



## TABLE OF CONTENTS

Table Of Authorities .....	3
Motion For Reconsideration Of Memorandum In Support Of Jurisdiction Of Appellant Guy Mettle .....	4
Rule Basis For Reconsideration .....	4
Embarrassed Chief Justice, Some Incompetent Supreme Court Staff, Legislative Intent, And Discrimination Against Pro Se Litigants .....	4
Professor Of Law, M. B. W. Sinclair On Legislative Intent .....	6
Constitution Questions, Not Reargued, But Of Great Public Interest .....	8
A Dangerous Precedent That Will Not Go Away Because It Is Ignored By The Supreme Court..	8
Statement Of Case And Facts.....	9
Summary Of Rules Of Construction That Guy Mettle Applied To This Case: .....	10
Great Public Interest In The Constitutional Issue Of Legislative Intent.....	13
Appellate And Supreme Courts' Intentional Violation Legislative Intent Is A Constitutional Issue Of Great Impact On The General Public Of Ohio .....	14
Chief Justice Of The Washington State Supreme Court, Law Review Article: A New Approach To Statutory Interpretation In Washington .....	14
Elements Of Ambiguity.....	15
Tools For Statutory Construction.....	15
Extrinsic Source Canons.....	16
This Case Is An Opportunity For The Ohio Supreme Court.....	18
Legislative Intent Is An Active Body Of Constitutional Law, And It Is A Constitutional Issue That Offers The Ohio Supreme Court The Opportunity To Clarify Issues And Procedures....	18
Guy Mettle's Propositions Of Law That Are Affected By The Supremacy Of Legislative Intent .....	19
Discrimination Against Pro Se Litigants And Legislative Intent Are Constitutional Questions Of Great Public Interest .....	19
Guy Mettle's Propositions Of Law That Addressed Discrimination Harm To Pro Se Litigants .....	21
Conclusion For Discrimination .....	22
Conclusion For Supremacy Of Legislative Intent .....	23
Request To The Court.....	23
Certificate Of Service .....	25
Appendix Index .....	26

## TABLE OF AUTHORITIES

### Cases

Haines v. Kerner, 404 U.S. 520 (1971).....	22
In Huffman V. Commissioner Of Internal Revenue, 978 F.2d 1139; 1992 U.S. App. LEXIS 28490.....	14
In State Ex Rel. Belknap v. Lavelle, 18 Ohio St. 3d 180; 480 N.E.2d 758; 1985.....	10
In State v. Liffing, 61 Ohio St. 39; 55 N.E. 168; 1899.....	10
In State v. Rossi, 86 Ohio St. 3d 620;1999.....	10
In State v. Westendorf, 1 <sup>st</sup> Dist. No. C-020114, 2003-Ohio-1019.....	5
In State, Ex Rel. Myers V. Chiamonte, 46 Ohio St. 2d 230; 348 N.E.2d 323; 1976.....	10
In Village v. Montgomery , 106 Ohio St. 3d 223; 2005 Ohio 4631; 833 N.E.2d 1230; 2005.....	10
State v. Bissantz, 30 Ohio St. 3d 120; 507 N.E.2d 1117; 1987.....	11
State v. Schiavo, 10th Dist., 2008 Ohio 298, 208 Ohio App. Lexis 251.....	5

### Other Authorities

Am. Sub. S.B. 13, Ohio 123rd General Assembly.....	5
Timeline of Washington State Rules of Appellate Procedure.....	22

### Rules

S.Ct.Prac.R. III, Section 6, (C).....	4
S.Ct.Prac.R. XI, Section 2, (B)(1).....	4

### Treatises

Chief Justice of the Washington State Supreme Court (1995-2001), and previously a member of the Washington State Senate (1979 to 1995), the Honorable Philip A. Talmadge, wrote a 13,000 word article in the Seattle University Law Review, "A New Approach to Statutory Interpretation in Washington.....	15
Professor of Law, M. B. W. Sinclair, New York Law School Law Review, 1997, wrote a 28,000 word article, titled "Review Essay: Legislative Intent: Fact Or Fabrication? Dynamic Statutory Interpretation.....	6

**MOTION FOR RECONSIDERATION OF MEMORANDUM IN SUPPORT OF  
JURISDICTION OF APPELLANT GUY METTLE**

**Rule basis for Reconsideration**

This motion for reconsideration is brought under S.Ct.Prac.R. XI, Section 2, (B)(1).

Under S.Ct.Prac.R. III, Section 6, (C), Guy Mettle's Memorandum In Support Of Jurisdiction asserted questions of public or great general interest, which will be amplified below, and which the Supreme Court order failed to address.

The Supreme Court order, filed September 10, 2008, simply states:

“Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.<sup>1</sup>”

**Embarrassed Chief Justice, Some Incompetent Supreme Court Staff, Legislative Intent, and Discrimination against Pro Se Litigants**

I place this section early in this motion to avoid precipitous repetition of an incompetent result from the Ohio Supreme Court.

Apparently the Honorable Chief Justice Thomas Moyer did not review Guy Mettle's Memorandum for Jurisdiction, and he did not draft the court decision, himself. The Chief Justice's signature was apparently applied to rubber stamp an incompetent decision prepared by junior staff or a law clerk. For the sake of Ohio and the USA, I surmise that Chief Justice Thomas Moyer has a greater legal intellect than was implied by his signature on that decision.

Guy Mettle presented 9 Propositions of Law.<sup>2,3</sup> The first proposition states:

---

<sup>1</sup> Court order in State v. Mettle, Supreme Court Case No. 2008-0921, is attached in the Appendix as Exhibit 1.

<sup>2</sup> Guy Mettle's Memorandum in Support of Jurisdiction is attached in the Appendix as Exhibit 2.

<sup>3</sup> Guy Mettle's 9 Propositions of Law are as follows:

Proposition of Law #1 - Supreme Court is obligated to determine legislative intent. Lower courts are similarly obligated.

Proposition of Law #1 - Supreme Court is obligated to determine legislative intent. Lower courts are similarly obligated.

A key Constitutional issue is that the 10<sup>th</sup> Dist. Appellate Court ignored the intent of the Ohio State Legislature.

In this case (State v. Mettle), the 10<sup>th</sup> Dist. Appellate Court merely cited<sup>4</sup> the 1<sup>st</sup> Dist. Appellate Court, which after explicitly expressing the manifest intent of the Legislative Act<sup>5</sup>, then the 1<sup>st</sup> Dist. Appellate court ruled exactly the opposite<sup>6</sup> of the legislative intent. That is judicial incompetence by both Appellate Courts.

(In this Motion for Reconsideration, the Statement of Facts will give more details of the courts actions, below.)

---

Proposition of Law #2 - Purpose of Rules of Construction is to determine Legislative Intent. Supreme Court and lower courts must use rules of construction.

Proposition of Law #3 - A cause of action exists when an official's failure to train or supervise personnel leads to deprivation of the litigant's constitutional rights. This applies to Ohio Courts

Proposition of Law #4 -- A cause of action exists when Ohio courts have not implemented a systematic and comprehensive program to protect the constitutional rights of pro se and indigent litigants

Proposition of Law #5 - 2953.36(D) violates constitution rights of due process and equal protection due to selective and vindictive enforcement.

Proposition of Law #6 - The State/Prosecutors must be held to equally, or more, strict standards as pro se litigants, otherwise it violates equal protection and due process. This is a corollary to the U.S. Supreme Court finding that pro se pleadings should be held to "less stringent standards" than those drafted by attorneys

Proposition of Law #7 - The State/Prosecutor should not be allowed to manipulate the court docket resulting in a case schedule to his advantage.

Proposition of Law #8 - R.C. 2953.36 (D) creates privileged classes in violation of constitutional rights of due process and equal protection.

Proposition of Law #9 - R.C. 2953.36 (D) does not prohibit sealing of records or nonviolent offenses when the victim is under age 18

<sup>4</sup> In State v. Mettle, 10<sup>th</sup> Dist. Appellate Court cited their own decision in State v. Schiavo, 10th Dist., 2008 Ohio 298, 208 Ohio App. Lexis 251, . Attached in Appendix: State v. Mettle as Exhibit 3; and State v. Schiavo as Exhibit, 4.

<sup>5</sup> The Legislative Act Summary and Am. Sub. S.B. 13, Ohio 123rd General Assembly are attached in the Appendix as Exhibit 5.

<sup>6</sup> 10 Dist. Appellate Court decision In State v. Westendorf, 1<sup>st</sup> Dist. No. C-020114, 2003-Ohio-1019, which is attached in the Appendix as Exhibit 6.

Even the 10<sup>th</sup> Dist. Common Pleas Court knew, and stated, that 10<sup>th</sup> District was not obligated to follow 1<sup>st</sup> Dist. Appellate Court's erroneous ruling<sup>7</sup>. But nevertheless, our 10<sup>th</sup> Dist. Appellate Court and our Supreme Court did follow the incompetent, unconstitutional ruling from the 10<sup>th</sup> Dist. Appellate Court.

Manifest legislative intent in the Legislative Act has supremacy over other court interpretations, clerical errors, or revised code. The power of elected legislatures to make law as representatives of "we the people" lies at the very foundation of our representative democracy. Any legal practitioner that does not know this has wasted his law school education, and they should review their junior high school social studies.

#### **Professor of Law, M. B. W. Sinclair on Legislative Intent**

Professor of Law, M. B. W. Sinclair, New York Law School Law Review, 1997, wrote a 28,000 word article, titled "Review Essay: Legislative Intent: Fact or Fabrication? Dynamic Statutory Interpretation."<sup>8</sup>

I quote Professor of Law, M. B. W. Sinclair:

"United States courts have taken as axiomatic that the intention of the legislature should govern the interpretation and application of statutes. This follows conceptually from the principle of legislative supremacy, a principle at the very foundation of our democratically ordered society. n8 A typical judicial statement is: "the primary rule for the interpretation of a statute ... is to ascertain, if possible, and enforce, the intention which the legislative body that enacted the law ... [has] expressed therein." n9 A perspicuous equivalent by the Honorable Judge Wald of the D.C. Circuit Court of Appeals, is: "when a statute comes before me to be interpreted, I want first and foremost

---

<sup>7</sup> In our own underlying case for sealing Guy Mettle's record, 10<sup>th</sup> District Common Pleas Court Case No. 07EP-229, Judge Schneider stated in open court that he would take the 1st Dist. Appellate Court decision under advisement, but that 10<sup>th</sup> District was not obligated to follow 1<sup>st</sup> District decisions. Indeed, 10<sup>th</sup> Dist. Common Pleas Court Judge Schneider stated that he did not believe that the Legislature intended to exclude non-support offenses from sealing of records, specifically because non-support is a non-violent offense. To his credit, Judge Schneider recited those legal concepts and statute details off the top of his head without the benefit of a brief.

<sup>8</sup> Professor of Law, M. B. W. Sinclair, New York Law School Law Review, 1997, 28,000 word article, titled "Review Essay: Legislative Intent: Fact or Fabrication? Dynamic Statutory Interpretation" is attached in the Appendix as Exhibit 7.

to get the interpretation right. By that, I mean simply this: I want to advance rather [\*1332] than impede or frustrate the will of Congress." n10 This principle is common in legal systems with British roots."

In his Conclusion, Professor of Law, Sinclair wrote:

"One reason flows from our faith in democracy, the principle of legislative [\*1388] supremacy and the ideal of a governance of laws. Legislators are elected; the legislature's view, the speaker's meaning, thus has a certain democratic legitimacy. To allow that "hearer's" meaning to triumph over a different meaning founded in the legislative intent would be anti-democratic and would allow the triumph of non-elective law making over the normal, elective law-making."

(Legislative Intent will be discussed in more detail, below.)

Ohio Appellate and Supreme Courts' refusal to follow Legislative Intent is a major constitutional issue. Not only that, but it is an issue of great public interest with massive legal, personal, business, economic, interstate, federal, and international impact because it attacks the foundations of our democracy and the rule of law in Ohio, by usurping the power of the Legislature.

Further, discrimination, for example a courts' use of pro se briefs as cannon fodder to train junior staff, law clerks, or as toss-away briefs for the convenience of the court, represents an extension of the discrimination against pro se litigants that is pervasive throughout Ohio courts and has been pervasive in this case, State v. Mettle. (Discrimination against pro se litigants will be discussed in more detail, below.) It is both a constitutional issue and an issue of great public interest with ever expanding impact on the public. Modern technology has given the general public ready access all legal materials needed for pro se representation, and millions of people may litigate pro se. No longer is the judicial system a high priesthood, accessible only to the initiated brotherhood of professional legal practitioners. That relic of the judicial process is an unconstitutional denial of due process and equal protection, which impacts millions of Ohio citizens, business, and organizations,

Both, the court's unconstitutional violation of legislative intent and the court's discrimination against pro se litigants, in general (and Guy Mettle, in particular), are issues that were explicitly and implicitly stated in Guy Mettle's nine Propositions of Law contained in his Memorandum in Support of Jurisdiction<sup>9</sup>. At that time, Guy Mettle assumed that a primer on social studies and the supremacy of legislative intent was not required at the level of the Ohio Supreme Court.

In fact, Supreme Court Rules of Practice place format and page limitations on a Memorandum in Support of Jurisdiction that would have prevented Guy Mettle from presenting a primer on Legislative Intent at that time.

### **Constitution Questions, Not Reargued, but of Great Public Interest**

Guy Mettle does not intend to simply re-argue Constitutional questions to demonstrate the court's judicial incompetence, but these issues are of great public interest and are so fundamental to our democracy that some review of the constitutional questions is required to present their great public interest and pervasive public impact.

### **A Dangerous Precedent that Will Not Go Away because it is Ignored by the Supreme Court**

Ohio State Judges are elected, without vetting, review, and approval by Congress like the approval process of Federal judges. So, at the State Appellate level, a certain amount of incompetence is normal. But the citizens of Ohio expect better from our Supreme Court.

---

<sup>9</sup> Guy Mettle's Memorandum in Support of Jurisdiction is attached in the Appendix as Exhibit 2

These issues are too important, with pervasive impact on the public, to simply be discarded by the convenient decision of the court. If the Ohio Supreme Court will not hear these issues, the court will be over ruled and embarrassed by higher courts.

The Ohio Supreme Court treads on dangerous legal ground when it lets stand Appellate Court decisions that knowingly place court interpretation above the manifest intent of the legislature, when it was explicitly stated in the legislative act. This is of great public interest, because this dangerous precedent which can be applied to any law and any person in Ohio.

### **Statement of Case and Facts**

In the Court of Common Pleas, Guy Mettle applied to have his records sealed for one offense of non-support. The State opposed based on State's claim that Ohio R.C. 2953.36 (D) prevented sealing convictions of an offense in circumstances in which the victim of the offense was under eighteen years of age.

However, the Act Summary of Am. Sub. S.B. 13, 123rd General Assembly reveals the Legislature's stated intent is the opposite of the Appellate Court's decision. The Legislative Act Summary states that a record can be sealed unless the conviction is for an offense of violence.

Quoting from the Act Summary of Am. Sub. S.B. 13, 123rd General Assembly:

**“Excludes from the Criminal Conviction Records Sealing Law all convictions of an offense of violence when the offense is (1) a misdemeanor of the first degree or a felony and when the offense is not riot and is not assault, inciting to violence, or inducing panic that is a misdemeanor of the first degree, (2) an offense of which the victim was under 18 years of age when the offense is a misdemeanor of the first degree or a felony, or (3) a felony of the first or second degree.<sup>10</sup>”**

The bolded font and underline are mine to emphasize the requirement of an offense of violence.

---

<sup>10</sup> The Legislative Act Summary and Am. Sub. S.B. 13, Ohio 123rd General Assembly are attached in the Appendix as Exhibit 5.

In the Common Pleas court hearing and in his brief, Guy Mettle raised constitutional issues, legislative intent, and 15 rules of construction to determine legislative intent. Guy Mettle raised the same issue in his second Proposition of Law:

Proposition of Law #2 - Purpose of Rules of Construction is to determine Legislative Intent. Supreme Court and lower courts must use rules of construction.

**Summary of Rules of Construction That Guy Mettle Applied to This Case:**

The Supreme Court should note that the Appellate Court denied Guy Mettle's timely motion for an extension of time, so Guy Mettle was unable to file an Appellate Court brief.

However, in Guy Mettle's response brief<sup>11</sup> in Common Pleas Court, Guy Mettle used 15 Rules of Construction to show manifest Legislative Intent:

- 1) Purpose of rules of construction is to determine lawmakers' intent.  
Ohio Supreme Court -- In State V. Liffing, 61 Ohio St. 39; 55 N.E. 168; 1899
- 2) The intention of the law makers must govern in the construction of penal, as well as other statutes.  
Ohio Supreme Court -- In State v. Liffing, 61 Ohio St. 39; 55 N.E. 168; 1899;
- 3) Specific provisions rule over general provisions to determine intent.  
Ohio Supreme Court -- In State, Ex Rel. Myers V. Chiaramonte, 46 Ohio St. 2d 230; 348 N.E.2d 323; 1976  
Ohio Supreme Court -- In State Ex Rel. Belknap v. Lavelle, 18 Ohio St. 3d 180; 480 N.E.2d 758; 1985  
Ohio Supreme Court -- In Village v. Montgomery , 106 Ohio St. 3d 223; 2005  
Ohio 4631; 833 N.E.2d 1230; 2005  
Ohio Supreme Court -- In State V. Liffing, 61 Ohio St. 39; 55 N.E. 168; 1899
- 4) Even where there is manifest omission or oversight by the legislature, penalties should not be extended to new classes of persons not intended by the legislature.  
Ohio Supreme Court - In State V. Liffing, 61 Ohio St. 39; 55 N.E. 168; 1899
- 5) Consider the whole, *in pari materia*, to determine intent.  
Ohio Supreme Court - In State V. City of Hamilton, 47 Ohio St. 52; 23 N.E. 935; 1890  
Ohio Supreme Court -- In State v. Rossi, 86 Ohio St. 3d 620; 1999
- 6) In seeking the meaning of an act, all of its words must be considered.

---

<sup>11</sup> Guy Mettle's Common Pleas Court response brief is in the Appendix as Exhibit 8.

Ohio Supreme Court - In State V. Liffing, 61 Ohio St. 39; 55 N.E. 168; 1899

- 7) Must assume the lawmaker intended to be consistent with himself.  
Ohio Supreme Court -- State V. City of Hamilton, 47 Ohio St. 52; 23 N.E. 935; 1890
- 7) Consider even the title of the Act to determine intent.  
Ohio Supreme Court - In State v. Liffing, 61 Ohio St. 39; 55 N.E. 168; 1899
- 8) Remedial law, especially, the court should determine intent.  
Ohio Supreme Court - In State v. Liffing, 61 Ohio St. 39; 55 N.E. 168; 1899.
- 9) Remedial law, especially, court should harmonize the law with intent and the whole.  
Ohio Supreme Court - In State v. Liffing, 61 Ohio St. 39; 55 N.E. 168; 1899
- 10) It is a universal rule that all words of a legislative act must be considered to determine its meaning.  
Ohio Supreme Court -- In State V. Liffing, 61 Ohio St. 39; 55 N.E. 168; 1899
- 11) Penal law, especially, strict construction means in favor life and liberty.  
Ohio Supreme Court - In State v. Liffing, 61 Ohio St. 39; 55 N.E. 168; 1899
- 12) Penal law, especially, use liberal interpretation in favor of accused.  
Ohio Supreme Court - In State v. Liffing, 61 Ohio St. 39; 55 N.E. 168; 1899
- 13) Penal Law, should not be extended to include new classes of people.  
Ohio Supreme Court - In State v. Liffing, 61 Ohio St. 39; 55 N.E. 168; 1899.
- 14) The Expungement provisions should be liberally construed to promote their purpose.  
Ohio Supreme Court -- In State v. Rossi, 86 Ohio St. 3d 620; 1999  
Appellate Court -- State v. Bissantz, 30 Ohio St. 3d 120; 507 N.E.2d 1117; 1987
- 15) "Statutes in derogation of common right, such as those restricting or regulating the pursuit of useful occupations and callings, are to be construed strictly."  
Ohio Supreme Court - In State v. Liffing, 61 Ohio St. 39; 55 N.E. 168; 1899

The State made no response to these issues and said nothing about them at the Common Pleas court hearing. Judge Charles Schneider ordered Mettle's record sealed.<sup>12</sup> Judge Schneider's decision was based on manifest Legislative Intent. Judge Schneider stated that he did

---

<sup>12</sup> Common Pleas Court Case 07EP-05-229, Decision and Entry Granting Defendant's Application to Seal Record of Conviction, Filed May 7, 2007, is attached in the Appendix as Exhibit 15.

not believe that the Legislative Act intended to prevent the sealing of records for the nonviolent offense of nonsupport.<sup>13</sup>

State appealed. Appearing pro se, Guy Mettle filed a timely motion for extension of time to file his Appellate brief<sup>14</sup>. Appellate court denied the extension of time<sup>15</sup>, and Guy Mettle was prevented from filing an appellate brief or presenting oral arguments.

(This is an example of discrimination against pro se litigants, because there is no purpose of judicial efficiency to deny an extension of time to pro se litigants that filed a timely motion. There after, the Appellate court takes months to render a decision.)

The Appellate court reversed the Common Pleas court, and ordered Mettle's record to be unsealed. The 10<sup>th</sup> Appellate court did not address constitutional issues, legislative intent, or rules of construction, but merely cited State v. Schiavo, 10th Dist., 2008 Ohio 298, 208 Ohio App. Lexis 251. However, State v. Schiavo merely cited State v. Westendorf from another district Appellate Court (1<sup>st</sup> District).

This chain of cases extended the geographic effect of unconstitutional rulings from 1<sup>st</sup> District to the 10<sup>th</sup> District, with the prospect that other districts will follow that lead and further extend the unconstitutional ruling to cover more millions of Ohio citizens.

The legal rational of the 1<sup>st</sup> District and 10<sup>th</sup> District Appellate court is provided by the underlying 1st District Appellate case, which is In State v. Westendorf, 1<sup>st</sup> Dist. No. C-020114, 2003-Ohio-1019. However, in State v. Westendorf, Appellate Judge Painter stated:

{¶11} “Everyone involved with this case must know that this result is unfortunate, and obviously not what the legislature intended.”

---

<sup>13</sup> Transcripts of Proceedings, Common Pleas Case No. 07EP-229, on Sept. 5, 2007, is attached in the Appendix as Exhibit 16. In this hearing Judge Charles Schneider ordered the case record sealed.

<sup>14</sup> Guy Mettle's motion for an extension of time is in the Appendix as Exhibit 9.

<sup>15</sup> Appellate Courts decision to deny Guy Mettle motion for extension of time is in the Appendix as Exhibit 10.

It was “unfortunate and obviously not what the legislature intended,” because 1<sup>st</sup> Appellate court ruled exactly the opposite of what they explicitly stated was the Legislative Intent of the legislative act<sup>16</sup>. The 1<sup>st</sup> Appellate Court ruled to unseal a record of nonsupport, which is not an offense of violence. In Guy Mettle’s case, the 10<sup>th</sup> Appellate court simply cited the 1<sup>st</sup> Appellate court’s decision.

Hence, 1<sup>st</sup> District and 10<sup>th</sup> District Appellate courts were well aware of that they were explicitly violating the legislative intent of the legislative act that gave rise to the revised code, which the Appellate courts were applying. (It should be noted that the Common Pleas courts had no trouble seeing the manifest legislative intent and explicitly ruling in concert with the legislative intent.)

Guy Mettle appealed to the Ohio Supreme court to get the Common Pleas Court ruling reinstated. On September 10, 2008, the Supreme Court dismissed the case with the inexplicable ruling that there was no substantial constitutional question.

### **Great Public Interest in the Constitutional issue of Legislative Intent**

When the courts usurp substantial legislative power from the Legislature, it is coup d’etat, which violates constitutional separation of powers, invalids everyone’s vote in our democracy, and destroys the democracy, itself. This is a matter of great public interest that affects every citizen of Ohio, every business, and legislative or political organization. Indeed it affects every citizen and entity in the USA, which deals directly or indirectly with Ohio, including 49 States, the Federal Government, along with foreign citizens, foreign countries, and international organizations, such as the United Nations.

---

<sup>16</sup> The Legislative Act Summary and Am. Sub. S.B. 13, Ohio 123rd General Assembly are attached in the Appendix as Exhibit 5.

In Guy Mettle's Memorandum in Support of Jurisdiction, he cited many cases and several Ohio Constitution Articles. Apparently, the Ohio Supreme Court staff was not interested doing the little work necessary to review the constitution or the case citations. Hence, I will now augment those citations with Law Reviews articles, which will more explicitly explain the supremacy of Legislative Intent.

**Appellate and Supreme Courts' Intentional Violation Legislative Intent Is a Constitutional Issue of great impact on the general public of Ohio.**

Quoting Professor of Law, M. B. W. Sinclair, New York Law School Law Review, 1997:<sup>17</sup>

"United States courts have taken as axiomatic that the intention of the legislature should govern the interpretation and application of statutes. This follows conceptually from the principle of legislative supremacy, a principle at the very foundation of our democratically ordered society."

The United States Court of Appeals for the Ninth Circuit, held that:

[HN9]"Although the starting point for analyzing a statute is with its language, the court may look beyond the language of the statute to the legislative history where the language is ambiguous, or where the literal application of the statute will produce a result demonstrably at odds with the intentions of its drafters.<sup>18</sup>"

Supremacy of Legislative Intent is universally accepted in USA law and 49 States, excluding Ohio. The impact of the legal error by Ohio Appellate and Supreme Courts on residents of Ohio cannot be understated

**Chief Justice of the Washington State Supreme Court, Law Review Article: A New Approach to Statutory Interpretation in Washington**

---

<sup>17</sup> Professor of Law, M. B. W. Sinclair, New York Law School Law Review, 1997, 28,000 word article, titled "Review Essay: Legislative Intent: Fact or Fabrication? Dynamic Statutory Interpretation" is attached in the Appendix as Exhibit 7.

<sup>18</sup> In *Huffman V. Commissioner of Internal Revenue*, 978 F.2d 1139; 1992 U.S. App. LEXIS 28490. Attached in the Appendix as Exhibit 11.

The Chief Justice of the Washington State Supreme Court (1995-2001), and previously a member of the Washington State Senate (1979 to 1995), the Honorable Philip A. Talmadge, wrote a 13,000 word article in the Seattle University Law Review, “A New Approach to Statutory Interpretation in Washington.” Quote:

When the legislature enacts a statute, it intends to accomplish a particular purpose. Such a purpose may be shrouded in imprecise drafting, legislative jargon, or political compromise. Nevertheless, it is the constitutional role of the courts in a particular case to implement the legislative purpose expressed in statute.<sup>19</sup>

In our own case, *State v. Mettle*, the 10<sup>th</sup> Appellate Court, 1<sup>st</sup> Appellate Court, and the State of Ohio (Franklin County Prosecutor) erroneously claimed that the “plain meaning rule” of construction trumped manifest legislative intent. The error in their reasoning is more formally expressed by Chief Justice Talmadge:

**“b. Elements of Ambiguity”**

“The flaw in the plain meaning rule is that the Washington decisional law offers little guidance as to what a plain meaning is. A careful reading of Washington State Supreme Court authority indicating a statute is plain or unambiguous reveals precious little guidance as to how the court arrived at such a belief. Even in the face of dissenting views as to the plain and unambiguous meaning of the statute, the court has held to its paradigm. n57 In truth, in the absence of any clear [\*192] articulation of what distinguishes a plain and unambiguous enactment from a murky, ambiguous statute, n58 it is clear that the court has imposed a value judgment in choosing a particular interpretation of a statute. Indeed, perhaps the legislative history or interpretative canons would reveal the statute is neither plain nor ambiguous. n59 Perhaps it is best to acknowledge this rule for what it is: a device by which the judiciary can impose its normative choice on the Legislature's act. Favored statutes contain plain and unambiguous language and contrary legislative history materials can be ignored; unfavored ambiguous statutes require in-depth judicial construction of the legislature's true intent. n60 “

**“II. Tools for Statutory Construction”**

“Once a Washington court determines a statute is ambiguous, it may resort to canons of statutory construction, principles developed in the common law, to give

---

<sup>19</sup> The Chief Justice of the Washington State Supreme Court (1995-2001), and previously a member of the Washington State Senate (1979 to 1995), the Honorable Philip A. Talmadge, wrote a 13,000 word article in the Seattle University Law Review, “A New Approach to Statutory Interpretation in Washington.” Attached in the Appendix as Exhibit 12.

meaning to the legislative action. In fact, the courts assume the legislature is aware of its rules of construction. n61 [\*193] The court may also resort to legislative history materials, materials generated inside and outside of the legislative process with respect to legislation, to attempt to discern what the legislature meant in enacting a law. Both the canons and legislative history materials have been used in Washington cases. Each is examined in turn.”

“The textual canons are assumptions about legislative meaning derived from the use of language, grammar, and sentence structure of the statute itself. They are generally useful maxims that hue most closely to the statutory text.”<sup>20</sup>

Guy Mettle’s note: The “plain meaning rule” is a “textual cannon” in the sense used by Chief Justice Talmadge.

Continuing with excerpts from Chief Justice Talmadge:

**“2. Extrinsic Source Canons”**

“In contrast to the textual canons, the extrinsic source canons look to evidence outside the words of the statute to determine the meaning of a statute...”

“The ultimate extrinsic canon of statutory interpretation is found in the materials of the legislative process itself. “

“Of greatest utility are legislative findings in a preamble section of a bill as the findings represent an affirmative statement of legislative intent enacted by the legislature.”<sup>21</sup>

The underlines are mine to emphasize the importance of legislative intent contained in the preamble to the legislative bill. In our case, State v. Mettle, it is precisely the preamble (Legislative Act Summary) of the legislative bill, which explicitly stated legislative intent cited

---

<sup>20</sup> The Chief Justice of the Washington State Supreme Court (1995-2001), and previously a member of the Washington State Senate (1979 to 1995), the Honorable Philip A. Talmadge, wrote a 13,000 word article in the Seattle University Law Review, “A New Approach to Statutory Interpretation in Washington.” Attached in the Appendix as Exhibit 12.

<sup>21</sup> The Chief Justice of the Washington State Supreme Court (1995-2001), and previously a member of the Washington State Senate (1979 to 1995), the Honorable Philip A. Talmadge, wrote a 13,000 word article in the Seattle University Law Review, “A New Approach to Statutory Interpretation in Washington.” Attached in the Appendix as Exhibit 12.

by Guy Mettle and the Common Pleas Court. The Legislative Act Summary, to Am. Sub. S.B. 13, Ohio 123rd General Assembly, explicitly stated that its restrictions on sealing records applies to “offenses of violence.”

“Excludes from the Criminal Conviction Records Sealing Law all convictions of an offense of violence when the offense is (1) a misdemeanor of the first degree or a felony and when the offense is not riot and is not assault, inciting to violence, or inducing panic that is a misdemeanor of the first degree, (2) an offense of which the victim was under 18 years of age when the offense is a misdemeanor of the first degree or a felony, or (3) a felony of the first or second degree.<sup>22</sup>”

Guy Mettle’s offense of nonsupport is not an offense of violence, and the manifest legislative intent is that nonviolent offenses may be sealed.

Hence, the Ohio Appellate Courts (1st District, and 10<sup>th</sup> District by use of 1<sup>st</sup> District citation) have explicitly noted legislative intent and ruled in the exact opposite manner. So stated by Appellate Justice Appellate Judge Painter:

{¶11} “Everyone involved with this case must know that this result is unfortunate, and obviously not what the legislature intended.<sup>23</sup>”

Therefore, in our case, State v. Mettle, on September 10, 2008, the Ohio Supreme Court was in error to dismiss Guy Mettle’s case because the Supreme Court declared that the case raised no substantial constitutional questions.

When the Courts explicitly notice manifest legislative intent, and then the courts rule exactly the opposite of the legislative intent, that is a constitutional issue of the greatest public interest.

This particular issue carries great weight because it violates constitutional separation of powers, and the courts usurp the law making authority of the elected legislature, in what amounts

---

<sup>22</sup> The Legislative Act Summary and Am. Sub. S.B. 13, Ohio 123rd General Assembly are attached in the Appendix as Exhibit 5.

<sup>23</sup> 10 Dist. Appellate Court decision In State v. Westendorf, 1<sup>st</sup> Dist. No. C-020114, 2003-Ohio-1019, which is attached in the Appendix as Exhibit 6.

to a coup d'etat. The public impact is heightened because other Appellate Courts (e.g. 10<sup>th</sup> District) reference the 1<sup>st</sup> Appellate Court decision to spread the constitutional error to millions of new people. With tacit Supreme Court approval, lower courts will continue to usurp legislative power in other districts, other cases, and affect every person in Ohio. This is a terrible precedent for the Ohio Supreme Court to let stand.

### **This Case is an Opportunity for the Ohio Supreme Court**

In his 13,000 word law review article, Chief Justice Talmadge examines legal theories behind Legislative Intent, and rules of construction with their strengths and weaknesses. Chief Justice Talmadge goes on to provide a framework for the proper use of rules of construction and suggests that the Supreme Court should adopt a framework for the systematic application of rules of construction.

