meaning of an ambiguous or equivocal response to the *Miranda* warning before proceeding with general interrogation.") (emphasis omitted); State v. Holloway, 760 A.2d 223, 228 (Me. 2000) (declining to extend *Davis* to require a suspect to unambiguously invoke his rights when there has not been a prior waiver); State v. Tuttle, 650 N.W.2d 20, 28 (S.D. 2002) ("*Davis*, in sum, applies to an equivocal postwaiver invocation of rights."); State v. Leyva, 951 P.2d 738, 743 (Utah 1997) ("[The requirement . . . that an officer limit his questioning to clarifying a suspect’s ambiguous or equivocal statement must be limited to prewaiver scenarios.").
115. *Id.*
116. *Id.* at 2254.
117. *Id.*
118. *Id.* at 2258–59.
defendant must fully know "the nature of the right being abandoned and the consequences of the decision to abandon it." Miranda illustrated the range of the spectrum when attempting to discern the validity of a waiver as follows:

An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.121

North Carolina v. Butler122 appropriately held that the language in Miranda should not be read to require a per se rule that only an express waiver is sufficient to illustrate a waiver. Butler allowed for an implicit waiver based on "the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating a waiver."123 But a waiver shall not be presumed from a suspect's silence even if the suspect eventually confesses.124 In Butler, the defendant refused to sign the waiver, but he expressly agreed to talk to the interrogating officer.125 The determinative factor thus turns on whether the defendant understands his rights and the consequences of his actions.126 However, if a suspect does express his desire to remain silent, a statement made thereafter may be admissible as a subsequent waiver of the right if the suspect's right to cut off questioning was scrupulously

120. Moran v. Burbine, 475 U.S. 412, 421 (1986) (noting that waiver must also be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception").
121. Miranda, 384 U.S. at 475.
123. Id. at 375.
124. Id. at 373.
125. Id.
126. Id. at 371. But see Colorado v. Connelly, 479 U.S. 157, 167 (1986) (holding that the "voluntariness" of a waiver of the right to remain silent depends on the absence of an over-reaching police probe and that a mentally ill defendant may waive his rights as long as there is no police coercion).
127. Berghuis v. Thompkins, 130 S. Ct. 2250, 2262 (2010). "The prosecution must make the additional showing that the accused understood these rights." Id. at 2261; see also Colorado v. Spring, 479 U.S. 564, 574 (1987) ("The Miranda warnings ensure that a waiver of these rights is knowing and intelligent by requiring that the suspect be fully advised of this constitutional privilege, including the critical advice that whatever he chooses to say may be used as evidence against him."); Connecticut v. Barrett, 479 U.S. 523, 530 (1987) (rejecting defendant’s argument upon a finding that he understood the consequences of making incriminating statements).
honored. This requires an examination into the amount of time between interrogations, the subject matter of the second interrogation, whether a new *Miranda* warning was given, and the degree to which police officer pursued further interrogation.

In *Berghuis*, the Court relied on the fact that Thompkins “could read and understand English” and knew “that police would have to honor his right to be silent . . . during the whole course of the interrogation” in concluding that he understood he was waiving his rights when he made the incriminating statement. The Court concluded by stating broadly that “[w]here the prosecution shows that a *Miranda* warning was given and that it was understood [an] uncoerced statement establishes an implied waiver of the right to remain silent.” In this case, the Court held Thompkins had not invoked his right to remain silent and cut off questioning and subsequently made a valid waiver of his right to remain silent by voluntarily making a statement, three hours into the interrogation.

V. DOES *BERGHUIS* OVERRULE *MIRANDA*?

A. Arguing Against *Berghuis*

The *Berghuis* decision is claimed to have “turn[ed] *Miranda* upside down.” Even Justice Sotomayor, who is a former prosecutor herself and knows the difficult task police face during interrogations, has been one of the decision’s biggest critics. The crucial facts in the case are that Thompkins refused to sign a waiver showing he understood his rights and then sat in almost complete silence for nearly three hours before making an incriminating statement. Critics argue this was not sufficient to convince the Court that Thompkins had invoked his right to remain silent and that he had not made a knowing and intelligent waiver of rights.

129. *See id.* at 104, 106 (allowing police to attempt to reinitiate questioning with a suspect who has invoked his right to silence, after two hours).
130. *Berghuis*, 130 S. Ct. at 2262.
131. *Id.*
132. *Id.* at 2262-63.
133. *Id.* at 2278 (Sotomayor, J., dissenting).
134. Barnes, *supra* note 6 (“[S]ome had speculated [Sotomayor] might be less protective of the rights of suspects than other [justices] . . . .”)
135. *Berghuis*, 130 S. Ct. at 2266 (Sotomayor, J., dissenting).
136. *Id.* at 2266-67, 2269; *see also* State v. Rossignol, 627 A.2d 524, 526-27 (Me. 1993) (holding that suspect had invoked right to remain silent by sitting in silence for twenty minutes).
The prosecution bears a heavy burden of demonstrating a knowing and intelligent waiver. This burden is intensified when a confession is given after a lengthy interrogation. Miranda stops just short of declaring a presumption of coercion, but courts must still presume that a suspect "did not waive his rights." If the Court properly applied Miranda it would clearly show the prosecution failed to satisfy its heavy burden. The words "yes," "yes" and "yes" were the only evidence presented to show Thompkins understood he was waiving his rights. The decision shifts the burden to the suspect to invoke his rights rather than keeping the burden on the police to obtain a valid waiver and relinquishment of rights. Previously, a suspect's rights were intact from the moment he walked into the interrogation room, and the burden was on the police to obtain a waiver. Now, a suspect must be aware of how to invoke his rights before he enters the interrogation room. Once a suspect has been read and understands his Miranda rights, anything he does after that, short of expressly stating that he wants to invoke his right to remain silent, will constitute a waiver.

The Court's application of the "clear invocation rule" announced in Davis to the right to remain silent creates an illogical irony that is "unlikely to convey that [a suspect] must speak" let alone speak in a particular manner. A "statement" is necessary for invoking the right to counsel because "there is no other way to invoke that right." A suspect cannot express that he wants a lawyer unless he states at least some variation of "I want a lawyer." Berghuis though, uses the act of keeping quiet and remaining silent to indi-

138. See id. at 476.
140. Berghuis, 130 S. Ct. at 2268–70 (Sotomayor, J., dissenting).
141. Id. at 2271.
142. See Barnes, supra note 6.
143. Id.
144. See id.
145. Berghuis, 130 S. Ct. at 2271 (Sotomayor, J., dissenting).
146. Id. at 2276.
148. Id.
cate a willingness to talk. 149 Logically, it follows that one manner in which a suspect may indicate that he wishes to remain silent is to remain silent. 150 Remaining silent “could be deemed the ultimate invocation.” 151 The suspect is indicating what he wants to do as he is doing it. 152 The central goal of Miranda—“ensuring that a suspect makes a free choice to speak to the police”—is compromised by the fact that Berghuis now forces a suspect to talk to police, or risk waiving his rights. 153 In essence, the decision compels a suspect to engage in conversation with the police while misinforming the suspect of his right to silence.

Regardless of whether remaining silent is considered an invocation of rights, the Berghuis decision erases the Miranda requirement that a suspect be “clearly informed” and that interrogation must cease when the suspect “indicates in any manner” his desire to remain silent. 154 Surely, the requirement of informing a suspect that he has the right to remain silent is left undisturbed, but this is no longer sufficient to clearly inform the suspect of all his rights. 155 The Miranda warnings give no hint as to the Court’s new clear invocation rule. 156 Just as easily as a suspect may make a clearly unambiguous statement that he wishes to remain silent, the officer can just as easily ask the suspect for clarification. Requiring an officer to ask for clarification when a suspect makes an ambiguous statement is currently not required but still considered good police practice. 157 A suspect who is unaware of how to invoke his rights is unaware of his rights and is no longer clearly informed. A suspect who must clearly state that he would like to remain silent—as the only means of invoking his right to remain silent—can no longer indicate his desire to do so “in any manner” as Miranda so valiantly advocated.

B. Arguing in Support of Berghuis

Some experts agree with Berghuis mainly because they remain indifferent on the decision and question the actual effect, if any, that the decision

151. Strauss, supra note 111, at 792.
152. Id.
153. Id. at 775.
155. Liptak, supra note 38.
157. Strauss, supra note 111, at 783–84.
will even have on current practice. Police are still required to inform a suspect of his Miranda warnings and ask him if he understands his rights. But now, police no longer need to conduct any follow up questions. "If a criminal suspect is informed of his Miranda rights and understands these rights, the suspect can remain silent to any questioning or instead can expressly invoke the right to remain silent." Miranda has been eroding since its inception, and this is just another case delaying its inevitable extinction. The Court did not take away a suspect’s right to remain silent or privilege against self incrimination. Post-Miranda silence still cannot be used against a suspect, and the suspect will continue to be questioned until he has invoked his rights. The decision is rather one of common sense. Where the dissent urges that silence demonstrates an unwillingness to talk, others argue it only demonstrates a willingness to be questioned. Besides, it is human nature to speak when attempting to clearly articulate an intention, and rarely does a suspect ever indicate his unwillingness to talk in a manner other than expressly stating so. As a result, the decision only affects an extreme minority of cases, and the human rights advocates may be exaggerating the effects of the decision.

Taking a more cynical approach, Miranda rights are violated constantly during interrogation, and the defense can seldom win the argument when going against a police officer’s word. Miranda was supposed to put a serious restraint on law enforcement’s ability to interrogate a suspect, but nearly eighty percent of suspects still agree to talk with police after receiving the Miranda warning. Miranda is no longer viewed as a formidable obstacle to police interrogations. Even police training and procedural manuals en-

---

159. Id.
160. Id.
162. Graham, supra note 158.
164. Chapman, supra note 149.
165. Graham, supra note 158.
166. Id.
167. Id.
courage police to begin the interrogation only after the suspect has demonstrated a willingness to cooperate and to take precautions with suspects where the Court does not require them to do so.\textsuperscript{169} The bottom line is if a suspect feels he wants to talk, he will, and if he does not want to talk, he will say so.\textsuperscript{170}

Others point to the flaws of \textit{Miranda} to illustrate the need for change, any change. Problems arising from \textit{Miranda} stem from the complete lack of uniformity in procedures and enforcement across jurisdictions.\textsuperscript{171} A uniform rule should advance the underlying goal of the Self-Incrimination Clause by “protecting the rights of suspects to both non-coercive and constitutionally-informed interrogation.”\textsuperscript{172} Congress no longer has authority to overrule \textit{Miranda}, and the power lies now with the Supreme Court.\textsuperscript{173} But, the flaws in \textit{Miranda} are evidenced by the countless exceptions and loopholes that have been created through case law.\textsuperscript{174}

Supporters have focused their arguments on criticizing \textit{Miranda} and its broad protections rather than supporting the logic of the \textit{Berghuis} decision, referring to \textit{Miranda} as “an artificial rule” created under the guise of the liberal Warren Court.\textsuperscript{175} \textit{Miranda} debates have created unnecessary costs, efforts, and confusion among law enforcement and defendants alike.\textsuperscript{176} \textit{Berghuis} relies heavily on the voluntariness of the statement and the absence of any evidence of police coercion.\textsuperscript{177} A voluntariness approach steers away from artificial rules created forty years ago and draws closer towards the actual words of the Constitution in “that no person shall be compelled to be a witness against himself” in a criminal case.\textsuperscript{178} But until uniformity exists, the goal of achieving constitutionally and legally effective interrogation to convict criminals while ensuring they are informed of their rights cannot be reached.\textsuperscript{179} For now, \textit{Berghuis} reasonably provided much needed aid to po-
lice and "recognize[d] the 'practical realities that the police face in dealing with suspects.""\textsuperscript{180}