This would prevent blind, omnipotent application of the plain meaning rule of construction in direct contradiction to legislative intent, which is exactly what happened in *State v. Mettle*, *State v. Schiavo*, and *State v. Westendorf*. These cases are cited by court after court, with ever spreading impact to new cases, new people, and new laws.

Supreme Court intervention makes common sense. Legislative aides, staff, and law clerks write the words of Ohio Revised Code, but few people can concoct a perfect code with but one, and only one, interpretation. Even the plain meaning rule must be applied judiciously, and in context of legislative intent, or simple clerical error and misinterpretations becomes inviolate law beyond the authority of courts to correct without a new act from the legislature.

**Legislative Intent is an active body of Constitutional Law, and it is a constitutional issue that offers the Ohio Supreme Court the opportunity to clarify issues and procedures.**

Activity in the field of Legislative Intent can be inferred from a search of Lexis-Nexis. When Guy Mettle performed a Lexis-Nexis Legal search of Law Reviews for the term “legislative intent,” Lexis-Nexis returned over 3,000 law review articles and exceeded the Lexis-Nexis maximum allowed search results. (A list of the first 50 titles is attached.<sup>24</sup>) This shows that Legislative Intent is a very active field of Constitutional Law, which would profit from decisions and guidance from the Ohio Supreme Court.

### **Guy Mettle’s Propositions of Law that are affected by the Supremacy of Legislative Intent**

The supremacy of Legislative Intent over other court interpretations of statutes was embodied in the following propositions of law presented by Guy Mettle:

Proposition of Law #1 - Supreme Court is obligated to determine legislative intent. Lower courts are similarly obligated.

Proposition of Law #2 - Purpose of Rules of Construction is to determine Legislative Intent. Supreme Court and lower courts must use rules of construction.

Proposition of Law #5 - 2953.36(D) violates constitution rights of due process and equal protection due to selective and vindictive enforcement.

Proposition of Law #8 - R.C. 2953.36 (D) creates privileged classes in violation of constitutional rights of due process and equal protection.

Proposition of Law #9 - R.C. 2953.36 (D) does not prohibit sealing of records or nonviolent offenses when the victim is under age 18.

### **Discrimination Against Pro Se Litigants and Legislative Intent are Constitutional Questions of Great Public Interest**

Millions of litigants are pro se for various reasons, but most of them are pro se because they cannot afford the high cost of litigation with attorneys, many of which are incompetent,

---

<sup>24</sup> Resulting list of Law Review articles from a Lexis-Nexus Search for “Legislative Intent” returned the titles of over 3,000 articles. The first 50 titles of that list are attached in the Appendix as Exhibit 13. This shows that Legislative Intent is a very active field of Constitutional Law, which would profit from decisions and guidance from the Ohio Supreme Court.

unmotivated to actually prepare briefs, or crooked and freely pad their bill for hours they never worked, double billed to other clients, or bill for non-existent work-product (such as research) that the attorney never produced. Frequently, attorneys know that after they milk a client for all they can get, the newly impoverished client is in a poor financial and legal position to seek timely recourse against both his original legal problem and his crooked or inept attorney. If the client assertively seeks appropriate action from his attorney, the attorney simply claims “differences” or an “antagonistic climate,” which justifies the attorney to abandon the case with 10 days notice, while the attorney keeps the client’s money, which effectively blocks the client from engaging another attorney for representation.

This problem is greatly exacerbated by the brotherhood of collusion between Judges, all of whom were attorneys, and the attorneys that regularly practice before their courts. Judges are only human, and they want to get along collegially with the professionals that regularly practice in their courts. And, the attorneys go to great lengths to get on the Judges’ good side. The collusion is a wink and nod understanding that the attorneys only need to fulfill the most minimal procedural actions, which allow them nearly to fail to prosecute the case and still get paid. Frequently, Judges and court staff favor attorneys in every manner, trusting that they can push pro se litigants out of the court system with unjustified, adverse rulings.

Hence, Guy Mettle was disappointed, but not completely surprised, when the Honorable Chief Justice Thomas Moore, signed the court order, apparently without reading the Memorandum of Jurisdiction, without being aware of the constitutional issues, and without considering the great social impact of his decision.

When two appellate courts explicitly recognized, and then ignored, legislative intent, in the underlying case, then it takes a disingenuous or intentionally blind review Justice not to

recognize the constitutional and social issues; or quite likely, the Chief Justice is merely rubber stamping the decision drafted by a junior law clerk or staff member. Using pro se cases as cannon fodder to train novice and junior staff may be part a court system's regular pattern of discrimination against pro se litigants; and if the court staff member was a senior, experienced practitioner, then more is the shame on him.

### **Guy Mettle's Propositions of Law that addressed discrimination harm to pro se litigants**

The court should note that Guy Mettle's Memorandum in Support of Jurisdiction asserted four Propositions of Law that addressed discrimination and the harm caused to pro se litigants:

Proposition of Law #3 - A cause of action exists when an official's failure to train or supervise personnel leads to deprivation of the litigant's constitutional rights. This applies to Ohio Courts.

Proposition of Law #4 -- A cause of action exists when Ohio courts have not implemented a systematic and comprehensive program to protect the constitutional rights of pro se and indigent litigants.

This is particularly poignant because in April, 2006, the Supreme Court published their "Report And Recommendations Of The Supreme Court Of Ohio Task Force On Pro Se & Indigent Litigants," which states: "The 52 recommendations of this report are based on one simple premise: to fulfill its duty of "justice for all", our legal system must become "user friendly" to the pro se litigant and afford timely access to effective legal counsel for indigent parties." None, or few, of these recommendations have been systematically implemented on a statewide basis, so the de facto discrimination continues against pro se litigants.

One particularly discriminating rule is the requirement that pro se litigants submit their opening brief in 20 days, which is practically impossible for someone not yet familiar with Appellate Procedure. The practical effect is that only experienced appellate

attorneys stand a chance to follow procedure and to meet Appellate Court deadlines. As described in Guy Mettle's Memorandum in Support of Jurisdiction, Guy Mettle was subjected to a particularly devious trick by Appellate Court Staff and Justices to prevent Guy Mettle from submitting an Appellate court brief.<sup>25</sup>

In this particular dirty trick, at the very beginning of the appeal, the Appellate Court Deputy Administrator, Mr. Douglas W. Eaton told Guy Mettle, face to face, "If you need more time, just ask." When Guy Mettle filed a timely motion for an extension of time to file his brief, the Appellate court denied his motion. Consequently, Guy Mettle was prevented from filing an Appellate Court brief and from presenting oral arguments.

Judicial efficiency is no reason to force the 20 day rule on pro se appellants. By comparison, in the State of Washington, all appellants can submit their opening brief up to 105 days after the trial court decision: Notice of Appeal in 30 days; then Statement of Issues in 30 Days; then Opening Brief in 45 days.<sup>26</sup>

Proposition of Law #6 - The State/Prosecutors must be held to equally, or more, strict standards as pro se litigants, otherwise it violates equal protection and due process. This is a corollary to the U.S. Supreme Court decision<sup>27</sup> that pro se pleadings should be held to "less stringent standards" than those drafted by attorneys.

Proposition of Law #7 - The State/Prosecutor should not be allowed to manipulate the court docket resulting in a case schedule to his advantage.

### **Conclusion for Discrimination Against Pro Se Litigants**

Pervasive, subtle, and blatant discrimination against pro se litigates is common in Ohio Courts at all levels, except perhaps small claims court. This causes unconstitutional violations of due process and equal protection under the law. The pervasive nature of the discrimination

---

<sup>25</sup> This Appellate Court dirty trick is described in Guy Mettle's Memorandum in Support of Jurisdiction (on page 10), which is attached in the Appendix as Exhibit 2.

<sup>26</sup> The timeline of Washington State Rules of Appellate Procedure is attached in the Appendix as Exhibit 14.

<sup>27</sup> Haines v. Kerner, 404 U.S. 520 (1971)

makes this of great public interest because it impacts every poor and middle class litigant in civil cases and in many criminal cases. The great social impact of this discrimination is ever increasing because computer and internet technology allow ever increasing numbers of pro se litigants to bypass the brotherhood of crooked or inept attorneys and to penetrate the priesthood of Appellate and Supreme Court litigants.

### **Conclusion for Supremacy of Legislative Intent**

In democracies and English based legal systems, legislative intent must trump other court interpretations of statutes. Even, the “plain meaning” rule is simply a rule of construction, which must be applied judiciously in the context of legislative intent. When Ohio Appellate Courts explicitly ignore manifest legislative intent (as stated by 10<sup>th</sup> Dist. Appellate Judge Painter), and then render decisions directly opposed to the Legislature’s intent, this violates constitutional separation of powers, usurps power of the legislature to make law, and undermines our democracy. It has great social impact on everyone and every business or legal entity that resides in Ohio, or interacts with Ohio, including other States, the Federal Government, foreign countries and international organizations. Without the supremacy of legislative intent, no one can trust Ohio laws or Ohio stability, because any clerical error or erroneous interpretation that seems to have plain meaning in an Ohio statute becomes inviolate, and it cannot be harmonized or clarified by the courts without another act of the Legislature. Even then, the evil cycle can repeat itself, because with this case the Ohio Supreme Court accepted that legislative intent has no place in Ohio law.

### **Request to the Court**

Guy Mettle respectfully requests that the Ohio Supreme court reconsider its decision that “dismisses the appeal as not involving any substantial constitutional question.” Substantial constitutional issues are at the very heart of this case, which will shake the foundations of Ohio’s constitution and legal system. Importantly, the court did not address the great public interest, economic and social impact of the issues raised by Guy Mettle, which are a sound basis for the Supreme Court to reverse its decision to dismiss, dated September 10, 2008. Without the supremacy of legislative intent, no less than Ohio’s social contract with its citizens is at stake, and chaos may result.

Date September 19, 2008

Respectfully submitted,

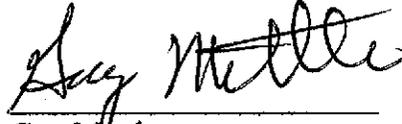


Guy Mettle  
Pro Se

CERTIFICATE OF SERVICE

I certify that a copy of this MOTION FOR RECONSIDERATION OF MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT GUY METTLE was sent by ordinary U.S. mail to counsel for appellees, Ron O'Brien, Franklin County Prosecuting Attorney, 373 S. High Street, 13<sup>th</sup> Floor, Columbus, OH 43215, on Date: September 20, 2008.

Date: \_\_\_\_\_ September 20, 2008 \_\_\_\_\_

A handwritten signature in black ink that reads "Guy Mettle". The signature is written in a cursive style with a horizontal line underneath it.

Guy Mettle,  
2715 Collinford Drive, #K  
Dublin, Oh 43016

## APPENDIX INDEX

Appendix with exhibits was filed simultaneously with this motion

1. Supreme Court order in State v. Mettle is attached in the Appendix as **Exhibit 1**.
2. Guy Mettle's Memorandum in Support of Jurisdiction is attached in the Appendix as **Exhibit 2**.
3. In State v. Mettle, 10<sup>th</sup> Dist. Appellate Court cited their own decision in State v. Schiavo, 10th Dist., 2008 Ohio 298, 208 Ohio App. Lexis 251, . Attached in Appendix: State v. Mettle as **Exhibit 3**;
4. State v. Schiavo, 10th Dist., 2008 Ohio 298, 208 Ohio App. Lexis 251 as **Exhibit 4**
5. The Legislative Act Summary, and Am. Sub. S.B. 13, Ohio 123rd General Assembly are attached in the Appendix as **Exhibit 5**.
6. 10 Dist. Appellate Court decision In State v. Westendorf, 1<sup>st</sup> Dist. No. C-020114, 2003-Ohio-1019, which is attached in the Appendix as **Exhibit 6**.
7. Professor of Law, M. B. W. Sinclair, New York Law School Law Review, 1997, 28,000 word article, titled "Review Essay: Legislative Intent: Fact Or Fabrication? Dynamic Statutory Interpretation" is attached in the Appendix as **Exhibit 7**.
8. Guy Mettle's Common Pleas Court response brief is in the Appendix as **Exhibit 8**.
9. Guy Mettle's motion for an extension of time is in the Appendix as **Exhibit 9**.
10. Appellate Courts decision to deny Guy Mettle's motion for extension of time is in the Appendix as **Exhibit 10**
11. In Huffman V. Commissioner of Internal Revenue, 978 F.2d 1139; 1992 U.S. App. LEXIS 28490. Attached in the Appendix as **Exhibit 11**.
12. The Chief Justice of the Washington State Supreme Court (1995-2001), and previously a member of the Washington State Senate (1979 to 1995), the Honorable Philip A. Talmadge, wrote a 13,000 word article in the Seattle University Law Review, "A New Approach to Statutory Interpretation in Washington." Attached in the Appendix as **Exhibit 12**.
13. Resulting list of Law Review articles from a Lexis-Nexus Search for "Legislative Intent" which returned the titles of over 3,000 articles. The first 50 titles of that list are attached in the Appendix as **Exhibit 13**. This shows that Legislative Intent is a very active field of

Constitutional Law, which would profit from decisions and guidance from the Ohio Supreme Court

14. The timeline of Washington State Rules of Appellate Procedure is attached in the Appendix as **Exhibit 14**.
15. Common Pleas Court Case 07EP-05-229, Decision and Entry Granting Defendant's Application to Seal Record of Conviction, Filed May 7, 2007, is attached in the Appendix as **Exhibit 15**.
16. Transcripts of Proceedings, Common Pleas Case No. 07EP-229, on Sept. 5, 2007, is attached in the Appendix as **Exhibit 16**. In this hearing Judge Schneider ordered the case record sealed.

IN THE SUPREME COURT OF OHIO

Guy Mettle

Appellant

v.

State of Ohio,

Appellee

:  
:  
: Ohio Supreme Court  
: Case No. 2008-0921

:  
:  
: On Appeal from the Franklin  
: County Court of Appeals,  
: 10th District, Case No. 07AP-892

---

APPENDIX FOR MOTION FOR RECONSIDERATION OF MEMORANDUM IN  
SUPPORT OF JURISDICTION OF APPELLANT GUY METTLE

---

Guy Mettle  
2715 Collinford Drive, #K  
Dublin, OH 43016  
(614) 432-6000

PRO SE, APPELLANT

Ron O'Brien (0017245)  
Franklin County Prosecuting Attorney  
373 South High Street, 13<sup>th</sup> Floor  
Columbus, OH 43215  
614-462-3555

COUNSEL FOR APPELLEE  
STATE OF OHIO, FRANKLIN COUNTY

APPENDIX INDEX

APPROX  
PAGE NO.

Appendix with exhibits was filed simultaneously with this motion

1. Supreme Court order in State v. Mettle is attached in the Appendix as **Exhibit 1**. - 4
2. Guy Mettle's Memorandum in Support of Jurisdiction is attached in the Appendix as **Exhibit 2**. - 6
3. In State v. Mettle, 10<sup>th</sup> Dist. Appellate Court cited their own decision in State v. Schiavo, 10th Dist., 2008 Ohio 298, 208 Ohio App. Lexis 251, . Attached in Appendix: State v. Mettle as **Exhibit 3**; - 36
4. State v. Schiavo, 10th Dist., 2008 Ohio 298, 208 Ohio App. Lexis 251 as **Exhibit 4** - 40
5. The Legislative Act Summary, and Am. Sub. S.B. 13, Ohio 123rd General Assembly are attached in the Appendix as **Exhibit 5**. - 42
6. 10 Dist. Appellate Court decision In State v. Westendorf, 1<sup>st</sup> Dist. No. C-020114, 2003-Ohio-1019, which is attached in the Appendix as **Exhibit 6**. - 49
7. Professor of Law, M. B. W. Sinclair, New York Law School Law Review, 1997, 28,000 word article, titled "Review Essay: Legislative Intent: Fact Or Fabrication? Dynamic Statutory Interpretation" is attached in the Appendix as **Exhibit 7**. - 52
8. Guy Mettle's Common Pleas Court response brief is in the Appendix as **Exhibit 8**. - 74
9. Guy Mettle's motion for an extension of time is in the Appendix as **Exhibit 9**. - 102
10. Appellate Courts decision to deny Guy Mettle's motion for extension of time is in the Appendix as **Exhibit 10** - 105
11. In Huffman V. Commissioner of Internal Revenue, 978 F.2d 1139; 1992 U.S. App. LEXIS 28490. Attached in the Appendix as **Exhibit 11**. - 107
12. The Chief Justice of the Washington State Supreme Court (1995-2001), and previously a member of the Washington State Senate (1979 to 1995), the Honorable Philip A. Talmadge, wrote a 13,000 word article in the Seattle University Law Review, "A New Approach to Statutory Interpretation in Washington." Attached in the Appendix as **Exhibit 12**. - 123

13. Resulting list of Law Review articles from a Lexis-Nexus Search for "Legislative Intent" which returned the titles of over 3,000 articles. The first 50 titles of that list are attached in the Appendix as **Exhibit 13**. This shows that Legislative Intent is a very active field of Constitutional Law, which would profit from decisions and guidance from the Ohio Supreme Court - 137
14. The timeline of Washington State Rules of Appellate Procedure is attached in the Appendix as **Exhibit 14**. - 142
15. Common Pleas Court Case 07EP-05-229, Decision and Entry Granting Defendant's Application to Seal Record of Conviction, Filed May 7, 2007, is attached in the Appendix as **Exhibit 15**. - 144
16. Transcripts of Proceedings, Common Pleas Case No. 07EP-229, on Sept. 5, 2007, is attached in the Appendix as **Exhibit 16**. In this hearing Judge Schneider ordered the case record sealed. - 148

**EXHIBIT No. 1**

1. Supreme Court order in State v. Mettle is attached in the Appendix as **Exhibit 1**.

# The Supreme Court of Ohio

FILED

SEP 10 2008

State of Ohio

Case No. 2008-0921

CLERK OF COURT  
SUPREME COURT OF OHIO

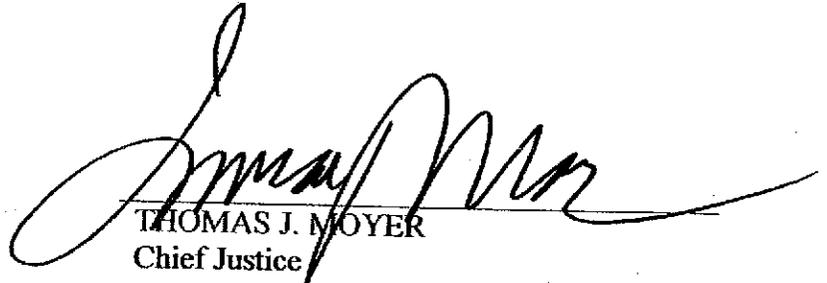
v.

ENTRY

Guy L. Mettle

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Franklin County Court of Appeals; No. 07AP892)



THOMAS J. MOYER  
Chief Justice

EXHIBIT No. 2

2. Guy Mettle's Memorandum in Support of Jurisdiction is attached in the Appendix as **Exhibit 2**.



TABLE OF CONTENTS

STATEMENT OF CASE AND FACTS ..... pg. 3

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC  
OR GREAT GENERAL INTEREST AND INVOLVES  
SUBSTANTIAL CONSTITUTIONAL QUESTIONS ..... pg. 5

ARGUMENT IN SUPPORT OF PROPOSTIONS OF LAW ..... pg. 6

Proposition of Law #1 - Supreme Court is obligated to determine legislative  
    intent. Lower courts are similarly obligated. .... pg. 6

Proposition of Law #2 - Purpose of Rules of Construction is to determine  
    Legislative Intent. Supreme Court and lower courts must use rules of  
    construction. .... pg. 8

Proposition of Law #3 - A cause of action exists when an official's failure to  
    train or supervise personnel leads to deprivation of the litigant's constitutional  
    rights. This applies to Ohio Courts. .... pg. 9

Proposition of Law #4 -- A cause of action exists when Ohio courts have not  
    implemented a systematic and comprehensive program to protect the  
    constitutional rights of pro se and indigent litigants. ....pg. 11

Proposition of Law #5 - 2953.36(D) violates constitution rights of due process  
    and equal protection due to selective and vindictive enforcement. ....pg. 11

Proposition of Law #6 - The State/Prosecutors must be held to equally, or more,  
    strict standards as pro se litigants, otherwise it violates equal protection and due  
    process. This is a corollary to the U.S. Supreme Court finding that pro se  
    pleadings should be held to "less stringent standards" than those drafted by  
    attorneys. ....pg. 12

Proposition of Law #7 - The State/Prosecutor should not be allowed to  
    manipulate the court docket resulting in a case schedule to his advantage. .... pg. 12

Proposition of Law #8 - R.C. 2953.36 (D) creates privileged classes in violation  
    of constitutional rights of due process and equal protection. ....pg. 14

Proposition of Law #9 - R.C. 2953.36 (D) does not prohibit sealing of records  
    for nonviolent offenses when the victim is under age 18. .... pg. 16

CONCLUSION ..... pg. 16

CERTIFICATE OF SERVICE ..... pg. 17

APPENDIX ..... pg. 18

Journal Entry of Franklin County Court of Appeals, Tenth District  
January 8, 2008 ..... apprx. Pg. 19

Journal Entry of Franklin County Court of Appeals, Tenth District  
February 13, 2008 ..... apprx. Pg. 20

Journal Entry of Franklin County Court of Appeals, Tenth District  
March 3, 2008 ..... apprx. Pg. 21

Opinion of Franklin County Court of Appeals, Tenth District  
March 27, 2008 ..... apprx. Pg. 22

Judgement Entry of Franklin County Court of Appeals, Tenth District  
March 27, 2008 ..... apprx. Pg. 25

Memorandum Decision of Franklin County Court of Appeals, Tenth District  
April 29, 2008 ..... apprx. Pg. 26

Journal Entry of Franklin County Court of Appeals, Tenth District  
April 29, 2008 ..... apprx. Pg. 29

## STATEMENT OF CASE AND FACTS

Statement of the Case can be summarized quickly, but the constitutional ramifications are complex and include 9 Propositions of Law. In order to maintain clarity, avoid repetition, and stay within the 15 page limit, this short Statement of Case is placed first.

In the Supreme Court, Mettle is the Appellant, but in the Appellate Court, Mettle was the Appellee. In order to avoid confusion, Supreme Court Appellant Mettle will be identified simply by his name when discussing actions in the lower courts.

In the Court of Common Pleas, Mettle applied to have his records sealed for one offense of non-support. The State opposed based on State's claim that Ohio R.C. 2953.36 (D) prevents sealing convictions of an offense in circumstances in which the victim of the offense was under eighteen years of age.

However, the Act Summary of Am. Sub. S.B. 13, 123rd General Assembly, carries different wording, which allows the record to be sealed unless the conviction is for an offense of violence: "Excludes from the Criminal Conviction Records Sealing Law all convictions of an offense of violence when the offense is (1) a misdemeanor of the first degree or a felony and when the offense is not riot and is not assault, inciting to violence, or inducing panic that is a misdemeanor of the first degree, (2) an offense of which the victim was under 18 years of age when the offense is a misdemeanor of the first degree or a felony, or (3) a felony of the first or second degree."

In Common Pleas court hearing and in his brief, Mettle raised constitutional issues, legislative intent, and 13 rules of construction. The State made no response to these issues and said nothing about them at the hearing. Judge Schneider ordered Mettle's record sealed, and

stated that he did not believe that the Legislative Act intended to prevent the sealing of records for the offense of nonsupport.

State appealed. Appearing pro se, Mettle filed a timely motion for extension of time to file his brief. Appellate court denied the extension of time, and Mettle was prevented from filing an appellate brief or presenting oral arguments.

The Appellate court reversed the Common Pleas court, and ordered Mettle's record to be unsealed. The 10<sup>th</sup> Appellate court did not address constitutional issues, legislative intent, or rules of construction, but merely cited *State v. Schiavo*, 10th Dist., 2008 Ohio 298, 208 Ohio App. Lexis 251. However, *State v. Schiavo* merely cited *State v. Westendorf* from another district Appellate Court.

This chain of cases extended the geographic effect of unconstitutional rulings from the Appellate courts. However, in *State v. Westendorf*, 1<sup>st</sup> Dist. No. C-020114, 2003-Ohio-1019, Appellate Judge Painter stated: ¶11 “Everyone involved with this case must know that this result is unfortunate, and obviously not what the legislature intended.”

The opinion worth addressing is *State v. Westendorf*, because its opinion includes an explanation, while *State v. Schiavo* does not. Fortunately, Mettle aimed much of his Common Pleas brief at *State v. Westendorf*, and so it is part of the Appellate court record.

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES SUBSTANTIAL CONSTITUTIONAL QUESTIONS

This case is of broad general interest because it affects thousands of parents who were, or will be, convicted of one offense of non-support. It affects their ability to find good employment because their criminal record remains unsealed, which affects their ability to support their children. Consequently, it affects thousands of children along with each child's second parent.

Also, the Appellate court's interpretation broadens the prohibition against sealing records to a huge number of offenses beyond those intended by the Legislative Act. At this point it affect tens (or hundreds) of thousands of people.

The particulars of this case and rulings of the Appellate court involve constitutional questions including due process, equal protection, separation of powers, rights of pro se litigants, rights of in forma pauperis litigants, court responsibility for their staff, the unconstitutional creation of privileged classes, and the courts' obligation to determine legislative intent. The two issues, that Appellate courts are ignoring rules of construction and ignoring legislative intent, will create complete chaos in Ohio's legal system, and in Ohio's legal interface to other states and the federal government.

To avoid repetition and stay within the 15 page limit, Appellant's detailed explanation of constitutional issues will be presented with the associated Proposition of Law. Additional statement of facts will be identified as needed. This concise form of organization is required by the fact that this memorandum contains 9 propositions of law.

#### ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of Law #1 - Supreme Court is obligated to determine legislative intent. Lower courts are similarly obligated.**

Ohio Const. Art. 4.1. Legislative Intent -- Where two legislative enactments are in apparent conflict, the supreme court's constitutional role under OConst art IV, § 1 is to interpret the intent of the general assembly: State v. Smorgala, 50 Ohio St. 3d 222, 553 N.E.2d 672, 1990

Ohio Const. Preamble: The rules for construing a constitution and a statute are substantially the same: : State ex rel. Greenlund v. Fulton, 99 Ohio St. 168, 124 N.E. 172 (1919).

Ohio Const Preamble: A technical meaning of a constitutional provision may be resorted to, if such meaning is in harmony with the manifest intention of the people in enacting such provision: *State ex rel. Sylvania Home Tel. Co. v. Richards*, 94 Ohio St. 287, 114 N.E. 263 (1916). Also quoted in Ohio Const. Art. 1.1.

Ohio Const. Art. 1.10 - Cumulative Error Doctrine. Pursuant to the cumulative error doctrine, the existence of multiple errors which may not individually require reversal may violate a defendant's right to a fair trial: *State v. Karl*, 142 Ohio App. 3d 800, 757 N.E.2d 30, 2001 Ohio App. LEXIS 2373, 2001 Ohio 3273, (2001).

Ohio Const. Art. 2.1 - Separation of Powers. The legislative power of the state is vested in the general assembly by OConst art II, § 1 and that body may not abdicate or transfer to others the essential legislative functions with which it is vested: *Belden v. Union Cent. Life Ins. Co.*, 143 Ohio St. 329, 55 N.E.2d 629 (1944).

Ohio Const. Art. 2.1 - The grant of legislative power in OConst art II, § 1, is limited only by express constitutional provisions in the Ohio and United States Constitutions: *Williams v. Scudder*, 102 Ohio St. 305, 131 N.E. 481 (1921).

Ohio Const. Art. 4.1 - The jurisdiction of the common pleas court is limited to judicial power under OConst art IV, § 1, and, except in the special instances in which the constitution expressly confers nonjudicial power, it has no nonjudicial power and cannot be invested with such power by the legislature

Ohio Const. Art. 4.1 - Independence of Judicial Branch -- The administration of justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers: *State ex rel. Johnston v. Taulbee*, 66 Ohio St. 2d 417, 423

When courts ignore legislative intent, they will enforce errors, including clerical errors, which is the case with R.C. 2953.36 (D).

**Proposition of Law #2 - Purpose of Rules of Construction is to determine Legislative Intent. Supreme Court and lower courts must use rules of construction.**

In *State V. Liffing*, 61 Ohio St. 39; 55 N.E. 168; 1899; the Supreme Court stated:  
“It should always serve the rule that the object of construction is to ascertain intention.”

Also, see Proposition of Law #1, above.

Rules of construction ignored by the Appellate courts, in this case alone, include:

- a) Purpose of rules of construction is to determine lawmakers' intent
- b) Specific provisions rule over general provisions to determine intent
- c) Intent is determined from the Legislative Act.
- d) Consider the whole, *in pari materia*, to determine intent
- e) In seeking the meaning of an act, all of its words must be considered.
- f) A fragment of the truth is not assumed to be the universal truth
- g) Must assume the lawmaker intended to be consistent with himself
- h) Consider even the title of the Act to determine intent
- i) Remedial law, especially, the court should determine intent.
- j) Remedial law, especially, court should harmonize the law with intent and the whole.
- k) Penal law, especially, the court should use “strict” construction against the state
- l) Penal law, especially, strict construction means in favor life and liberty
- m) Penal law, especially, use liberal interpretation in favor of accused

Appellant will provide case citations for each these rules of construction in his Merit Brief. The citations are omitted now due to the 15 page limit on this memorandum, but they were included in Mettle's Common Pleas brief, which is in the Appellate Court record.

**Proposition of Law #3 - A cause of action exists when an official's failure to train or supervise personnel leads to deprivation of the litigant's constitutional rights. This applies to Ohio Courts.**

See 1995 U.S. App. LEXIS 12617: "A plaintiff cannot bring a cause of action under the theory of respondeat superior under 42 U.S.C.S. § 1983, but a cause of action exists when an official's failure to train or supervise personnel leads to deprivation of the plaintiff's constitutional rights. See Denton, 112 S. Ct. at 1733."

In Haines v. Kerner, 404 U.S. 520 (1971), the U.S. Supreme Court found that pro se pleadings should be held to "less stringent standards" than those drafted by attorneys.

In April, 2006, the Supreme Court published their "Report And Recommendations Of The Supreme Court Of Ohio Task Force On Pro Se & Indigent Litigants," which states: "The 52 recommendations of this report are based on one simple premise: to fulfill its duty of "justice for all", our legal system must become "user friendly" to the pro se litigant and afford timely access to effective legal counsel for indigent parties."

That report recommends "Although there is no substitute for competent legal counsel, some litigants will represent themselves, either voluntarily or involuntarily. Incomprehensible forms, as well as complex court rules and procedures, impair the ability of self-represented litigants to present their cases."

Ohio Const. Art. 1.16. -- Due Process - Trial court violated due process and committed plain error by finding the defendant guilty of the charged offense without offering him an opportunity to present a defense: State v. Litreal, 170 Ohio App. 3d 670, 868 N.E.2d 1018, 2006 Ohio App. LEXIS 5410, 2006 Ohio 5416, (2006), criticized by Bryan-Wollman v. Domonko, 115 Ohio St. 3d 291, 2007 Ohio 4918, 874 N.E.2d 1198, 2007 Ohio LEXIS 2227 (2007).

STATEMENT OF FACTS FOR PROPOSITION OF LAW #3 - Two Appellate court actions deprived Mettle of his constitutional rights. (This information is part of the court record.) First, the 10th Appellate Court local rules state: "A party claiming to be indigent shall file with their complaint a motion for leave to proceed in forma pauperis supported by an affidavit showing indigency and indicating their actual financial condition and the disposition of any request for similar leave sought in any other court." When Mettle asked the Appellate Court Administration for their form to file for "In Forma Pauperis" status, the court administration said they did not have one, and directed Mettle to file an affidavit stating that his income fell below the guidelines used by the Public Defender's Office. When Mettle did so, the Appellate court denied his motion to proceed in forma pauperis.

The Appellate court does not have a form which mentions "in forma pauperis" to conform with the wording in their local rules. The Court administration was also confused by this term, and misdirected this pro se litigant, which is part of a consistent pattern of Appellate court abuse of this pro se litigant, and by logical extension, other pro se litigants.

Similarly, 10th Appellate Court did not have a form for extension of time, which is arguably one of the most common motions for pro se litigants at the Appellate level. At the very beginning of the appeal, the Appellate Court Deputy Administrator, Mr. Douglas W. Eaton told Mettle, face to face, "If you need more time, just ask." When Mettle filed a timely motion for an extension of time to file his brief, the Appellate court denied the motion. Consequently, Mettle was prevented from filing an Appellate Court brief and from presenting oral arguments. Mettle was denied due process and equal protection. By contrast (as shown in Proposition of Law #7, below), the Appellate court abused its discretion and granted extensive leeway to the Prosecutor, which also violated Mettle's constitutional rights to due process and equal protection.

**Proposition of Law #4 -- A cause of action exists when Ohio courts have not implemented a systematic and comprehensive program to protect the constitutional rights of pro se and indigent litigants.**

See Proposition of Law #3, above. In particular, see the "Report And Recommendations Of The Supreme Court Of Ohio Task Force On Pro Se & Indigent Litigants" that was published two years ago, in April 2006, and remains without systematic and comprehensive implementation. This case is evidence of that. And Mettle was further victimized by plea bargain fraud during the non-support trial, which is evidenced by an affidavit filed during that time period. The Supreme Court's own report provides extensive evidence to support this Proposition of Law #4.

**Proposition of Law #5 - R.C. 2953.36 (D) violates Constitutional rights of due process and equal protection due to selective and vindictive enforcement.**

Ohio Const. Article 1.2, 1.16; U.S. Const. 14th Amendment - The equal protection clause applies not only to duly enacted statutes and ordinances, but also to local customs, policies, or usages which have the force of law: *Stengel v. Columbus*, 737 F. Supp. 1457 (S.D. 1988).

Ohio Const. Article 1.2 -- The equal protection clause of the United States Constitution is violated when public officials intentionally, deliberately or systematically discriminate by not enforcing municipal zoning ordinances against a class of violators expressly included within the terms of such ordinances: *Columbiana v. Keister*, 5 Ohio App. 3d 81, 449 N.E.2d 465

Ohio Const. Article 1.2 -- Equal protection guarantees are violated where a municipal licensing ordinance ostensibly applies to all massage businesses, but it is only enforced against businesses that advertise in "adult" publications: *State v. Norris*, 147 Ohio App. 3d 224, 769 N.E.2d 896, 2002 Ohio App. LEXIS 977, 2002 Ohio 1033, (2002).

STATEMENT OF FACTS AS APPLIED TO PROPOSITION OF LAW #5 -- State's Appellate brief cited 10 cases that involved sex, drugs, or violence. All of these cases would have been ineligible to have their records sealed without the requirement that the victim be under age 18. By contrast, the State could only cite one type of case that involved non-violent offenses against victims under the age of 18. That one type of offense is nonsupport. R.C. 2953.36 became effective in January 2004. After four years, the only non-violent, non sex, non drug examples found by the State and presented in their brief were nonsupport cases. This is prima facie evidence of the State's selective and vindictive prosecution/opposition to nonsupport cases which apply to have their records sealed.

**Proposition of Law #6 - The State/Prosecutors must be held to equally, or more, strict standards as pro se litigants, otherwise it violates equal protection and due process. This is a corollary to the U.S. Supreme Court finding that pro se pleadings should be held to "less stringent standards" than those drafted by attorneys.**

See Haines v. Kerner, 404 U.S. 520 (1971) -- In finding plaintiff's complaint legally sufficient, Supreme Court found that *pro se* pleadings should be held to "less stringent standards" than those drafted by attorneys.

Also, see Proposition of Law #7, below.

**Proposition of Law #7 - The State/Prosecutor should not be allowed to manipulate the court docket resulting in a case schedule to his advantage.**

See Proposition of Law #6, above.

STATEMENT OF CASE AND FACT FOR PROPOSITION OF LAW #7 -- Prosecutor's manipulation of court calendar and fraud on the court are shown as follows. Normally, the Appellate case would have been placed on the Court's accelerated calendar. However the Prosecutor filed a Docketing Statement declaring that:

- a) "This appeal should be assigned to the regular calendar"
- b) "Although the appeal meets one or more of the reasons for being assigned to the accelerated calendar, it should not be assigned to the accelerated calendar because: 1. Brief in excess of 15 pages (see Loc.R. 7(B)) is necessary to set forth adequately the facts and argue to issues in the case."

In fact, the Prosecutor filed a brief only 6 pages in length. Prosecutor committed fraud on the Court in his false justification for the regular calendar instead of the accelerated calendar.

The motivation of the Prosecutor to commit calendar fraud came to light when the Prosecutor filed his "Supplemental Authority" citing *State v. Schiavo*, which was rendered on January 29, 2008, while *State v. Mettle* was still in progress. The Prosecutor was privy to both *Schiavo's* and *Mettle's* briefs. Prosecutor knew that *Mettle's* brief was much stronger with many citations, constitutional issues, and arguments from the Ohio Supreme Court. The Prosecutor was highly motivated to conclude *State v. Schiavo* first, in order to cite it as an authority in *State v. Mettle*. This locked the 10<sup>th</sup> Appellate Court into a decision that was adverse to *Mettle*, no matter the merits of *Mettle's* case. Prosecutor accomplished this by filing a fraudulent Docketing Statement and fraudulently placing *State v. Mettle* on the regular calendar.

It should be noted that the State/Prosecutor's Appellate brief was practically identical to brief he used in the Common Pleas court, and it contained the same arguments and issues. There were no issues of length or complexity that required the Prosecutor to use the regular calendar in the Appellate Court.

On this basis, *Mettle* filed a motion to strike the State's Appellate brief. However, the Appellate court denied *Mettle's* motion. This represents favoritism in favor of the State in comparison to the Court's previous strict judgment of *Mettle's* own motion for an extension of

time, which the Appellate court denied. This was abuse of discretion and violated due process and equal protection.

**Proposition of Law #8 - R.C. 2953.36 (D) creates privileged classes in violation of constitutional rights of due process and equal protection.**

Ohio Const. Art 1.2. -- A city ordinance prohibiting loitering for the purpose of engaging in drug-related activity violates the federal and Ohio due process clauses because it can only be interpreted as impermissibly vague or overbroad: *City of Akron v. Rowland*, 67 Ohio St. 3d 374, 618 N.E.2d 138, 1993 Ohio LEXIS 1861, 1993 Ohio 222, (1993).

Ohio Const. Art 1.2. -- RC § 2921.15 violates freedom of speech and equal protection by singling out peace officers and placing them in a special, privileged category: *State v. English*, 120 Ohio Misc. 2d 16, 776 N.E.2d 1179, 2002 Ohio Misc. LEXIS 33, 2002 Ohio 5440, (MC 2002).

R.C. 2953.36 states “Sections 2953.31 to 2953.35 of the Revised Code do not apply to any of the following: ... (D) Convictions of an offense in circumstances in which the victim of the offense was under eighteen years of age when the offense is a misdemeanor of the first degree or a felony;...”

Ohio R.C. contains many clauses that give extra protection to minors and vulnerable groups of people. Similarly, the legislative intent of R.C. 2953.36(D) is to provide an extra level of protection (deterrence against offenses) for an allegedly vulnerable class of people, namely youths under the age of 18. However, “under 18 years of age” is overbroad and creates a privileged class of people, specifically, emancipated youths under the age of 18.

Generally, Ohio R.C. does not give extra protection to able, emancipated persons. Even child support laws provide less support and protection for emancipated youths. In our present

time of the War on Terror, we have thousands of emancipated youths who are in the military, are combat trained, and combat hardened. Similarly, thousands of emancipated youths are gang members and hardened criminals. None of them deserve extra protection. However, R.C. 2953.26(D) is overbroad and does just that. This creates a large group of able, emancipated persons receiving extra protection at the expense of parents, who must still earn a living to support their own children.

Experts say that the War on Terror and gangs will go on for generations; hence there is no end in sight for the unconstitutionally privileged classes created by R.C.2953.36 (D). Arguably, social scientists and attorneys could give more examples of privileged classes created by R.C.2953.36 (D), which is therefore unconstitutional due to violation of due process and equal protection.

The unconstitutional, privileged classes can only increase in scope when R.C. 2953.36(D) is interpreted to ignore the legislative intent that limits the prohibition on sealing records to offenses of violence. See the Act Summary of Am. Sub. S.B. 13, 123rd General Assembly. It carries wording which allows the record to be sealed unless the conviction is for an offense of violence: "Excludes from the Criminal Conviction Records Sealing Law all convictions of an offense of violence when the offense is (1) a misdemeanor of the first degree or a felony and when the offense is not riot and is not assault, inciting to violence, or inducing panic that is a misdemeanor of the first degree, (2) an offense of which the victim was under 18 years of age when the offense is a misdemeanor of the first degree or a felony, or (3) a felony of the first or second degree."

**Proposition of Law #9 - R.C. 2953.36 (D) does not prohibit sealing of records for nonviolent offenses when the victim is under age 18.**

See Propositions of Law # 1, 2, 5, and 8.

The legislative intent is clear from Am. Sub. S.B. 13, Act Summary, which stipulated “offenses of violence” when the victim is under age 18.

Note that Am. Sub. S.B. 13, Act Summary provides another complete suite of prohibitions to sealing records of offenses, which never mention “offenses of violence.” If the limitation to “offenses of violence” is not used, then Am. Sub. S.B. 13 already has specified which offenses are covered, without the condition of the victim being under age 18.

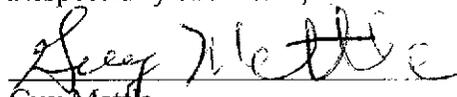
If well known rules of construction are applied (See Propositions of Law # 1, 2, 5, and 8), then R.C.2953.36 (D) must be restricted to offenses of violence.

CONCLUSION

For the reason discussed above, this case involves matters of public and great general interest and substantial constitutional questions. The appellant requests that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

Date May 11, 2008

  
Guy Mettfe  
Pro Se

CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for appellees, Ron O'Brien, Franklin County Prosecuting Attorney, 373 S. High Street, 13<sup>th</sup> Floor, Columbus, OH 43215, on Date: May 11, 2008.



Guy Mettle,  
2715 Collinford Drive, #K  
Dublin, Oh 43016

APPENDIX

Journal Entry of Franklin County Court of Appeals, Tenth District  
January 8, 2008 ..... apprx. Pg. 19

Journal Entry of Franklin County Court of Appeals, Tenth District  
February 13, 2008 ..... apprx. Pg. 20

Journal Entry of Franklin County Court of Appeals, Tenth District  
March 3, 2008 ..... apprx. Pg. 21

Opinion of Franklin County Court of Appeals, Tenth District  
March 27, 2008 ..... apprx. Pg. 22

Judgement Entry of Franklin County Court of Appeals, Tenth District  
March 27, 2008 ..... apprx. Pg. 25

Memorandum Decision of Franklin County Court of Appeals, Tenth District  
April 29, 2008 ..... apprx. Pg. 26

Journal Entry of Franklin County Court of Appeals, Tenth District  
April 29, 2008 ..... apprx. Pg. 29

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of:

Guy L. Mettle,

(State of Ohio,

Appellant).

No. 07AP-892

(REGULAR CALENDAR)

JOURNAL ENTRY

Appellee not explaining the basis for his request for an extension of time, appellee's January 3, 2008 motion is denied.

  
\_\_\_\_\_  
JUDGE

*off*

FILED  
COURT OF APPEALS  
FRANKLIN COUNTY, OHIO  
2008 JAN -8 PM 2:55  
CLERK OF COURTS

~~25~~ 25

dx1

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

FILED  
COURT OF APPEALS  
FRANKLIN CO. OHIO  
2008 FEB 13 PM 1:50  
CLERK OF COURTS

In the Matter of:

Guy L. Mettle,

(State of Ohio,

Appellant).

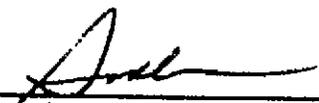
:  
:  
:  
:

No. 07AP-892

(REGULAR CALENDAR)

JOURNAL ENTRY

Appellee's February 8, 2008 request for oral argument is denied, oral argument not available to a party who does not file a brief. Appellee's February 8, 2008 motion to strike supplemental authority filed by appellant is denied. Appellee's February 8, 2008 motion for leave to proceed, *in forma pauperis*, is denied, appellee's motion and affidavit not providing the court sufficient financial information to determine whether appellee is indigent.

  
\_\_\_\_\_  
JUDGE

cc: Deputy Court Administrator



IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

FILED  
COURT OF APPEALS  
2009 MAR -3 PM 12: 25  
CLERK OF COURTS

In the Matter of:

Guy L. Mettle,

(State of Ohio,

Appellant).

No. 07AP-892

(REGULAR CALENDAR)

JOURNAL ENTRY

Appellee has demonstrated no good cause to strike appellant's brief. Accordingly, appellee's February 22, 2008 motion to strike appellant's brief and dismiss this appeal is denied.

Judge Lisa L. Sadler

Judge Judith L. French

Judge William A. Klatt

*akc*

27

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio, :  
Plaintiff-Appellant, :  
v. : No. 07AP-892  
Guy L. Mettle, : (C.P.C. No. 07EP-05-229)  
Defendant-Appellee. : (REGULAR CALENDAR)

---

O P I N I O N

Rendered on March 27, 2008

---

FILED  
COURT OF APPEALS  
FRANKLIN CO, OHIO  
2008 MAR 27 PM 1:17  
CLERK OF COURTS

*Ron O'Brien*, Prosecuting Attorney, and *Kimberly M. Bond*, for appellant.

*Guy L. Mettle*, pro se.

---

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, the State of Ohio ("appellant"), filed this appeal seeking reversal of a judgment by the Franklin County Court of Common Pleas granting the motion of appellee, Guy L. Mettle ("appellee"), to seal the record of his criminal conviction. For the reasons that follow, we reverse the trial court's judgment.

{¶2} In case No. 96CR-05-2848, appellee was charged with three counts of failure to provide support for dependents in violation of R.C. 2919.21. Each of the counts

*[Handwritten signature]*

alleged that the dependent was under the age of 18 years. On January 4, 2001, appellee pled guilty to count three of the indictment, a fourth-degree felony, with the other two counts being dismissed. On February 14, 2001, the court sentenced appellee to a period of incarceration of 18 months, with the entire sentence stayed on the condition that appellee complete five years of probation.

{¶3} On May 7, 2007, appellee filed an application seeking to seal the record of his conviction pursuant to R.C. 2953.32. Appellant objected, arguing that appellee was not eligible to have the record of his conviction sealed under the then-existing version of R.C. 2953.36(D), which provided that the sections governing the sealing of a record of conviction do not apply to "[c]onvictions of an offense in circumstances in which the victim of the offense was under eighteen years of age when the offense is a misdemeanor of the first degree or a felony."<sup>1</sup> The trial court held a hearing, and concluded that the General Assembly did not intend the exclusion for offenses where the victim was under 18 years old to apply to convictions for failing to provide support to dependents. The trial court therefore granted appellee's application to seal the record of his conviction.

{¶4} Appellant filed this appeal, alleging as the sole assignment of error:

THE TRIAL COURT ERRED BY GRANTING APPELLEE'S APPLICATION TO SEAL THE RECORD OF HIS CONVICTION AS APPELLEE WAS INELIGIBLE UNDER R.C. 2953.36(D).

{¶5} In a recent decision, we held that a conviction for failing to provide support to dependents under R.C. 2919.21 is covered by the exclusion in R.C. 2953.36 of

---

<sup>1</sup> Effective October 10, 2007, R.C. 2953.36 was amended. Under the amendment, paragraph (D) is now paragraph (F), but the amendment did not otherwise alter the wording of the exclusion for offenses where the victim was less than 18 years old.

convictions where the victim of the offense was under the age of 18 years. *In re Schiavo*, Franklin App. No. 07AP-699, 2008-Ohio-298, citing *State v. Westendorf*, Hamilton App. No. C-020114, 2003-Ohio-1019. Consequently, the trial court erred when it granted appellee's application to seal the record of his conviction.

{¶6} Accordingly, appellant's assignment of error is sustained, we hereby reverse the trial court's judgment, and remand this matter to the trial court for further proceedings consistent with this opinion.

*Judgment reversed;  
cause remanded.*

KLATT and FRENCH, JJ., concur.

---

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio, :  
 :  
 Plaintiff-Appellant, :  
 :  
 v. : No. 07AP-892  
 : (C.P.C. No. 07EP-05-229)  
 :  
 Guy L. Mettle, : (REGULAR CALENDAR)  
 :  
 Defendant-Appellee. :

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on March 27, 2008, appellant's assignment of error is sustained, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law consistent with said opinion. Costs shall be assessed against appellee.

SADLER, KLATT, and FRENCH, JJ.

By  \_\_\_\_\_  
Judge Lisa L. Sadler

2008 MAR 27 PM 1:20  
CLERK OF COURTS

Guy L. Mettle

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio, :  
Plaintiff-Appellant, :  
v. : No. 07AP-892  
Guy L. Mettle, : (C.P.C. No. 07EP-05-229)  
Defendant-Appellee. : (REGULAR CALENDAR)

---

MEMORANDUM DECISION

Rendered on April 29, 2008

---

*Ron O'Brien*, Prosecuting Attorney, and *Kimberly M. Bond*, for appellant.

*Guy L. Mettle*, pro se.

---

ON MOTIONS

SADLER, J.

{¶1} Appellee, Guy L. Mettle ("appellee"), has filed an application seeking reconsideration of our opinion. In that opinion, we reversed the decision of the Franklin County Court of Common Pleas granting appellee's application to seal the record of his conviction pursuant to R.C. 2953.32. Appellee has also filed a pleading entitled "MOTION FOR HEARING BEFORE RELEASE OF OPINION" in which he expresses concern that release of our opinion, which was rendered on March 27, 2008, will disclose

FILED  
COURT OF APPEALS  
TENTH APPELLATE DISTRICT  
2008 APR 29 PM 1:00  
CLERK OF COURTS

his identity. Since our opinion was released on the same date it was rendered, that motion is denied as moot.

{¶2} The proper standard for our consideration of an application for reconsideration is whether the application "calls to the attention of the court an obvious error in its decision, or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been." *Columbus v. Hodge* (1987), 37 Ohio App.3d 68, 523 N.E.2d 515, citing *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, 5 OBR 320, 450 N.E.2d 278. However, "[a]n application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court." *State v. Owens* (1997), 112 Ohio App.3d 334, 336, 678 N.E.2d 956, dismissed, appeal not allowed, 77 Ohio St.3d 1487, 673 N.E.2d 146.

{¶3} The conviction for which appellee sought to have the record sealed was for failing to provide support to dependents in violation of R.C. 2919.21. In reversing the trial court's decision to grant the application, we found that appellee's conviction was subject to the exclusion set forth in R.C. 2953.36 that prohibits sealing records of conviction where the victim of the offense was under the age of 18 years. *State v. Mettle*, Franklin App. No. 07AP-892, 2008-Ohio-1425. In reaching this decision, we followed our decision in *In re Schiavo*, Franklin App. No. 07AP-699, 2008-Ohio-298, in which we held that convictions under R.C. 2919.21 are covered by the exclusion for offenses where the victim is under the age of 18 years.

{¶4} Appellee's application for reconsideration does not call to our attention any obvious error in our decision, or otherwise raise any issue that was either not considered

at all or not fully considered by us when it should have been. Therefore, we deny appellee's application for reconsideration.

*Motions denied.*

KLATT and FRENCH, JJ., concur.

---

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio, :  
 :  
 Plaintiff-Appellant, :  
 :  
 v. : No. 07AP-892  
 : (C.P.C. No. 07EP-05-229)  
 :  
 Guy L. Mettle, : (REGULAR CALENDAR)  
 :  
 Defendant-Appellee. :

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on April 29, 2008, it is the order of this court that the motion for hearing before release of opinion, and the motion for reconsideration is denied.

SADLER, KLATT, and FRENCH, JJ.

By  \_\_\_\_\_  
Judge Lisa L. Sadler

2008 APR 29 PM 4:10  
CLEMSON COUNTY

EXHIBIT No. 3

3. In *State v. Mettle*, 10<sup>th</sup> Dist. Appellate Court cited their own decision in *State v. Schiavo*, 10th Dist., 2008 Ohio 298, 208 Ohio App. Lexis 251, . Attached in Appendix: *State v. Mettle* as **Exhibit 3**;

*Guy L. Mettle*

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio, :  
 :  
 Plaintiff-Appellant, :  
 :  
 v. : No. 07AP-892  
 : (C.P.C. No. 07EP-05-229)  
 Guy L. Mettle, : (REGULAR CALENDAR)  
 :  
 Defendant-Appellee. :

**O P I N I O N**

Rendered on March 27, 2008

FILED  
COURT OF APPEALS  
FRANKLIN CO. OHIO  
2008 MAR 27 PM 1:17  
CLERK OF COURTS

*Ron O'Brien*, Prosecuting Attorney, and *Kimberly M. Bond*, for appellant.

*Guy L. Mettle*, pro se.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, the State of Ohio ("appellant"), filed this appeal seeking reversal of a judgment by the Franklin County Court of Common Pleas granting the motion of appellee, Guy L. Mettle ("appellee"), to seal the record of his criminal conviction. For the reasons that follow, we reverse the trial court's judgment.

{¶2} In case No. 96CR-05-2848, appellee was charged with three counts of failure to provide support for dependents in violation of R.C. 2919.21. Each of the counts

alleged that the dependent was under the age of 18 years. On January 4, 2001, appellee pled guilty to count three of the indictment, a fourth-degree felony, with the other two counts being dismissed. On February 14, 2001, the court sentenced appellee to a period of incarceration of 18 months, with the entire sentence stayed on the condition that appellee complete five years of probation.

{¶3} On May 7, 2007, appellee filed an application seeking to seal the record of his conviction pursuant to R.C. 2953.32. Appellant objected, arguing that appellee was not eligible to have the record of his conviction sealed under the then-existing version of R.C. 2953.36(D), which provided that the sections governing the sealing of a record of conviction do not apply to "[c]onvictions of an offense in circumstances in which the victim of the offense was under eighteen years of age when the offense is a misdemeanor of the first degree or a felony."<sup>1</sup> The trial court held a hearing, and concluded that the General Assembly did not intend the exclusion for offenses where the victim was under 18 years old to apply to convictions for failing to provide support to dependents. The trial court therefore granted appellee's application to seal the record of his conviction.

{¶4} Appellant filed this appeal, alleging as the sole assignment of error:

**THE TRIAL COURT ERRED BY GRANTING APPELLEE'S APPLICATION TO SEAL THE RECORD OF HIS CONVICTION AS APPELLEE WAS INELIGIBLE UNDER R.C. 2953.36(D).**

{¶5} In a recent decision, we held that a conviction for failing to provide support to dependents under R.C. 2919.21 is covered by the exclusion in R.C. 2953.36 of

---

<sup>1</sup> Effective October 10, 2007, R.C. 2953.36 was amended. Under the amendment, paragraph (D) is now paragraph (F), but the amendment did not otherwise alter the wording of the exclusion for offenses where the victim was less than 18 years old.

convictions where the victim of the offense was under the age of 18 years. *In re Schiavo*, Franklin App. No. 07AP-699, 2008-Ohio-298, citing *State v. Westendorf*, Hamilton App. No. C-020114, 2003-Ohio-1019. Consequently, the trial court erred when it granted appellee's application to seal the record of his conviction.

{¶6} Accordingly, appellant's assignment of error is sustained, we hereby reverse the trial court's judgment, and remand this matter to the trial court for further proceedings consistent with this opinion.

*Judgment reversed;  
cause remanded.*

KLATT and FRENCH, JJ., concur.

---

EXHIBIT No. 4

4. **State v. Schiavo, 10th Dist., 2008 Ohio 298, 208 Ohio App. Lexis 251 as Exhibit**  
**4**

LEXSEE

In the Matter of: Stenio A. Schiavo, Appellee, (State of Ohio, Appellant.)

No. 07AP-699

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

2008 Ohio 298; 2008 Ohio App. LEXIS 251

January 29, 2008, Rendered

**PRIOR HISTORY: [\*\*1]**

APPEAL from the Franklin County Court of Common Pleas. (C.P.C. No. 07EP-50).

**DISPOSITION:** Judgment reversed and remanded with instructions.

**COUNSEL:** Samuel Shamansky, for appellee.

Ron O'Brien, Prosecuting Attorney, and Kimberly Bond, for appellant.

**JUDGES:** TYACK, J. BRYANT and KLATT, JJ., concur.

**OPINION BY:** TYACK

**OPINION**

(REGULAR CALENDAR)

DECISION

TYACK, J.

[\*P1] The State of Ohio is appealing from the granting of an application to seal the record of Stenio A. Schiavo. The State of Ohio assigns a single error for our consideration:

THE TRIAL COURT ERRED WHEN IT GRANTED APPELLEE'S APPLICATION TO SEAL THE RECORD OF HIS CONVICTION AS APPELLEE WAS INELIGIBLE UNDER R.C. 2953.36(D).

[\*P2] Stenio A. Schiavo was convicted of a first degree misdemeanor violation of non-support of dependents, in violation of R.C. 2919.21. The trial court granted an expungement of this conviction over the objection of the State of Ohio. The State of Ohio contended that R.C. 2953.36(D) barred an expungement because the victims were under 18 years of age. The State of Ohio has made this contention on appeal. Counsel for Stenio A. Schiavo has waived the filing of a brief to dispute this contention.

[\*P3] The information in the record indicates that Stenio A. Schiavo is the father of two [\*\*2] children, both of whom are under the age of 18. Mr. Schiavo was ordered to pay child support for the benefit of his children and did not do so. R.C. 2953.36(D) states that a person convicted of a first degree misdemeanor in which the victim was under 18 years of age is not eligible for expungement. Mr. Schiavo's children are the victims of his failure to pay support. *State v. Westendorf*, Hamilton App. No. C-020114, 2003 Ohio 1019, at P3. Accordingly, R.C. 2953.36(D) bars expungement of his conviction.

[\*P4] The sole assignment of error is sustained. The trial court's order granting an expungement is vacated and this cause is remanded to the Franklin County Court of Common Pleas with instructions to enter an order denying the application to seal the record in this case.

*Judgment reversed and remanded with instructions.*

BRYANT and KLATT, JJ., concur.

EXHIBIT No. 5

5. The Legislative Act Summary, and Am. Sub. S.B. 13, Ohio 123rd General Assembly are attached in the Appendix as **Exhibit 5**.



**Am. Sub. S.B. 13**  
123rd General Assembly  
(As Passed by the General Assembly)

**Sen. Blessing**

**Reps. Logan, Myers, Taylor, Callender, Jones, Grendell, Terwilleger**

**Effective date: \***

---

**ACT SUMMARY**

- Modifies the definition of "first offender" that designates who is eligible to have criminal conviction records sealed under the Criminal Conviction Records Sealing Law to also include, in certain circumstances, offenders who have two or three convictions resulting from the same charges, guilty plea, or official proceeding and resulting from related criminal acts that were committed within a three-month period.
- Permits a court in which an application is filed requesting the sealing of criminal conviction records based on the modification described in the preceding paragraph to determine that it is not in the public interest for the two or three convictions to be counted as one conviction and, as a result, to deny the application.
- Excludes from the Criminal Conviction Records Sealing Law all convictions of an offense of violence when the offense is (1) a misdemeanor of the first degree or a felony and when the offense is not riot and is not assault, inciting to violence, or inducing panic that is a misdemeanor of the first degree, (2) an offense of which the victim was under 18 years of age when the offense is a misdemeanor of the first degree or a felony, or (3) a felony of the first or second degree.

---

\* *The Legislative Service Commission had not received formal notification of the effective date at the time this analysis was prepared.*

---

## CONTENT AND OPERATION

### Offenders who are authorized to request sealing of criminal conviction records and bail forfeitures

#### Continuing and prior law

Prior law generally permitted any person who had been convicted of an offense in Ohio or in any other jurisdiction, and who previously or subsequently had not been convicted of the same or a different offense in Ohio or any other jurisdiction (defined as a "first offender"), to apply, in accordance with specified procedures described below, for the sealing of the person's criminal conviction record. Under continuing law, for purposes of the conviction record sealing provisions: (1) when two or more convictions result from or are connected with the same act, or result from offenses committed at the same time, they are counted as one offense, and (2) a conviction of a minor misdemeanor, or a conviction of a state or local traffic offense under a provision of R.C. Chapter 4511., 4513., or 4549. or under a substantially similar municipal ordinance, other than a violation of R.C. 4511.19, 4511.192, 4511.251, 4549.02, 4549.021, 4549.03, 4549.042, or 4549.07, a violation of R.C. 4549.41 to 4549.46, or a violation of a municipal ordinance substantially similar to any of those sections, is not considered a "previous or subsequent conviction." (R.C. 2953.31.)

Under continuing law, the conviction record sealing provisions do not apply to a conviction that subjects the offender to a mandatory prison term, specified sex offense convictions, or specified state or local traffic offense convictions and bail forfeitures in traffic cases (R.C. 2953.36).

#### Operation of the act

The act modifies the definition of "first offender" that designates who is eligible to have criminal conviction records sealed, as described above, to specify that, when two or three convictions result from the same indictment, information, or complaint, from the same plea of guilty, or from the same "official proceeding" (see below), and result from related criminal acts that were committed within a three-month period but do not result from the same act or from offenses committed at the same time, they are to be counted as one conviction, provided that a court may decide as described below in "Procedures to obtain the sealing of criminal conviction records and bail forfeitures" that *it is not in the public interest for the two or three convictions to be counted as one conviction*. If a court so determines, the offender in question is not a first offender and is not eligible to have his or her criminal conviction records sealed. (R.C. 2953.31(A).) An "official proceeding" is any proceeding before a legislative, judicial, administrative, or other

governmental agency or official authorized to take evidence under oath, and includes any proceeding before a referee, hearing examiner, commissioner, notary, or other person taking testimony or a deposition in connection with an official proceeding (R.C. 2953.31(E) by reference to R.C. 2921.01, which is not in the act).

The act expands the provision that specifies certain categories and types of convictions to which the conviction records sealing provisions never apply. Under the act, in addition to the categories and types of offenses specified under continuing law, the conviction record sealing provisions also do not apply to the following convictions (R.C. 2953.36):

(1) Convictions of an offense of violence when the offense is a misdemeanor of the first degree or a felony and when the offense is not riot and is not assault, inciting to violence, or inducing panic that is a misdemeanor of the first degree;

(2) Convictions of an offense in circumstances in which the victim of the offense was under 18 years of age when the offense is a misdemeanor of the first degree or a felony;

(3) Convictions of a felony of the first or second degree. (R.C. 2953.36.)

### **Procedures to obtain sealing of criminal conviction records and bail forfeitures**

#### **Prior law**

Under prior law, a first offender generally was permitted to apply to the sentencing court or, if the conviction was in a court of another state or a federal court, to any court of common pleas for the sealing of the conviction record *upon the expiration of three years after final discharge if convicted of a felony or upon the expiration of one year after final discharge if convicted of a misdemeanor*. A person who was arrested for a misdemeanor offense and who effected a bail forfeiture was permitted to apply to the court in which the case was pending when bail was forfeited for the sealing of the record of the case, *at any time after the expiration of one year from the date on which the bail forfeiture was entered*. Unless indigent, the applicant was required to pay a \$50 fee.

Upon the filing of the application, the court was required to conduct a hearing in accordance with specified procedures. One of the things the court was required to determine was whether the applicant is a first offender or whether the applicant and the prosecutor agreed to the bail forfeiture. The prosecutor for the case was required to be notified of, and could participate in, the hearing. If the court determined that the applicant was a first offender or the subject of a bail

forfeiture, that no criminal proceeding was pending against the applicant, that the applicant's interests in having the conviction or bail forfeiture records sealed were not outweighed by any legitimate governmental needs to maintain the records, and that the rehabilitation of a first offender applicant had been attained to its satisfaction, the court *generally was required to order* all official records pertaining to the case sealed and all index references to the case deleted and, in the case of bail forfeitures, was required to dismiss the charges in the case. The proceedings in the case were considered not to have occurred, and the person's conviction or bail forfeiture were required to be sealed. (R.C. 2953.32(A) to (C).)

### Operation of the act

The act modifies the procedures that apply regarding the determination of whether an application requesting the sealing of criminal conviction records should be granted. Under the act, if an applicant applies as a first offender and has two or three convictions that result from the same indictment, information, or complaint, from the same plea of guilty, or from the same official proceeding, and result from related criminal acts that were committed within a three-month period but do not result from the same act or from offenses committed at the same time, in making its determination as to whether the offender is a first offender, the court *initially must determine whether it is not in the public interest for the two or three convictions to be counted as one conviction*. If the court determines that it is not in the public interest for the two or three convictions to be counted as one conviction, the court must determine that the applicant is not a first offender. If the court does not make that determination, the court must determine that the offender is a first offender. If the court determines that the offender is a first offender, the procedures described above under "Prior law" apply regarding the determination as to whether the application for sealing should be granted. (R.C. 2953.32(C)(1).)

### Protections afforded when records are sealed

Continuing law, unchanged by the act, provides certain protections when criminal conviction records are sealed.

When the records are sealed, inspection of the sealed records included in the order may be made only by specified persons for limited, specified purposes. Among the permitted persons and uses are inspection by (R.C. 2953.32(D)): (1) any law enforcement officer or prosecutor, or their assistants, to determine the nature and character of any subsequent charges to be filed against the person, (2) the person's parole or probation officer for use in supervising the person or in making authorized inquiries and reports, (3) any persons named in an application made by the person who is the subject of the records, (4) a law enforcement officer

involved in the case, for use in the defense of a civil action arising out of that involvement, (5) a prosecuting attorney or an assistant, to determine the person's eligibility for a pre-trial diversion program, (6) any law enforcement agency or employee or by the Department of Rehabilitation and Correction as part of a background investigation of a person who applies for employment with the agency as a law enforcement officer or with the Department as a corrections officer, (7) by any law enforcement agency or authorized employee to determine the disposition and use of investigatory work product under R.C. 2953.321, and (8) by the Bureau of Criminal Identification and Investigation or an authorized employee for the purpose of providing information to a board or person pursuant to the criminal records check provisions contained in R.C. 109.57(F) and (G) or in R.C. 109.77.