It is clear that Miranda tried to achieve uniformity by striking a balance between protecting a defendant's constitutional rights and providing law enforcement with strict guidelines for police to follow.\textsuperscript{181} In theory this seemed ideal. But we have seen how in some circumstances it is counter-productive to let a criminal go free due to a technical deficiency in Miranda, as demonstrated by the numerous exceptions to Miranda.\textsuperscript{182} Miranda thus created its own contradiction by preaching its constitutional protection and its need in any custodial interrogation and then creating exceptions when Miranda does not appear to be as important.\textsuperscript{183} Miranda began as a procedural tool to protect a suspect from the pressure of custodial interrogation.\textsuperscript{184} But it has since been casted into a limited and unintended role serving only "to insure the admissibility of post-waiver statements."\textsuperscript{185}

It makes more sense to place the burden on a suspect and require the suspect to invoke his rights.\textsuperscript{186} The only burden for the prosecution is to convince the court that the statements given by the suspect were not compelled and that Miranda warnings were issued.\textsuperscript{187} Courts only require this to be proven by a preponderance of the evidence standard rather than the harsher, more difficult burden of clear and convincing.\textsuperscript{188} But the prosecution does not also bear the burden of convincing the court that the defendant made a wise decision by waiving the defendant's rights.\textsuperscript{189} The Constitution itself does not even require police officers to coach a suspect and ensure that a suspect makes a constitutionally informed decision. Some even argue that the Constitution requires nothing more than a mere recitation of the Fifth Amendment and that "the statement should be admissible as long as it is not compelled."\textsuperscript{190} Ignorance of the law is not a defense although this entails

\begin{footnotes}
\item 180. Barnes, \textit{supra} note 6.
\item 183. Cassell & Litt, \textit{supra} note 34, at 1173.
\item 184. Berger, \textit{supra} note 168, at 1063.
\item 185. \textit{Id}.
\item 186. Liptak, \textit{supra} note 38.
\item 187. Brief Amicus Curiae of the Criminal Justice Legal Found. at 12, Berghuis v. Thompsons, 130 S. Ct. 2250 (2010) (No. 08-1470) [hereinafter Brief Supporting Petitioner].
\item 189. Brief Supporting Petitioner, \textit{supra} note 187, at 11–12.
\item 190. Liptak, \textit{supra} note 38.
\end{footnotes}
possible infringement on an individual's due process rights. Ignorance of the Constitution should follow, and an argument that a suspect did not know the extent of his rights should not be a defense absent evidence of police coercion. Besides, informing the suspect of his right to counsel expressly provides the suspect with an opportunity to seek assistance from someone acting in the suspect's benefit. It is an unlikely scenario to envision a suspect knowingly and expressly waiving his right to silence and invoking his right to counsel or invoking his right to counsel, but expressly waiving his right to silence. Both options provide the same rights to the individual to cease the interrogation upon command. The difference is in how much leeway the police are afforded to re-question the suspect. The result of *Berghuis* is that police will no longer have to guess what the suspect is thinking when he sits in silence, having understood his rights, but choosing neither to waive them nor invoke them.

VI. CRITIQUE

The discussion here is not whether *Miranda* is a constitutional requirement or whether it is the only sufficient method of ensuring constitutional rights. The discussion here is whether *Miranda* remains intact in light of the Supreme Court's decision in *Berghuis*. In this respect, the answer appears to be a definitive "no." The Supreme Court created an even greater confusion by stating that the four *Miranda* warnings are still required, but ignoring the essential principles and underlying reasons for the warnings—to clearly inform the suspect of his rights so that a suspect cannot argue, at least in theory, a violation of the privilege against self incrimination. The problem in *Berghuis* is that the Court severed core aspects of *Miranda* while claiming it remains intact and leaving little guidance on how police should apply the decision. What remained was a muddled opinion, chalk full of confusing logic, that would make at least four scholarly Supreme Court Justices scratch their heads.

It was only when Thompkins' case reached the Supreme Court that he was informed of the need to expressly and explicitly invoke his right to remain silent. If *Miranda* 's requirement that a suspect be clearly informed of his rights during the interrogation still exists, this assumes that Thompkins was fully aware that an express statement was required to invoke his rights. It ignores the possibility that perhaps he thought he was invoking his right to

“remain” silent by remaining silent. The Court then states that Thompkins three one-word responses at the end of a three-hour interrogation demonstrated a voluntary waiver of rights.\textsuperscript{193} This assumes that Thompkins had a sudden change of heart and decided to cooperate. It ignores the possibility that perhaps, realizing that sitting in silence was not going to stop the interrogation and his rights were not being honored, his will broke and he succumbed to the pressures exerted by the police. The same principles \textit{Miranda} applied in reaching its conclusion were blatantly ignored by \textit{Berghuis}.

Since its decision, \textit{Miranda} placed a heavy burden on police to prove there was a waiver, citing the need to protect the individual from incriminating himself. \textit{Berghuis} alludes to a greater need to protect police from having to make judgments in the field and risk having a confession suppressed as the reasoning for developing a clear cut objective test as the standard of proof.\textsuperscript{194} This clearly shifts the focus of the protection to the police and ignores the notion that “clear” and “unambiguous” remains a subjective inquiry. The objective test makes voluntariness easier to prove for police, and it ignores whether the confession was actually voluntary. It looks only to whether the defendant specifically stated his desire to remain silent. In the most basic form, the distinction between \textit{Miranda} and \textit{Berghuis} is clear. \textit{Miranda} protects the defendant, and \textit{Berghuis} protects the police. \textit{Miranda} announces defendants’ rights as the ultimate importance in a confession case and takes the defendant’s side when faced with ambiguity. \textit{Berghuis} stands for the complete opposite and renounces defendants’ rights. The decision sides with the police when faced with ambiguity.

\textit{Berghuis} concludes that “full comprehension of the right to remain silent . . . [is] sufficient to dispel whatever coercion is inherent in the interrogation process.”\textsuperscript{195} True or not, this assumes that a suspect who is told that he has the right to remain silent understands this to mean that he must first express and unambiguously state he would to like to remain silent, before continuing to remain silent. Without an additional instruction by the interrogating officer, the \textit{Miranda} warning, as it stands, no longer protects the individual’s Fifth Amendment rights, nor clearly informs him of such rights. The fact is, telling a suspect that anything he says can be held against him can reasonably lead to a suspect incorrectly thinking that verbally stating he would like to remain silent may be used against him as incriminating evidence and using his refusal to talk as evidence of guilt.

\textsuperscript{193} Id. at 2271.
\textsuperscript{194} Id. at 2260.
\textsuperscript{195} Id. (quoting Moran v. Burbine, 475 U.S. 412, 427 (1985)).
“Voluntariness” cannot be substituted for “clearly informed” while remaining loyal to Miranda. Miranda requires that they both be met in a sequence. A suspect must be clearly informed of his rights—given a proper Miranda warning—and then must voluntarily, knowingly, and intelligently choose whether to waive those rights. It is impossible for a suspect to make such a decision when he has only been partially informed of his rights. A suspect, who is told he has the right to remain silent, but not told how to invoke that right, is left a sitting duck for police to question for countless hours. Ironically, the first step to keep Miranda intact is to change the warning that has become part of our society. Informing a suspect of the right to remain silent no longer satisfies the clearly informed standard. At the very least, Miranda must now inform the suspect of how to invoke his rights. Specifically, the warning must tell the suspect he has to expressly state that he wants to invoke his right to remain silent. Unless the Supreme Court is willing to adopt similar changes, Miranda hangs in the balance.196

If the Supreme Court had only specifically stated it was overruling many, if not all, of the Miranda principals it could have avoided many of the critics’ arguments. It is well established that the Supreme Court has the power to overrule its own decisions, and it does so all the time. Of course, many critics would have focused their arguments stating this could not happen because Miranda is embedded in our Constitution. But again, there is nothing that restricts the Court from overruling its own ruling so long as it abides by the Constitution. The Constitution does not require for warnings or that a suspect is clearly informed of his rights; it only requires that no suspect be compelled to be a witness against himself. It could be argued that a mere reading of the Fifth Amendment is sufficient to inform the suspect of his rights. The binding precedent for what is or is not constitutional begins first and foremost with the Constitution itself, not the Miranda opinion. Consequently, the power to make this judgment rests squarely on the Supreme Court. However, the Court owes it to everyone who is not sitting on the bench to clarify the path it seeks to take.

196. See id. at 2271–72 (Sotomayor, J., dissenting).

At best, the Court today creates an unworkable and conflicting set of presumptions that will undermine Miranda’s goal of providing “concrete constitutional guidelines for law enforcement agencies and courts to follow.” . . . At worst, it overrules [silently] an essential aspect of the protections Miranda has long provided for the constitutional guarantee against self-incrimination.

Berghuis, 130 S. Ct. at 2271–72 (Sotomayor, J., dissenting) (citation omitted).
VII. CONCLUSION

The Supreme Court appears to have left Miranda on life-support and is changing the face of criminal procedure at an alarming rate. The next case to come to the Supreme Court on this issue could very well be the last of Miranda. Whether Miranda remains the best balance protecting constitutional rights and providing concrete guidelines for enforcement is a matter of opinion. But a rule drawing as much criticism as it has support must be questioned. There is rarely, if ever, a case that satisfies everyone, but what can be respected is consistency and uniformity. By reversing the lower court’s ruling in Berghuis without expressing where Miranda stands, the Court has only created more confusion. Berghuis stands for the complete opposite of Miranda and trying to make them exist together is as illogical as requiring a suspect to speak to remain silent.