Additionally, when the nature and character of the offense with which a person is to be charged would be affected by the sealed information, it may be used for charging the person, and, in any criminal proceeding, proof of any otherwise admissible prior conviction may be introduced and proved even if a sealing order was issued for the prior conviction. Upon conviction of a subsequent offense, the sealed records may be considered by the court in determining the sentence or other disposition to impose. (R.C. 2953.32(C)(2), last paragraph of (D), and (E).)

A person or governmental entity that maintains sealed conviction or bail forfeiture records may maintain an index to the sealed records, to be used only by authorized persons and for authorized purposes. (R.C. 2953.32(F).)

Except in certain specified education-related contexts, an order to seal a person's conviction record restores the subject person to all rights and privileges not otherwise restored by termination of sentence or probation or by final release on parole. Except in relation to use in evidence in a subsequent criminal proceeding, in any application for employment, license, or other right or privilege, any appearance as a witness, or any other inquiry, a person may be questioned only with respect to convictions not sealed or bail forfeitures not expunged, unless the question bears a direct and substantial relationship to the position for which the person is being considered. (R.C. 2953.33--not in the act.)

Except when the release or dissemination is authorized under law, as described above, any state or local government officer or employee who releases or otherwise disseminates or makes available for any purpose involving employment, bonding, or licensing in connection with any business, trade, or profession to any person, or to any state or local government entity, any information or other data concerning any arrest, complaint, indictment, trial, hearing, adjudication, conviction, or correctional supervision the records with

respect to which the officer or employee had knowledge of were sealed by an order issued under the above-described provisions, is guilty of divulging confidential information, a misdemeanor of the fourth degree. Any person who uses, disseminates, or otherwise makes available any index prepared pursuant to R.C. 2953.32(F), other than as permitted by law, is guilty of a misdemeanor of the fourth degree. (R.C. 2953.35--not in the act.)

---

## HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	01-20-99	p. 27
Reported, S. Judiciary	05-11-99	p. 405
Passed Senate (33-0)	05-12-99	p. 421
Reported, H. Criminal Justice	10-13-99	p. 1267
Passed House (92-1)	10-20-99	pp. 1302-1304
Senate concurred in House amendments (32-0)	11-09-99	pp. 1152-1153

99-SB13.123/rss

EXHIBIT No. 6

6. 10 Dist. Appellate Court decision In State v. Westendorf, 1<sup>st</sup> Dist. No. C-020114, 2003-Ohio-1019, which is attached in the Appendix as **Exhibit 6**.

LEXSEE 2003 OHIO 1019

STATE OF OHIO, Plaintiff-Appellant, vs, MICHAEL P. WESTENDORF, Defendant-Appellee.

APPEAL NO. C-020114

COURT OF APPEALS OF OHIO, FIRST APPELLATE DISTRICT, HAMILTON COUNTY

2003 Ohio 1019; 2003 Ohio App. LEXIS 957

March 7, 2003, Date of Judgment Entry on Appeal

NOTICE:

[\*\*1] THESE ARE NOT OFFICIAL HEADNOTES OR SYLLABI AND ARE NEITHER APPROVED IN ADVANCE NOR ENDORSED BY THE COURT. PLEASE REVIEW THE CASE IN FULL.

PRIOR HISTORY: Criminal Appeal From: Hamilton County Court of Common Pleas. TRIAL NO. B-0004425.

DISPOSITION: Reversed.

SYLLABUS

The trial court had no jurisdiction to seal the record of defendant's first-degree misdemeanor conviction for failing to support his minor child, in violation of R.C. 2919.21(A)(2), because R.C. 2953.36(D) precludes the sealing of the record of a "conviction of an offense in circumstances in which the victim of the offense is under eighteen years of age when the offense is a misdemeanor of the first degree or a felony."

COUNSEL: Michael K. Allen, Hamilton County Prosecuting Attorney, and Rebecca L. Collins, Assistant Prosecuting Attorney, for Plaintiff-Appellant.

Michael P. Westendorf, Pro se.

JUDGES: DOAN, J. SUNDERMANN, J., concurs. PAINTER, P.J., concurs separately.

OPINION BY: DOAN

OPINION

DECISION.

DOAN, J.

[\*P1] Defendant-appellee Michael P. Westendorf pleaded guilty to and was convicted of failing to support his minor child, in violation of R.C. 2919.21(A)(2) [\*\*2], a first-degree misdemeanor. Subsequently, Westendorf filed an application to seal the record of his conviction, which the trial court granted. The state has appealed.

[\*P2] The state's first assignment of error, which alleges that the trial court erred in granting Westendorf's application because the trial court had no jurisdiction to seal the record of his conviction, is sustained.

[\*P3] R.C. 2953.36(D) precludes the sealing of records of "conviction of an offense in circumstances in which the victim of the offense was under eighteen years of age when the offense is a misdemeanor of the first degree or a felony." The victim in a case of non-support is the child. See *State v. Chapman*, 1st Dist. No. C-020115, 2002 Ohio 7336; *State v. Hall* (2000), 137 Ohio App.3d 666, 739 N.E.2d 846; *State v. Howard* (Sept. 11, 1998), 1st Dist. No. C-971049, 1998 Ohio App. LEXIS 4192.

[\*P4] Westendorf pleaded guilty to a first-degree misdemeanor. The victim of his crime was his three-year-old daughter. R.C. 2953.36(D) clearly and unambiguously precludes sealing the record of conviction where the victim was under eighteen years of age. [\*\*3] Therefore, the trial court had no jurisdiction to grant Westendorf's application to seal his record of conviction.

[\*P5] Westendorf argues that the legislature did not intend R.C. 2953.36(D) to apply to nonviolent offenses. The Legislative Service Commission's analysis of Am.Sub.S.B. No. 13, 123rd General Assembly, under the section entitled "Act Summary," states that the act "excludes from the Criminal Conviction Records Sealing Law all convictions of an offense of violence when the

Handwritten initials and scribbles at the bottom of the page.

*offense is (1) a misdemeanor of the first degree or a felony and when the offense is not riot and is not assault, inciting to violence, or inducing panic that is a misdemeanor of the first degree, (2) an offense of which the victim was under 18 years of age when the offense is a misdemeanor of the first degree or a felony, or (3) a felony of the first or second degree.*" (Emphasis ours.)

[\*P6] The section of the Legislative Service Commission's analysis entitled "Operation of the Act" states, "The act expands the provision that specifies certain categories and types of convictions to which the conviction records sealing provisions never apply. Under the act, in addition [\*\*4] to the categories and types of offenses specified under continuing law, *the conviction record sealing provisions also do not apply to the following convictions \* \* \*:* (1) convictions of an offense of violence when the offense is a misdemeanor of the first degree or a felony and when the offense is not riot and is not assault, inciting to violence, or inducing panic that is a misdemeanor of the first degree; (2) *convictions of an offense in circumstances in which the victim of the offense was under 18 years of age when the offense is a misdemeanor of the first degree or a felony,* (3) convictions of a felony of the first or second degree." (Emphasis ours.)

[\*P7] The Legislative Service Commission's "Act Summary" appears to support Westendorf's argument that R.C. 2953.36(D) does not apply to nonviolent offenses, but the "Operation of the Act" section mirrors the provisions of R.C. 2953.36(D), which state that records of convictions of first-degree misdemeanors where the victim is under eighteen years old may not be sealed. While the Legislative Service Commission's analysis may be ambiguous, the clear language of the statute [\*\*5] is not. The trial court had no jurisdiction to grant Westendorf's application to seal his conviction.

[\*P8] The second assignment of error, which alleges that the trial court erred in granting the application because Westendorf's interest in sealing the record of conviction was outweighed by a legitimate governmental need to maintain the record, is subsumed in our disposition of the first assignment of error and is sustained solely for the reason that the trial court had no jurisdiction to seal the record of Westendorf's conviction.

[\*P9] Therefore, the judgment of the trial court is reversed.

Reversed.

SUNDERMANN, J., concurs.

PAINTER, P.J., concurs separately.

CONCUR BY: PAINTER

CONCUR

PAINTER, P.J., concurring.

[\*P10] The Legislative Service Commission summary of the bill states that it would not apply in this instance. We might assume that the summary is what most legislators read. So what they *thought* they were passing is what is described in the summary. But what they *actually* passed was the law itself.

[\*P11] Everyone involved with this case must know that this result is unfortunate, and obviously not what the legislature intended. But we [\*\*6] cannot look to legislative intent—a risky proposition at any time—unless the law is ambiguous. It is not ambiguous. There is no ambiguity in "no." We must follow the law as written.

[\*P12] Perhaps the lesson here is that laws should be read before being passed.

EXHIBIT No. 7

7. Professor of Law, M. B. W. Sinclair, New York Law School Law Review, 1997, 28,000 word article, titled "Review Essay: Legislative Intent: Fact Or Fabrication? Dynamic Statutory Interpretation" is attached in the Appendix as **Exhibit 7.**

Copyright (c) 1997 New York Law School Law Review  
New York Law School Law Review  
1997

41 N.Y.L. Sch. L. Rev. 1329

**LENGTH:** 28062 words

**REVIEW ESSAY: LEGISLATIVE INTENT: FACT OR FABRICATION?**

**DYNAMIC STATUTORY INTERPRETATION**

by William N. Eskridge. (Harvard University Press, Cambridge, 1994) n1

**NAME:** M. B. W. Sinclair \*

**BIO:**

\* Professor of Law, New York Law School. I am indebted to Emily V. Sinclair for her remarkably insightful advice.

**SUMMARY:**

... In 1579, following the case of *Eyston v. Studd*, Edmund Plowden, court reporter, wrote a theory of statutory interpretation that has become a historical monument. ... Eskridge argues that there is and can be no such thing as the intention of the legislature, and even if there were, the hypostatizations called "legislative intent" in judicial opinions could not solve problems of statutory interpretation. ... This essay follows the pattern set by Eskridge: Section II covers the first chapter of the book and its attack on the concept of legislative intent while Section III reviews the exposition of dynamic statutory interpretation in Chapter 2. ... Further, "the interpreter's own context, including her situatedness in a certain generation and a certain status in our society, influences the way she reads simple texts ... A simple plain meaning approach to statutory interpretation seems unlikely to yield the determinacy needed for a foundational theory of statutory interpretation." ... "Suppose a legislator enacts that it shall be a crime for anyone "to carry concealed on his person any dangerous weapon." ... The intension of the words "dangerous weapon" has not changed either. ... What is the point of this story? It is, says Eskridge, exemplary of dynamic statutory interpretation. ... Professor Eskridge's arguments against originalist statutory interpretation and those in favor of the multi-dimensional variability of dynamic statutory interpretation are not convincing. ...

**TEXT:**

[\*1329]

I.

Introduction

In 1579, following the case of *Eyston v. Studd*,<sup>n2</sup> Edmund Plowden, court reporter, wrote a theory of statutory interpretation that has become a historical monument. When faced with an interpretive difficulty,

Page 1

it is a good way, when you peruse a statute, to suppose that the law-maker is present, and that you have asked him the question you want to know touching the equity, then you must give yourself such an answer as you imagine he would have done, if he had been present ... And therefore when such cases happen which are within the letter, or out of the letter, of a statute, and yet don't directly fall within the plain and natural purport of the letter, but are in some measure to be conceived in a different idea from that which the text seems to express, it is a good way to put questions and give answers to yourself thereupon, in the same manner as if you were actually conversing with the maker of such laws, and by this means you will easily find out what is the equity in those cases. n3

Almost contemporaneously, the Exchequer Chamber in *Heydon's Case*,<sup>n4</sup> gave similar rules for interpretation:

[\*1330]

And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal (B) n5 or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered: -

1st. What was the common law before the making of the Act.

2nd. What was the mischief and defect for which the common law did not provide.

3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.

And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato comodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico. n6

Both of these theories of statutory interpretation are from the era in which judicial decision was held superior to legislation. As parliamentary power became more assertive, courts conversely became more deferential. Nineteenth and twentieth century English courts never doubted that their role in cases governed by statute was subordinate to the

legislature. For example: "but it is to be borne in mind that the office of the Judges is not to legislate, but to declare the expressed intention of the Legislature, even if that intention appears to the Court injudicious." n7 [\*1331] Similarly, United States courts have taken as axiomatic that the intention of the legislature should govern the interpretation and application of statutes. This follows conceptually from the principle of legislative supremacy, a principle at the very foundation of our democratically ordered society. n8 A typical judicial statement is: "the primary rule for the interpretation of a statute ... is to ascertain, if possible, and enforce, the intention which the legislative body that enacted the law ... [has] expressed therein." n9 A perspicuous equivalent by the Honorable Judge Wald of the D.C. Circuit Court of Appeals, is: "when a statute comes before me to be interpreted, I want first and foremost to get the interpretation right. By that, I mean simply this: I want to advance rather [\*1332] than impede or frustrate the will of Congress." n10 This principle is common in legal systems with British roots. n11

The legislative intent that governs the interpretation and application has been located spatially in the legislature that enacted the statute in question and temporally at or just prior to the moment of enactment. According to the long tradition of Anglo-American judicial thought, when the applicability of the words of the statute to the case at hand is not clearly determinate, the judge must resort to relevant (and permissible n12 ) indicia of the legislative intent. The above statements differ only in how they seek to find that legislative intent, and the freedom they would give to the judge in applying the intent. n13 [\*1333]

Page 2

41 N.Y.L. Sch. L. Rev. 1329, \*1329

Although this long and unbroken tradition in the judiciary n14 has met with some dispute in academic literature, n15 Professor William Eskridge's book, *Dynamic Statutory Interpretation*, is the first integrated, sustained attack on it. Eskridge argues that there is and can be no such thing as the intention of the legislature, and even if there were, the hypostatizations called "legislative intent" in judicial opinions could not solve problems of statutory interpretation. Instead of interpretation grounded in a state of affairs locatable at the moment of enactment, what we have and should have is interpretation based on contemporaneous social, economic, and political conditions. "The meaning of a statute will change as social context changes, as new interpreters grapple with the statute, and as the political context changes ...." n16 This is dynamic statutory interpretation.

Although the thesis that statutory interpretation is dynamic forms the core of Eskridge's book, there is much else. Eskridge has been a prodigiously productive scholar during the last ten years and his book is in large part composed of prior articles. This has its advantages. In the course of knocking down the rivals to his dynamic theory of statutory interpretation, Eskridge gives an airing to many presently fashionable theories. For example, in Chapter 4 he surveys "liberal theories," in Chapter 5 "legal process theories" derived from the 1950s work of Henry Hart and Albert Sacks, n17 and in Chapter 6 "normativist theories," i.e., natural law theory, n18 "feminist republicanism," n19 postmodernism, n20 including subsections on "Deconstruction and the Rule of Law" n21 and "Critical Pragmatism." n22 Eskridge's strategy is to take on a theory in every little detail, to leave no jurisprudential stone unturned, or perhaps, no jurisprudential earth unscorched. The detail can be numbing, eye-glazing. Yet, even if one is not convinced by the argument, the form in [\*1334] which Eskridge has chosen to make his case results in a work with sufficient coverage to be worthy of shelf space as a reference and source book. And it is not only a source book for high-flying theory; there is much of practical value. For example, Chapter 8 includes as useful a guidebook to the interpretation of legislative inaction as one could wish for. n23

Eskridge is at his best in straight legal analysis; his examples are thoroughly researched and clearly presented. The presentation in Chapter 1 of the Weber case, n24 its history, difficulties, resolution and consequences is exemplary. n25 Other major cases, such as *Griffin v. Oceanic Contractors, Inc.*, n26 *Bob Jones University v. United States*, n27 *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, n28 and *Patterson v. McLean Credit Union*, n29 make clearly analyzed illustrations. The account of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* n30 could be a standard introduction to judicial deference. Legislation and agency interpretation are also subject to careful, detailed scrutiny. An example is the analysis of 212(a)(4) of the Immigration and Nationality Act of 1952 as interpreted in *Fleuti v. Rosenberg* n31 and *Boutilier v. INS* n32 and later amended by Congress and reinterpreted by the INS. n33 Where Eskridge depends more on the examples than argument, it is a tribute to their clarity that they sometimes work to undermine his argument than to support it. n34 [\*1335]

Despite these riches, and the occasional contentious analysis, n35 this essay focuses solely on Eskridge's core thesis, that statutory interpretation is or should be dynamic. Eskridge's strategy is first to undermine the concept of legislative intent, and then to show how dynamic interpretation steps into the remnant theoretical breach. Chapter 1, "The Insufficiency of Statutory Archaeology," n36 covers the first stage. The second stage is explained in Chapter 2, "The Dynamics of Statutory Interpretation," n37 with an extended illustration in Chapter 3, "A Case Study: Labor Injunction Decisions, 1877-1938." n38 These arguments form Part I of the book. Parts II and III, "Jurisprudential

Theories for Reading Statutes Dynamically" and "Doctrinal Implications of Dynamic Statutory Jurisprudence," respectively, are intended to elaborate the theory set forth in Part I and defend it against jurisprudential usurpers. In fairness, one ought not to ignore Parts II and III, but this review unavoidably does so.

This essay follows the pattern set by Eskridge: Section II covers the first chapter of the book and its attack on the concept of legislative intent while Section III reviews the exposition of dynamic statutory interpretation in Chapter 2. In both sections I attempt to summarize Eskridge's arguments as fairly as possible before examining their plausibility. A conclusion follows.

II.

Page 3

41 N.Y.L. Sch. L. Rev. 1329, \*1333

### Legislative Intent

Chapter 1 of Professor Eskridge's book brilliantly marshals attacks on the idea of legislative intent. It is brilliant in comprehension, in argument and in rhetorical style. After a first reading, it is difficult to see how one was ever taken in by the likes of Plowden, Heydon's Case, Chief Justice Marshall<sup>n39</sup> and Judge Wald. But against all that accumulated wisdom, surely the chapter deserves a second, very careful reading. [\*1336]

A.

#### Nomenclature

Eskridge is a master of Rumpelstiltskinism: name it and claim it.<sup>n40</sup> Even his title, "Dynamic Statutory Interpretation," is an example. "Dynamic" is a fashionable accolade: we all want to be dynamic; to be static is to be stuck in the mud.<sup>n41</sup> Merely by choosing such a name, Eskridge guarantees many a mention in law classrooms and a substantial following among faculty and students. And it gets better. The supporting cast includes "pragmatic dynamism," "hermeneutic dynamism" and "institutional dynamism," all trenchantly deep, not to mention irresistibly euphonious. Eskridge terms all methods of interpretation that give primacy to the enacting legislature "originalist theories" because their key determinate is original intent. Of course, we are more accustomed to the term "originalist" in the context of constitutional law, but by drawing on that custom in the use of the term, Eskridge does us a useful service. *There is no harm in the realization of commonalities in statutory and constitutional interpretation as long as we don't forget the rather special content and quality of constitutions.* By adopting the expression, we are in no way adopting either the political or moral positions associated with those who propound originalism in constitutional interpretation. Inescapably, however, the use of the term conjures up often stated negative feelings toward extreme conservative proponents of originalism in constitutional interpretation, such as Robert Bork. This rhetorical antipathy is more useful to Eskridge's cause than the descriptive accuracy of the word "original."

Eskridge calls this search for legislative intent that originalism requires of us, "statutory archaeology." It is curious that this too has a pejorative ring. It should not as there is nothing negative or unseemly about archaeology as a discipline and source of knowledge. Perhaps the name is rhetorically effective because it raises a specter of insecurity or speculation in results. But this too should be a reason to embrace it. The perfect determinacy that Eskridge demands of originalist theories is beyond any interpretive enterprise. To do the best we can despite merely finite data sources and with the critical thoroughness of an archaeologist, is surely a worthy enough aspiration. [\*1337]

B.

#### The Case Against Legislative Intent

In order to show that the intent of the enacting legislature can govern the interpretation of a statute, proponents of originalism need to show that "concrete cases can be analytically connected with decisions that have been made by a majority-based coalition in the legislature ..."<sup>n42</sup> Their problem, Eskridge argues, is that none of the theories can deliver consistently on this promise ... None of the originalist schools (intentionalism, purposivism, textualism) is able to generate a theory of what the process or the coalition "would want" over time, after *circumstances have changed* ... *None of the methodologies yields determinate results. Consequently, none fully constrains statutory interpreters or limits them to the preferences of the enacting coalition.*<sup>n43</sup>

Page 4

41 N.Y.L. Sch. L. Rev. 1329, \*1335

Here we have, in outline, the target, its problems, and the criterion originalism must but cannot meet.

Why can legislative intent not be "analytically connected with decisions?" First, what is legislative intent?

Eskridge claims, "the meaning colloquially suggested by the invocation of legislative intent is the actual intentions of the legislative coalition that enacted the statute."<sup>n44</sup> Intent is thus an aggregation of the intents of the individual legislators who vote, or more specifically, of those who voted in the majority (the "enacting coalition"), as to the meaning of the statute in question. But the specific meaning in mind of a majority of our elected representatives is rarely revealed in the legislative record.<sup>n45</sup> This is because: (1) "legislators usually do not have a specific intention on more than a few issues (if that) in any bill on which they vote"; (2) "even when legislators state for the record what they

think a bill means for a specific issue, their statements may not be reliable because of strategic behavior," e.g., allaying the doubts of others; (3) "problems with identifying the actual intent of individual legislators become overwhelming when these hard-to-figure individual intentions must be aggregated for each legislative chamber and then matched up with the intent of the president"; n46 and (4) [\*1338] "even if it could be discovered, the intent of the House is not the intent of Congress[.]" n47 nor, presumably, of the President.

That seems clear enough. So what have intentionalists been talking about? "What intentionalists usually mean by the term is conventional rather than actual legislative intent ... Statements by authoritative speakers (bill sponsors and the reporting committee) can be an adequate surrogate for actual legislative intent ...." n48 "Theories of conventional intent generally fall back on the simple idea that what the sponsor or committee says about the bill is binding on the legislature." n49 But such statements are not reliable indicia of the aggregate of legislators' intentions. Statements by floor managers and committee chairs are fallible because they may be made for purposes other than giving authoritative interpretive information. And one can never be sure as to the real purpose of the statement. So, says Eskridge, we need a theory for evaluating the talk in the legislative history, and so far none has been forthcoming. n50

There is another possibility though: "imaginative reconstruction." Imaginative reconstruction is exactly Plowden's method, but Eskridge interprets it as the attitude of the pivotal player or pivotal players: "those participants in the enactment process whose support was critical in helping a bill pass through the various 'veto gates' which can kill legislation." n51 There is, of course, the problem of determining who is a pivotal player given the strategic behavior of legislators to increase their power by appearing to be pivotal. But Eskridge's principal objection is more theoretical and more directly applicable to the sort of imaginative reconstruction Plowden advocates.

Imaginative reconstruction calls for posing counterfactual questions to a long-departed pivotal legislator ... The counterfactual nature of the questions tends to render the inquiry indeterminate. Every statute carries with it certain assumptions about the nature of law and society. Often those assumptions turn out to be wrong, or simplistic, or obsolescent in light of social change - change that sometimes occurs in response to the statute itself. As the assumptions prove incorrect, the statute inevitably deviates from its original course through an often imperceptible [\*1339] process of implementation and interpretation. Once such changes have occurred, how should an intentionalist even pose the question? n52

In this vein, the late Professor Warren Lehman called legislative intent a metaphor and a phantom:

Put another way, behind the act of the legislature, there is no person or group of persons with whom Plowden could imagine a conversation such as he recommended, the purpose of which was to determine intent. Plowden would have to have the whole legislature there. And it would not in chorus echo either "God forbid," or "Yes, for in this respect they are to be looked upon as executors." The answer would be a babble; the issue would almost certainly have to be put to a vote. And the vote would almost certainly not be unanimous. It might well be that no solution would attract a clear

Page 5  
41 N.Y.L. Sch. L. Rev. 1329, \*1337

majority. Indeed, that may be the reason for the silence and ambiguity in the first place. n53

This looks rather convincing, doesn't it? Here is a good summary passage about legislative intent.

The rhetorical force of intentionalism rests on its ability to link a current interpretation to past legislative majorities. But in hard cases an intentionalist cannot prove that her interpretation is the one actually intended by most legislators, either through rigorous vote counting, or through conventional sources, or even through reconstruction of the enacting coalition. n54

What about legislative purpose?

In Professors Hart and Sacks' highly influential teaching materials, *The Legal Process*, the basic method of statutory interpretation is stated thus:

in interpreting a statute a court should:

1. Decide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved; and then [\*1340]
2. Interpret the words of the statute immediately in question so as to carry out the purpose as best as it can, making sure, however, that it does not give the words either -
  - (a) a meaning they will not bear, or
  - (b) a meaning which would violate any established policy of clear statement. n55

Is purpose then something different from intent? Professor Eskridge thinks so: "legislative purpose is a more elastic concept than legislative intent ...."; n56 "an inquiry into legislative purpose is set at a higher level of generality than an inquiry into specific intentions ...." n57 Going along with this stipulation, is purpose subject to considerations different from those about legislative intent?

Eskridge's first line of attack on legislative purpose as a determinate (as the determinate) of the meaning of a statute is to follow the strategy he used against intent: disaggregate the purposes of individual senators and

congressmen, and point out that even as individuals they "have a complex bundle of goals, most notably achieving reelection and prestige inside the Beltway, as well as contributing to good public policy." n58 Even worse, because they make bargains and back-room deals, "legislators may have incentives to obscure the real purposes of the statute. Legislators do not say, "This is a back-room deal, distributing rents to a group.' Instead they say, "This statute helps America." n59 And, because actual legislation results from bargaining, amending, compromise: "the statutes that result from this process of sequential deals and trade-offs tend to be filled with complex compromises which cannot easily be distilled into one overriding purpose." n60 *This generally parallels his arguments about intent, but adds a strong flavor of public choice theory.* n61 [\*1341]

As he did with intent, Professor Eskridge argues that there is a multiplicity of legislative purposes. Elsewhere, he uses the apt example of criminal law. Consider, for example, a typical penal statute. Commonly we say it serves at least three purposes, i.e., deterrence, rehabilitation and retribution. How can a legislature, a diverse group of people with differing interests, aims, and values, have a purpose? "Even if legislators had purposes, the legislature probably does not, and the process of statutory enactment undermines any coherent purpose the proposed statute might at one point have had." n62

Page 6

41 N.Y.L. Sch. L. Rev. 1329, \*1339

Although he says his arguments about "purpose" and "intent" are similar, n63 Eskridge does make a set of arguments that could be different. They are based on the "higher level of generality" that is said to distinguish purpose from intent. "An attributed policy purpose is too general and malleable to yield interpretive closure in specific cases, for its application depends on context and the interpreter's perspective." n64 He sets it up neatly in the form of three paradoxes, framed in terms of the opinions in *United Steelworkers of America v. Weber*, n65 the pioneer case on voluntary affirmative action. [\*1342]

The first paradox is that two apparently opposing purposes appear to support their opposite views. n66 For example, Justice Brennan writing for the majority said "the purpose of Title VII was to get jobs for African Americans." Justice Rehnquist in dissent said "the purpose of Title VII was to provide equality of opportunity." By manipulating time frames, Eskridge demonstrates that one could use the latter to support the majority result and the former to support Rehnquist's dissent. n67

The second paradox is that the two purposes are arguably the same. According to the empirical circumstances and the nature of proof, equality of opportunity can only be shown to exist if African-Americans obtain jobs in proportional numbers. "The purpose of a statute changes over time as the targeted problem changes, often negating the assumptions critical to the original formulations of that purpose. Statutory purpose also changes as new interpreters approach the issue, often reacting to problems they perceive in prior interpretations." n68

The third paradox is that a judge can change her determination of purpose according to the context. Neither Brennan nor Rehnquist believed the stated purpose to be the only one, thus: "purpose is dynamic even in the hands of the same interpreter because the interpreter's understanding of the statutory purpose depends in part on the context in which he or she [\*1343] is applying the statute." n69 Eskridge proves this point using Brennan's opinion for the Court eight years later in *Johnson v. Transportation Agency*, n70 which extended the *Weber* rational and purpose to women, a scope clearly not contemplated in the legislative history.

In summary, "like intentionalism, purposivism cannot connect its results with original legislative expectations because it has no robust positive theory of enacting coalitions." n71

C.

Textualism

Eskridge also categorizes the "new textualism," associated primarily with Justice Antonin Scalia, as an originalist methodology. n72 "For these "new textualists," Eskridge writes, "the beginning, and usually the end, of statutory interpretation should be the apparent meaning of the statutory language." n73 However, for reasons similar to those brought to bear against legislative intent and purpose, this does not suffice: "like intentionalism and purposivism, textualism cannot rigorously be tied to majority preferences, does not yield determinate answers or meaningfully constrain the interpreter in hard cases, and is not an accurate description of what agencies and courts actually do when they interpret statutes." n74 Further, "even text-based interpretation is hard to link up with majority preferences because there may be several equally plausible majority-based preferences in the legislature." n75 Again Eskridge relies on *contextual variation in textual meaning*. *But to this he adds the standard arguments from postmodernism that meanings can look different to different readers and at different times.* n76 "The new textualist position is that statutory text is [\*1344] the most determinate basis for statutory interpretation. That proposition, important to their theory, is questionable." n77 Further, "the interpreter's own context, including her situatedness in a certain generation and a certain status in our society, influences the way she reads simple texts ... A simple plain meaning approach to statutory interpretation seems unlikely to yield the determinacy needed for a foundational theory of statutory interpretation." n78

So ultimately, "for practical as well as theoretical reasons, textualism fails as a foundational, constraining methodology for interpreting statutes. As do intentionalism and purposivism." n79

D.

Page 7

41 N.Y.L. Sch. L. Rev. 1329, \*1341

Conclusion re Intent and Purpose and Text

The arguments about legislative intent, legislative purpose and textualism are pretty similar. They have had an impact on academic thinking (if not, mercifully, on judges). Modern apologists tend to acknowledge the validity of the attacks and refer to legislative intent (or purpose) as a fiction, although a necessary fiction.

No, the intent of the legislature is a phantom because the will of the legislature is a metaphor. What a legislature does when it acts is something like what a man does. And so the collectivity behind its act is something like a single man's mind. But it has a will or an intention only insofar as a certain arbitrary percentage of its members can assent to certain terms. The problem of the non-existent will is demonstrated most clearly by the case in which the subject matter to which the law is to be applied could not have been known to its draftsmen: e.g., the application of a nineteenth-century statute to the airplane. The unreality of the intention that is supposed to be the real law is laid bare by the suggestion that the relevant question is what the nineteenth century legislature would have done had it only known about the airplane.

n80

The fiction is needed, for example, to "remind all who deal with a statute that they are operating in a field of law in which they are not free to [\*1345] define public policy simply according to their own judgment." n81 In other words, we fabricate the notion of legislative intent so that judges and others implementing statutes should feel constrained in some way.

Perhaps the best summary of what Eskridge claims to have established in Chapter 1 is at the beginning of Chapter 2: "Chapter 1 argued that originalist theories cannot limit statutory interpretation to a single factor or exclude postenactment considerations, do not yield objective and determinate answers in the hard cases, and cannot convincingly tie results in statutory cases to the expectations of original legislative majorities." n82 I don't think we have to concede.

E.

What's Wrong With These Arguments?

Eskridge's arguments, although appealing, rest on fundamental misconceptions of three general types. First, he evaluates originalist theories according to a criterion inappropriate to a socio-cultural phenomenon such as law. Second, he fundamentally misconceives the concept of legislative intent (and its more or less general variants) as it is and has been used in originalist interpretation. Third, he fails to draw important distinctions in modes of meaning of legislative enactments. I shall explain, seriatim.

I. Criterion of Evaluation

When "legislative intent" and "legislative purpose," the originalist concepts of statutory archaeology, are tried in the preceding arguments, they are found wanting according to some criterion of goodness, quality or explanatory excellence. We need to extract those criteria and examine their propriety to the subject. One would not judge the drafting of a statute by the criteria appropriate to a rock-and-roll song any more than one would judge Brie inferior Stilton, or a Siamese cat an incompetent shepherd. Yet a commonplace argumentative strategy is to set an impossibly high criterion of success and then point out the subject's failure to meet it. Just such a fallacy pervades Eskridge's argument.

In his introduction to Part 1, Eskridge claims that he "develops the thesis as a positive, that is descriptive, theory of

Page 8

41 N.Y.L. Sch. L. Rev. 1329, \*1344

how courts and agencies interpret statutes." n83 Again, at the beginning of Chapter 1 he writes: "as a positive matter, all originalist theories fail, and they fail in similar ways. To begin with, none of them accurately describes what American agencies [\*1346] and courts do when they interpret statutes." n84 This cannot be believed. If it were, his case would be much too easy, indeed trivial. As Hart and Sacks wrote:

Do not expect anybody's theory of statutory interpretation, whether it is your own or somebody else's, to be an accurate statement of what courts actually do with statutes. The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation. n85

Eskridge's fallacy is *ignoratio elenchi*: n86 no proponent of originalism in any of its forms could claim perfect generality and one hundred percent descriptive accuracy. Eskridge seems to think that descriptive accuracy for legal decision-making is just like descriptive accuracy for empirical phenomena like chemical interactions. This is a mistake.

Throughout the argument, Eskridge uses the Supreme Court opinions in *United Steelworkers of America v. Weber*.

n87 At issue was Title VII's application to a voluntary affirmative action program of 703(a)(1) of the Civil Rights Act of

1964, n88 a statute with an unusually replete legislative history. His analysis of Brennan's majority and Rehnquist's dissenting opinions is superb; n89 the chapter is worth reading for that alone. Needless to say, there is evidence of a variety of attitudes, intentions and purposes among individual legislators, judicious selections from which fuel the [\*1347] opposing opinions. But a single example, even one as seminal as Weber, n90 does nothing for this debate. It makes a splendid illustration of a failure of originalist theories to determine an outcome; this was a hard case, requiring real judgment backed with reasoning. But Eskridge seems to think that the example does more than merely illustrate: He thinks it demonstrates the failure of originalist interpretation in general. This too is a mistake.

Theories of statutory interpretation are not like theories of physics or chemistry. In physical sciences universality is required: if gravity works here it works everywhere and in the same way; if copper expands upon heating today, it expanded upon heating yesterday and will again tomorrow. For laws governing the behavior of inanimate material, complete generality is required and a counter-example is disastrous. n91 But legal decision-making is not that sort of subject. It is difficult, perhaps impossible, to claim of any proposition descriptive of law the universal accuracy and testability we require of propositions of the empirical sciences. n92 Law is a social phenomenon, subject to all the willful vagaries of human behavior. Even the laws generated by legal decisions, as compared with theories about how they are made (like theories of statutory interpretation), allow counter examples without being invalidated. One reason at least is that legal data, cases and judicial opinions are always contestable. If a particular decision is not congenial to one's theory, you can say it was wrongly decided. n93 Eskridge is clearly aware of this, as he freely contests judicial decisions. n94 [\*1348]

As with all social phenomena, empirical evidence of interpretive theories needs to be based on relative frequencies, not particular cases. n95 To make an empirical (in Eskridge's terms "positive" or "descriptive") claim that originalism is not the basis of judicial decisions, one would have to show that it never is - an impossible task - or that it rarely is or that it is relatively infrequent. One case, even a landmark case such as Weber, does not do that. Eskridge frequently says that what he is doing is descriptive, but the claim is not supported by what he actually does in this Chapter.

Eskridge's argument is normative, n96 and we should not be misled by his protests to the contrary. What is at issue is the effectiveness, the workability, even the wisdom and desirability of originalist theories of interpretation. Can, or should, legislative intent or purpose guide and constrain judicial decisionmaking under statutes?

For a "Yes" answer to this question, Eskridge would require an originalist theory to give a determinate answer even in hard cases. "Like intentionalism, purposivism does not yield determinate answers in the hard cases." n97 In the jargon, introduced by Ronald Dworkin, a hard case is one [\*1349] the outcome of which is not determined by the set of antecedent legal resources; it thus requires judgment. n98 Taken literally, then, the standard of excellence Eskridge

Page 9

41 N.Y.L. Sch. L. Rev. 1329, \*1345

demands is a necessary impossibility. So, on the principle of charity, we should look for a somewhat reduced standard. He does suggest that by "hard cases" he means only those that "arise when the issue is either unanticipated or conflictual." n99 In such cases an originalist cannot prove that hers is the meaning actually intended by most legislators, either through rigorous vote counting, or conventional sources or even reconstruction of the enacting coalition. The Weber case demonstrates that the concept of legislative purpose (or intent) does not give a determinative result to the question. This is because "an attributed policy purpose is too general and malleable to yield interpretive closure in specific cases, for its application depends on context and the interpreter's perspective." n100

The point Eskridge misses here is that the distinguishing characteristic of hard cases is that they are hard. Of course there is no archaeological method of resolving them in talismanic fashion. If there were they would not be hard. Even on this reduced criterion (not indeterminate on prior law, but unanticipated or conflictual), the standard he requires is impossible to meet. Were it satisfied by the words of the statute and all other archaeological resources, that is, were the problem anticipated, the parties would not be litigating. Were there no legitimate conflict, the parties would not be litigating, and especially not before the Supreme Court.

Eskridge ignores the empirical fact that most potential disputes in society are not litigated because the behavioral standards, including those established by statute, are quite clear to the governed, and just as the legislatures intended. His argument that in conflictual scenarios unanticipated by the enacting legislature the "application [of the statute] depends on context and the interpreter's perspective[.]" n101 adds nothing. Of course different judges can reach different conclusions in such cases. Otherwise we would have no conflicts for judicial resolution, and no dissents in such resolutions. [\*1350]

Eskridge's criterion of adequacy, viz., universal determinacy and mathematical certainty, cannot be met by foundationalist, originalist or any other theory of statutory interpretation of any content. n102 And he offers no other method or standard of evaluation. But that does not mean it can not be done or that we should be excused from the task. After all, when we discuss statutory interpretation decisions we do not do so in vacuo. And one limitation should be clear: the choice of method should not be simply outcome driven such that the method utilized achieves the result the

judge or critic personally prefers.

At the very end of the chapter, Eskridge introduces a new criterion, explaining or predicting statutory interpretations. "The analysis also suggests that originalist theories are not capable of explaining or predicting statutory interpretations, even when interpreters are rhetorically invoking one or more originalist theories to justify their interpretations." n103 But explaining is exactly what originalist argument does in particular cases. Eskridge seems here to confuse the legal explanation or justification given in the opinion and the judge's personal motivation, a confusion characteristic of legal realism. Since law and legal decisions are intrinsically public communications, this conflation of motive and reason is illegitimate. Prediction is the laboratory science test. As pointed out above, if it were applied to law, disagreement could only be based on mistake and dissenting opinions would hardly be possible.

When it comes to judicial decisionmaking, at the forefront of constraints under our constitution is legislative supremacy. n104 If this is to mean anything, statutes, the product of the legislative process, must constrain judicial decisions so that "any conflict between the legislative will and the judicial will must be resolved in favor of the former." n105 No theory can provide universal determinacy no matter what the archaeological resources. But any reasonable theory should require deference to the legislature. And deference of the judiciary requires compliance with the intent, purpose, will or meaning of the legislature. As Judge Wald puts it, the judge must strive "to advance rather than impede or frustrate the will of Congress." n106 No one should pretend that [\*1351] this is always easy. New York's chief judge, Judge Judith Kaye explained:

Ascertaining the legislative intent is often no less difficult than drawing common-law or constitutional distinctions, requiring "a choice between uncertainties," surely an "ungainly judicial function." ... Indeed, "there is no sharp break of Page 10

41 N.Y.L. Sch. L. Rev. 1329, \*1349

method in passing from 'common law,' old style, to the combinations of decisional and statutory law now familiar. Statutes, after all, need to be interpreted, filled in, related to the rest of the corpus." n107

Such an attitude acknowledges our democratic structure, legislative supremacy, and the search for guidance by legislative intent in difficult cases.

## 2. What is "legislative intent?"

Attacks on the notion of the intention of the legislature presume that this intention is a perfect analogue of the intention of an individual human in giving a direction or command. Unless something can be found in the legislative process which is equal to the mental process or state of the individual, there will be no such thing as legislative intent. But why should we expect the intent of a legislature to be such a perfect analogue of an individual human's intent in the utterance of an order or direction? Perhaps the temptation comes from our belief that the paradigm of legislation is something like the ten commandments, or the commands of a sovereign. n108 Or, perhaps, it is a tendency to think of one's own intent as the paradigm and of anything ascribed on less perfect criteria as mythic. However, that is simply to put a high redefinition on "intent." Whatever the cause, insisting that legislative intent be the same as the intent of an individual, ensures that intent will not be found in the assembly or the assembly's behavior.

Eskridge's conception of intention is limited to the individual human's mental state and so his compendium of arguments is completely confined to the conception of legislative intent as "the actual intentions of the [\*1352] legislative coalition that enacted the statute." n109 Legislative intent (and legislative purpose is exactly parallel in this respect) is seen only as an aggregate of individual intents; if meaning, intent or purpose is something in the mind of the speaker, then the meaning, intent, or purpose of the speech of an aggregation of speakers or a legislative body, can only be an aggregation of those individual meanings, intents or purposes. This identification of legislative intent with individual intent is a mistake. But it is a special kind of mistake, viz, a category mistake. n110

The concept of "category mistake" was introduced by Oxford philosopher Gilbert Ryle with a famous set of examples.

A foreigner visiting Oxford or Cambridge for the first time is shown a number of colleges, libraries, playing fields, museums, scientific departments and administrative offices. He then asks "But where is the University? I have seen where the members of the Colleges live, where the Registrar works, where the scientists experiment and the rest. But I have not yet seen the University in which reside and work the members of your University' ... His mistake lay in his innocent assumption that it was correct to speak of Christ Church, the Bodleian Library, the Ashmolean Museum and the University, to speak, that is, as if "the University' stood for an extra member of the class of which these other units are members. He was mistakenly allocating the University to the same category as that to which the other institutions belong. n111

After two further illustrations, Ryle continues:

These illustrations of category-mistakes have a common feature which must be noticed. The mistakes were made by people who do not know how to wield the concepts University, division and team-spirit. Their puzzles arose from inability to use certain items in the English vocabulary. [\*1353]

The theoretically interesting category-mistakes are those made by people who are perfectly competent to apply concepts, at least in the situations with which they are familiar, but are still liable in their abstract thinking to allocate those concepts to logical types to which they do not belong. n112

Page 11

41 N.Y.L. Sch. L. Rev. 1329, \*1351

Ryle's purpose was to demonstrate how, in the philosophy of mind, Cartesian dualism was a category mistake and that recognizing this dissolved most of its problems. Once we recognize the categorical difference between legislative and individual intent, many of the problems associated with originalist theories of statutory interpretation will also dissolve. Ryle suggests that one way to test for a category mistake is to examine incongruity in conjoined lists. For example, "She left in a flurry of tears and a taxi." n113 Similarly, it is easy to find anomalous parallels with "intent' predicated of a person and of a legislature. "John said [PHI] , but intended the opposite." "Congress enacted [PSI] , but intended the opposite." "Jane's words belie her intent." "The legislation belies congress' intent." It is grammatically anomalous to lump legislative intent together with acting, pretending, lying or dissembling. Doing so is to make a mistake. n114 Individual humans can act, lie, defraud, dissemble and disguise their true intentions in any number of more or less venal ways. However, a legislature cannot - a legislature cannot even make a Freudian slip. When we ascribe an intent to another person, we can go wrong in a number of ways having to do with the imperfect correlation between public manifestations and interior states. Were this not so, play acting would be impossible: "An "inner process' stands in need of outward criteria." n115 With humans we know from our own case, and allow for in others, the possibility of an intent different from that manifested. However, with legislatures we do not and cannot. Thus finding the intent of the legislature is rather easier and more certain than finding the intent of an individual. A legislature is an intrinsically public body and wears its inner thoughts on its sleeve, so to speak. To conflate "legislative intent" with "individual human intent" is to make a category mistake. Eskridge's [\*1354] arguments about legislators' having no intent, n116 or dissembling n117 lose credibility when this category mistake is uncovered.

It is one thing to show the error of identifying legislative intent with individual intent, or to think of legislative intent as an aggregate of the intents of the individual legislators. It is quite another thing to give an account of legislative intent itself. Many philosophers have addressed this, giving an account of the intention of a collective body as fundamental, at least as fundamental and perhaps more so than individual intent. n118 Renowned philosopher John Searle puts it thus:

Many species of animals, our own especially, have a capacity for collective intentionality. By this I mean not only that they engage in cooperative behavior, but that they share intentional states such as beliefs, desires, and intentions ... Obvious examples are where I am doing something only as part of our doing something. So if I am an offensive lineman playing in a football game, I might be blocking the defensive end, but I am blocking only as part of our executing a pass play. n119

Searle argues against the view that singular intentionality is fundamental and collective intentionality must therefore be derived.

In my view ... these efforts to reduce collective intentionality to individual intentionality fail. Collective intentionality is a biologically primitive phenomenon that cannot be reduced to or eliminated in favor of something else ... The crucial element in collective intentionality is a sense of doing (wanting, believing, etc.) something together, and the individual intentionality that [\*1355] each person has is derived from the collective intentionality that they share. n120

Why do so many think collective intentional acts must be built of individual intentionality? Because we think of intentionality as a kind of mental state, something strictly within an individual mind:

Page 12

41 N.Y.L. Sch. L. Rev. 1329, \*1353

I want to claim, on the contrary, that the argument contains a fallacy and that the dilemma is a false one. It is indeed the case that all my mental life is inside my brain, and all your mental life is inside your brain, and so on for everybody else. But it does not follow from that that all my mental life must be expressed in the form of a singular noun phrase referring to me. The form that my collective intentionality can take is simply "we intend," "we are doing so-and-so," and the like. In such cases, I intend only as part of our intending. The intentionality that exists in each individual head has the form "we intend." n121

Accordingly, the concept of legislative intent, ascribed to a legislature of many members, does not have to be parasitic on individual intent. It is independent, at least as fundamental as individual intent, and perhaps more so. One could think of it as an emergent property. Hydrogen and oxygen are both colorless gasses, and perfectly dry. But put them together in the right combination and they become water, the paradigm of wet things. Wetness then is an emergent property of the combination. Intent, likewise, is an emergent property of a legislature. n122

If we look at how we use the words "legislative intent," or their close relatives "legislative purpose," "legislative will" and the like, we find nothing magical or mysterious. When a judge faces a problem the solution to which is not

immediately apparent under the governing statute, what should she do? The doctrine of legislative supremacy suggests that the choice should not be entirely free, that if she can she should follow the will of the legislature rather than her own. She should seek to find and then defer to legislative intent. That's fairly ordinary, isn't it? We are entitled to assume that the legislature was not enacting sentences at random, so finding its intent or purpose in selecting the particular words and sentences in question is a matter of finding what was meant in a case [\*1356] like this. Even Judge Easterbrook, himself once a skeptic about legislative intent, n123 acknowledges as much.

We must separate two questions: (1) What did Congress think the words of 92 meant? (Assume for the moment that a collective body can "think" or "intend" anything at all.) (2) How did Congress expect things to turn out in a world governed by the new statute? The former question concerns the interpretation of the law; legislative "intent" is relevant in the sense that it shows how the legal community understood these words at the time. The latter question rarely assists the interpretive enterprise, because "intent" is useful only to the extent it helps illuminate the meaning of the enacted statute. It does not matter what Congress intended in the abstract; the question is what it meant by what it enacted. n124 This does not mean that legislative intent will always be easily or unequivocally determinable. It is no more easily or unequivocally determinable than the intent of an individual person. But the legislature presents in public all relevant information on which to base arguments and judgments of intent. Individuals don't.

Of course, legislation is often the end result of compromises, negotiations and even under-the-table bargains. n125 But that does not alter the fact that the legislative intent is discoverable, if at all, entirely from a public record. The private deal struck in the men's room has no place in the public record and no place in the determination of legislative intent. n126 [\*1357] Justice O'Connor probably means something similar in drawing a distinction between a legislator's motive and the purpose of the legislation:

Even if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted the law. n127

Legislative intent is derived from sources beyond the words of the statute but the sources are confined to publicly available materials. We may debate their meaning but only based on publicly accessible sources. n128 A legislature can have a variety of intents, purposes, motives and wills, or none at all, n129 but all those of permissible relevance are to be discovered in the public record. Thus, the legislature as such cannot act, pretend, lie, or disguise its "true feelings."

Page 13

41 N.Y.L. Sch. L. Rev. 1329, \*1355

Legislative intent is more objectively determinable than individual human intent.

Those who would seek something different, something more like the intention of an individual, are indeed seeking a phantom. The legislative intent that is to be implemented in statutory interpretation is not [\*1358] phantasmic, it is not even something that can be disguised, hidden or misrepresented. Quite the contrary. Legislative intent is something to be sought in printed records and justified by public argument. It is also apparent, as a matter of empirical observation, that this is the belief of practicing judges.

### 3. The Nature of Statutory Meaning

When we look for the legislative intent, we look for the role the legislature intended the statute to play in society.

Primarily, as Chief Justice Marshall said: "The intention of the legislature is to be collected from the words they employ." n130 But if the words are not clear, if the words are ambiguous, if the words seem inconsistent with other enactments or if the words of the statute lead to absurdity or manifest injustice, what then? In a passage quoted above, Warren Lehman identified as problematic "the case in which the subject matter to which the law is to be applied could not have been known to its draftsmen: e.g., the application of a nineteenth-century statute to the airplane." n131 The problem is useful for identifying two different senses of meaning of the words the legislature employs, the intension and the extension. n132 These provide a distinction that can help us dissolve some of the conceptual difficulties that have been built up around interpreting statutes, including "the unreality of [legislative] intention ...." n133

Consider, for example, the word "green." If an English speaker goes into a factual environment (a room, for instance) in which he has never been before, he will be able to pick out all of the green things there. This is simply what it is to be a speaker of English and to know the meaning of "green." Included in this ability is being able to distinguish the things that are obviously and indisputably green from those that are borderline; the class of green things in a factual environment has fuzzy edges.

One could say that the meaning of "green" is the class of green things. But this would not do because then one would not know the meaning of "green" unless one had surveyed all green things. Nobody has done or could do this although many people know the meaning of "green." [\*1359] Nor is the meaning merely all the green things one is presently observing, for there are many other things that can properly be said to be green.

On the other hand, it would not do to say that the meaning is the criterion in the mind of an English speaker to which she personally ascribes the predicate. The language is more public and more objectively testable than that. One

can, and must be able to be right or mistaken in what one says. The meaning of predicates relates to and their correct ascription depends upon facts in the extra-linguistic world. A general theory of meaning has to accommodate both of these facets: the empirical world and the speaker's linguistic knowledge.

The intension of the word is what one knows. It is the criterion according to which the speaker confidently can ascribe "green" to objects in an hitherto unobserved factual set-up. <sup>n134</sup> Note the spelling: "intension" with an "s". The class of green things (at a particular scene) is the extension of the word "green" (at that scene). These are two aspects (or modes of meaning <sup>n135</sup>) of predicate expressions. <sup>n136</sup> Intensions are the determiners of extensions, but we demonstrate our knowledge of intensions by correct application to extensions. Of course some people are better at picking out green things than others, and some disputes about borderline cases can be irresolvable. But this does not alter the fact of a linguistic community's shared knowledge of intensions of words. To the contrary: If speakers of the language did not have this shared knowledge in common, not only would communication be impossible but so would these [\*1360] very indeterminacies and disputes about words. When we talk of meanings, then, we usually mean intensions. <sup>n137</sup>

When legislatures speak, when they enact statutes, what mode of meaning do they intend? Intensions or extensions? Clearly intensions. Legislators may use descriptions of particular fact patterns, historical or hypothetical, as

Page 14  
41 N.Y.L. Sch. L. Rev. 1329, \*1357

diagnostics, as motivations, as sales pitches or as reductio conclusions. But the strings of words they enact convey meanings by way of commonly shared intensions and apply to indefinitely many fact patterns not specifically contemplated in the legislative process. <sup>n138</sup> This must be the case. Were statutes confined only to those fact patterns explicitly contemplated by the enacting legislature, they would have no application to any other fact patterns, including those occurring at different or future times.

Eskridge, in his arguments against the existence of legislative intent, fails to recognize the distinction between intension and extension as modes of meaning. Many of his and others' arguments depend exactly on confusing the two. For example, Eskridge writes:

The "original intent" and "plain meaning" rhetoric in American statutory interpretation scholarship and decisions treats statutes as static texts and assumes that the meaning of a statute is fixed from the date of enactment ...

... Other industrialized countries conceive of statutory interpretation as dynamic: the meaning of a statute is not fixed until it is applied to concrete circumstances, and it is neither uncommon nor illegitimate for the meaning of a provision to change over time...

... Over time, the gaps and ambiguities proliferate as society changes, adapts to the statute, and generates new variations on the problem initially targeted by the statute. The original meaning of the statute or the original intent of the legislature has less [\*1361] relevance for figuring out how the statute should apply to unforeseen circumstances. <sup>n139</sup> Presumably he does not mean that the sequence of words, the "collocation of ink spots" that comprise the statute is not static until amended. So he must mean that the statute's meaning can develop. If he means extensional meaning, then "the meaning of a statute is not fixed until it is applied to concrete circumstances" is trivially true. But in terms of intensions, it is simply false. Intensional meaning might change over time, <sup>n140</sup> but when it does, the meaning as and when enacted is usually discoverable. <sup>n141</sup> Judge Easterbrook makes and relies on this point:

Unanticipated developments frustrate many a drafter. So it was with 85; in 1864 Congress could not have anticipated credit cards and the computers that make them possible, but the Court did not suggest that this lack of precognition limited the scope of the law. Economic changes (the transistor, high speed interstate communications networks, and so on) greatly altered the effect of 85 without altering its meaning. <sup>n142</sup>

It does not follow that the application of the statute to unforeseen circumstances is necessarily clear or determinate. It does mean that the judge is constrained by the statute, by its meaning and is not completely free to decide as she might choose. Judge Learned Hand wrote: "But we have not to decide what is now proper; we are to reconstruct, as best we may, what was the purpose of Congress when it used the words in which 8(b) and 8(c) were cast." <sup>n143</sup> The principle of legislative supremacy requires that intensional meaning, "the original meaning of the [\*1362] statute or the original intent of the legislature," provide the relevant constraint on judicial decisions under it.

None of this, of course, means that decision-making in hard cases is easy or certain. It means only that it is constrained and that a judge must look to that constraint. As New York's chief judge, Judge Judith Kaye has recently written: "I do not think one has to be a "metademocrat," a "public law theorist," or even (heaven forbid) a "dynamic statutory interpreter" to acknowledge that the "will of the legislature" is not always easy (or even possible) to discern

Page 15  
41 N.Y.L. Sch. L. Rev. 1329, \*1360

when it comes to specific facts before a court." <sup>n144</sup>

And as Justice Brennan said:

The struggle for certainty, for confidence in one's interpretive efforts, is real and persistent. Although we may never achieve certainty, we must continue in the struggle, for it is only as each generation brings to bear its experience and understanding, its passion and reason, that there is hope for progress in the law. n145

F.

#### Summary

Thus we see that Eskridge's case against archaeological theories, theories of the existence and priority of legislative intent, purpose or meaning, rests on three fallacies. First, he sets the criterion of success for such theories at a level inappropriate to the subject matter, legal decision making. "None of the methodologies yields determinate results. Consequently, none fully constrains statutory interpreters or limits them to the preferences of the enacting coalition." n146 Of course no originalist theory will "fully constrain" a judge or determine her decision in any but the most trivial of cases.

The second fallacy confuses the intent, purpose or meaning of an institutional body like a legislature with that of an individual human. If "intent" is only understood as the inner psychological state of an individual person, then legislative intent is seen as some sort of aggregate [\*1363] of the personal intents of individual legislators. This is a category mistake. Legislative intent is a demonstrably different phenomenon which, although not always ascertainable with scientific precision, is still more objectively determinable than individual intent.

Third, Eskridge confuses the application of a string of words to a particular situation with the meaning of those words, i.e., he fails to distinguish extensions from intensions. n147 Meanings, in the sense of intensions, are public and relatively stable. Were they not, language would be impossible. Determination of whether particular complicated factual situations are within the extension at a given time and place of a particular, complicated set of words is not always clear, easy or determinate. That is why courts are needed, and, in a society built on the democratic principle of legislative supremacy, why courts in difficult cases resort to extrinsic aids to determine the will, intent, purpose or meaning of the legislature.

Much of Eskridge's argument is taken up with examples, usually of Supreme Court cases. n148 But law is not a laboratory science. Examples, or counter examples, carefully chosen for their indeterminate quality, cannot prove originalist theories of statutory interpretation inviolable. At most they show that in hard cases what counts as legislative intent can be as underdetermined and contentious as the statute itself.

In deference to Eskridge's illustrative method, let us look at a simple hypothetical finely adapted to his purpose by Lon Fuller. "Suppose a legislator enacts that it shall be a crime for anyone "to carry concealed on his person any dangerous weapon.' After the statute is passed someone invents a machine, no larger than a fountain pen, capable of throwing a "death ray.' Is such a machine included? Obviously, yes." n149 The key issue here will be the meaning of the noun phrase "dangerous weapon.' Assume that a death ray machine will not be found among the scenarios expressly contemplated by the enacting legislature. Nor do we have any information about the individual intents of the members of the enacting coalition or of the log-rolling that went into creating that coalition's dominance. But that legislature enacted a string of meaningful words, not a set of particular descriptions of real or hypothetical states of affairs. As Fuller says, "obviously" this death ray machine is among the items picked [\*1364] out by "dangerous weapon' in any plausible factual scenario. n150 This is obvious to any speaker who knows the meaning - the intension - of the words.

Page 16

41 N.Y.L. Sch. L. Rev. 1329, \*1362

n151 Legislative intent, the intent behind the enactment of words with meanings in the sense of intensions is neither phantom nor metaphor: it too is obvious. Legislatures do not enact prohibitions spuriously, for no purpose. To doubt the existence or determinability of the legislature's intent or purpose in this case would be strange indeed, despite our lack of access to the inner attitudes of the legislators.

Remember "the primary rule for the interpretation of a statute" derived from the democratic principle of legislative supremacy is, "to ascertain, if possible, and enforce, the intention [of] the legislative body that enacted the law ...." n152 Has the intention of the legislature that enacted the prohibition on carrying dangerous weapons changed because of the invention of the death ray? Surely not. The intension of the words "dangerous weapon' has not changed either. It is simply being applied to a different factual set-up than was possible at the time of enactment. n153

Looking to intensions as the meaning of the statute and to the intent of the legislature as publicly manifested is hardly novel, even if the jargon [\*1365] is. It is merely a way of articulating widely held intuitions, the same intuitions that underlie Plowden's method and the rules of Heydon's Case. Those who, like Eskridge, argue that a statute means only the extensions recognized by the individual members of the enacting coalition (plus those later added by courts) fly in the face of everyday interpretive realities.

III.

The Dynamics of Statutory Interpretation n154

Chapter 1 of Eskridge's book is negative: it seeks to destroy a key underpinning of rival theories. Chapter 2, by

contrast, is positive: it lays out the basic arguments for his idea. It is certainly an idea with legs, an idea as dynamic as its name. "Here I argue that statutory interpretation is multifaceted and evolutive rather than single faceted and static, involves policy choices and discretion by the interpreter over time as she applies the statute to specific problems, and is responsive to the current as well as the historical political culture." n155

One gets the feeling that this is a theory that is to be all things to all persons. Whatever in society can change over time or place or can have more than one "facet," can be dynamically influential. The clearest summary comes at the beginning of Chapter 3:

Statutory interpretation is a cultural as well as a legal process. Cultural shifts generate movement of statutory meaning. Changes in society, its values, and its competing ideologies shape and reshape statutory meaning as they reveal new practical problems unresolved by the statute, interpretive horizons distant from those of the drafters, and novel political environments attentive to interpretive developments. n156

[\*1366] So, "the meaning of a statute will change as social context changes, as new interpreters grapple with the statute, and as the political context changes ...." n157

Eskridge categorizes influential variables into three groups: those arising out of factual developments, those dependent on the interpreter, and those that result from the work of legal institutions, like courts. These he terms "Pragmatic Dynamism," "Hermeneutic Dynamism" and "Institutional Dynamism." Their exposition comprises the affirmative case for dynamic statutory interpretation.

A.

Pragmatic Dynamism: Applying Statutes Under Changed Circumstances n158

Page 17

41 N.Y.L. Sch. L. Rev. 1329, \*1364

Pragmatism comes in many shapes and sizes, almost as many, one might say, as there are pragmatists. n159 What is Eskridge's pragmatism?

Pragmatism argues that there is no "foundationalist" (single overriding) approach to legal issues. Instead, the [] problem should [be] considered from different angles, applying practical experience and factual context before arriving at a solution ...

...

... Pragmatism emphasizes the concrete over the abstract and is problem-solving in its orientation ... Pragmatic thought understands application as a process of practical reasoning. n160

On this account, I must say I join the club, don't you?

How does pragmatism create or require dynamism in statutory interpretation? The enactment of a statute, its purpose and the meanings of its terms, are embedded in and presuppose the cultural understandings of the time. It is fashionable to point out how even the "hard sciences" are infected with social relativity. n161 But the point has long been stock in [\*1367] trade in social philosophy. The economist Joseph Schumpeter pointed out that our social presuppositions are ideologically driven.

Analytic work begins with material provided by our vision of things, and this vision is ideological almost by definition. It embodies the [definition] of things as we see them, and wherever there is any possible motive for wishing to see them in a given rather than another light, the way in which we see things can hardly be distinguished from the way in which we wish to see them. n162

Our social understandings and conceptions of justice, like our wishes, ideologies and technology, vary with time and place. The point was made some four hundred years ago by that foundational legal genius, Francis Bacon.

And as veins of water acquire diverse flavors and qualities according to the nature of the soil through which they flow and percolate, just so in these legal systems natural equity is tinged and stained by the accidental forms of circumstances, according to the site of territories, the disposition of peoples, and the nature of commonwealths. n163

How a statute will apply to a given set of facts in a changed social, political, economic, technological and moral environment will not be determined at its enactment, but will depend on judicial adaptation. An adaptive decision under an old statute in new circumstances may appear to give new meanings to the old words. Thus it will appear dynamic.

Bacon biographer Daniel Coquillette summarizes Bacon's method of statutory interpretation thus: "its essence was to determine and articulate the rationale of the statute's enactment, and then to apply the statute, not according to its strict terms, but as appropriate to achieve the statute's goals given the changes in time and circumstance since its enactment." n164

[\*1368] This is pragmatic dynamism. In Eskridge's account, since the "rationale of the statute's enactment," the legislative intent, is either non-existent or indeterminable, it too becomes contextually variable - dynamic.

From a problem solving position then, a statute may present itself as uncertain in meaning, indeterminate of the legal status of the facts at hand. Eskridge explains with an example. Section 212(a)(4) of the Immigration and Nationality Act of 1952, provided that "aliens afflicted with psychopathic personality, epilepsy, or a mental defect shall be excluded from the United States." n165 Legislative history shows that this was so drafted as to be, in the Public

Health Service's (PHS's) understanding, "sufficiently broad to provide for the exclusion of homosexuals and sex perverts." n166 In the early 1950s, homosexuality was thought "in the medical and psychiatric profession ... [to be] a mental 'disease,' a type of 'psychopathic personality.'" n167 "By the 1960s, as empirical studies found no correlation between pathology and homosexuality, [] the Ninth Circuit in *Fleuti v. Rosenberg* n168 ] explicitly relied on newer medical studies in its effort to curtail application of the psychopathic personality exclusion." n169 The Supreme Court however, in 1965, sided with the PHS and original intent, upholding the exclusion of a homosexual under the statute. n170 At the same time, Congress sought to override *Fleuti* by amending 212(a)(4) "to exclude aliens "afflicted with psychopathic personality, or sexual deviation, or mental defect." n171 But medical enlightenment could not be forestalled; Eskridge attributes the change to the 1969 Stonewall riots: [\*1369]

Within four years of Stonewall the American Psychiatric Association removed "homosexuality" from its list of mental disorders, after intense debate over the evidence. Other medical associations followed suit immediately, and the prior medical consensus collapsed. Responding to the new views within the medical establishment, the PHS announced in 1979 that it would no longer carry out examinations or issue certificates to exclude gay men, bisexuals, and lesbians pursuant to section 212(a)(4) because there was no reliable basis for considering homosexual orientation a medical disorder. n172

The story continues to date and is very well told.

What is the point of this story? It is, says Eskridge, exemplary of dynamic statutory interpretation. "The PHS's about-face represented a dynamic interpretation of section 212(a)(4) based on changed societal and cultural circumstances." n173 Of course "dynamic statutory interpretation" is Eskridge's expression and he has control over its meaning. But if this is all he means, it doesn't amount to very much, and certainly is not much different from the views of a "static originalist." He explains that "assumptions" made at the enactment of the statute in 1952 had proven invalid, and "when those assumptions become obsolescent, the statute's application changes." n174 The general original purpose of the section was "to prevent entry into the United States of people with severe medical problems." n175 The relevant assumption, then, was that homosexuality was such a severe medical problem. n176 Ultimately, "what drove the statute's evolution (and ultimately drove the statute into an early retirement) was a sea change in American attitudes about sexual orientation, from hysterical intolerance to partial toleration." n177 Nicely expressed, perceptive, and accurate, but it doesn't support his thesis.