If Miranda is to remain alive, the Court has two options. The Court may erase the Berghuis decision or modify the Miranda warning to eliminate any argument that a suspect was not clearly informed of his right. If the Court wants to require an express invocation of rights, it should require an express instruction on the rights. Both options seem unlikely in light of the Supreme Court’s consistent trend toward deferential police treatment. There is not enough room atop the criminal procedure pedestal for both of these landmark cases. Right now it appears the Supreme Court has grown old with Miranda and is looking for a change. But until the Court specifically overrules or addresses the inconsistencies discussed in this article, confusion will continue to grow in the legal community. Every defendant will cite Miranda in his brief and the prosecution will cite Berghuis. It remains to be seen which case the presiding Court will accept. After creating such a stir by requiring a suspect to clearly and unambiguously express his intent to invoke his rights, the Court could at least follow suit, and clearly and unambiguously explain to us all what to make of Miranda now.
VIRTUAL ADOPTION: THE INEQUITIES OF THE EQUITABLE DOCTRINE

JAIME P. WEISSER*

I. INTRODUCTION .......................................................... 550

II. ADOPTION: FROM LEGAL ADOPTION TO VIRTUAL ADOPTION ........ 553
   A. Specific Performance of an Agreement to Adopt: The Contract Theory .................................................. 556
   B. Detrimental Reliance on an Agreement to Adopt: The Estoppel Theory .................................................. 559

III. OTHER STATES AND VIRTUAL ADOPTION .......................... 561
   A. Uniquely Divergent Cultures Necessitate Virtual Adoption: Calista Corp. v. Mann ........................................ 561
   B. Adoption by Estoppel at Work: Luna v. Estate of Rodriguez .. 562
   C. Virtual Adoption Compels the Imposition of Child Support Obligations: Johnson v. Johnson .................... 563
   D. The Inequities of a Testate Estate: In re Estate of Seader ...... 565

IV. FLORIDA AND VIRTUAL ADOPTION ................................ 567
   A. Florida Invokes the Doctrine of Virtual Adoption: The Case of Sheffield v. Barry ..................................... 568
   B. The Doctrine Begins to Take Shape: Laney v. Roberts ....... 569
   C. Virtual Adoption and Florida’s Homestead Provision: Williams v. Dorrell .............................................. 570
   D. The Inequities of the Equitable Doctrine .......................... 570
      1. A Contract to Adopt is Insufficient .......................... 570
      2. “Enough” Is Not Enough ........................................... 573

V. VIRTUAL ADOPTION OUTSIDE OF PROBATE COURT .......... 574
   A. Florida Fails to Follow Suit: Inconsistencies Lead to an Inequitable Doctrine ........................................... 576
   B. Expanding the Doctrine ............................................. 578

* Jaime P. Weisser will receive her J.D. from Nova Southeastern University, Shepard Broad Law Center, in May 2012. Jaime received a Bachelor’s of Science from the University of Florida, with a Major in Journalism and Communications and a Minor in Anthropology. Jaime would like to thank The Honorable Mark A. Speiser, Circuit Judge in the Seventeenth Judicial Circuit in and for Broward County, Florida, for his guidance and assistance in selecting the topic for this article, as well as his continued support in the research and development of the text. She would also like to thank the entire staff of Nova Law Review for their dedication and skill in editing the article. Most importantly, Jaime would like to thank her family for their never-ending patience, motivation, and encouragement, without which, this article could not have come together.
American society has long recognized the importance and value of an individual's right to acquire, control, and transfer private property. As a general rule, an individual not only has the ultimate control over such property with regard to gifts made during the person's lifetime, but also in the case of disposition of the individual's property upon his or her death.

When a person dies, there are generally three ways with which to distribute the decedent's remaining personal property. First, the decedent can die testate, that is, with a will. When a person dies testate, he or she is free to devise property to, or disinherit, whomever he or she sees fit, without being bound by stringent rules mandating who can, and who cannot, inherit from the decedent. This testamentary freedom allows the decedent to determine exactly who the intended beneficiaries of his or her will should be, including individuals or classes of people who are not related to the decedent by marriage, blood, or otherwise. Second, the decedent can die with a will substitute, such as a revocable inter vivos trust, or life insurance. Lastly, the decedent can die intestate, that is, without a valid will. When a decedent dies intestate, there is neither a testamentary inheritance nor disinheriance, so it is difficult to ascertain the proper method of distributing his or her property. As a result, an intestate decedent's property will be distributed according to the governing state's intestacy statutes.

Intestacy statutes may vary from state to state, but as a general rule, intestacy statutes attempt to fill the intent gap and distribute property "in accordance with the probable intent of the average intestate decedent." Thus,
most intestacy statutes provide a default distributive scheme that decedents would be likely to follow if they had provided for the distribution of their own estates. Typically, such statutes distribute the decedent’s property first to the decedent’s surviving spouse, and then to the decedent’s surviving children, if any, and then to more remote descendants. That being said, because intestate succession is primarily a creation of statutory law, it is important to recognize the difference in treatment between persons authorized to inherit under the laws of intestate succession and those who are not recognized whatsoever.

Generally, intestacy statutes are explicit in providing children with the right to inherit from an intestate parent. What is not clear, however, is the meaning of “child” according to the statutory language and the bounds of the parent-child relationship necessary to establish the right to intestate succession. For example, while “child” is generally understood to refer to the “natural relationship based upon biological reproduction,” a child could also be someone who was legally adopted by the decedent or even someone who was not legally adopted by the decedent, but nonetheless maintained a parent-child relationship with the decedent. Accordingly, differentiating between the proper meaning of “child” within intestacy statutes will always be the determining factor in deciding whether a child is entitled to a share of an intestate decedent’s estate.

A biological child will always be entitled to inherit from an intestate decedent, as will a child who was formally legally adopted by the decedent. As to the third scenario, however, in which the child was cared for, supported by, and educated by the decedent, and maintained a parent-child relationship with the decedent, it is unclear whether the child will be entitled to inherit from the intestate decedent when no formal adoption proceedings have been completed. Such is the case in a virtual adoption.

A virtual adoption occurs when a child was supposed to be legally adopted but his or her adoptive parents failed to satisfy the legal requirements of a formal adoption. It is an equitable doctrine which generally arises when the would-be adoptive parent dies intestate, and it operates to

12. Id. at 380–81.
13. Id. at 381.
15. Tritt, supra note 1, at 381.
allow the virtually adopted child to inherit from the intestate decedent. 19
Thus, while the Uniform Probate Code is the ultimate authority on inheritance in the case of an intestacy proceeding, virtual adoption is the well-recognized exception to the statutory scheme. 20 Be that as it may, the enforcement of the doctrine of virtual adoption has yet to be applied consistently throughout the courts in this country. 21

Employing principles of equity and public policy, probate courts have come to recognize the necessity, legitimacy, and application of virtual adoption in intestacy proceedings. 22 However, with the steady increase in the divorce rate 23 and the rapid changes in “traditional” family life, 24 the doctrine is quickly spreading to other areas of law and is no longer limited to probate matters. 25 Nonetheless, there remain inconsistencies in its application and the appropriate circumstances in which courts can invoke the doctrine to provide relief for virtually adopted children. 26 As a result, virtual adoption should no longer be looked at under limited, narrow circumstances, but should instead be broadened to prevent unfair results for virtually adopted children, just as the doctrine was intended to do.

This article will discuss the equitable doctrine of virtual adoption and the need for, and implications of, expanding the doctrine outside of probate

19. E.g., Miller, 591 So. 2d at 322.
20. See Johnson, 617 N.W.2d at 111.
21. See generally Tarver v. Evergreen Sod Farms, Inc., 533 So. 2d 765 (Fla. 1988) (holding that a virtual adoption is not sufficient where the decedent is killed in an industrial accident and the virtually adopted child seeks compensation under the Workers’ Compensation Act); Grant v. Sedco Corp., 364 So. 2d 774 (Fla. 2d Dist. Ct. App. 1978) (holding that virtual adoption does not apply to a minor child, who is neither the biological child nor legally adopted child of the decedent, in the case of wrongful death). But see Johnson, 617 N.W.2d at 111 (holding that virtual adoption does apply to child support obligations).
25. See Johnson, 617 N.W.2d at 108 (holding that public policy protects the welfare and best interests of children, and that “child support guidelines do not preclude the imposition of a child support obligation on one who has equitably adopted a child”). The court held:
Applying the doctrine of equitable adoption to impose a child support obligation, when the circumstances of the case require it, fully comports with this public policy. . . . Nothing in the law of [North Dakota] bars application of the doctrine in the context of a child support obligation. First, the existence of statutory adoption procedures does not forbid the proposed application of the doctrine. . . . Rather, our adoption statutes and the doctrine of equitable adoption coexist, operating side by side to promote the best interests of the child.
Id. at 105.
26. See Tarver, 533 So. 2d at 765. But see Johnson, 617 N.W.2d at 97.
court. The first section will outline the evolution from formal legal adoptions to the equitable virtual adoption, as well as highlighting the differences in the rights and responsibilities of the respective parties. The second section of the article will begin by discussing the history and reasoning behind the doctrine, including the two theories upon which virtual adoption is based. The third section will analyze each of the theories through a discussion of the application of virtual adoption in other United States jurisdictions, with careful attention to the specific facts of each case in which the doctrine was invoked or struck down. The fourth section will analyze virtual adoption through a discussion of the application of the doctrine in Florida, specifically focusing on the differences between Florida and the aforementioned jurisdictions. The fifth section will discuss the major flaws in the application of virtual adoption thus far and why virtual adoption is not just a probate issue anymore. Throughout this article’s entirety, it should become clear why the doctrine should be expanded to areas of the law outside of probate court, should be recognized by state legislatures, and should be given more weight in today’s society in order to afford virtually adopted children the protection and justice they deserve.

II. ADOPTION: FROM LEGAL ADOPTION TO VIRTUAL ADOPTION

More than 2.1 million adopted children live in the United States.27 According to the 2000 U.S. Census Bureau, more than 100,000 adopted children live in Florida alone.28 With such a vast number of children being adopted yearly, it is no surprise that the legal rights of adopted children have become exceedingly uncertain.29

Adoption is purely statutory in origin, as it was not recognized at common law.30 Being purely statutory, the state has a “compelling interest” in finding stable, permanent homes for adoptive children.31 Moreover, courts consider the adoptive child’s best interest to be of utmost importance with regard to specific findings in adoption proceedings.32 Thus, the statutes

28. Id. at 4.
29. See, e.g., Tarver, 533 So. 2d at 767 (holding that virtual adoption would not warrant relief in a worker’s compensation proceeding). But see Johnson, 617 N.W.2d at 105 (holding that virtual adoption would warrant relief in a divorce proceeding, obliging the adoptive father to continue paying child support).
31. FLA. STAT. § 63.022(1)(a) (2009).
32. Id. § 63.022(2).
which govern adoption are designed to ensure certainty and to protect adoptive children from being adopted by "unsuitable persons."

Adoption is defined as the "establishment or creation of a legal relationship of parent and child between persons who were not so related by nature or law." When a child has been legally adopted, the child's relationship with his or her natural parents is deemed terminated, and the child becomes the legal equivalent of the biological child of his or her adoptive parents. As such, the adoptive child is also entitled to the legal rights otherwise conferred upon biological children, including acquiring the status of being the adoptive parent's "legal heir." Thus, the adopted child has all the rights and responsibilities that a biological child would have, as an adopted child and biological child are often regarded as one in the same. It therefore follows that the adopted child is entitled under the statutes of intestate succession to the property of his or her adoptive parents. Thus, in theory and in practice, the adopted child is considered both a descendant of the adopting parent and one of the natural kindred of the adopting parent's family.

Although adoption has become more commonplace in today's society than in decades past, the necessary steps to "legally" adopt a child have become more extensive and demanding. The dynamic of the "typical" American family is rapidly evolving as well. Many Americans have differing views of what an "adoptive" or "step" parent-child relationship entails, as well as differing views on whether a formal adoption is deemed acceptable within a particular cultural group. As a result, virtual adoptions are "more common among some cultural groups than others, as people differ widely in the way they view family relationships and the process of adoption."

Virtual adoption is an equitable remedy that is most often invoked to protect someone "who was supposed to have been adopted as a child" but who was not legally adopted because his or her parents failed to complete the

35. In re Estate of Seader, 76 P.3d at 1239. Similarly, Florida defines adoption as "the act of creating the legal relationship between parent and child where it did not exist." Fla. Stat. § 63.032(2) (2010).
36. See In re Estate of Seader, 76 P.3d at 1239.
37. Id.
38. Fla. Stat. § 731.201(20). Property is defined as "both real and personal property or any interest in it and anything that may be the subject of ownership." Id. § 731.201(32).
39. Id. § 732.108(1).
40. See Bell, supra note 24, at 418 ("The issues involved in virtual adoption become increasingly complex as family structures evolve to encompass relationships forming from divorce, remarriage, and extended households . . . .").
42. Id.
steps necessary to establish a formal adoption. The doctrine was not created as a means to supplement the legal relationship between a parent and child. Nor does the application of the doctrine change the status of a virtually adopted child to that of a legally adopted child. Instead, the primary function of virtual adoption is limited to allow a virtually adopted child to inherit from an adoptive parent who dies intestate. Courts reason that when an adoptive parent dies without a will, "there was neither a testamentary inheritance nor a testamentary disinheritance." Accordingly, courts view the doctrine as the appropriate means with which to fill the "intent 'gap' by allowing the child to inherit as if he or she had been adopted." Further, although the majority of states recognize virtual adoption, the doctrine remains narrowly tailored and is often invoked exclusively in courts of equity in order to prevent "inequitable and unjust" results stemming from intestacy statutes.