The meaning of the original statute was clear. In this case original intent, purpose and all that are acknowledged and useful. In 1952 the meaning of "psychopathic personality" and "severe medical problems" included "homosexuality" as a sub-part. Thus, the extension of the statute's terms at any given scenario would, according to the understanding [\*1370] of homosexuality prevalent at the time, include all present homosexuals. The meaning of "psychopathic personality" and "severe medical problems" did not change and the criteria of "psychopathic personality" might be exactly the same now as they were then. But our official understanding of homosexuality has changed dramatically, and now those criteria would not fit it as such. The original intensions, like the original intent and the original purpose, of the key expressions in 212(a)(4) have not changed, but their application today does not require the exclusion of homosexuals. However, had the section included homosexuals expressly, n178 no matter how enlightened and accepting society became, until repeal of that language, the Immigration and Naturalization Service and the PHS would be stuck, wouldn't they? That meaning and original intent would be too plain to escape.

What Eskridge has failed to recognize is the difference in modes of meaning, and what it is, perforce, that a legislature enacts and intends. A legislature cannot normally enact extensions; they would be simply too particular. This he acknowledges: "because they are aimed at big problems and must last a long time, statutory enactments are often general, abstract, and theoretical." n179 But it is a distinction he constantly ignores. For example: "statutory meaning is not fixed until it is applied to concrete problems... Every time a statute is applied to a problem, statutory meaning is created." n180 This is not trivial. A large measure of stability of meanings, intensions, is essential if language is to function. Every argument that Eskridge makes about meanings of statutory expressions can be made about common language expressions, equally fallaciously.

B.

Hermeneutic Dynamism: The Critical Role of the Interpreter's Perspective n181

This sub-section is easily the weakest in the first chapters, and there is ample indication that the author is aware of it. In some ways this doesn't matter: it's weakness is only in it's failure to substantiate a position nobody would seriously contest. But in some ways it does matter. [\*1371] The role of the sub-section's thesis as support for the general theory of dynamic statutory interpretation is exemplary of a form of fallacious but dangerously seductive argument.

"Hermeneutical dynamism" and its role are defined by the following: "the independent and changing identity of the interpreter ensures dynamic interpretation for reasons best explained by philosophical hermeneutics. The interpreter's role involves selection and creativity, which is influenced, often unconsciously, by the interpreter's own frame of reference - assumptions and beliefs about society, values, and the statute itself." n182 The citations, here omitted, are to postmoderns, especially to the work of Hans-Georg Gadamer and his epigones. n183 In effect the section elaborates on the stunningly original insight of postmodernism that things look different from different points of view. It's true and it's inescapable. Even the judge who strives mightily to follow the express will of the legislature "is influenced, often unconsciously" by his socialization, point of view, "field of vision," n184 pre-understandings, in short by his "horizon." n185 One may look on all this with understandable skepticism, but it cannot be ignored. Eskridge makes the arguments as clearly and honestly as anyone. n186

Eskridge introduces the argument with a list of various interpretations of Jane Eyre over the last hundred and fifty years n187 and his own interpretations when young and at present, thus showing that "the meaning of Jane Eyre will not only change from generation to generation and from interpreter to interpreter but will change for the same reader over [\*1372] time." n188 But in what sense of "meaning?" Surely Eskridge doesn't mean that "There was no possibility of taking a walk that day[.]" n189 says different things to different readers. Of course what determines the possibilities of walking has varied over time with the development of thermal underwear and the like and the mere likelihood of contemplating a walk varies with social class. But does it follow that the meaning of the sentence varies accordingly? Were it a legal problem, interpretation would more likely fall on a sentence such as this than on set of words as long and rambling as a this novel. And very often, as Eskridge's own examples show, the crux is the meaning of just a few words. He tells the story well, but it doesn't do much for his argument.

Eskridge is aware of the difficulty, but works on it from a different angle:

Literary interpretation is not legal interpretation, and so it is not immediately clear that hermeneutics generally, and specifically my use of Jane Eyre, provides any insight into statutory interpretation. The traditionally emphasized difference between the two derives from the normative force of statutory interpretation: what we learn from interpreting statutes has a coercive effect on us that is not the same as what we learn from interpreting novels. n190

His first response is to minimize this difference: "surely there is some truth in this traditional distinction between legal and literary interpretation, but it is usually expressed too strongly." n191 Novels too can "have a substantial normative force ...." n192 "I do insist that there is not necessarily less at stake in the interpretation of literary or religious texts than there is in the interpretation of legal texts." n193 No doubt, and no doubt relevant, if only all things that have "normative force" had it in the same or at least in a commensurable manner. They don't. In the extreme, the life or death of a particular person could hinge on a judge's interpretation of a statute and at the least some person's wealth or welfare will be at stake. That's not the sort of normative force Jane Eyre has.

Eskridge does not rest his case for hermeneutic dynamism (meaning's dependence on the interpreter) on literary criticism alone. He returns to [\*1373] the example of 212(a)(4) of the Immigration and Nationality Act and its interpretation. Just as the development of public attitudes and medical and psychological wisdom changed the factual

Page 20

41 N.Y.L. Sch. L. Rev. 1329, \*1370

application of "psychopathic personality," so too, aided by the replacement of old judges by new, they changed the horizons of the judiciary. The change in judicial attitudes affected judicial opinions. Who could doubt it? So long as there are reasonable dissents to decisions under statutes, how can there be any doubt that different judges with different judicial horizons, produce different results? Eskridge makes portentous and elegantly expressed claims for hermeneutic dynamism. For example: "[it] recasts the traditional textual, historical, and evolutive inquiries as more explicitly interconnected and mutually influencing." n194 "By representing the interpreter's horizon of thought as the field on which this back-and-forth process proceeds, the hermeneutical model recognizes the critical role played by the interpreter's framework." n195 Yet all the bells and whistles in the world can't rescue it from the obvious: different judges can have different views.

Were that all there is to it, it would be harmless enough. But it isn't really. It is clear that no general description will completely capture the empirical reality of judicial interpretation. All theories of and arguments about statutory interpretation are thus to a great extent about the justifiability, the propriety or the validity (under some higher predicate), of a particular approach. What Eskridge does in this sub-section is move the question from normative justification to the acceptance of empirical descriptions. It is *hardly to be denied, empirically, that a judge's horizons influence her decisions*. But it does not follow that a judge should acquiesce to her own subjective preferences, in disregard of legislative intent, precedent or discordant societal norms. Quite the contrary. This is one of the reasons that we have judicial opinions, and require judges to strive for objectivity in them. n196 "I decide thus-and-so because this is how I was brought up/my education, religion and socialization so dictate' are not acceptable in the judicial system. All lawyers know that and right from the start, law school socialization prevents it. n197 Eskridge's argument lacks a

normative qualification and limitation on the hermeneutical [\*1374] dynamism thesis. But just such a limitation is necessary if we are not to accept judicial whim as a normatively neutral justification. n198

To be fair I should acknowledge that there are indications that Eskridge sees this point. He writes that "hermeneutics rejects the idea that individual beliefs necessarily dominate interpretation[.]" n199 yet only as a bald statement, inconsistently backing off from the rest of the sub-section. Even this he sees as a problem for the predictability essential to legal planning. It is overcome by the fact that, despite what he has written immediately before, the role of the interpreter is quite insignificant because judges are similar in attitude and horizons. This because the interpreter is constrained by her institutional tradition: "the statutory interpreter is constrained - often unconsciously - by the traditions of the surrounding culture and of her professional culture, just as all interpreters are." n200 Is this just a re-taking of the entire preceding argument of the sub-section?

C.

Institutional Dynamism: Statutory Interpretation as a Sequential Process n201

The third leg of the triad underpinning the theory of dynamic statutory interpretation has a name only slightly more commonplace: "Institutional dynamics." It results from the structure of the social institutions involved with statutes namely: the legislature, the Supreme Court, other courts, lawyers, police officers, administrative agencies in both front-office and back-office functions and the citizenry. All interpret statutes and their interpretations have an effect on the interpretations of others. So far Eskridge has concentrated on the Supreme Court and the federal legislature. Here he wants to focus on the others, all of which are even more subject to changing social mores and pressures.

Here, at last, Eskridge recognizes that he and others interested in statutory interpretation concentrate too much on the Supreme Court:

we should stop looking at statutory interpretation just from the perspective of the Supreme Court and instead consider statutes from ... the perspective of private parties, agencies, and lower courts, whose work most shapes and influences what the Court [\*1375] hears and how it will resolve cases ... This claim suggests how statutory interpretation is

Page 21

41 N.Y.L. Sch. L. Rev. 1329, \*1373

dynamic, but in a more complex way than has been suggested thus far. n202

Looking at interpretation at levels other than the Supreme Court is a plan worth hearty endorsement. Indeed, the authoritative force of Supreme Court interpretive practice, how it goes about statutory interpretation rather than the interpretations it puts on statutes, is a subject worthy of more exploration. At the very least it is of less than precedential power. Much could also be gained from focusing more on everyday state statutes, such as the Uniform Commercial Code or Uniform Probate Code, than on contentious high-level federal statutes. It is, after all, where most professional interpretation takes place.

There are distinctions among all these less than supreme institutions, distinctions implicit in Eskridge's explication of institutional dynamics. Administrative agencies in their back-office roles provide interpretive elaborations of statutes or make rules when delegated the authority to do so. Theirs are statute-like products, in generality and power. The front-office agency employee deciding whether one of society's victims should continue to receive governmental largesse, the police officer deciding whether to arrest and charge a disruptive teenager, a lawyer deciding how to advise his client on a point of estate planning, just like trial courts, all deal with particular factual scenarios. n203 The former group expand on intensions and the latter decide whether particular facts are in extensions.

The former group, those with the power to make public verbal elaborations of legislative enactments, influence the public and the Supreme Court. So much is transparent. n204 Lawyer's read books of regulations and the Court, ceteris paribus, defers to agency interpretations. n205 Eskridge provides clear and dramatic historical examples. n206 The impact of the latter group (lower level institutions [\*1376] applying statutes) is not so obvious. Persons in these kinds of role select which cases proceed through the judicial system and how far. They determine what examples the Supreme Court will come to consider. These people work day to day in the trenches with the public who enjoy or suffer the effects of legislation. Such front-line institutional operatives are subject to present day social, political and moral values and pressures, not "the historical preferences of the original enacting coalition." n207 The filter they provide on the case load of higher level courts is thus dynamic, not static and historic. Surely this is correct. But what is really needed here is an examination of what persons in these roles typically look to in interpreting statutes. Does the lawyer examine present socio-political mores or the legislative history of the section? When one, when the other, and why?

How does Congress figure in institutional dynamism? It always has the power to overrule a Supreme Court interpretation of one of its statutes. Whether it does so or not is governed entirely by its "current preferences ... [not by] the historical preferences of the original enacting coalition." n208 The Supreme Court will always be aware of this and may modify its interpretive decisions accordingly. Thus, the institutional relationship between Congress and the Court enhances the dynamism of Supreme Court interpretation. n209

These three sub-theories, pragmatic, hermeneutic and institutional dynamism, comprise Eskridge's affirmative

support for Dynamic Statutory Interpretation. As he writes: "different intellectual traditions - pragmatism, hermeneutics, and positive political theory - interact to explain the dynamics of statutory interpretation." n210 In other words, they tell us what is meant by the word "dynamic" and make a convincing case that in this sense statutory interpretation is indeed dynamic. Thus the question is whether this means anything more than has long been understood as statutory interpretation sans modifier. Insofar as that question is answered affirmatively, the interesting theoretical question is whether, as presented, the theory of dynamic statutory interpretation can be justified. Eskridge himself asks the right questions at the end of [\*1377] Chapter 3: "Is dynamic [statutory] interpretation consistent with the rule of law? With democratic theory? With justice?" n211

The Weber n212 case, its statutory basis and its subsequent judicial progeny, illustrates all three kinds of dynamism. The statute in question, 703(a)(1) of the Civil Rights Act of 1964, n213 was fifteen years-old by the time the case reached the Supreme Court in 1979. Much had changed in industry and society, including changes brought about by the statute itself and the actions of administrative agencies. The facts could not have arisen in 1964. The nine justices had varied backgrounds, varied horizons, and varied socio-political outlooks. Weber was a hard case: the outcome was not determined by the aggregate legal resources available, different outcomes were possible, thus genuine judgment was

Page 22  
41 N.Y.L. Sch. L. Rev. 1329, \*1375

necessary. Another eight years passed before Johnson v. Transportation Agency n214 expanded on Weber reasoning, removing it even further from what was envisioned by the enacting coalition in 1964. The Weber decision could not have taken place in 1964 and Johnson could not have taken place in 1979, let alone in 1964. Statutory interpretation is thus dynamic.

But that means little more than that 1979 was different from 1964 and 1987 was different from both, and in ways that had an impact on the type of behavior coming within the scope of the statute. The expression "dynamic statutory interpretation" is, in this sense, a pleonasm. To find statutory interpretation that was not dynamic in this sense, one would have to go back more than five hundred years to the days of England when change, like travel and communication, was slow, where the legislators were the judges and when Judge Hengham is reported to have said "Do not gloss the statute for we know it better than you; we made it." n215 In England through the Fourteenth Century at least, both the enactment and application of statutes fell to the same persons. The late Professor Thorne wrote: The interpretation of statutes in its modern sense is a late-comer to English law: it must be obvious that so long as the law maker is his own interpreter the problem of a technique of interpretation does not arise. Only when he is forced to delegate [\*1378] the function of interpretation to a different person does the matter become urgent. n216 If this is all Eskridge means to distinguish by the word "dynamic," then his theory really is pleonastic: dynamic statutory interpretation is merely statutory interpretation.

Dynamic statutory interpretation must be more than that, and it is. The basic argument form takes a true, but particular premise, and deduces not only the inevitability and generality of that phenomenon, but also its virtue. If variation in meaning with time, interpreter, and institutional setting is inevitable, it must be normatively proper. Well dressed up, it can look very good. This is a standard ploy of post-modern argumentation. n217 But nevertheless it is invalid.

Archaeological data is sometimes insufficient to determine with certainty the legislative intent relevant to a question, n218 but that does not justify rejection of that data in its entirety. Even where the archaeological data tends toward a uniform conclusion, different conclusions will always be possible. n219 However, that does not justify inferring that the obvious conclusion is not warranted, or that the indefinitely many alternate possibilities are equally plausible. The meaning (in some sense) of a statutory text may depend in some way upon the reader; but that does not warrant a judge's abandoning deference to legislative intent or taking her own preferences as a justified interpretation. The reader's institutional context may have some effect on the reader's interpretation of some statute; but it does not follow that all statutory interpretation is institutionally variable and legislative intent irrelevant. The mere [\*1379] possibility of alternative interpretations of a statute does not warrant the inference that no particular interpretation is the most justifiable. Possible fallibility suggests only that the interpreter should be alert to alternatives and justify the determination made.

What about the criterion of adequacy that Eskridge set for the "rival" originalist theories? As previously described, he set the impossibly high test of determinately resolving all problems, a standard I argued they never claimed or aspired to and which guaranteed their failure. Does dynamic statutory interpretation meet its author's own standard? Later in the book, when he espouses postmodernism, Eskridge says that it does not! "The postmodern skepticism about an objective rule of law and majority-based statutory applications finds support in the analysis in Part I of this book." n220 "In short, dynamic theories may not meet the modernist assumptions any better than the originalist theories questioned in Part I. The methods introduced in this book for criticizing modernist-based originalist reasoning can be extended to criticize modernist-based dynamic reasoning." n221 Does this make a mockery of the arguments of

Chapters 1 and 2? Not necessarily. It depends on these "modernist assumptions." Eskridge says they are  
Page 23

41 N.Y.L. Sch. L. Rev. 1329, \*1377

an authoritative, legitimate answer to a statutory puzzle can be arrived at through a process of reasoning that itself legitimates the answer. Because the answer is arrived at through a method independent of the specific interpreter, a good interpretation can be replicated by other interpreters and is a legitimate application of the rule of law. n222 If being replicable by others is a modernist criterion of goodness in statutory interpretation, it seems pretty good to me. n223 But does it rest on the use of "a method independent of the specific interpreter"? Not necessarily. That's a set up ignoratio elenchi. [\*1380]

Eskridge says modernists require "that reason can yield determinate answers, tied to legislative expectations and capable of replication by differently situated interpreters[.]" n224 Note that "replication" doesn't necessarily mean "adoption" nor does it require the replicator to agree. If it's a hard question, the old-fashioned commonplaces - postmodern insights - that things look different from different points of view and that people can in good faith hold different values, suggest that different interpreters can reach different solutions to hard questions. However, it does not follow that one cannot understand, and in that sense replicate, the reasoning of another, even of that ubiquitous character of postmodern rhetoric, The Other.

Despite Eskridge's protestations to the contrary, I believe Eskridge's dynamic statutory interpretation does meet the elevated standard of adequacy that archaeological theories failed. Oddly enough, that is the theory's most serious problem. By claiming all interpretive resources as its own and by claiming indiscriminate legitimacy for them all, the theory can provide answers to all questions of statutory interpretation.

The key to the universal power of dynamic statutory interpretation is its acceptance of the three kinds of dynamism as normatively justified: each can provide a justified resource on which to base a decision and each can properly be outcome determinative. For example, hermeneutic dynamism recognizes the interpreter's subjective horizons as a legitimate resource and thus guarantees a justified answer to any interpretive question, viz, whatever the judge wishes. But one never needs to state it so bluntly. The judge is inevitably situated in a factual world, normatively constituted and unavoidably ideological - pragmatic dynamism. n225 And, of course, the judge - or other interpreter - is an element of an institutional setting that creates and controls his or her perception and evaluation of fact and reasoning - institutional dynamism. In such a dynamic world, the judge's own personal predilections may not present themselves as very dominant. "One lesson of hermeneutics is "how little interpreters and their points of view matter ...'" n226 Yet, however disguised, if hermeneutic dynamism has any role in the theory, one has to ask: how can any interpretation be wrong? If I disagree, or argue against it, isn't that just because of a different viewpoint due to social and cultural makeup? n227 [\*1381]

Dynamic statutory interpretation can satisfy any criterion of adequacy because, in the end analysis, it uses no more than whatever is necessary to reach a decision. To that extent dynamic statutory interpretation could be said to be no theory at all, merely an elaborate description of the fact that courts must decide cases brought to them and of all the causal factors that could bring about such decisions. Later, Eskridge renames the theory "critical pragmatism" and returns to the limitations of social and institutional context. But it doesn't help.

If the rule of law is situated in practice, there is no foundational theory that can capture that protean complexity, but our situation within practice ... may help us figure out which applications work best within the conventions of society and law. And these are themselves plural: no single legal convention governs statutory interpretation, but all are relevant - statutory text, legislative intent or purpose, the best answer... It takes into account a number of different factors in evaluating interpretations - conventions of language and expression, the statute's background history, its subsequent interpretation, its relationship to other legal norms, and its consequences. n228

Page 24

41 N.Y.L. Sch. L. Rev. 1329, \*1379

The trouble is: can you think of anything that has been suggested as an aid to or factor in statutory interpretation that is not here? Within this comprehensive grab-bag, Eskridge offers no ordering of priorities. So, this is not a theory in any of the usual senses of "theory". It has no explanatory power. n229

To some extent this makes Eskridge's theory an elaborate version of legal realism: One cannot avoid the power of the final decision-maker. In this context, the problem is the theory's disregard of the constitutional [\*1382] principle of legislative supremacy and our social ideal of a government of laws, not of men.

We should, therefore, examine Eskridge's treatment of legislative supremacy as a principle hostile to dynamism.

n230 In Chapter 4, Eskridge addresses liberalism as the progeny of social contract theory:

Liberalism views government as a social contract among autonomous individuals who in the distant hypothetical past gave up some of their freedom to escape the difficulties inherent in the state of nature. For liberals the baseline is private activity (property, contract, the market), and government regulation is the exception requiring justification. The

justification for government regulation is consent. n231

In the United States this consent "is embodied in the Constitution" n232 which expressly incorporates the concept of legislative supremacy. n233 As to this liberalism's position on statutory interpretation: "because the Constitution does give Congress the authority to adopt statutes entitled to supremacy unless unconstitutional, liberalism requires a connection between the text and/or the legislative history of the statute and the interpretation reached in a particular case." n234 Prima facie this would seem to present a problem to dynamic statutory interpretation, at least as elaborated in Chapter 2. How can the judge's horizon's be hermeneutically determinate? How can present social concerns be pragmatically determinate? How can the accident of choice of lawyers in bringing a case be determinate of a statute's meaning? Surely that determination is constitutionally delegated to Congress? These questions do not present a problem to dynamic statutory interpretation if "one thinks about legislative intent in a complex way." n235

This is not merely a verbal ad hominem. n236 Eskridge explains what he means by "complex." "The legislature typically does not have a 'specific intent' as to most issues of statutory application, or at least no specific intent beyond delegation of statutory detail and gap filling to other decision makers.. The legislature may also have a 'general intent' [\*1383] about the goals the statute subserves." n237 Consider a set of facts brought before a court under a statute some time after its passage. It is hardly likely that the particular fact set was expressly contemplated by the enacting legislature, but even if it was, argues Eskridge, the change in the general factual environment may require a different decision from one just after the statute's enactment. "Even when one can figure out the legislature's specific intent as to an issue when it enacted the statute, there may be considerable doubt that the legislature "would have' specifically intended that the issue be resolved in that way if it could have predicted future circumstances." n238

Thus, the argument goes, there is a change in general intent when the generally relevant factual environment changes. "To implement the legislature's general intent requires dynamic interpretation as circumstances change, because the statute has to adapt to the changed circumstances if it is to achieve its goal, even if that means bending the literal terms or original meaning of the directive." n239 Not necessarily.

I may never have had a clear grasp of the meaning of "psychopathic personality," but I never understood it to include homosexuality. When (in response to the medical profession's revised view) Congress and the courts and the Public Health Service changed their understanding, the meaning - the intension - of the operative predicate "psychopathic personality" did not change. It was clarified that a person was not within its extension merely by virtue of being homosexual. Chief Judge Judith Kaye of the New York Court of Appeals offers a good example.

Page 25

41 N.Y.L. Sch. L. Rev. 1329, \*1381

Only recently ... my court construed the words "currently dangerous" in a criminal statute governing whether a paranoid schizophrenic, found not responsible for attempted murder by reason of mental disease or defect, should remain confined in a secure mental hospital. Surely the word "currently" is clear enough: it means right now, at this moment. But, as the court wrote, to apply those words strictly "would lead to the absurd conclusion that a defendant in a straightjacket, surrounded by armed guards, is not currently dangerous under the statute." Instead, we applied concepts of "common-sense and substantial justice" to give the term "currently" what must have been its intended meaning: dangerous not at the moment of confinement and treatment, but foreseeably dangerous if confinement and [\*1384] treatment were not continued into the future. Indeed, had our courts interpreted the word "currently" in its most literal sense, we would have been less than faithful to the underlying legislative purpose - to protect society from potentially dangerous insanity acquitees. n240

Of course intensions may change over time. The meaning of "science' between 1790 and the present is a clear example. But typically intensions remain fairly constant even though the factual environment, state of knowledge, and cultural, social, political, economic, and technological backgrounds change so much that there is a clear change in extensions. That is why Jane Austen, Charles Dickens, Francis Bacon and Lord Coke remain quite intelligible to this day.

Thus in this instance, Eskridge does not make his case. But suppose he had. Suppose, like the meaning of "science,' words changed in meaning with changes in factual background. Would that save dynamic statutory interpretation from the charge of ignoring legislative supremacy? Well for one thing it would show that present meanings are linked to the present general factual environment, n241 and sometimes that can matter. Surely a court would have a choice between the original meaning and the present one. We use the 1790 meaning of "science' in the Constitution, but not the 1790 understanding of "cruel and unusual.' But even if this is an answer, what about the other aspects of dynamic statutory interpretation? This is only pragmatic dynamism but not hermeneutic dynamism and institutional dynamism. For example the judge cannot avoid and thus (in dynamic statutory interpretation) is permitted to exercise her horizons (subject only to some tradition, itself a component of the horizons) in reaching her decision. This is hardly deferential to legislative supremacy.

What we see here occurs too frequently in these chapters. I find my margins replete with the comment: "If that's all you mean by "dynamic', I agree." But of course this is not all that is meant by dynamic statutory interpretation. This is

an example of the pervasive problem that the theory simply claims too much. In examples it is elided by ignoring problematic aspects. But is it legitimate to take one component of the theory alone to [\*1385] satisfy an objection without considering the impact of all the other components?

For example, in the same subsection, n242 Eskridge retells Judge Posner's version n243 of Plowden's story. n244 Courts are the interpretive servants of the legislatures. By analogy, suppose that after the captain gave explicit orders, the platoon commander took her troops off on patrol and runs into a situation not contemplated by the captain. What does the platoon commander do? *One means is to determine what the captain would have wanted in such circumstances and implement it.* Eskridge comments, "neither the formal nor the functional supremacy of the high command is sacrificed by such a dynamic reading of one's orders." n245 Indeed not. If that is all that's meant by "dynamic" who could quibble about statutory interpretation's being dynamic. No one in the last two or three hundred years would have doubted it. Yet this ignores hermeneutical and institutional dynamism.

The argument in this chapter does not adequately deal with the principle of legislative supremacy even on its own terms. Only if dynamic statutory interpretation qua dynamic is reduced to triviality does it even approach the question. The richness of the theory advanced by Eskridge in the first chapters suggests that this is not what he intends.

If anything is absolutely clear, it is that no one source of understanding is adequate for interpretation of all statutes. In a sense, what Eskridge claims for dynamic statutory interpretation is free use of all resources, theoretical power to all judges to use what they will at their own discretion. That seems a fine idea in the abstract and arguably inevitable given that any accessible resource will be determinative in at least some case. But it is a position that, if adopted, would be a  
Page 26

41 N.Y.L. Sch. L. Rev. 1329, \*1383

danger to our legal order. If any interpretive resource is freely and equally available, any chosen outcome will be justifiable. By giving the judiciary such freedom, Eskridge's theory would significantly shift legal power from the legislature to the judiciary. It would take us back four hundred years to the era of judicial supremacy, epitomized by Lord Coke's renowned statement in *Dr. Bonham's Case*: [\*1386]

It appears in our books, that in many cases, the common law ... will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such act to be void ... n246

This would greatly exacerbate the problem of the legitimacy of such power in the hands of non-elected officials, often with life tenure.

What is essential - but Eskridge does not provide - is an ordering among sources of statutory interpretation. As I have noted throughout the above, legislative supremacy is a principle constitutionally enshrined and essential to the realization of democracy. Any theory of statutory interpretation must recognize this principle. Accordingly, a theory of statutory interpretation must be little more than a hierarchy of sources, constrained by legislative supremacy, with an account of the appropriate conditions for access to different levels. In one of his postmodern moments, Eskridge writes that a principled ordering of interpretive resources is impossible: "I cannot offer a normative theory of dynamic statutory interpretation that satisfies traditional rule of law or democratic criteria, for the criteria are themselves elusive in a postmodern world." n247 Elusive or not, such an ordering, a principled ordering, is exactly what is required of a normative theory of statutory interpretation.

But a theory of statutory interpretation doesn't have to be so elusive. For example, democracy and legislative supremacy suggest that one cannot fail to start with the language of the statute: that is all that the legislature actually said. Then it must answer certain questions: under what circumstances is resort to extrinsic sources justified? what is the priority among different extrinsic sources? and under what circumstances might that ordering be changed?

Eskridge's predominant argument form is inevitability. There are cases in which each resource will be dominant. No doubt true, but it doesn't signal equal normative justifiability. Occasional inevitability does not mean equal priority. Not all cases are hard cases. Some are not even difficult, some are merely difficult or very difficult, but very few are intractable. [\*1387]

IV.

## Conclusion

Professor Eskridge's arguments against originalist statutory interpretation and those in favor of the multi-dimensional variability of dynamic statutory interpretation are not convincing. The arguments in both Chapters 1 and 2 of Eskridge's book and the problems inherent in them are all arguments that can be made about ordinary, non-statutory linguistic (or, more generally, symbolic) communication. In this light, Eskridge curiously missed a standard and quite powerful argument in support of his theory.

Linguistic behavior normally relates to communication. With statutes the communicative function is critical because statutes give notice to the governed of behavioral control data. This is critical to statutes because, as long held

fundamental, absent notice of it a person cannot be bound by a law. n248 But our legislatures speak only through their statutes; statutes are the only authoritative legislative voice. n249 Surely, then, the governed should be able to rely on the authoritative legislative voice and resolve ambiguities and indeterminacies as seems proper in their community  
Page 27

41 N.Y.L. Sch. L. Rev. 1329, \*1385

without having to resort to further, less accessible and non-authoritative resources. Linguists distinguish speaker's meaning from hearer's meaning. Surely, with legislative speech, the hearer's meaning should prevail. It is an argument that until recently, prevailed in the courts of England. n250

However, this argument has not prevailed in the United States. One reason flows from our faith in democracy, the principle of legislative [\*1388] supremacy and the ideal of a governance of laws. Legislators are elected; the legislature's view, the speaker's meaning, thus has a certain democratic legitimacy. To allow that "hearer's" meaning to triumph over a different meaning founded in the legislative intent would be anti-democratic and would allow the triumph of non-elective law making over the normal, elective law-making.

The extent to which I resort to the principle of legislative supremacy in opposition to dynamic statutory interpretation must by now be crashingly obvious. Its recurrence, however, has much to do with the pervasive shape of Eskridge's arguments, and in particular their applicability to all linguistic communication. Arguments from linguistics may help us to understand the sentences comprising statutes, but not qua statutes. The importance of legislative speech, and the difficulties peculiar to its application arise out of its special governmental role. "The question of how judges should decide cases cannot be conclusively resolved ... by a (new and better) theory about meaning or understanding. All the important questions can be answered - and should be answered - by a political theory about the appropriate relationships among rulemakers, rule-interpreters, and the general public." n251 Legislative supremacy is so fundamental because it underlies the critical relationship in statutory interpretation - the hierarchical ordering of authoritative sources. Eskridge's linguistic arguments fail because they ignore exactly this.

Our fascination with difficult and contentious cases, especially those that reach that pinnacle of judicial decision-making, the United States Supreme Court, unduly undermines our confidence in statutes as sources of law. For most situations, most statutes work just fine. This is one reason why the overwhelming majority of interpersonal transactions work without conflict, why so few of those that do not are litigated, why so few of those that are litigated go to trial, and of those that do, why the remainder that warrant appeal on statutory interpretation grounds is an exceedingly minuscule percentage of all transactions. But that minuscule percentage remainder is not in danger of extinction. There are simply too many possibilities for interpretation to go awry. Especially if the stakes are high, the incentive for advocates to find problems is too often productive. The point was made more than a hundred years ago by Sir James Fitzjames Stephen: "Human language is not so constructed that it is possible to prevent people from misunderstanding it if they are [\*1389] determined to do so ...." n252 Of the Indian Criminal Code (for the drafting of which Stephen was partially responsible) he wrote: "The idea by which the whole Code is pervaded, and which was not unnaturally suggested by parts of the history of the English law, is that every-one who has anything to do with the administration of the Code will do his utmost to misunderstand it and evade its provisions ...." n253 Today there surely exist ample resources and motivation for determined attacks on legislative good sense. But even with the best cooperative spirit, problems are unavoidable.

The language of the statute itself is not always clear and unambiguous, and even when it is, its application to the particular facts at issue may not be. Looking to extrinsic archaeological resources will not always provide the guiding legislative intent or will or purpose to resolve the difficulty. Nor will the common law methodology of drawing on prevailing, contemporary societal values. Hard cases can be very hard. But that fact alone does not justify a general abandonment of the principles and procedures of democratic statutory interpretation.

Professor Eskridge may not have made the case for his central theory of dynamic statutory interpretation, but in attempting to do so he does collect and present very clearly the sort of arguments which are characteristic of legal academics of our time. In this respect his Dynamic Statutory Interpretation is a landmark work.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure  
Criminal Offenses  
Weapons  
General Overview  
Governments  
Legislation  
Interpretation  
Legal  
Page 28

41 N.Y.L. Sch. L. Rev. 1329, \*1387

Ethics  
Public Service

#### FOOTNOTES:

n1. William N. Eskridge, Jr., Dynamic Statutory Interpretation (1994).

n2. 2 Plow. 459, 75 Eng. Rep. 688 (1574).

n3. Id. at 467.

n4. 76 Eng. Rep. 637 (1584).

EXHIBIT No. 8

8. Guy Mettle's Common Pleas Court response brief is in the Appendix as **Exhibit 8**.

55669013

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO  
CRIMINAL DIVISION

FILED  
COMMON PLEAS COURT  
FRANKLIN CO OHIO  
07 AUG 16 AM 11:17  
CLERK OF COURTS

In the Matter of:

Guy Mettle  
Applicant  
Pro Se

Expungement Case No. 07EP-229  
Application to seal 96CR-2848

Judge Schneider

**APPLICANTS RESPONSE #1 TO STATE'S OBJECTION**

The Prosecutor has found an error in the law that he is misapplying with a broad stroke to harm a huge number of rehabilitated parents and their children. Specifically, the Prosecutor claims that all rehabilitated parents cannot be eligible for expungement if their first offense is nonsupport. The Prosecutor's aggressive application of a legal error causes inordinate social damage by harming the ability of rehabilitated parents to earn a living, and it harms their dependent children.

This is like a traffic cop that located a speed trap on a deceptive stretch of road. Rather than work with traffic engineers to correct a deceptive and unsafe condition, he exploited it to write as many tickets as possible. (In New Rome, OH, this behavior caused so much social damage that Franklin County Common Pleas Court abolished the New Rome Mayor's court and the township<sup>1</sup>)

In this response, Applicant will show that:

- a) Prosecutor's errors of fact and law
- b) Prosecutors point of law is an error because it.
  - violates legislative intent

<sup>1</sup> New Rome had long been the target of scorn and criticism from Central Ohio residents, state officials, and even national media, due to decades of harassing motorists in one of the worst speed traps in the United States and the internal corruption of its local government. In 2004, the village was ordered legally dissolved by a Franklin County Common Pleas Court judge, and its residents, land and assets were made part of Prairie Township. (Source: Wikipedia.com and common knowledge in Central Ohio, which can be confirmed via court records.)

- Is authoritatively acknowledged to be an error.
  - Is a plain error
  - violates rules of construction
- c) Broad application of the error causes great harm to a large body of people never intended by the Legislature
- d) The law in question is remedial law
- e) This court has the jurisdiction to correct the Prosecutor's error and the obligation to harmonize the remedial law.
- f) This Applicant is eligible and deserving of expungement.

**Prosecutor's Errors of Fact**

**1. Prosecutor's False Claim:** That the applicant was convicted of a Felony 4.

**Correct Fact:** The Applicant pled guilty to one count of Felony 5.

Ohio Revised Code section 2919.21 provides:

Criteria for Felony, 4th degree: Absent parent/defendant has previously pled guilty or been convicted of felony non-support.

Criteria for Felony, 5th degree:

- a) absent parent/defendant has previously plead guilty or been convicted of misdemeanor non-support, or
- b) if the arrearage is equal to the amount of support ordered for an accumulated period of 26 weeks out of 104 consecutive weeks

The Prosecutor's own Criminal History Report shows that the Applicant had no previous convictions of any type. Felony 5, criteria b) is the only criteria that applies to the Applicant's nonsupport conviction.

**2. Prosecutor's False Claim:** "Is applicant a first offender? NO."

**Correct Fact:** The Applicant is a first offender. The Prosecutor's own Criminal History Report shows that Applicant has one conviction for non-support, which does apply to first offender status. Applicant has one subsequent conviction for a minor misdemeanor, which does not affect the Applicant's First Offender status. Per R.C. 2953.31(A), the following do not constitute a previous or subsequent conviction: "A conviction for a minor misdemeanor". The exclusion of minor misdemeanors is also confirmed by the Legislative Service Commission, Final Analysis, Am. Sub. S.B. 13, 123<sup>rd</sup> General Assembly, which states under Continuing and Prior law that:

"(2) a conviction of a minor misdemeanor," ... is not considered a 'previous or subsequent conviction' (R.C.2953.31)"

**Prosecutor's 5 Criteria for This Court's Jurisdiction:**

The State's Objection denies the jurisdiction of this court. The Prosecutor lists 5 criteria for this court's jurisdiction. As shown in the next section, the Prosecutor's 5 criteria are unsupported by citations in the State's Objection, and the 5 criteria should be considered as the Prosecutor's own compilation.

However, Applicant addresses the Prosecutor's 5 criteria as follows.

Prosecutor's Criteria #1: "(1) the applicant a final discharge on the conviction, which includes full payment of any restitution ordered"

Applicant's Status: Applicant fulfills this criteria. Applicant prepaid all child support two years in advance. The trial court determined that the Defendant (Applicant) had fulfilled all of his obligations, terminated his probation, and gave final discharge on 9/25/2003.

Prosecutor's Criteria #2: "(2) the application was filed after the statutory waiting period;"

Applicant's Status: Applicant fulfills this criteria. Over three years have elapsed since the Applicant's final discharge by the trial court on 9/25/2003.

Prosecutor's Criteria #3: "(3) there are no pending criminal proceedings against the applicant;"

Applicant's Status: Applicant fulfills this criteria. The Prosecutor's own Criminal History Report shows that no criminal proceedings are pending against the Applicant.

Prosecutor's Criteria #4: "(4) the applicant qualifies as a first offender under RC.2953.32(A);"

Applicant's Status: Applicant is a First Offender, which Applicant has shown to be true. (See herein, page 3, under "2. Prosecutor's False Claim".)

Prosecutor's Criteria #5: "(5) the conviction to be sealed does not fall within any category in R.C. 2593.36." (Prosecutor's words.)

Applicant's Status: This Applicant is in good standing of the relevant statutes. Further below, Applicant will show that the Prosecutor misapplies an acknowledged legal error, and that the Applicant's expungement falls within the proper jurisdiction of this court.

**Prosecutor's Misapplication of Shifflet v. Thomson Newspapers:**

State's Objection denies the jurisdiction of this court. Prosecutor cites Shifflet v. Thomson Newspapers (1982), 69 Ohio St.2d 179, 182 to support the Prosecutor's 5 Criteria, which he uses to deny the jurisdiction of this court. A detailed reading of Shifflet v. Thomson Newspapers in Lexus-Nexus does not reveal support for the Prosecutor's jurisdictional claims or for the Prosecutors 5 Criteria. For brevity, this Applicant quotes the Lexus-Nexus Head Notes to give the court the flavor of the case: "

"Libel and slander -- Newspaper report and statements concerning expungement of conviction record -- Summary judgment for defendants -- Defenses established -- Truth -- Fair and impartial reporting -- Lack of malice -- Expungement proceedings -- Not closed proceedings."

Shifflet v. Thomson Newspapers supports the conclusion that expungement proceedings do not have to be closed proceedings. (A newspaper reporter was properly allowed into the hearing room.) That case record does not support the Prosecutor's 5 Criteria, and it does not block the jurisdiction of this court.

**Prosecutor's Misapplication of State v. Simon to R.C. 2953.36**

Prosecutor cites State v. Simon with regard to the Prosecutor's own Criteria #5 for this court's jurisdiction. In State's Objection, the Prosecutor's Criteria #5 states:

"(5) the conviction to be sealed does not fall within any category in R.C. 2593.36. See State v. Simon, 87 Ohio St.3d 531"

State v. Simon does not support Prosecutors Criteria #5. The reference that State v. Simon makes to R.C.2953.36 is as follows:

“Specific statutory provisions govern the sealing of a record of conviction. See R.C. 2953.31 through 2953.36. In particular, R.C. 2953.36 provides that the conviction records of some offenders cannot be sealed. As relevant to this case, R.C. 2953.36 provides, inter alia, that “sections 2953.31 to 2953.35 of the Revised Code do not apply to convictions when the [\*\*1043] offender is subject to a mandatory prison term \* \* \* .”

”An offender is subject to a mandatory prison term when that offender is not eligible for probation. Thus, if an offender is ineligible for probation, that offender cannot have his record of conviction sealed. In this way, R.C. 2953.36 requires us to refer to statutory provisions on probation to determine eligibility for expungement.”

The Applicant was fully discharged from probation on 9/25/2003. Hence, the Applicant was not subject to a mandatory prison term. Hence, State v. Simon, R.C. 2953.36 leaves this Applicant eligible for expungement.

And, while State v. Simon states that “the conviction records of *some* offenders cannot be sealed”, it does not support the Prosecutor’s attempt to turn his Criteria #5 into a blanket statement. By using the word “some”, State v. Simon shows that there can be additional criteria and mitigating circumstances, which allow some Applicant’s to have their record sealed under R.C.2953.36.

By presenting his Criteria #5 as a blanket and unalterable statement, the Prosecutor attempts to justify his previous, erroneous claim that no rehabilitated parent can be eligible for expungement if his/her first offense was nonsupport. State v. Simon does not support that.

### **Prosecutor Misapplies Burden-to-Show-Eligibility**

In State’s Objection, the Prosecutor states “Applicant bears the burden of showing he is eligible under R.C.2953.31 et seq.” However a detailed reading of R.C.2953.31-2953.26 shows no such burden placed upon the Applicant.

In fact, the cited R.C. places the burden on the State to justify State’s objections.

R.C.2953.32(B) states "...The prosecutor shall specify in the objection the reasons for believing a denial of the application is justified."

### **Prosecutor's Broad Misapplication of an Acknowledged Legal Error**

State's Objection argues that all rehabilitated parents are never eligible for expungement if they were convicted of nonsupport. Prosecutor contends that "R.C. 2953.36(D) bars expungement of any felony conviction where the victim was under the age of 18." By definition, child support is for children under the age of 18. Hence, Prosecutor broadly argues that a nonsupport conviction automatically blocks any and all parents from expungement of a single nonsupport conviction.

### **Authoritative Acknowledgement of the Legal Error**

See the Legislative Act for R.C. 2953.36 is Am. Sub. S.B. 13, 123<sup>rd</sup> General Assembly.

**Legislative Act Summary** states:

- "Excludes from the Criminal Conviction Records Sealing Law all convictions of an offense of violence when the offense is (1) a misdemeanor of the first degree or a felony and when the offense is not riot and is not assault, inciting to violence, or inducing panic that is a misdemeanor of the first degree, (2) an offense of which the victim was under 18 years of age when the offense is a misdemeanor of the first degree or a felony, or (3) a felony of the first or second degree."

[Applicant's note: In the interest of brevity, the first 2 out of 3 bullet points have been omitted.]

Applicant calls to attention the phrase "Excludes .... all convictions of an offense of violence ..."

In R.C.2953.36, the Legislature was clearly voting and legislating on "offense of violence", not on nonviolent offenses such as nonsupport.

In State v. Westendorf, 1<sup>st</sup> Dist. No. C-020114, 2003-Ohio-1019. Appellate court Judge P.J.

Painter acknowledges the error in R.C.2953.36 that is being exploited by the Prosecutor.

Appellate Judge Painter states:

{¶10} The Legislative Service Commission summary of the bill states that it would not apply in this instance. We might assume that the summary is what most legislators read. So what they thought they were passing is what is described in the summary. But what they actually passed was the law itself.

{¶11} Everyone involved with this case must know that this result is unfortunate, and obviously not what the legislature intended. But we cannot look to legislative intent—a risky proposition at any time—unless the law is ambiguous. It is not ambiguous. There is no ambiguity in “no.” We must follow the law as written.

{¶12} Perhaps the lesson here is that laws should be read before being passed.”

As shown here, Appellate Judge Painter emphatically recognizes the error contained in R.C. 2953.36, deems it obvious and unfortunate, and he attempts to deal with the ambiguity that it creates.

Applicant will show below that Appellate and Supreme Court rulings provide this court with the jurisdiction and obligation to correct the error and harmonize the law.

### **Appellate Court Defines R.C. 2953.36(D) as Applying to Offense of Violence**

State v. Fowler, 12th Appellate District, Case # CA2001-03-005, defines

R.C.2953.36 as applying to crimes of violence. Appellate court states:

“On March 23, 2000, R.C. 2953.36 was amended to include language which excepts from eligibility for expungement convictions for misdemeanors of the first degree, and felonies when the underlying offense is an offense of violence.”

### **Supreme Court Considers All the Words to Determine Meaning**

The Supreme Court requires that all the words of a Legislative Act must be considered to determine its meaning. In State V. Liffing, 61 Ohio St. 39; 55 N.E. 168; 1899; the Supreme Court states:

12th  
DIST.

"The maxim invoked is applicable to the case because it serves the universal rule that, in seeking the meaning of an act, all of its words must be considered."

### **Supreme Court Considers Even the Title of the Act to Determine Its Purpose**

In *State v. Liffing*, 61 Ohio St. 39; 55 N.E. 168; 1899; the Supreme Court considers the title of the Legislative Act to indicate the lawmaker's purpose:

"The purpose of the ACT is accurately indicated [\*52] by its title to be "to regulate the practice of medicine."

No less should this court consider the Legislative Act Summary to determine its purpose.

### **Supreme Court on Remedial and Penal Provisions**

The Supreme Court stated (*State V. Liffing*):

In the construction of statutes there is a great difference between remedial and penal provisions; the former being expanded and often having words interpolated by the courts from the context or other sections in order to carry out the apparent purpose of the act and include cases within its spirit; while the latter are not thus expanded, even though there is a manifest omission or oversight on the part of the legislature.

The Legislative Act which gave rise to R.C.2953.36 is remedial law, which the Supreme Court says is often interpolated by the courts from the context in order to carry out the apparent purpose of the act and include cases within its spirit. We have a clear statement of the lawmakers' intent in the Legislative Act Summary, and the spirit of the act does not include nonviolent offenses like non-support.

The Legislative Act is also penal law, which the Supreme Court says are not thus expanded, even though there is a manifest omission or oversight on the part of the legislature. However, R.C.2953.36 is penal code, and the Prosecutor does expand its meaning to include nonviolent cases of nonsupport, which were not intended by the lawmakers.

In State's Objections, the Prosecutor violates both of the principles stated by the Supreme Court. The Prosecutor ignores the spirit and intent of remedial law, and he expands the scope of penal law. More properly, non-violent, nonsupport offenses do not fall under R.C.2953.36(D).

### **Prosecutor Applies Plain Error**

The Supreme Court defines Plain Error by two criteria:

- a) "Plain error is obvious"
- b) "and but for the error, the outcome of the trial clearly would have been otherwise. "

See State v. Johnson, 112 Ohio St. 3d 210; 2006 Ohio 6404; 858 N.E.2d 1144; at [\*\*P31].

Prosecutor's application of R.C. 2953.36 to rehabilitated parents with a non-violent offense of nonsupport is an obvious error, be it a clerical error by the Legislature, or an error of application by the Prosecutor. Appellate Judge Painter stated:

"{¶11} Everyone involved with this case must know that this result is unfortunate, and obviously not what the legislature intended."

See State v. Westendorf, 1<sup>st</sup> Dist. No. C-020114, 2003-Ohio-1019.

Part b) of the Supreme Court's Plain Error Test is equally obvious. But for the erroneous application of R.C.2953.36 to nonviolent, nonsupport offenses, the outcome of this expungement proceeding would be otherwise than intended by State's Objection.

Hence, the primary premise of State's Objection is well construed as a plain error.

### **Prosecutor Violates Constitutional Rights**

See State vs. Rush, 83 Ohio St. 3d 53; 1998 Ohio 423; 697 N.E.2d 634;

The Ohio Supreme Court states that "in criminal cases, this court may consider constitutional challenges to the application of statutes in specific cases of plain error, or where the rights and interests involved may warrant it." The Supreme Court states (State v. Rush):

"Although not properly raised below, in criminal cases this court may "consider constitutional challenges to the application of statutes in specific cases of plain error or where the rights and interests involved may warrant it." In re M.D. (1988), 38 Ohio St. 3d 149, 527 N.E.2d 286, [\*\*\*14] syllabus. Because Mitchell and Rush now present, albeit in tardy fashion, a constitutional argument in a criminal case that if correct would indicate that plain error occurred, we will address the issue."

Applicant submits that the Prosecutor's application of statute R.C.2953.36 is a specific case of plain error, and it damages the Applicant's rights and interests. Prosecutor's plain error application of the statute is a violation of Applicant's constitutional rights.

### **Prosecutor Violates Rules of Construction**

#### **Summary of Rules of Construction Applied to This Case:**

- a) Purpose of rules of construction is to determine lawmakers' intent
- b) Specific provisions rule over general provisions to determine intent
- c) Intent is determined from the Legislative Act.
- d) Consider the whole, *in pari materia*, to determine intent
- e) In seeking the meaning of an act, all of its words must be considered.
- f) A fragment of the truth is not assumed to be the universal truth
- g) Must assume the lawmaker intended to be consistent with himself
- h) Consider even the title of the Act to determine intent
- i) Remedial law, especially, the court should determine intent.
- j) Remedial law, especially, court should harmonize the law with intent and the whole.

- k) Penal law, especially, the court should use "strict" construction against the state
- l) Penal law, especially, strict construction means in favor life and liberty
- m) Penal law, especially, use liberal interpretation in favor of accused

**Summary - Application of Rules of Construction to State's Objection**

- a) Lawmaker's intent is clear that R.C.2953.36(D) should apply only to offenses of violence
  - a. Stated in Legislative Act Summary (See herein, page 7.)
  - b. Stated by Appellate Judge P.J. Painter in State v. Westendorf (See herein, page 7.)
  - c. Stated by Appellate Court in State v. Fowler (See herein, page 8.)
- b) Broadening the Legislative Act to non-violent crime makes it more general than the lawmakers' intent and than their specific statement in the Legislative Act Summary.
- c) As the Prosecutor applies R.C.2953.36(D), he:
  - a. Fails to apply rules of construction
  - b. Ignores the Legislative Act Summary
  - c. Does not determine the intent of the Legislative Act
  - d. Fails to consider the whole act, in pari materia, to determine intent
  - e. Assumes a fragment of the truth to be the universal truth.
  - f. Violates specific over general -- The Legislative Act Summary and Lawmaker's Intent are more specific than the Prosecutor's broad application to non-violent offenses
  - g. Violates strict interpretation of penal code against the state and in favor of life and liberty
  - h. Violates liberal interpretation Penal code in favor of accused
  - i. Violates liberal interpretation of remedial law

- j. Fails to harmonize the remedial law
- k. Forces the lawmaker to be inconsistent with himself

### **Detail - Application of Rules of Construction to State's Objection**

The purpose of rules of construction is to determine lawmakers' intent.

In State V. Liffing, 61 Ohio St. 39; 55 N.E. 168; 1899; the Supreme Court stated:

"It should always serve the rule that the object of construction is to ascertain intention."

Regarding R.C.2953.36(D), the lawmaker's obvious intent is that it should apply only to offenses of violence. See:

- a. Legislative Act Summary (See herein, page 7.)
- b. Appellate Judge P.J. Painter's statement that R.C.2953.36(D) "result is unfortunate, and obviously not what the legislature intended." (State v. Westendorf. See herein, page 7.)

Broadening the Legislative Act so that it applies to violent and non-violent offenses makes R.C.2953.36(D) a more general provision than the lawmakers' intent and their statement in the Legislative Act Summary, which is a more specific provision that applies only to violent offenses.

This violates the elementary rule of construction that more specific provisions prevail over general provisions. In State Ex Rel. Belknap v. Lavelle, 18 Ohio St. 3d 180; 480 N.E.2d 758; 1985; the Supreme Court stated:

"It is a well-established rule of construction that specific provisions prevail over general [\*\*\*7] provisions."

In State v. Liffing, 61 Ohio St. 39; 55 N.E. 168; 1899; the Supreme Court stated:

"Where general or generic terms follow specific or particular ones in a statute, the former are limited in meaning to things of the same kind or nature;"

Per the Prosecutor's interpretation, Operation of the Act and R.C.2953.36(D) are broader, more general provisions that follow more specific terms used the Legislative Act Summary. However, according to State v. Liffing, the Operation of the Act and R.C.2953.36(D) must use the same meaning of terms as is clear in the preceding Legislative Act Summary because the Act Summary is more narrow and specific. Hence, State v. Liffing limits R.C.2953.36(D) to violent offenses.

In State, Ex Rel. Myers V. Chiaramonte, 46 Ohio St. 2d 230; 348 N.E.2d 323; 1976; the Supreme Court stated:

"Therefore, pursuant to R. C. 1.51, R. C. 124.33, the general provision, shall control over R. C. 5503.03, the special provision, only if 'the manifest intent is that the general provision [shall] prevail.'"

No interpretation of the Legislative Act (Am. Sub. S.B. 13, 123<sup>rd</sup> General Assembly) holds that the lawmakers' manifest intent was to enact the more general provision that R.C.2953.36(D) applies to non-violent offenses and that encompass all rehabilitated parent which have one offense of nonsupport. Not even State v. Westendorf declares it to be the lawmakers' manifest intent. To the contrary, Appellate Judge Painter says it "obviously" is not the lawmakers' manifest intent. Hence, Prosecutor's application of R.C.2953.36(D) violates this rule of construction.

In Village v. Montgomery, 106 Ohio St. 3d 223; 2005 Ohio 4631; 833 N.E.2d 1230; 2005 the Supreme Court also requires manifest intent in order for a broader, more general provision to prevail over a more specific provision. The Supreme Court stated:

"If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local [\*228] provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail."

In the Legislative Act, the Summary is the narrower special provision. But R.C.2953.36(D) results in a broader, more general provision, which is against the manifest intent of the lawmakers and against *Village v. Montgomery*.

In *State V. City of Hamilton*, 47 Ohio St. 52; 23 N.E. 935; 1890; the Supreme Court states:

“The intention of the law maker is to be deduced from a view of the whole, and every part of the enactment, taken and compared together. He must be presumed to have intended to be consistent with himself throughout, and at the same time to have intended effect to be given to each and every part of the law; and from this it results that general language found in one part, is to be modified and restricted in [\*\*\*51] its application, when it would otherwise conflict with specific provisions found in another.”

The prosecutor applies his broader, more general interpretation of R.C.2953.36(D) by refusing the view the whole, every part of the enactment, taken and compared together. The Supreme Court requires that the Prosecutor must modify and restrict his general application when it conflicts with specific provisions in the act. Only thus can the lawmaker be consistent with himself throughout. The Prosecutor must restrict R.C.2953.36(D) to match the specific intent and terms of the Legislative Act Summary.

The Supreme Court makes it crystal clear that the intention of the law makers must govern in the construction of penal, as well as other statutes. In *State v. Liffing*, 61 Ohio St. 39; 55 N.E. 168; 1899; the Supreme Court stated:

“The intention of the law makers must govern in the construction of penal, as well as other statutes, though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. *U.S. v. Wiltberger*, 5 Wheat, [\*\*\*8] 95.”

Appellant calls attention to the Supreme Court statements which *harmonize* application of the law with the policy and objects of the legislature. In *State v. Liffing*, the Supreme Court stated:

"The admitted rule that penal statutes are to be strictly construed is not violated by allowing their full meaning, or even the more extended of two meanings, where such construction best *harmonizes* with the context and most fully promotes the policy and objects of the legislature. U.S. v. Hartwell, 6 Wallace, 385; U.S. v. Winn, 3 Sumner, 211."

The Supreme Court states that the spirit of the statute can be used to adjust the statute (State v. Liffing):

"It is a familiar rule that that which is within the spirit of a statute, though not within the letter, may sometimes be declared to be within the statute even in criminal cases. U.S. v. Morrissey, 32 Fed. Reporter, 147."

The Supreme Court states that even where there is manifest omission or oversight by the legislature, penal penalties should not be extended to new classes of persons not intended by the legislature

(State v. Liffing):

"Where the penal cause is less comprehensive than the body of the act, the courts will not extend the penalties provided therein to classes of persons or things not embraced within the penal clause, even where there is a manifest omission or oversight on the part of the legislature."

The Supreme Court states that where two constructions are possible, strict construction favors life and liberty (State v. Liffing):

"The rule of strict construction, in the case of penal statutes, requires, that where an act contains such an ambiguity as to leave reasonable doubt of its meaning, it is the duty of the court not to inflict the penalty; that where it admits of two constructions, that which operates in favor of life or liberty is to be preferred."

### **Harmonizing Remedial Law**

In State v. Rossi, 86 Ohio St. 3d 620;1999; the Supreme Court of Ohio makes three points relevant to this case. The Supreme Court states that:

- a) related and coexisting statutes must be harmonized,
- b) the expungement provisions are remedial
- c) the expungement provisions must be liberally construed to promote their purpose..

In State v. Rossi, the Supreme Court makes these points in excerpt #1:

“Under the applicable rule of statutory construction, all statutes relating [\*\*\*7] to the same general subject matter must be read in pari materia. *Cater v. Cleveland* (1998), 83 Ohio St. 3d 24, 29, 697 N.E.2d 610, 615. Further, in interpreting related and co-existing statutes, we must harmonize and accord full application to each of these statutes unless they are irreconcilable and in hopeless conflict. *State v. Patterson* (1998), 81 Ohio St. 3d 524, 526, 692 N.E.2d 593, 595. In addition, the remedial expungement provisions of R.C. 2953.32 and 2953.33 must be liberally construed to promote their purposes. R.C. 1.11; *Barker v. State* (1980), 62 Ohio St. 2d 35, 42, 16 Ohio Op. 3d 22, 26, 402 N.E.2d 550, 555.”

The Supreme Court makes the same points again in excerpt #2:

“Therefore, in construing R.C. 2961.01, 2953.32, and 2953.33 in pari materia and liberally construing the expungement [\*\*\*9] provisions in R.C. 2953.32 and 2953.33, the statutes are capable of being harmonized so that the expungement provisions of R.C. 2953.32 and 2953.33 provide certain convicted felons with an additional avenue to restore rights and privileges they forfeited under R.C. 2961.01.”

#### **Court Can Adjust Remedial Law R.C.2953.32 et seq.**

State v. Fowler, 12<sup>th</sup> Appellate District, Case # CA2001-03-005, confirms that R.C.2953.31 et seq.

- a) are remedial
- b) is not substantive law
- c) that the court has considerable control over remedial law, even to the point of applying it retroactively, which *State v. Fowler* does.

State v. Fowler states:

“Section 28, Article II of the Ohio Constitution provides a limitation that the General Assembly shall have no power to pass retroactive laws. This limitation applies only to substantive law and does not apply to remedial law. *Kneisley v. Lattimer-Stevens Co.* (1988), 40 Ohio St.3d 354, 356. It is well-established law in Ohio that the expungement provisions set forth in R.C. 2953.31 et seq. are remedial in nature. *State v. Bissantz* (1987), 30 Ohio St.3d 120, 121; *State v. Heaton* (1995), 108 Ohio App.3d 38, 40-41.”

#### **Expungement Statutes are Remedial and Constructed Liberally**

In State v. Bissantz, the Appellate Court confirms that expungement statutes are remedial law that must be constructed liberally. Quoting State v. Bissantz, 30 Ohio St. 3d 120; 507 N.E.2d 1117; 1987:

“We further observe that this court, considering R.C. 2953.31 *et seq.* in *Barker v. State* (1980), 62 Ohio St. 2d 35, 16 O.O. 3d 22, 402 N.E. 2d 550, determined the statute to be remedial in nature and subject to liberal construction as mandated by R.C. 1.11.”

**Prosecutor Shows No Legitimate Need to Maintain Applicant's Record, and Applicant Demonstrates Compelling Interests in Having His Record Sealed.**

R.C. 2953.32 states:

“(C)(1) The court shall do each of the following:”

“(C)(1)(e) Weigh the interests of the applicant in having the records pertaining to the applicant's conviction sealed against the legitimate needs, if any, of the government to maintain those records.”

In State's Objection, the Prosecutor presented no legitimate need of the government to maintain the Applicant's records.

In State v. Liffing, 61 Ohio St. 39; 55 N.E. 168; 1899; the Supreme Court stated:

“Statutes in derogation of common right, such as those restricting or regulating the pursuit of useful occupations and callings, are to be construed strictly.”

Applicant has a compelling interest to have his records expunged. The Applicant seeks employment, which is effectively prevented when the State maintains the Applicant's record by preventing expungement.

For example, Applicant sought general clerical employment through an employment agency. Applicant was filling out the computerized application when he marked “yes” in the box for felony conviction. An alarm went off in the manager's office. The manager came out and demanded that the Applicant leave the premises immediately. The Applicant could not even fill out an application for general clerical work when his felony record is maintained by the state.

As a completely rehabilitated parent, who was fully discharged when he paid all child support 2 years early, this applicant has a compelling need to maximize his earning ability due to his age, approaching retirement, and recent destitution. It is in the State's interest to allow this Applicant to support himself during his retirement years. It is not in the State's interest to force this Applicant to become a burden on the State in his later years, which could result from the State's Objections.

Additionally, the child's mother has approached the Applicant for financial assistance with the child's college expenses. It is in the State's interest not to harm the child's ability to receive financial assistance from his parent.

#### **5<sup>th</sup> Appellate Court Supports Expungement Based on Rehabilitation and Weighing Factors**

Consider State v. Lowery, 2004-Ohio-4429, 5th Appellate District, Case #03-CA-86.

Rehabilitation -- In State v. Lowery, the Appellate Court confirmed that it is correct to grant expungement on the basis of rehabilitation. Quoting from State v. Lowery:

"{¶16} In its Second Assignment of Error, the State maintains the trial court erred in granting appellee's application for expungement on the basis of rehabilitation. We disagree."

"{¶21} The States Second Assignment of Error is overruled"

Weighting Factors -- In State v. Lowery, the Appellate Court confirmed that it is correct to grant expungement on the basis of Weighing Factors. Quoting from State v. Lowery:

"{¶22} In its Third Assignment of Error, the State maintains the trial court abused its discretion when it granted appellee's application for expungement on the basis of the "weighing" factors of R.C. 2953.32(C)(1)(e). We disagree."

"{¶25} The State's Third Assignment of Error is therefore overruled."

**Prosecutor's Misapplication of State v. Simon to Rules of Evidence;**

**Rules of Evidence should apply to this Adversarial Proceeding**

Prosecutor cites State v. Simon, 87 Ohio St.3d 531, which states:

"An expungement proceeding is not an adversarial one; the primary purpose of an expungement hearing is to gather information. *Id.* Because expungement proceedings are not adversarial, the Rules of Evidence do not apply. See Evid.R. 101(C)(7)."

However, Evid.R. 101 (C) (7) also states:

"The subsection has excluded only non-adversary statutory proceedings in which the rules would be, by their nature, clearly inapplicable, e.g., a name change pursuant to R.C. 2717.01. A name change is ex parte. To change a name, the court needs only "proof in open court" to effectuate the name change. The formal rules of evidence are by their nature clearly inapplicable to such a judicial proceeding. Ordinarily, the probate of an estate is non-adversary, and the rules of evidence should not be applicable. But if a dispute should arise during the course of the probate proceedings (for example, a will contest, itself a special statutory proceeding governed by R.C. 2107.71 to 2107.77) the procedure waxes adversary and the rules of evidence should apply."

The Prosecutor has misapplied the legal error in R.C. 2593.36(D) many times to every rehabilitated parent who applied for expungement of a single nonsupport conviction. (This history can be definitively established from court records.) From the generic errors in the State's Objection, it is prima facie that they cut and paste their Objection, and change the subject's name to punish all similar applicants.

By such a wide spread misapplication of the law, the Prosecutor should be well aware that he initiated an adversarial proceeding, which elicits strong and well founded objections. Per Evid.R. 101 (C) (7), the rules of evidence apply to this adversarial proceeding.

This expungement case is a justiciable controversy. In State v. Golston, 71 Ohio St. 3d 224; 1994 Ohio 109, the Supreme Court held that expungement is sufficient cause for justiciable controversy.

CONFIDENTIAL  
STATE DIST. APP. CT.  
VRS  
12TH DIST. APP. CT.  
UNRECORDED  
APPLICATION  
STATE SUPREME COURT  
TESTIFY  
ABW  
STATE SUPREME COURT  
APPLICANT

“Appellant's statutory right to seek **expungement** of the 1989 felony conviction will necessarily be lost if appellant is unable to successfully obtain reversal of his 1991 felony convictions. Further, in [\*\*\*9] our judgment, appellant's interest in clearing his name in this case by seeking reversal of the 1991 felony convictions is enough to establish the existence of a justiciable controversy.”

A succinct test justiciable controversy is offered by the Montana State Supreme Court:

” The test of whether a justiciable controversy exists is:

- (1) that the parties have existing and genuine, as distinguished from theoretical, rights or interests;
- (2) the controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument invoking a purely political, administrative, philosophical or academic conclusion; and
- (3) the controversy must be one the judicial determination of which will have the effect of a final judgment in law or decree in equity “upon the rights, status or legal relationships of one or more of the real parties in interest, or lacking these qualities, be of such overriding public moment as to constitute the legal equivalent of all of them.”

See Montana State v. GRYCZAN, Supreme Court of Montana, No. 96-202, 1997.

Federal and Ohio State law have similar definitions for justiciable controversy, but Applicant did not find an Ohio case that expressed it so succinctly.

Applicant's expungement case meets the three test criteria for justiciable controversy:

1) Applicant has genuine rights and interests; 2) this court may effectively operate on the controversy; and 3) this court's judicial determination will have the effect of a final judgment in law upon the rights of the Applicant.

Consequently, this expungement proceeding is a justiciable controversy, and the Prosecutor's application of a plain error to all first offender, rehabilitated parents has made this an adversarial proceeding (Evid.R. 101 (C) (7)), which the Prosecutor had cause to know in advance. In State's Objection, the Prosecutor presented multiple false statements as facts, which further supports the need for this proceeding to follow the rules of evidence.

**Relief Request #1 – Summary Judgment**

Prosecutor has made this an adversarial proceeding. The State violated the rules of evidence and irrecoverably damaged the Applicant's interests. Applicant requests that the court issue summary judgment in favor of the Applicant's expungement.

**Relief Request #2 – Summary Judgment**

Applicant request summary judgment in his favor because of Prosecutor's plain error and violation of Applicant's constitutional rights..