In its most basic form, virtual adoption can be established when a decedent has expressly agreed to adopt a child, there was reliance on the agreement by the child or the child's natural parents, and the decedent treated the child as his or her own. Thus, when an intestate decedent's intent to raise the child was unambiguous, a court of equity would invoke the doctrine of virtual adoption so as to carry out the intent of the decedent to adopt and provide for the child.

Where a decedent's intent is ambiguous, however, courts face difficult challenges in invoking the doctrine. As a result, a fundamental prerequisite of virtual adoption is that there is some type of agreement between the natural and adoptive parents, be it oral or written. When an express agreement has been made and relied upon, a court is more likely to treat a child as though he or she was virtually adopted, thus allowing the child to inherit

44. See Williams v. Dorrell, 714 So. 2d 574, 575 (Fla. 3d Dist. Ct. App. 1998).
46. In re Estate of Seader, 76 P.3d at 1240.
47. Id. at 1245.
48. Id.
49. See id. at 1241.
51. E.g., Kelley v. Flagship Nat'l Bank of Boynton Beach (In re Estate of Wall), 502 So. 2d 531, 531 (Fla. 4th Dist. Ct. App. 1987).
54. Bell, supra note 24, at 419; Estate of Ford, 82 P.3d at 754; Johnson v. Johnson, 617 N.W.2d 97, 108 (N.D. 2000).
from the decedent's estate. However, while an agreement is necessary to establish virtual adoption, it is not sufficient. Courts weigh several factors in order to determine if a virtual adoption has taken place.

To establish virtual adoption, a court of equity will employ one of two theories. Under the contract theory, a court will order specific performance of an agreement to adopt when the child can prove that there has been reliance on the agreement to adopt and partial performance by the decedent in parenting the adoptive child. Under the estoppel theory, the decedent's estate will be precluded from denying that a child was adopted, effectively prohibiting the party from preventing the child from inheriting under intestacy statutes. Whichever theory a court applies, however, the authorities concur that the application of the doctrine of virtual adoption will invariably produce the same results.

A. Specific Performance of an Agreement to Adopt: The Contract Theory

When a court grants equitable relief to a child based on the contract theory, the court is merely enforcing an agreement to adopt between a child's natural and adoptive parents. The object is that when an adoptive parent acts as a promisor who agrees to raise and legally adopt a child, and there has been part performance by the parties, courts will order specific performance of the prior agreement to adopt.

By its definition, specific performance calls for "[t]he rendering, as nearly as practicable, of a promised performance through a judgment or decree." Thus, when a court orders specific performance of an agreement to adopt, it appears as though the court is ordering an adoptive parent to complete the necessary steps to legally adopt the child. However, because a claim of virtual adoption does not come to fruition until after an adoptive parent has died intestate, requiring the decedent to complete a formal adop-
tion is impossible. As a result, virtual adoption cases that rely on the contract theory often enforce specific performance based on the parties' part performance of the agreement to adopt. Thus, although problems often arise when a court orders specific performance, the ultimate goal of the contract theory is to alleviate these problems and provide justice and equity for the child.

The contract theory is founded on the idea that because adoptive parents have entered into an oral or written contract to adopt the child, granting a claim of virtual adoption is best achieved through specific performance. However, while the majority of states recognize virtual adoption, the standards of proof are vague, and the requirements differ between the jurisdictions which have invoked the doctrine. Nonetheless, although these elements may vary slightly across state lines, courts in every jurisdiction have consistently held that in order to enforce specific performance of a contract, the claimant must first establish an express agreement to adopt.

In Poole v. Burnett (In re Heirs of Hodge), Florida's Fifth District Court of Appeal held that a claim of virtual adoption would grant a child an enforceable contract right, pursuant to the satisfaction of five elements. The court determined that the five elements required to establish virtual adoption include:

1. an agreement between the natural and adoptive parents;
2. performance by the natural parents of the child in giving up custody;
3. performance by the child by living in the home of the adoptive parents;

66. Id.
67. See id.
68. See id.
70. Bell, supra note 24, at 418.
71. Id.
72. Id. at 425. A rule calling for the analysis of the parties' overall relationship would be vague and subjective. Bean v. Ford (Estate of Ford) 82 P.3d 747, 753 (Cal. 2004). Instead, courts look to the "particular expressions of intent to adopt," id., and generally require the existence of the parties' "mutual intent to create a legal relationship." Johnson v. Johnson, 617 N.W.2d 97, 108 (N.D. 2000).
73. 470 So. 2d 740 (Fla. 5th Dist. Ct. App. 1985).
74. Id. at 741.
4. partial performance by the foster parents in taking the child into the home and treating the child as their child; and

5. intestacy of the foster parents.\textsuperscript{75}

“Sufficient evidence” was the governing standard to prove an agreement to adopt,\textsuperscript{76} but the majority of courts now require that the claimant prove the aforementioned elements by “clear and convincing evidence.”\textsuperscript{77} However, because virtual adoption is meant to carry out the decedent’s intent to adopt a child, a mutually affectionate relationship, absent any direct agreement to adopt the child, is inherently insufficient to determine the decedent’s intent.\textsuperscript{78} Thus, courts generally permit the decedent’s intent to enter into a contract and adopt the claimant to be shown by a bevy of expressions, including:

- Proof of an unperformed express agreement or promise to adopt.
- Other acts or statements directly showing that the decedent intended the child to be, or to be treated as, a legally adopted child.
- The decedent’s statement of his or her intent to adopt the child, or the decedent’s representation to the claimant or to the community at large that the claimant was the decedent’s natural or legally adopted child.\textsuperscript{79}

In determining whether there is evidence of an agreement to adopt, be it direct or indirect, courts look at the parties’ objective manifestations, reasoning that the secret intentions of the parties are irrelevant.\textsuperscript{80} Further, while an agreement is necessary to create and enforce a contract, contracts also require consideration to be valid and binding.\textsuperscript{81} That being said, however, consideration is difficult to ascertain in a claim for virtual adoption:\textsuperscript{82}

- The status of the child is unclear. Is the child a third-party beneficiary of the contract, or is the child a party to the agreement? . . .
- The notion that the child is a third-party beneficiary of the con-

\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{78} Bean v. Ford (Estate of Ford), 82 P.3d 747, 753 (Cal. 2004).
\textsuperscript{79} Id. at 754.
\textsuperscript{80} Johnson v. Johnson, 617 N.W.2d 97, 108 (N.D. 2000); Estate of Ford, 82 P.3d at 754.
\textsuperscript{81} Johnson, 617 N.W.2d at 101.
\textsuperscript{82} Robinson, supra note 69, at 956.
tract is belied by the fact that he or she provides part of the “con-
sideration” that makes the contract enforceable, that is, living with
the equitably adoptive parents as their child.\textsuperscript{83}

For this reason, upon proof of an unambiguous agreement, courts will
then look at the parties’ performance of the contract in order to determine
whether it should be enforced in equity.\textsuperscript{84} Thus, where an unambiguous con-
tract is proven, both to adopt the child and to allow the child to inherit,\textsuperscript{85} and
the contract is supported by valid and adequate consideration, the contract
will be enforced and the child will be treated as though he or she were legally
adopted for certain limited purposes.\textsuperscript{86}

\textbf{B. Detrimental Reliance on an Agreement to Adopt: The Estoppel Theory}

Like the contract theory, virtual adoption based on the estoppel theory is
also an equitable remedy that grants relief to the claimant when a statutory
adoption is incomplete, notwithstanding a prior agreement to adopt.\textsuperscript{87} Also
like the contract theory, some proof of an agreement to adopt is required.\textsuperscript{88}
However, unlike the contract theory, the estoppel theory rests on the notion
that a court will uphold a child’s adoptive status when the child and the de-
cedent maintained “a relationship consistent with that of [a biological] parent
and child.”\textsuperscript{89} Thus, when the claimant can prove “1) an agreement to adopt,
2) performance by the child, and 3) the child’s reliance on the agreement or
belief in [his or her] adoptive status,” then the claimant will be entitled to
equitable relief based on adoption by estoppel.\textsuperscript{90}

With the estoppel theory, what you see is what you get: as the name
implies, the theory places less emphasis on specific, delineated requirements,
and instead focuses on equity and justice.\textsuperscript{91} Therefore, when a child has re-
lied upon representations by the decedent as to the child’s adoptive status,
the estoppel theory will grant the child the right to inherit from the dece-
dent’s estate, despite the child’s adoptive status. In *Calista Corp. v. Mann*, the court held:

> Where one takes a child into his home as his own, thereby voluntarily assuming the status of parent, and by reason thereof obtains from the child the love, affection, companionship, and services which ordinarily accrue to a parent, he is thereafter estopped to assert that he did not adopt the child in the manner provided by law.

Equity rests on the notion that “equity regards as done what ought to have been done.” In granting relief under the estoppel theory, courts generally focus on the nature of the relationship between the decedent and the child. When the statements, admissions, and conduct of the decedent are such that they provide ample proof of an agreement to adopt, it is within the court’s discretion to infer such an agreement from that evidence. Thus, while a court may insist on proof of an express agreement to adopt, it is not necessary because “equity [will nonetheless] estop[] the foster parent and his privies from denying the relationship they represented to the child.” Therefore, with or without an express agreement to adopt, where the parties acted in good faith under the impression that the child was adopted, the decedent’s estate will be estopped from preventing the child from inheriting from the intestate decedent.

---

92. See, e.g., id. at 426 (“Reliance provides the grounds for promissory estoppel, which is applied as an equitable remedy when justice requires.”).
94. *Id.* at 61 (quoting *Mize v. Sims*, 516 S.W.2d 561, 564 (Mo. Ct. App. 1974)).
96. *E.g.*, *id.* at 426.
97. *Calista Corp.*, 564 P.2d at 61.
99. *See id.* But *see* Otero v. City of Albuquerque, 965 P.2d 354, 361 (N.M. Ct. App. 1998) (“[T]he equitably adopted child should not be treated as the legal child of the equitable parent for all purposes. Only one who has detrimentally relied can claim an estoppel, and only one who has caused the reliance can be estopped.”) (citations omitted).
III. OTHER STATES AND VIRTUAL ADOPTION

The majority of states will grant equitable relief for a virtually adopted child in one form or another. Of at least thirty-eight jurisdictions that have considered the doctrine, no less than twenty-seven have recognized and upheld a claim of virtual adoption in intestate proceedings. However, although the doctrine is generally invoked in limited circumstances, several courts have broadened the doctrine and applied it in unique situations in order to avoid the unjust results of strict adherence to the law. Likewise, a handful of jurisdictions have upheld claims of virtual adoption in legal proceedings outside the realm of probate court.

A. Uniquely Divergent Cultures Necessitate Virtual Adoption: Calista Corp. v. Mann

In 1977, the Supreme Court of Alaska held that the doctrine of virtual adoption is an appropriate remedy in intestate proceedings. In Calista Corp., a case of first impression in Alaska, the claimants were the adoptive daughters of shareholders of Calista Corp., and each sought the shares of the corporation that they claimed to be entitled to under the Alaskan laws of intestate succession. In order to inherit through the intestacy statutes, Alaska required that the claimants qualified as “issue” of the decedents, meaning “lineal descendants of all generations, with the relationship of parent and child at each generation.” However, neither of the claimants were the biological children of the decedents; instead, the girls claimed that they were “culturally” or “traditionally” adopted by the deceased shareholders.

100. Sanderson v. Bathrick (In re Estate of Seader), 76 P.3d 1236, 1241 (Wyo. 2003) (stating that “[t]he majority of states recognize equitable adoption”).


102. See, e.g., Calista Corp., 564 P.2d at 61 (holding that the unique cultural mosaic of the Alaskan community justified the recognition of a virtual adoption claim); Luna v. Estate of Rodriguez, 906 S.W.2d 576, 579 (Tex. App. 1995) (applying a less stringent standard with which to find that the claimant was the virtually adopted son of the decedent).

103. See, e.g., Johnson v. Johnson, 617 N.W.2d 97, 104 (N.D. 2000) (holding that virtual adoption applies to child support obligations).


105. Id. at 54–55. In Calista Corp., there were two claimants: Katie Mann, who was seeking shares of Calista Corporation and Sea Lion Corporation stock, and Catherine Peters, who was seeking shares of Calista Corporation and Bethel Native Corporation stock. Id. at 55.

106. Id. at 59 (emphasis omitted).

107. Id.
The appellant took the position that adoption, unknown at common law, is purely statutory and that it must be "affirmatively proved by the person claiming its existence." The appellant argued that the laws of Alaska "provide[d] the exclusive method for adoption" and, therefore, that the claimants were not the children of the decedents for purposes of intestate property distribution. Despite this argument, however, the appellant's reasoning was flawed because he ignored the holdings from the twenty-six states that had recognized virtual adoption and instead relied on the decisions from the eight states that refused to recognize the doctrine.

Nonetheless, the court agreed with the claimants and held that equity would be employed to avoid hardship to the child of an intestate decedent, even if there was no valid legal adoption. The court analyzed the diversity of cultures in Alaska and reasoned that the "cultural mosaic" of the Alaskan community made it difficult to achieve "a unified justice system sensitive to the needs of the various cultures." Accordingly, the court held that the unique makeup of the native Alaskan community called for the implementation of the doctrine of virtual adoption in order to avoid unjust and intolerable results to the adoptive children of intestate decedents.

B. Adoption by Estoppel at Work: Luna v. Estate of Rodriguez

In Luna v. Estate of Rodriguez, the appellate court in Texas held that equity requires a decree of adoption by estoppel when there is convincing evidence of the necessary elements to establish a cause of action for a virtual adoption by estoppel. In Luna, Christopher Luna, the claimant, was the biological son of Mary Helen Luna and the alleged adoptive son of the decedent, Henry Rodriguez. When the decedent died intestate, Christopher attempted to determine his heirship, alleging his status to be that of the dece-

---

108. Calista Corp., 564 P.2d at 60 (quoting In re Bradley, 6 Alaska 89, 91 (1918)).
109. Id. at 59–60.
110. See id. at 60.
111. See id. at 61–62.
112. Id. at 61.
114. 906 S.W.2d 576 (Tex. App. 1995).
115. Id. at 581.
116. Id. at 578. Mary Helen had been awarded custody of Christopher when she divorced Christopher's biological father, Alfred Luna. Id. Although Alfred's parental rights were never terminated, Christopher alleged that he had a distant relationship with his biological father and that his natural father had abandoned him. Id. Christopher also claimed that he was "reared, cared for, and clothed" by the decedent, that he referred to the decedent as "dad," and that he was known in the community as the decedent's son. Luna, 906 S.W.2d at 578.
dent's equitably adopted son.\textsuperscript{117} However, when Christopher filed his application for declaration of heirship, he was met with opposition from the decedent's brother and second wife.\textsuperscript{118} The trial court agreed with the defendants, holding that Christopher failed to allege certain required elements of virtual adoption, but the court of appeals ultimately reversed that decision.\textsuperscript{119}

To establish adoption by estoppel, there must be “clear, unequivocal, and convincing evidence” of an agreement to adopt, coupled with performance by the child in reliance on that agreement.\textsuperscript{120} However, in Luna, the appellate court reassessed the requisite elements to establish adoption by estoppel and reversed the trial court, holding that proof of an agreement can be shown by “circumstantial evidence.”\textsuperscript{121} The court also held that the agreement can be made “with the child, the child’s parents, or someone in loco parentis.”\textsuperscript{122} Thus, where the child’s natural parent has abandoned the child, an agreement with the other natural parent is satisfactory to prove that an agreement to adopt has taken place.\textsuperscript{123} Looking at the record, the court determined that an agreement to adopt did take place between the decedent and the claimant’s mother, and that the claimant relied on that agreement “by conferring love, affection, companionship, and other benefits” to the decedent.\textsuperscript{124} In the end, the court employed a lower standard to prove adoption by estoppel, determined that Christopher’s application for heirship did allege the essential elements of virtual adoption by estoppel, and reversed the decision of the trial court.\textsuperscript{125}

C. Virtual Adoption Compels the Imposition of Child Support Obligations: Johnson v. Johnson

When a child is the center of a legal proceeding, the court will look to fulfill the best interests of the child and make decisions which both reflect and enhance the child’s well-being.\textsuperscript{126} In Johnson v. Johnson,\textsuperscript{127} the Supreme

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{117} Id.
\item \textsuperscript{118} Id.
\item \textsuperscript{119} Id. at 578, 583.
\item \textsuperscript{120} Id. at 581. A child who acts in reliance on an agreement does not necessarily act in reliance “on an agreement to adopt or on representations about adoptive status,” but rather he acts in reliance on his belief in his “status” as an adopted child. Luna, 906 S.W.2d at 581.
\item \textsuperscript{121} Id.
\item \textsuperscript{122} Id. Loco parentis is defined as “[s]upervision of a young adult by an administrative body such as a university.” Black’s Law Dictionary 858 (9th ed. 2009).
\item \textsuperscript{123} Luna, 906 S.W.2d at 581.
\item \textsuperscript{124} Id. at 582.
\item \textsuperscript{125} See id.
\item \textsuperscript{126} See Johnson v. Johnson, 617 N.W.2d 97, 105 (N.D. 2000).
\end{itemize}
\end{footnotesize}
Court of North Dakota employed this line of reasoning and refused to restrict the application of virtual adoption, holding that the facts and circumstances of the case warranted the imposition of child support on the virtually adopted child’s father.\textsuperscript{128}

In \textit{Johnson}, Madonna and Antonyio Johnson acted as Jessica’s natural parents since she was three months old, and they led her to believe that she was their child for all intents and purposes.\textsuperscript{129} For example,

\begin{quote}
Antonyio listed Jessica as his dependent on his federal tax returns. The Air Force listed Jessica as Antonyio’s dependent daughter on his transfer orders and for medical benefits, placing her under his social security number. . . . [T]he Johnsons consistently called her Jessica Johnson. Jessica was baptized in Antonyio’s family’s church in Georgia . . . .\textsuperscript{130}
\end{quote}

Thus, although they never formally adopted her, the Johnsons instituted adoption proceedings in two different states and regularly maintained that Jessica was their daughter.\textsuperscript{131} However, when the Johnsons later divorced, there was some debate as to Jessica’s adoptive status and, accordingly, Madonna’s right to child support from Antonyio.\textsuperscript{132} The trial court ruled in favor of Antonyio, determining that he was not obligated to pay child support; however, when Madonna later appealed the decision, the court looked at the relationship of Jessica and Antonyio and reversed that decision.\textsuperscript{133}

The Supreme Court of North Dakota noted that a contract to adopt is necessary to establish virtual adoption in inheritance proceedings, but it is not sufficient in the domestic context.\textsuperscript{134} Courts generally require more direct evidence supporting the notion that there is a true parent-child relationship between the parties.\textsuperscript{135} Here, the court likened Jessica and Antonyio’s relationship to that of a stepparent and stepchild, but determined that the contract to adopt Jessica took the case outside the realm of normal stepparent-stepchild obligations.\textsuperscript{136} The court reasoned that in a normal stepparent-stepchild relationship,

\begin{itemize}
\item \textsuperscript{127} 617 N.W.2d 97 (N.D. 2000).
\item \textsuperscript{128} Id. at 105.
\item \textsuperscript{129} Id. at 100.
\item \textsuperscript{130} Id.
\item \textsuperscript{131} Id. at 100.
\item \textsuperscript{132} \textit{Johnson}, 617 N.W.2d at 101.
\item \textsuperscript{133} Id.
\item \textsuperscript{134} Id. at 108–09.
\item \textsuperscript{135} See id. at 109.
\item \textsuperscript{136} Id. at 107–08.
\end{itemize}
the child is aware that the stepparent is just that, the spouse of the child's natural parent. . . . [But] [i]n the case at bar, Antonyio and Madonna led Jessica to believe she was their natural child . . . . [T]he parties engaged in an elaborate fiction, which is not a part of the normal stepparent-stepchild relationship. . . .

Thus, although there was a contract to adopt Jessica, the court also looked at the nature of the relationship between Jessica and Antonyio.138

The court ultimately determined that Jessica and Antonyio’s relationship was comparable with that of a true parent and child, and therefore justified the imposition of Antonyio’s child support obligations as Jessica’s adoptive father.139 The court reasoned that statutory adoption and virtual adoption coexist and that North Dakota’s public policy required the “protection of the welfare and best interests of children.”140 Moreover, looking at the “increased prevalence of blended families in [today’s] society,” the court held that constraining the application of virtual adoption to inheritance proceedings would be “detrimental” to virtually adopted children.141

D. The Inequities of a Testate Estate: In re Estate of Seader

It is well settled that virtual adoption is an equitable doctrine that is generally limited to intestacy proceedings.142 However, Sanderson v. Bathrick (In re Estate of Seader)143 challenged this long-standing principle when the decedent’s grandsons sought to inherit their mother’s share of the decedent’s estate, as it was devised to their mother in the decedent’s will.144

The claimants, Kim and Kirk Olive, were the biological children of Julie, the virtually adopted daughter of the decedent.145 In his will, the decedent left one-third of his estate to Julie and the remaining interest to his two biological sons.146 However, Julie died before the decedent, and the other

137. Johnson, 617 N.W.2d at 107–08.
138. See id. at 109.
139. Id. In its decision, the court noted that North Dakota precedent justified the recognition of virtual adoption in the context of child support and child custody. Id. at 105. Further, although virtual adoption had previously been applied primarily to inheritance proceedings, the court found that the State’s child support guidelines did not prohibit the imposition of child support obligations on a parent who has virtually adopted a child. See id. at 108.
140. Johnson, 617 N.W.2d at 105.
141. Id. at 107.
143. 76 P.3d 1236 (Wyo. 2003).
144. Id. at 1237–38.
145. Id. at 1238.
146. Id.
beneficiaries of the estate challenged Kim and Kirk’s ability to inherit their mother’s share of her adoptive father’s estate. The decedent’s biological sons argued that Julie’s share had lapsed, prohibiting her sons from inheriting her share, and that Julie’s share therefore was to be divided between her brothers. However, according to Wyoming statutes, whether or not Julie’s share had lapsed would be contingent upon the court finding Julie to be a “lineal descendent” of the decedent’s grandparent. The court ultimately determined that Julie was not the collateral relative or lineal descendent of the decedent, either biologically or through legal adoption, and therefore did not qualify as a lineal descendent under the statute.

When a decedent dies testate, the court is to fulfill the decedent’s intent as it is laid out in the terms of the will. Thus, although Julie was not legally adopted by the decedent, she was nonetheless entitled to a portion of his estate as per the terms of his will. Notwithstanding Julie’s right to inheritance, however, the court ultimately concluded that the statute was unambiguous and could not be applied to an equitable doctrine in order to “broaden the class of persons identified by the statute.” Accordingly, because Julie was not a lineal descendent of the decedent, her biological children could not invoke the doctrine of virtual adoption to a testate estate in order to inherit their mother’s share of the estate.

147. Id.
148. See In re Estate of Seader, 76 P.3d at 1245.
149. Id. The court held: The phrase “lineal descendent” is not defined in the statute. The word “lineal” connotes “a direct blood relative,” and “lineal descent” indicates “[d]escent in a direct or straight line, as from father or grandfather to son or grandson.” “Lineal descent” is contrasted with “collateral descent,” which refers to “descent in a collateral or oblique line, from brother to brother or cousin to cousin. With collateral descent, the donor and donee are related through a common ancestor.

Id. (citations omitted).
150. Id.
151. See id.
152. See In re Estate of Seader, 76 P.3d at 1245 (holding that equitable adoption is the judicial remedy for an intent “gap” when the decedent dies intestate, but that a decedent who dies testate avoids judicial intervention since “there is no gap to be filled. We know the decedent’s intent from the terms of the will.”).
153. Id. “This case serves as a good example of why the doctrine of equitable adoption should not be applied to testate estates—the result may negate both legislative and testamentary intent.” Id. at 1245–46.
154. See id. at 1245.
IV. FLORIDA AND VIRTUAL ADOPTION

Every court that considers a claim for virtual adoption adheres closely to the equitable maxim "equity regards that as done which ought to have been done." In theory, the doctrine serves to promote fairness and justice and seeks to protect children who were not formally or legally adopted according to statutory requirements. The doctrine was originally intended to allow children of intestate decedents to inherit as though the children were legally adopted. However, because virtual adoption is an equitable remedy, many courts have broadened the doctrine and applied it in other areas of the law as well. These courts reason that despite a child's adoptive status, the child should nonetheless be put in the same position as though he or she were naturally born or formally adopted.

The state of Florida first recognized the doctrine of virtual adoption in 1943, but the Supreme Court of Florida stopped short of setting forth any definitive requirements to establish the doctrine or circumstances that would render the application of the doctrine appropriate. Instead, the court relied on case law from other jurisdictions and applied a broad standard with which to determine that the claimant was entitled to equitable relief.

Although Florida did not set the precedent for virtual adoption cases, the doctrine has evolved in the almost seventy years that it has been recognized in Florida. Be that as it may, Florida courts have yet to follow their out-of-state counterparts in granting equitable relief to virtually adopted children outside of probate court. Thus, while other jurisdictions have

---

156. Warner, supra note 62, at 583. For a discussion of the statutory elements, see pages 557–59, supra.
157. E.g., Sheffield, 14 So. 2d at 419–20.
158. See, e.g., Williams v. Dorrell, 714 So. 2d 574, 576 (Fla. 3d Dist. Ct. App. 1998) (holding that the virtually adopted child of the decedent was considered an "heir" and therefore entitled to the decedent's property as per Florida's homestead provision); Johnson v. Johnson, 617 N.W.2d 97, 109 (N.D. 2000) (holding that virtual adoption applies to child support obligations).
159. See, e.g., Johnson, 617 N.W.2d at 108.
160. See Sheffield, 14 So. 2d at 419–20.
161. See Part IV(A), infra.
162. Warner, supra note 62, at 584.
163. See Miller v. Paczier, 591 So. 2d 321, 322 (Fla. 3d Dist. Ct. App. 1991) (per curiam) (holding that virtual adoption does not warrant compensation in the case of a virtually adopted adult); Grant v. Sedeco Corp., 364 So. 2d 774, 774–5 (Fla. 2d Dist. Ct. App. 1978) (holding that virtual adoption does not warrant compensation in the case of a wrongful death); Tarver
recognized the rights of virtually adopted children in cases regarding child support obligations and child custody, Florida courts consistently limit the doctrine to intestacy proceedings. As a result, many children in Florida continue to suffer from the injustice that the equitable doctrine of virtual adoption was intended to counteract.

A. Florida Invokes the Doctrine of Virtual Adoption: The Case of Sheffield v. Barry

In the landmark case *Sheffield v. Barry*, the Supreme Court of Florida held that an oral contract to adopt would be an enforceable contract right where there was "performance on the one part and partial performance on the other." In *Sheffield*, the child's natural mother and adoptive parents agreed that the latter would assume all parental rights of the child, but the adoptive father died intestate before finalizing the child's formal adoption. Thus, although the child had no adequate remedy at law, the court relied upon precedent from other jurisdictions and held that the child was nonetheless entitled to equitable relief.

In *Sheffield*, it was unclear whether the agreement to adopt was oral or written, but the court held that such a distinction would be negligible in a case of virtual adoption. Instead, the court focused on the relationship between the child and the decedent in order to determine the child's rights to the decedent's estate. The court reasoned that although the decedent failed to legally adopt the child, the partial performance of his parental obligations...
gave the child an enforceable contract right, ultimately allowing her to inherit from his estate. In the end, the court applied basic theories of contract law, holding that the child was entitled to specific performance of the agreement to adopt between the child's natural mother and adoptive parents.

B. The Doctrine Begins to Take Shape: Laney v. Roberts

In 1982, Florida's Third District Court of Appeal held that a virtual adoption had taken place, despite the fact that the claimant knew she was not legally adopted. In Laney v. Roberts, the claimant's biological parents entered into an agreement with the Merickels, the child's aunt and uncle, which stipulated that the Merickels were to adopt, raise, and educate the child to the best of their ability. Accordingly, when Mary Irene (Irene) began living with the Merickels in 1932, she renounced all ties with her biological parents and referred to her aunt and uncle as "mother and dad." Moreover, Irene considered the Merickels to be her parents and lived with them until she got married.

When Mrs. Merickel died, however, Irene was prevented from inheriting from her estate. The trial court held that Irene was not the legally or virtually adopted daughter of the decedent, as evidenced by the fact that she signed her marriage certificate with her birth name, and not the decedent's last name. Nonetheless, taking this isolated incident into consideration, the court determined that "[s]uch paltry evidence" was insufficient to overcome the breadth of evidence establishing Irene's adoptive status.

On appeal, the court applied the reasoning employed in Sheffield and held that specific performance of an agreement to adopt would be granted when the last surviving foster parent dies intestate. Thus, in spite of the fact that Irene did not learn of the agreement between her parents and the

172. Id.
173. See id. (holding that the child should be entitled to the rights of the estate that she would have had, had her adoption been legalized).
175. 409 So. 2d 201 (Fla. 3d Dist. Ct. App. 1982).
176. Id. at 202.
177. Id. at 201–02.
178. See id. at 202.
179. Id. at 202–03. Mr. Merickel died intestate in 1979 and Mrs. Merickel died intestate later that year. Laney, 409 So. 2d at 202. Irene later brought an action against the co-personal representatives of Mrs. Merickel's estate claiming that she had been virtually adopted by the Merickels, but the trial court disagreed. Id. at 202–03.
180. See id. at 203.
181. Id.
182. See id. at 203.
Merickels until Mrs. Merickel’s death, the court determined that she had established the elements of virtual adoption by clear and convincing evidence. The court reasoned that Irene’s performance was “satisfied by living in the home of the [Merickels]” and that her lack of knowledge of the agreement was therefore irrelevant.

C. Virtual Adoption and Florida’s Homestead Provision: Williams v. Dorrell

Florida’s homestead provision provides, in pertinent part, that a decedent’s property is exempt from a court-ordered sale of the property and that the exemption “shall inure to the surviving spouse or heirs of the owner.” Under Florida law, the term “heirs” is defined as “those persons who are entitled under the statutes of intestate succession to the property of a decedent.” However, in order to determine legal heirs for the purpose of intestate succession of real or personal property, Florida’s homestead provision applies a loose interpretation of Florida’s intestacy statutes.

In Williams v. Dorrell, Florida’s Third District Court of Appeal held that a virtually adopted child constituted an “heir” for the purpose of Florida’s homestead provision. The court determined that the claimant satisfied the requisite elements necessary to establish that she was the virtually adopted daughter of the decedent. As such, the court held that Florida’s homestead provision extended to include a virtually adopted child, and the claimant was therefore entitled to an interest in the decedent’s property.

D. The Inequities of the Equitable Doctrine

1. A Contract to Adopt Is Insufficient

A claim of virtual adoption invariably begins with an agreement to adopt. Thus, when a claimant can establish that there is direct evidence of

183. Laney, 409 So. 2d at 203.
184. Id.
185. Williams v. Dorrell, 714 So. 2d 574, 576 (Fla. 3d Dist. Ct. App. 1998) (quoting FLA. CONST. art X, § 4(b)).
186. FLA. STAT. § 731.201(20) (2010).
187. Williams, 714 So. 2d at 576.
188. 714 So. 2d 574 (Fla. 3d Dist. Ct. App. 1998).
189. Id. at 576.
190. Id. at 575.
191. Id. at 576.
VIRTUAL ADOPTION

an oral or written contract providing for the child’s adoption, courts are more inclined to continue with a virtual adoption analysis. Nevertheless, even if a claimant can prove the elements of virtual adoption by clear and convincing evidence, courts are still reluctant to expand the doctrine beyond its conventional reach.

In *Grant v. Sedco,* Mikel Marks was raised by the decedent pursuant to an agreement between the decedent and Marks’ biological mother. Although he was never legally adopted, Marks was the decedent’s child in the traditional sense. However, when the decedent died in an automobile accident, Marks was denied compensation for his adoptive mother’s death.

The court recognized that Marks was the virtually adopted son of the decedent for all intents and purposes, but nonetheless held that virtual adoption would not warrant relief in the case of wrongful death. The court reasoned that a virtual adoption provides an equitable remedy through the enforcement of a contract right but that it does not create the relationship of a parent and child. Accordingly, the court concluded that the Florida Wrongful Death Act would not grant relief to a minor child that is neither the natural or legally adopted child of the decedent.

Ten years later, the Supreme Court of Florida relied on the arguments set forth in *Grant* and ruled that a virtual adoption would not warrant relief in the case of a worker’s compensation proceeding. In *Tarver v. Evergreen Sod Farms, Inc.,* the court ultimately held that a virtual adoption was not akin to a legal adoption, despite the fact that the elements of virtual adoption

---

193. *See, e.g., id.*
194. *See generally* Tarver v. Evergreen Sod Farms, Inc., 533 So. 2d 765, 767 (Fla. 1988) (holding that a virtual adoption is not sufficient where the decedent is killed in an industrial accident and the virtually adopted child seeks compensation under the Workers’ Compensation Act); Grant v. Sedco Corp., 364 So. 2d 774, 775 (Fla. 2d Dist. Ct. App. 1978) (holding that virtual adoption does not apply to a minor child, who is neither the biological child nor legally adopted child of the decedent, in the case of wrongful death). *But see* Johnson v. Johnson, 617 N.W.2d 97, 105 (N.D. 2000) (holding that virtual adoption applies to child support obligations).
195. 364 So. 2d 774 (Fla. 2d Dist. Ct. App. 1978).
196. *Id.* at 774.
197. *See id.*
198. *Id.*
199. *See id.* at 775 ("Although the limitations upon recovery by an equitably adopted child might seem harsh, the Florida Wrongful Death Act does not compensate all those aggrieved by the death of another. It only compensates some and in certain ways.").
200. *Grant,* 364 So. 2d at 775.
201. *Id.*
203. 533 So. 2d 765 (Fla. 1988).
had been satisfied. The court reasoned that the doctrine of virtual adoption is intended to avoid unfair results stemming from intestacy statutes, and it is not to be utilized before the death of an adoptive parent. The court concluded that the worker's compensation statute was unambiguous and, accordingly, refused to extend the doctrine of virtual adoption to a worker's compensation claim.

In 1991, Florida's Third District Court of Appeal again denied the petitioner, the virtually adopted son of the decedent, the relief that he sought. In Miller v. Paczier, Florida's Third District Court of Appeal held that a claim of virtual adoption, while a valid and well-recognized exception to the Florida Probate Code, is not applicable when the claimant is an adult. In Miller, the claimant was the decedent's adult nephew who asserted that he was entitled to the decedent's estate as the decedent's adopted son and not as the decedent's nephew. Focusing on the nature of the relationship between the claimant and the decedent, it was evident that the two had developed a stronger bond than that of a typical nephew and aunt or uncle. Notwithstanding his adoptive status, however, the court declined to extend the doctrine to virtually adopted adults. The court reasoned that expanding the doctrine "beyond the purpose for which it was conceived [would] open the door of the probate courts to fraudulent and frivolous claims."

204. Id. at 767.
205. Id.
206. Id. Under the worker's compensation statute, "'Child' includes a posthumous child, a child legally adopted prior to the injury of the employee, and a stepchild or acknowledged illegitimate child dependent upon the deceased." Id. at 766 (quoting FLA. STAT. § 440.02(5) (1988)). The court held that a virtual adoption "[did] not create the legal relationship of parent and child within the meaning of 'legal adoption' as required in the workers' compensation statute." Tarver, 533 So. 2d at 767.
208. 591 So. 2d 321 (Fla. 3d Dist. Ct. App. 1991) (per curiam).
209. Id. at 322.
210. Id. at 322. The court proffered:

[The claimant] alleges that during his adulthood, he developed a close relationship with his aunt and uncle, to the point that they regarded him as a son. He contends that this close relationship gave rise to an implied contract to adopt him and that he should take an intestate share as a son, rather than the smaller share he would receive as a nephew.

Id.
211. Id.
212. Miller, 591 So. 2d at 322–23.
213. Id. at 323.
2. “Enough” Is Not Enough

Since 1943, Florida courts have honored and enforced an oral or written agreement to adopt when a virtually adopted child’s parent dies intestate. In *Sheffield*, Florida’s seminal virtual adoption case, the court recognized a claim for virtual adoption, but the court’s decision did little to develop the doctrine. It was not until 1985 that Florida’s Fifth District Court of Appeal set forth the essential elements required to establish virtual adoption.

In order to determine that a claimant has been virtually adopted, he or she must prove the necessary elements to establish that an adoption has taken place. When a claimant cannot establish all five elements by clear and convincing evidence, however, a court will not grant the claimant the relief that he or she seeks.

In *Urick v. McFarland*, Florida’s Second District Court of Appeal held that without an agreement to adopt, satisfaction of the remaining elements of virtual adoption would not suffice. In *Urick*, George Urick lived with his mother and the decedent in the same capacity as that of a traditional family, and Urick maintained a true parent-child relationship with the decedent. Further, although the decedent never adopted him, “Mr. Urick accepted [the decedent] as his ‘dad,’ and [the decedent] treated Mr. Urick like a

---

215. Sheffield v. Barry, 14 So. 2d 417 (Fla. 1943) (en banc).
217. *In re Heirs of Hodge*, 470 So. 2d at 741.
219. See, e.g., Douglass v. Frazier (*In re Estate of Musil*), 965 So. 2d 1157, 1161 (Fla. 2d Dist. Ct. App. 2007) (“Despite the failure of proof on the fourth element, the probate court found—based on equitable principles—that a virtual adoption had occurred. Here, the probate court fell into error.”); Urick v. McFarland, 625 So. 2d 1253, 1254 (Fla. 2d Dist. Ct. App. 1993) (“Although [the claimant] proved all remaining elements of [virtual adoption], without proof of the agreement he cannot prevail.”).
220. 625 So. 2d at 1253 (Fla. 2d Dist. Ct. App. 1993).
221. Id. at 1254.
222. Id. at 1253–54. George Urick’s biological parents got divorced when he was three years old, but Urick continued to live with his father until he was fifteen. Id. at 1253. When Urick’s biological father died, however, Urick began living with his mother and the decedent. Id. at 1253. Although the decedent never adopted Urick, they maintained the relationship of a father and son. *Urick*, 625 So. 2d at 1254.
When the decedent died, however, Urick was not entitled to any of the decedent's estate. The court reasoned that although Urick had "fulfilled the responsibilities that usually befall a son," Urick had nonetheless failed to prove an agreement to adopt between the decedent and Urick's natural parents. Consequently, despite Urick's proof of all of the remaining elements of virtual adoption, the court held that "without proof of the agreement, he cannot prevail." As such, Urick was not the virtually adopted son of the decedent and, accordingly, the court denied George Urick's claim to inherit from the decedent's estate.

Nearly fifteen years after its decision in Urick, Florida's Second District Court of Appeal again determined that failure to prove all five elements would not be sufficient to prevail on a claim of virtual adoption. In Douglass v. Frazier (In re Estate of Musil), the court reiterated its previous holding that the elements of virtual adoption must all be shown by clear and convincing evidence. Thus, while there may be evidence supporting some of the required elements, anything short of "clear and convincing" is not enough.

V. VIRTUAL ADOPTION OUTSIDE OF PROBATE COURT

A legally adopted child is afforded all the rights and privileges that biological children enjoy. Thus, regardless of the nature of the relationship between an adoptive parent and child, the child will nonetheless be treated as the lineal descendent of that parent. That being said, when an adoptive

223. Id. at 1253.
224. Id. Both Urick's mother and the decedent died intestate. Id. at 1254. Urick's mother died before the decedent, and upon her death the decedent received the majority of his wife's property. Id. Thus, in order for Urick to inherit from the decedent, he would have to be a "lineal descendent." Urick, 625 So. 2d at 1254.
225. Id.
226. Id.
227. See id. at 1253.
228. Douglass v. Frazier (In re Estate of Musil), 965 So. 2d 1157, 1161 (Fla. 2d Dist. Ct. App. 2007).
229. 965 So. 2d 1157 (Fla. 2d Dist. Ct. App. 2007).
230. Id. at 1160.
231. See id. at 1161 ("[T]he probate court's findings establish without question that [the claimant] did not prove the fourth element of virtual adoption by clear and convincing evidence. Accordingly, we reverse the portion of the probate court's final order . . . [that the claimant] was the virtually adopted son of the decedent.").
parent dies intestate, his or her biological children and legally adopted children will be considered equally under Florida’s intestacy statutes.\(^{234}\)

On the contrary, however, when an agreement or promise to adopt a child has not come to fruition in the eyes of the law, that child may not be recognized at all.\(^{235}\) Accordingly, regardless of the nature of the relationship between the alleged adoptive parent and child, the child may nonetheless be treated as though he or she has no ties whatsoever to the parent.\(^{236}\) Consequently, when an alleged adoptive parent dies intestate, his or her alleged adopted children may have no remedy at all, legal or equitable.\(^{237}\)

Virtual adoption is the judicially created doctrine intended to resolve this ethical quandary.\(^{238}\) Being an equitable remedy, it is most often employed in order to avoid the injustice that flows from intestacy statutes.\(^{239}\) To date, virtual adoption has been recognized in a number of cases in which the decedent died intestate, and but for this equitable remedy, the claimants would otherwise be without any recourse.\(^{240}\) Be that as it may, virtual adoption is an extremely limited doctrine and, needless to say, so too are the rights of those who are virtually adopted.

Virtual adoption is founded on the notion that when a parent dies intestate, the child should not be precluded from inheriting from the decedent’s estate, despite the parent’s failure to procure a legal adoption.\(^{241}\) Hence, the doctrine has traditionally been limited to intestacy proceedings and has found little merit outside of probate court.\(^{242}\) Further, although virtual adoption has made extensive progress since its inception in Florida in 1943, the doctrine still remains unpredictable. Unlike other jurisdictions which have already exhibited their willingness to progress at the same rate as today’s population, Florida has yet to see the correlation between strong public policy in favor of the family unit and applying this policy in virtual adoption proceedings outside of probate court. As a result, Florida is falling by the wayside as it shockingly seeks to inhibit the rights of its citizens both in law and in equity.

\(^{234}\) Id.  
\(^{235}\) See Warner, supra note 62, at 586.  
\(^{236}\) See, e.g., Grant v. Sedco Corp., 364 So. 2d 774, 775 (Fla. 2d Dist. Ct. App. 1978).  
\(^{237}\) See id.  
\(^{238}\) Warner, supra note 62, at 583.  
\(^{239}\) Bd. of Educ. v. Browning, 635 A.2d 373, 377 (Md. 1994).  
\(^{241}\) Warner, supra note 62, at 583.  
\(^{242}\) See, e.g., Grant, 364 So. 2d at 775.
NOVA LAW REVIEW

A. Florida Fails to Follow Suit: Inconsistencies Lead to an Inequitable Doctrine

Florida courts have many a time granted and denied atypical claims of virtually adopted children, often leading to ambiguous and inconsistent results. For example, Florida's Second District Court of Appeal has previously held that virtual adoption would warrant relief in an intestacy proceeding, but not in the case of a wrongful death. Similarly, Florida's Third District Court of Appeal explicitly denied the claims of virtually adopted adults, reasoning that expanding the doctrine would propel it beyond its intended purpose. Notwithstanding these decisions, however, the court had no qualms about extending the doctrine to consider a virtually adopted child an "heir" under Florida's homestead provision. The court also willingly held that a virtually adopted child is entitled to inherit from an intestate decedent's estate, despite the fact that the child is unaware of the agreement to adopt her.

Virtual adoption is to be invoked where "justice, equity and good faith require it," but conflicting decisions from various jurisdictions have certainly contributed to the discrepancies among the courts. For instance, the Supreme Court of Florida has said that the doctrine is not to be applied prior to the death of an adoptive parent, while the Supreme Court of North Dakota held that the child's welfare and best interests should be protected. Accordingly, the Florida court held that virtual adoption would not apply to a worker's compensation proceeding, whereas the North Dakota court used the doctrine to compel child support obligations. Florida courts adhere to a strict interpretation of virtual adoption, arguing that equitable remedies do

243. See, e.g., Williams v. Dorrell, 714 So. 2d 574, 576 (Fla. 3d Dist. Ct. App. 1998); Miller v. Paczier, 591 So. 2d 321, 323 (Fla. 3d Dist. Ct. App. 1991) (per curiam); Laney, 409 So. 2d at 203; Grant, 364 So. 2d at 775.
244. Grant, 364 So. 2d at 775; see supra p. 571.
245. Miller, 591 So. 2d at 323; see supra p. 572.
246. Williams, 714 So. 2d at 576; see supra p. 570.
247. Laney, 409 So. 2d at 203; see supra pp. 569-70.
249. See, e.g., Tarver v. Evergreen Sod Farms, Inc., 533 So. 2d 765, 767 (Fla. 1988) (holding that virtual adoption would not warrant relief in a worker's compensation proceeding). But see Johnson v. Johnson, 617 N.W.2d 97, 105-06 (N.D. 2000) (holding that virtual adoption would warrant relief in a divorce proceeding, obliging the adoptive father to continue paying child support).
250. Tarver, 533 So. 2d at 767.
251. Johnson, 617 N.W.2d at 105.
252. Tarver, 533 So. 2d at 767.
253. Johnson, 617 N.W.2d at 105.
not comport to the statutory scheme.\textsuperscript{254} Thus, regardless of the negative consequences of limiting the doctrine, Florida consistently maintains that it is to be invoked exclusively upon the intestate death of an adoptive parent and solely to provide recourse for virtually adopted children.\textsuperscript{255}

Nevertheless, when the unique circumstances of a case require it, equity should resolve what the law cannot. As early as 1977, the Supreme Court of Alaska followed this logic and determined that the application of virtual adoption was necessitated by the state’s vast cultural landscape.\textsuperscript{256} The Alaska court reasoned that, where a legal remedy is unavailable, virtual adoption is an appropriate vehicle with which to avoid hardship to virtually adopted children.\textsuperscript{257} Despite this long-standing principle, however, Florida has yet to follow suit with regard to granting appropriate remedies and equitable relief.\textsuperscript{258} Likewise, Florida’s Second District Court of Appeal has often denied claims of virtually adopted children, arguing that the alleged adoption was not established by clear and convincing evidence.\textsuperscript{259} This Florida court injudiciously ignored the relationship between the claimant and decedent in spite of the fact that it would be unjust and inequitable to do so.

In each of the aforementioned cases, Florida courts have failed to provide justice and equity to the virtually adopted children of intestate decedents.\textsuperscript{260} The courts recognize that the doctrine was intended as a means to supplement the lack of a legal remedy, but nonetheless refuse to concede to the reasoning of courts in other jurisdictions. Further, although the doctrine should be used in good faith to provide relief to virtually adopted children, Florida courts maintain that applying it to extraordinary circumstances would inescapably lead to an influx of fraudulent claims.\textsuperscript{261} Thus, while courts in other jurisdictions increasingly apply the doctrine outside of probate court, Florida continues to rely on its own precedent and has thus far declined to extend the doctrine beyond its conventional reach.\textsuperscript{262} As a result, virtually

\begin{itemize}
  \item \textsuperscript{254} See Tarver, 533 So. 2d at 767.
  \item \textsuperscript{255} See id.
  \item \textsuperscript{256} Calista Corp v. Mann, 564 P.2d 53, 61–62 (Alaska 1977).
  \item \textsuperscript{257} Id. at 61.
  \item \textsuperscript{258} See Douglass v. Frazier (In re Estate of Musil), 965 So. 2d 1157, 1161 (Fla. 2d Dist. Ct. App. 2007); Urick v. McFarland, 625 So. 2d 1253, 1254 (Fla. 2d Dist. Ct. App. 1993).
  \item \textsuperscript{259} In re Estate of Musil, 965 So. 2d at 1161; see Urick, 625 So. 2d at 1254.
  \item \textsuperscript{260} See, e.g., Tarver v. Evergreen Sod Farms, Inc., 533 So. 2d 765, 767 (Fla. 1988); In re Estate of Musil, 965 So. 2d at 1161; Urick, 625 So. 2d at 1254; Miller v. Paczier, 591 So. 2d 321, 323 (Fla. 3d Dist. Ct. App. 1991) (per curiam); Grant v. Sedco Corp., 364 So. 2d 774, 775 (Fla. 2d Dist. Ct. App. 1978).
  \item \textsuperscript{261} Miller, 591 So. 2d at 323.
  \item \textsuperscript{262} Compare, e.g., Tarver, 533 So. 2d at 767 with Johnson, 617 N.W.2d 97, 107 (N.D. 2000).
\end{itemize}
adopted children are not getting the recognition they deserve, and they continue to suffer the harsh consequences of Florida's strict adherence to the law.

B. Expanding the Doctrine

In theory, virtual adoption is employed "to render a more equitable outcome," but in practice, the results are quite conflicting. If, as the authorities contend, the doctrine truly rests on the theory that "equity regards that as done that which ought to have been done," then these same authorities should also contend that limiting the application of the doctrine to intestacy proceedings is inherently inequitable. Instead, however, courts consistently deny claims of virtually adopted children, arguing that a virtual adoption does not supplement or create the relationship of a true parent and child. These same courts also argue that virtual adoption is not akin to a legal adoption and that virtual adoption merely provides an equitable remedy through the enforcement of a contract right.

In Florida, when the last surviving parent dies intestate, the decedent's entire estate is to pass to the descendants of the decedent. However, Florida statutes strictly define "descendant," and when read in conjunction with the definition of "child," Florida law expressly excludes stepchildren, foster children, and remote descendants. Thus, although adopted children are considered descendents of the adopting parent, Florida statutes solely refer to legally adopted children and do not make reference to those who were merely virtually or equitably adopted.

It may be so that virtual adoption is not wholly analogous to legal adoption, but courts often lose sight of the fact that the doctrine originated as a means to provide equitable relief in cases where legal relief was not availa-

263. See Warner, supra note 62, at 585.
264. Sheffield v. Barry, 14 So. 2d 417, 419 (Fla. 1943) (en banc); see also Kelley v. Flagship Nat'l Bank of Boynton Beach (In re Estate of Wall), 502 So. 2d 531, 532 (Fla. 4th Dist. Ct. App. 1987); Lankford v. Wright, 489 S.E.2d 604, 606 (N.C. 1997).
266. Tarver v. Evergreen Sod Farms, Inc., 533 So. 2d 765, 767 (Fla. 1988).
267. Grant, 364 So. 2d at 775.
268. FLA. STAT. § 732.103(1) (2010).
269. See id. § 731.201(9) (defining descendants as "a person in any generational level down the applicable individual's descending line and includes children, grandchildren, and more remote descendents.").
270. See id. § 731.201(3).
271. See id. § 732.108(1).
When a decedent dies intestate, virtual adoption is designed to allow the decedent’s virtually adopted child to inherit from the decedent’s estate as if the child were legally adopted. Virtual adoption has been utilized in divorce proceedings as well, compelling the parents of virtually adopted children to continue with their child support obligations. Courts have also applied the doctrine in cases with unusual fact patterns, in cases with state-specific homestead provisions, and in cases where the elements of virtual adoption were not entirely complied with.

Case law undoubtedly supports the idea that a virtually adopted child can inherit from an intestate decedent’s estate. Even so, there are many cases in which the court confirmed that a virtual adoption had taken place, but nonetheless denied the petitioner’s claims. Thus, it seems wholly contradictory that Florida courts grant equitable remedies to virtually adopted children in some circumstances, but continually refuse to provide them in others.

What’s more, probate courts generally focus on the testator or decedent’s intent in distributing or administering the decedent’s estate, while family law courts generally focus on what is in the best interests of the child. This, too, is inherently contradictory. How is one court supposed to put the best interest of the child first, while another court will not even recognize that same child as being legitimate? It is impossible for a virtually adopted child to ever be granted relief if courts are continually skirting the line between decisions which may be equitable and decisions which are plainly unjust. In order to avoid this anomaly, probate courts and family law courts need to align and, where appropriate, always focus on what is in the best interests of the child. Likewise, as virtual adoption is sure to become an issue of increasing prevalence, courts need to be more steadfast in adopting principles of equity and public policy in order to more accurately assess individual cases.

Further, while the criteria may be the same in evaluating claims of virtual adoption, no two courts employ the same reasoning when applying the

272. See Warner, supra note 62, at 585.
277. See Habecker v. Young, 474 F.2d 1229, 1230 (5th Cir. 1973) (holding that although the word “adopt” was never used, it would not bar a remedy through virtual adoption).
278. See Warner, supra note 62, at 587.
279. See id.
280. Tritt, supra note 1, at 376.
requisite elements. Some courts focus too much on the applicable statutes, while others put too much emphasis on the specific, delineated requirements of both the contract theory and adoption by estoppel. Additionally, while some decisions indicate a trend toward more equitable outcomes for virtually adopted children, there is still a great weight of authority that has prevented the doctrine from reaching its true potential. Looking at the substantial amount of case law, there is direct evidence supporting a more comprehensive, cohesive remedy for virtually adopted children. And, comparing the decisions of the various states that have upheld claims of virtual adoption inside and outside of probate court, it seems evident that it is time for state legislatures to formally recognize these informally adopted children.

Similarly, because today’s typical family is not the “typical” American family that once was, Florida’s laws are quickly falling behind other jurisdictions which have begun to move in a more appropriate direction. Florida’s sluggish response to support the expansion of virtual adoption is a shortcoming, at best. The longer Florida courts wait to apply the doctrine in all cases in which equity requires avoiding an unjust outcome, the farther Florida will be departing from its strong public policy in favor of the cohesive family unit and doing what is in the best interests of the children. And, while there is validity to the argument that expanding the doctrine will lead to an influx of frivolous claims, there are other avenues which are better suited to deal with these concerns.

VI. CONCLUSION

Florida was not the first state to recognize the equitable doctrine of virtual adoption, and it certainly will not be the last.281 Further, although the doctrine has progressed significantly in recent years, there still remain a number of ambiguities and inconsistencies in its application.282 Virtual adoption was originally intended to be applied to children who were supposed to be legally adopted, but whose adoptive parents failed to complete a formal adoption prior to dying intestate.283 The doctrine relies on equitable principles, and it operates to allow the virtually adopted child to take an in-
testate share from the decedent equal to that of a legally adopted or biological child.\textsuperscript{284} However, in light of recent decisions, it appears the doctrine is growing ever more popular, and courts are more frequently called upon to expand the scope of its applicability.\textsuperscript{285}

What's more, as the dynamic of the typical American family continues to evolve, so too do the applicable statutes which dictate the rights of inheritance in both testate and intestate proceedings.\textsuperscript{286} Further, with the steady increase in the number of children adopted each year, Florida courts will likewise see a steady increase in the number of adopted children contesting their inheritance rights. Nonetheless, Florida has yet to align with other jurisdictions and apply the doctrine to provide a wide range of equitable remedies.\textsuperscript{287} Accordingly, it is unlikely that the claims of virtually adopted children will withstand even minimal judicial scrutiny in the near future.

In order for virtually adopted children to be granted the relief they seek, Florida courts need to expand the scope of virtual adoption and apply it outside of probate court, and in situations other than intestacy proceedings. The only way that the doctrine will, \textit{in good faith}, provide justice and equity is if Florida accepts the reasoning set forth by other jurisdictions and allows virtual adoption to be recognized both in probate court and in other areas of the law.

\textsuperscript{284} Id.  
\textsuperscript{285} See, e.g., Johnson v. Johnson, 617 N.W.2d 97, 105 (N.D. 2000).  
\textsuperscript{286} Bell, supra note 24, at 418.  
\textsuperscript{287} See, e.g., Tarver v. Evergreen Sod Farms, Inc., 533 So. 2d 765, 767 (Fla. 1988) (holding that virtual adoption would not warrant relief in a worker's compensation proceeding). \textit{But see} Johnson, 617 N.W.2d at 105 (holding that virtual adoption would warrant relief in a divorce proceeding, obliging the adoptive father to continue paying child support).