**Relief Request #3 – Summary Judgment**

Applicant requests summary judgment in favor of his expungement because Prosecutor failed to present legitimate State's interest in maintaining Applicant's Record

**Relief Request #4 –**

Failing summary judgment, Applicant requests that the court apply the rules of evidence for adversarial proceedings to this case.

**Relief Request #5 –**

Applicant requests that the court grant expungement for the many valid reasons presented herein.

**Relief Request #6 –**

Applicant requests that Prosecutor be directed to correct the record to show that Applicant was convicted of a single count of Felony 5, which is consistent with R.C. 2919.21.

**Relief Request #7**

Applicant requests that the State should notify all rehabilitated, first offender parents that were denied expungement for nonsupport. State should inform them that expungement is available, or granted, to them retroactive to the date of their application denial, or such relief is available as the court deems appropriate.

**Relief Request #8**

Applicant requests that State should notify all first offender parents prior to completing a plea bargain for nonsupport. The accused should be informed whether or not they will be eligible for expungement if they plead guilty to nonsupport, or provided such notice as the court deems appropriate.

**Additional Information on Applicant's Rehabilitation**

This Applicant has never seen his child. Applicant's visitation was blocked by the child's mother.

The mother is a significantly older woman that was married to an even older, sterile husband. She decided that she wanted a fourth child before menopause. She divorced her husband and then remarried him. In the interim, she targeted a younger, fertile male (the Applicant) to become the

involuntary father of her fourth child. Although, the Applicant lived in California, the mother begged him to make a visit during Christmas vacation. He did so. She promised to use birth control and even displayed her supply. At the end of the vacation, the mother informed the Applicant that she had not used birth control and that it was her most fertile period. As a result the mother became pregnant.

The mother informed the Applicant that she would remarry her 1<sup>st</sup> husband; he would adopt the child; and she refused all contact with the Applicant. Since Applicant lived in California, was unemployed and going to college, he did not fight the issue in Ohio.

In the interim, Applicant cared for his elderly and infirm parents. When Applicant returned to Ohio in 2000, he learned the mother had, indeed, remarried her first husband, but that he had not adopted the child. The mother again refused to allow visitation, but she did make multiple demands for money from the Applicant's mother, in amounts which were approximately 10 times the total amount of child support. (The mother included one of those excessive financial demands in the Pretrial Investigation.)

In Ohio, the Applicant was destitute and lived in homeless shelters for well over a year. Applicant found employment, working long hours in multiple jobs, and fully paid all child support, including paying it off early at the mother's request before the child was 18.

Despite being targeted by an older woman for involuntary fatherhood; despite never getting permission to meet the child; this Applicant is a rehabilitated parent that has fully met, and exceeded, his financial obligations.

### **Additional Information on Applicant's Plea Bargain.**

Just prior to returning to Ohio, this Applicant was caring for his elderly mother that had recently been diagnosed with cancer. The trial Prosecutor and Public Defender induced Applicant to accept a plea bargain with promises that the Applicant would be permitted to visit his dying mother. However, the Prosecutor and the Public Defended defrauded the Applicant with a false plea bargain. At sentencing and thereafter, the Prosecutor opposed allowing the Applicant to visit his dying mother. She died without seeing her son (the Applicant) again. Applicant documented this in an affidavit to the trial court.

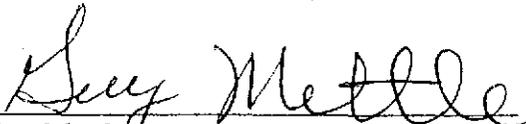
Today, the plea bargain fraud continues. The Prosecutor claims that the Applicant was convicted of Felony 4, when the plea bargain was for Felony 5. Per R.C. 2919.21, Felony 5 is the only criteria that applies. (See herein, page 2.)

### **Purpose of the Additional Information**

Applicant provided this additional information so that this court can see the extent of Applicant's rehabilitation. Applicant was tricked into becoming an involuntary father. The mother prevented him from meeting the child, even when the child was a teenager. The Prosecutor and Public Defender defrauded the Applicant at the plea bargain, and the Applicant was prevented from visiting his dying mother. However, Applicant still completed full payment of child support years early at the request of the child's mother. And, the mother has contacted the Applicant with a request for financial assistance with the child's college education.

Applicant submits that he deserves to, and is legally entitle to resume his economic life as fully as possible. To this end, Applicant should be granted expungement.

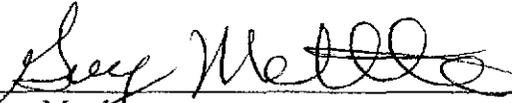
Date: August 13, 2007

  
Guy Mettle  
2715 Collinford Drive, #K  
Dublin, OH 43016  
(614) 432-6000

**Certificate of Mailing**

The Applicant, Guy Mettle, certifies that he mailed APPLICANTS RESPONSE #1 TO STATE'S OBJECTION via certified U.S. Mail to the parties listed below, on

Date: August 13, 2007.

  
Guy Mettle  
2715 Collinford Drive, #K  
Dublin, OH 43016  
(614) 432-6000

Clerk of Courts  
Franklin County Common Pleas Court  
369 South High Street, 3rd Floor  
Columbus, OH 43215  
(614) 462-3650

Ron O'Brien  
Prosecuting Attorney  
373 S. High Street, 14<sup>th</sup> Floor  
Columbus, OH 43215  
Tel (614) 462-3555

Guy Mettle  
2715 Collinford Drive, #K  
Dublin, OH 43016

EXHIBIT No. 9

9. Guy Mettle's motion for an extension of time is in the Appendix as **Exhibit 9**.

**ORIGINAL**

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO  
TENTH APPELLANT DISTRICT  
2007

In the matter of:

**Guy Mettle**  
**Applicant-Appellee**  
**Pro Se**

**Appellate Case No. 07AP-892**  
**Regular Calendar**

-vs-

**State of Ohio, Respondent-Appellant**

CBURT  
FRANKLIN COUNTY  
2008 JAN -3 PM 4: 14  
CLERK OF COURT  
ALS  
110

ON APPEAL FROM THE COURT OF COMMON PLEAS  
FRANKLIN COUNTY, OHIO  
(Record of this case is Sealed)

**REQUEST FOR EXTENSION OF TIME  
TO FILE BRIEF OF APPLICANT-APPELLEE**

Applicant-Appellee requests an extension of time to file his response to State's brief.

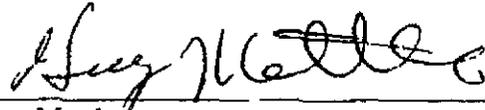
Date: January 2, 2008

*Guy Mettle*  
\_\_\_\_\_  
Guy Mettle  
Applicant-Appellee  
2715 Collinford Drive, #K  
Dublin, OH 43016  
(614) 432-6000

**Certificate of Mailing**

Applicant-Appellee, Guy Mettle, certifies that he mailed Request For Extension Of Time  
To File Brief Of Applicant-Appellee via U S Mail to the parties listed below, on

Date: January 2, 2008



Guy Mettle  
2715 Collinford Drive, #K  
Dublin, OH 43016  
(614) 432-6000

Clerk of Courts  
Franklin County Appeals Division  
10<sup>th</sup> Appellate District  
373 South High Street, 23rd Floor  
Columbus, OH 43215  
(614) 462-3600

Ron O'Brien  
Prosecuting Attorney  
373 S High Street, 13<sup>th</sup> Floor  
Columbus, OH 43215  
Tel (614) 462-3555

EXHIBIT No. 10

**10. Appellate Courts decision to deny Guy Mettle's motion for extension of time is in the Appendix as **Exhibit 10****

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of:

Guy L. Mettle,

(State of Ohio,

Appellant).

:

:

:

:

No. 07AP-892

(REGULAR CALENDAR)

JOURNAL ENTRY

Appellee not explaining the basis for his request for an extension of time, appellee's January 3, 2008 motion is denied.

  
\_\_\_\_\_  
JUDGE

*Handwritten initials*

FILED  
COURT OF APPEALS  
FRANKLIN CO. OHIO  
2008 JAN - 8 PM 2: 55  
CLERK OF COURTS

~~106~~ 106

EXHIBIT No. 11

11. In *Huffman V. Commissioner of Internal Revenue*, 978 F.2d 1139; 1992 U.S. App. LEXIS 28490. Attached in the Appendix as **Exhibit 11**.

34 of 99 DOCUMENTS

**Clair S. Huffman; Estate of Patricia C. Huffman, Deceased, Clair S. Huffman,  
Executor, Petitioners/Appellants/ Cross-Appellees, v. Commissioner of Internal  
Revenue, Respondent/Appellee/ Cross-Appellant.**

Nos. 91-70331, 91-70423

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

978 F.2d 1139; 1992 U.S. App. LEXIS 28490; 92-2 U.S. Tax Cas. (CCH) P50,570; 70  
A.F.T.R.2d (RIA) 6016; 92 Cal. Daily Op. Service 9016; 92 Daily Journal DAR 14935

July 6, 1992, Argued and Submitted, Pasadena, California  
November 4, 1992, Filed

**SUBSEQUENT HISTORY:** Amended December 4, 1992, Reported at 1992 U.S. App. LEXIS 31896.

**PRIOR HISTORY:** [**\*\*1**] Appeal from a Decision of the United States Tax Court. Tax Ct. No. 0973-2.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** *Petitioner taxpayers appealed a decision from the United States Tax Court, which denied in part their motion for costs and attorney's fees under 26 U.S.C.S. § 7430 and U.S. Tax Ct. R. 231.*

**OVERVIEW:** *Unable to persuade respondent Commissioner of Internal Revenue that a notice of deficiency was improper, petitioner taxpayers filed a complaint in tax court. Respondent filed an answer admitting that petitioners owed no tax liability but denying that the issuance of the deficiency notice was improper. Petitioners sought costs and attorney's fees under 26 U.S.C.S. § 7430 and U.S. Tax Ct. R. 231. The tax court granted reasonable administrative costs under 26 U.S.C.S. § 7430(a)(1), finding that respondent's position as to the notice of deficiency was not substantially justified because the adjustments to petitioners' partnership violated partnership audit rules. However, the tax court held that respondent's position in the judicial proceeding was substantially justified because the answer fully conceded the case. On petitioners' appeal, the court upheld the use of a bifurcated inquiry under 26 U.S.C.S. § 7430 and affirmed the award under 26 U.S.C.S. § 7430(a)(1). Reversing in part, the court held that respondent's position at the judicial level was not substantially justified and that petitioners were therefore entitled to reasonable litigation costs under 26 U.S.C.S. § 7430(a)(2).*

**OUTCOME:** *The court affirmed the tax court's grant of reasonable administrative fees and costs to petitioner taxpayers, but reversed the denial of reasonable litigation costs, finding that respondent commissioner's position at both levels was not substantially justified.*

**CORE TERMS:** attorney's fees, judicial proceeding, substantially justified, administrative proceeding, notice of deficiency, costs, civil proceeding, bifurcated, per hour, prevailing, notice, reimbursement, cost-of-living, reasonableness, specialized, separately, spent, prevailing party, substantial justification, starting point, unjustified, hourly, Justice Act, case law, matter of law, cases decided, plain language, prelitigation, cross-appeal, partnership

LexisNexis(R) Headnotes

*Civil Procedure > Remedies > Costs & Attorney Fees > Costs > General Overview*

108

***Tax Law > Federal Tax Administration & Procedure > Tax Court (IRC secs. 7441-7491) > General Overview***  
[HN1] See 26 U.S.C.S. § 7430(c)(7).

***Civil Procedure > Appeals > Standards of Review > De Novo Review***

***Tax Law > Federal Tax Administration & Procedure > Tax Court (IRC secs. 7441-7491) > Standards of Review > Abuse of Discretion***

***Tax Law > Federal Tax Administration & Procedure > Tax Court (IRC secs. 7441-7491) > Standards of Review > De Novo Review***

[HN2] The tax court's construction of 26 U.S.C.S. § 7430, as to the bifurcation and cost-of-living adjustment issues, involves questions of law, which an appellate court reviews *de novo*. The tax court's determination of whether the commissioner's position was substantially justified is reviewed for abuse of discretion, as is its determination of the amount of attorney's fees to be awarded.

***Civil Procedure > Remedies > Costs & Attorney Fees > General Overview***

***Tax Law > Federal Tax Administration & Procedure > Tax Court (IRC secs. 7441-7491) > General Overview***

[HN3] The reasoning employed by the courts under the attorney's fees provision of the Equal Access to Justice Act applies equally to review under 26 U.S.C.S. § 7430.

***Governments > Legislation > Interpretation***

[HN4] As a general rule, a modifying clause applies only to its immediate antecedent.

***Governments > Legislation > Interpretation***

[HN5] Words with a fixed legal or judicially settled meaning, where the context so requires, must be presumed to have been used in that sense. Words of both technical and common usage are construed in the latter sense unless the statute plainly indicates otherwise.

***Governments > Legislation > Interpretation***

[HN6] A statute must be examined as a whole, with all of its sections and subsections in mind.

***Civil Procedure > Remedies > Costs & Attorney Fees > Costs > General Overview***

***Tax Law > Federal Tax Administration & Procedure > Tax Court (IRC secs. 7441-7491) > General Overview***

[HN7] The prevailing party in both administrative proceedings and judicial proceedings who seeks administrative and litigation costs under 26 U.S.C.S. § 7430 must separately establish that the United States' position in each of the proceedings was not substantially justified.

***Civil Procedure > Remedies > Costs & Attorney Fees > General Overview***

***Tax Law > Federal Tax Administration & Procedure > Tax Court (IRC secs. 7441-7491) > General Overview***

[HN8] According to the plain language of 26 U.S.C.S. § 7430 and under the normal rules of statutory construction, a bifurcated analysis of "substantially justified" should be made in each proceeding.

***Governments > Legislation > Interpretation***

[HN9] Although the starting point for analyzing a statute is with its language, the court may look beyond the language of the statute to the legislative history where the language is ambiguous, or where the literal application of the statute will produce a result demonstrably at odds with the intentions of its drafters.

***Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Statutory Awards***

***Tax Law > Federal Tax Administration & Procedure > Tax Court (IRC secs. 7441-7491) > General Overview***

[HN10] In order to recover an award of attorney's fees from the government, a tax litigant must qualify as a "prevailing party" under 26 U.S.C.S. § 7430(c)(4)(A). First, the litigant must establish that the position of the United States was not substantially justified. Second, the taxpayer must also substantially prevail with respect to either the amount in controversy or the most significant issue or set of issues presented. 26 U.S.C.S. § 7430(c)(4)(A)(ii). The phrase "substantially justified" in 26 U.S.C.S. § 7430(c)(4)(A) means justified in substance or in the main - that is, justified to a

degree that could satisfy a reasonable person. That is no different from the "reasonable basis both in law and fact" formulation. To be "substantially justified" means more than merely undeserving of sanctions for frivolousness.

*Civil Procedure > Pleading & Practice > Pleadings > Answers*

*Civil Procedure > Remedies > Costs & Attorney Fees > General Overview*

*Tax Law > Federal Tax Administration & Procedure > Tax Court (IRC secs. 7441-7491) > General Overview*

[HN11] If the government concedes the taxpayer's case in its answer, the government's conduct is reasonable.

*Civil Procedure > Remedies > Costs & Attorney Fees > General Overview*

*Civil Procedure > Appeals > Standards of Review > Abuse of Discretion*

*Tax Law > Federal Tax Administration & Procedure > Tax Court (IRC secs. 7441-7491) > Standards of Review > Abuse of Discretion*

[HN12] Because of the fact-bound nature of the inquiry, a deferential abuse of discretion review of the Tax Court's finding of substantial justification is appropriate.

*Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Reasonable Fees*

*Tax Law > Federal Tax Administration & Procedure > Tax Court (IRC secs. 7441-7491) > General Overview*

[HN13] So long as the government's position justifies recovery of fees, any reasonable fees to recover such fees are recoverable.

*Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Reasonable Fees*

*Tax Law > Federal Tax Administration & Procedure > Tax Court (IRC secs. 7441-7491) > General Overview*

[HN14] The measure of reasonable attorney's fees awarded as administrative or judicial proceeding costs under 26 U.S.C.S. § 7430(a) is based upon prevailing market rates for the kind or quality of services furnished but shall not be in excess of \$ 75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for such proceeding, justifies a higher rate. 26 U.S.C.S. § 7430(c)(1)(B)(iii).

*Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Reasonable Fees*

*Tax Law > Federal Tax Administration & Procedure > Tax Court (IRC secs. 7441-7491) > General Overview*

[HN15] General tax expertise does not qualify as a "special factor" within the meaning of 26 U.S.C.S. § 7430(c)(1)(B)(iii) warranting an enhancement of the fee award under 26 U.S.C.S. § 7430(a).

*Civil Procedure > Appeals > Reviewability > General Overview*

[HN16] Generally, a party may not raise new issues on appeal. However, the court of appeals has discretion to a new issue that is solely a matter of statutory construction.

*Civil Procedure > Remedies > Costs & Attorney Fees > Costs > General Overview*

*Tax Law > Federal Tax Administration & Procedure > Tax Court (IRC secs. 7441-7491) > General Overview*

[HN17] The correct starting point for calculating the Cost-Of-Living Adjustment (COLA) provided in 26 U.S.C.S. § 7430 is January 1, 1986, the effective date of the COLA provision.

**COUNSEL:** Kevin G. Staker, Gregory R. Gose, Philip G. Panitz, Steven L. Staker, Law Offices of Staker and Gose, Camarillo, California, for the petitioners/appellants/appellees.

Gilbert S. Rothenberg, Gary R. Allen, Kimberly S. Stanley, Tax Division, Department of Justice, Washington, D.C., for the respondent/appellee/appellant.

**JUDGES:** Before: Joseph T. Sneed and Dorothy W. Nelson, Circuit Judges, and Oliver W. Wanger, \* District Judge.

\* The Honorable Oliver W. Wanger, United States District Judge for the Eastern District of California, sitting by designation.  
Opinion by Judge Wanger.

**OPINION BY: WANGER****OPINION****[\*1140] OPINION**

WANGER, District Judge:

Petitioners, Clair S. Huffman and his wife, Patricia S. Huffman, now deceased, appeal from the Tax Court's partial grant of their motion for costs and attorney's fees requested under I.R.C. § 7430, as amended by the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342, § 6239(a) ("TAMRA"), which allows the recovery of "reasonable administrative costs" and "reasonable litigation costs" by a prevailing party in a tax case. I.R.C. § 7430(a).<sup>1</sup> The Commissioner cross-appeals. **[\*\*2]** We affirm in part, reverse in part, and remand.

<sup>1</sup> All statutory references are to the Internal Revenue Code (Title 26 of the United States Code) unless otherwise indicated. Section 7340 was added to the Internal Revenue Code in 1982. Pub.L.No. 97-248, § 292(a), 96 Stat. 324, 572-74 (1982). The parts of § 7430 relevant to this appeal were amended in 1986, effective for amounts paid after 9/30/86, in civil actions or proceedings commenced after 12/31/85 (Pub.L.No. 99-514, § 1551(b), 100 Stat. 2085, 2753 (1986)), and in 1988 by TAMRA, effective for civil actions or proceedings commenced after November 10, 1988. Where applicable the amendments are referred to or cited by the date of amendment, e.g., § 7430 (1988) or "the 1988 amendments."

I

**ISSUES**

1. Did the Tax Court err as a matter of law in bifurcating the analysis under § 7340 to determine whether the "United States' position in the proceeding" was "substantially justified" into two stages: the "administrative stage," which concerns the notice of deficiency, **[\*\*3]** and the "judicial stage" which concerns the government's answer to the Tax Court petition?<sup>2</sup>

<sup>2</sup> [HN1] Section 7430(c)(7) reads as follows:

(7) Position of United States. - The term "position of the United States" means -

(A) the position taken by the United States in a judicial proceeding to which subsection (a) applies, and

(B) the position taken in an administrative proceeding to which subsection (a) applies as of the earlier of -

(i) the date of the receipt by the taxpayer of the notice of the decision of the Internal Revenue Service Office of Appeals, or

(ii) the date of the notice of deficiency.

**[\*1141]** 2. Assuming bifurcated analysis is proper under § 7430, did the Tax Court err as a matter of law, or otherwise abuse its discretion, by considering only the answer filed by Respondent in the judicial proceeding and in holding that the United States' position in the judicial proceeding was substantially justified?

3. Did the Tax Court err as a matter of law in holding that the tax specialty of taxpayers' counsel was **[\*\*4]** not, nor were any other "special factors" shown, within the meaning of § 7430(c)(1)(B)(iii), which would justify awarding Clair S. Huffman, individually and as executor, attorney's fees in excess of the statutory rate of \$ 75.00 per hour?

4. Did the Tax Court err as a matter of law in determining that, while Petitioners were entitled to reimbursement for attorney's fees in excess of \$ 75.00 per hour due to an increase in the cost of living, the measurement of the cost of living adjustment was from October 1, 1981 (the effective date of the Equal Access to Justice Act) and not from January 1, 1986 (the effective date of the cost of living adjustment in § 7430)?<sup>3</sup>

<sup>3</sup> Petitioners object to consideration of this issue because Respondent did not argue it below in the Tax Court.

5. Did the Tax Court abuse its discretion in finding that 15.9 hours of attorney time and \$ 20.00 for costs were all the recoverable fees and costs?

#### **BACKGROUND**

The procedural history of this matter is extended, and largely irrelevant to the [\*\*5] disposition of the issues. The Internal Revenue Service engaged in stonewalling and outright perjury in handling the administrative disposition of Petitioners' notice of deficiency after this notice was initially issued in violation of the TEFRA partnership audit rules. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 402, 96 Stat. 324, 648-69 (codified as amended at I.R.C. §§ 6221-6233). There followed an administrative hearing, a subsequent petition in Tax Court, a concession by the Commissioner to judgment on the pleadings, and then a motion by Petitioners pursuant to section 7430 and Tax Court Rule 231 for litigation costs and attorney's fees. The issues on appeal arise from the Tax Court's treatment of this motion.

Petitioners sought reimbursement for attorney's fees in the total amount of \$ 8,400.00, representing 67.2 hours of attorney time at \$ 125.00 per hour, plus costs of \$ 156.77. Five point nine attorney hours were spent before the Tax Court petition was filed. Eleven point three attorney hours were spent after the petition was filed, but before the attorney's fees motion was prepared. Attorney hours in the amount of 50.0 were devoted to recovering [\*\*6] taxpayers' reimbursement for attorney's fees and costs.<sup>4</sup>

<sup>4</sup> A more detailed breakdown of the attorney time for which Petitioners sought reimbursement is as follows:

Purpose	Hours
Before filing Tax Court petition (5.9 hours):	
Conferences, research and drafting petition.	5.9
After petition but before attorney's fees motion	(11.3 hours):
Review IRS answer, discussions with IRS.	0.8
Prepare motion to amend the caption and substitute parties.	1.4
Prepare motion for judgment on the pleadings.	3.3
Review proposed decision and discussion with IRS.	5.8
After attorney's fees motion (50.0 hours):	
Prepare motion for litigation costs and affidavits.	10.4
Prepare amendment to motion for litigation costs (to add one paragraph to include costs incurred after filing motion) and review IRS' objection.	2.5

Purpose	Hours
Reply to IRS' objection.	24.6
Prepare for hearing on motion (includes 1.4 hours for work of co-counsel).	5.7
Attend hearing (includes 3.6 hours for co-counsel).	6.8
TOTAL	67.2

[\*1142] The Tax Court granted, in part, Petitioners' motion for costs and attorney's fees. Reimbursement for "reasonable administrative costs" under section 7430(a)(1) for all the 5.9 attorney hours incurred pre-petition after receipt of the notice of deficiency plus \$ 20.00 costs was allowed upon the finding that the Commissioner's position as to the notice of deficiency was not substantially justified because the partnership adjustments violated the partnership audit rules. The award included the reasonable attorney's fees incurred to "persuade [the Commissioner] that the notice of deficiency was improper and to rescind that notice of deficiency."

The court did not award Petitioners reasonable "litigation costs" under section 7430(a)(2), and held that the Commissioner's position in the "judicial proceeding" was substantially justified because the answer fully conceded the case. Nevertheless, the court found it was reasonable for Petitioners' counsel to have spent time preparing, filing, discussing, and prosecuting the attorney's fees and costs motion, and awarded reimbursement for 10 of the 50 hours claimed. The balance was disallowed because the Tax Court "believed that it was unreasonable to expend 50 hours of attorney time to recover costs pertaining to the entire 17.2 hours incurred prior to the Motion."

The \$ 75.00 hourly rate, specified by section 7430 unless "the court determines that an increase in the cost of living or a special factor . . . justifies a higher rate," was enhanced only for cost-of-living increases. § 7430(c)(1)(B)(iii). The Tax Court rejected Petitioners' claim that they were entitled to a special factor enhancement to \$ 125.00 per hour, held that the prevailing market rate in a given geographic area is not a special enhancement factor under section 7430, and disagreed that "the dearth of qualified tax attorneys in Ventura County," justified fee enhancement. "It observed that it is not enough to simply say 'that lawyers skilled and experienced enough to try the case are in short supply.'" The court rejected Petitioners' argument that their attorney Staker's "specialized training" in tax law was a special factor, and held that his expertise was not "needful for the litigation in question." In applying a cost-of-living adjustment ("COLA"), the court chose October 1, 1981, as the baseline date because that was the date of enactment of a similar attorney's fee provision contained in the Equal Access to Justice Act, Pub. L. No. 96-481, § 204(a), 94 Stat. 2321, 2327-29 (1980) (codified as amended at 28 U.S.C. § 2412(d)) ("EAJA").

Petitioners were awarded \$ 1,628.49 attorney's fees for 15.9 hours of attorney's services at the rate of \$ 102.42 per hour, and \$ 20.00 as "administrative costs." The remaining 51.3 hours of attorney time claimed and \$ 136.77 of costs were held to be "nonrecoverable litigation costs." [\*\*7]

<sup>5</sup> The cost-of-living adjustment was based on inflation as measured by the consumer price index for all urban consumers ("CPI-U") between February of 1989 and May of 1990.

Petitioners' appeal was timely. The Commissioner cross-appeals the Tax Court's calculation of the COLA under section 7430. Petitioners also seek recovery of fees and costs incurred in this appeal pursuant to section 7430. *See Prandini v. National Tea Co.*, 585 F.2d 47, 53 (3d Cir. 1978), *cited with approval in In Re Nucorp Energy, Inc.*, 764 F.2d 655, 660-661 (9th Cir. 1985).

The central question presented under § 7430 is: At what point or points in the proceeding does the determination of whether there was substantial justification of government conduct commence? Once a determination of the point of commencement has been made and it is found that no substantial justification exists, do the effects of that determination persist throughout the entire proceedings? Petitioners contend that the [\*\*8] determination of no substantial justification should be made at the earliest possible point in the proceeding consistent with law, and that the determination is thereafter binding. The Commissioner contends that an initial determination in administrative proceedings is not binding on later judicial proceedings.

#### [\*1143] JURISDICTION AND STANDARDS OF REVIEW

Jurisdiction is conferred by I.R.C. § 7482. [HN2] The Tax Court's construction of section 7430, as to the bifurcation and cost-of-living adjustment issues, involves questions of law which we review *de novo*. *Sliwa v. Commissioner*, 839 F.2d 602, 605 (9th Cir. 1988). The Tax Court's determination of whether the Commissioner's position was "substantially justified" is reviewed for abuse of discretion, *Bertolino v. Commissioner*, 930 F.2d 759, 761 (9th Cir. 1991), as is its determination of the amount of attorney's fees to be awarded. *Pierce v. Underwood*, 487 U.S. 552, 571, 101 L. Ed. 2d 490, 108 S. Ct. 2541 (1988) (setting review standard for award of attorney's fees under the Equal Access to Justice Act).

[HN3] The reasoning employed by the courts under the attorney's fees provision of the Equal [\*\*9] Access to Justice Act applies equally to review under section 7430. *Estate of Merchant v. Commissioner*, 947 F.2d 1390, 1393 (9th Cir. 1991) ("Most of the Supreme Court's reasoning [under the EAJA] applies equally to review under [section 7430]"); *Oliver v. United States*, 921 F.2d 916, 922 (9th Cir. 1990) ("There is little dispositive difference between section 7430 and the EAJA.").

#### DISCUSSION

##### *Construction Of Section 7430: Bifurcation.*

Section 7430 was amended in 1988 to delineate separately the administrative and court phases of the proceedings by replacing the term "civil proceeding" with "administrative or court proceeding." The terms "reasonable administrative costs" incurred in an administrative hearing and "reasonable litigation costs incurred in connection with" a court proceeding were also added. Corresponding changes were made throughout the statute.

In the amended subsection (c)(7), which defines the key phrase "position of the United States," "civil proceeding" was changed to "judicial proceeding" in paragraph (A), while language concerning "administrative proceedings" in paragraph (B) was rewritten. [\*\*10] <sup>6</sup>

<sup>6</sup> Prior to the 1988 amendments, pertinent parts of section 7430 provided:

##### AWARDING OF COURT COSTS AND CERTAIN FEES.

(a) *In general.* - *In the case of any civil proceeding which is -*

(1) *brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title, and*

(2) *brought in a court of the United States (including the Tax Court and the United States Claims Court), the prevailing party may be awarded a judgment (payable in the case of the Tax Court in the same manner as such an award by a district court) for reasonable litigation costs incurred in such proceeding.*

(c) *Definitions.*

(1) *Reasonable litigation costs*

(2) *Prevailing party*

978 F.2d 1139, \*1143; 1992 U.S. App. LEXIS 28490, \*\*10;  
92-2 U.S. Tax Cas. (CCH) P50,570; 70 A.F.T.R.2d (RIA) 6016

(3) Civil actions. - The term "civil proceeding" includes a civil action.

(4) Position of United States. - The term "position of the United States" includes -

(A) the position taken by the United States in the *civil* proceeding, and

(B) any administrative action or inaction by the District Council of the Internal Revenue service (and all subsequent administrative action or inaction) upon which such proceeding is based.

...

26 U.S.C. § 7430(a), (c)(1) - (4) (1987) (emphasis added).

The 1988 amendments changed § 7430 as follows:

Subsection

(a) "In General.":

"Civil proceeding" was changed to "administrative or court proceeding;" paragraph (2) ("brought in a court of the United States . . .") was deleted; "reasonable litigation costs incurred in such proceeding" was broken down into "reasonable administrative costs incurred in connection with such administrative proceeding" and "reasonable litigation costs incurred in connection with such court proceeding;"

Subsection (c) "Definitions.":

Subsection (c)(1), "Reasonable litigation costs," which included "reasonable court costs," reasonable expenses and costs associated with experts and any studies, and attorney's fees, was broken down into two subsections, (c)(1) "Reasonable litigation costs," which includes reasonable court costs, reasonable expenses and costs associated with experts and any studies, and attorney's fees, and

(c)(2) "Reasonable administrative costs," which includes administrative fees, reasonable expenses and costs associated with experts and any studies, and attorney's fees.

Subsection (c)(2), "Prevailing party," was renumbered as subsection (c)(4), and "civil proceeding" was changed to "the proceeding."

Subsection (c)(3), "Civil actions," defining a "civil proceeding," was deleted, and subsections (c)(5) and (c)(6), which separately define "Administrative proceedings" and "Court proceedings," were added.

Subsection (c)(4), "Position of the United States," was renumbered as subsection (c)(7). In Paragraph (A), "civil proceeding" was changed to "judicial proceeding;" paragraph (B) was deleted, and a new paragraph (B) with subparagraphs (i) and (ii) was added.

[\*\*11] [\*1144] Divergent judicial opinions exist as to whether the phrase "position of the United States" referred to the government's position both in prelitigation administrative proceedings and after the commencement of litigation. 14 Jacob Mertens, *Law of Federal Income Taxation* § 50.566 (1992). *Sliwa*, 839 F.2d at 606, held that under the 1982 version of section 7430, "position of the United States" referred to the government's position in both prelitigation administrative proceedings and after commencement of litigation, not only the government's in-court litigation position. 7 However, this Court has recognized that "[the] rule of *Sliwa* does not apply to section 7430 in its present form, after the 1986 and 1988 amendments." *Estate of Merchant*, 947 F.2d at 1392, n.6; see also *Bertolino*, 930 F.2d at 761 (implying that *Sliwa* was not applicable to cases decided after the 1986 amendment to section 7430). The interpretation of amended section 7430 presents a question of first impression in this circuit.

7 Under 7430 (1982), the prevailing party was required to establish that the position of the United States was "unreasonable." The present standard is "not substantially justified."

[\*\*12] The Tax Court bifurcated the inquiry whether the "position of the United States" was substantially justified: 1) in the administrative proceeding, where the "position of the United States" as to the deficiency notice was held not to be substantially justified; and 2) the judicial proceeding, where the "position of the United States," as determined by its answer which conceded the case, was held to be substantially justified. The Tax Court found that because the plain

language of amended 7430(c)(7), unlike that of pre-1988 § 7430, refers to the *administrative proceeding* separately from the *judicial proceeding*. Congress intended that the United States could take two positions, which can be evaluated separately to determine if each was "substantially justified." The Tax Court acknowledged but did not follow *Sliwa* because that decision was "not applicable to cases decided under TAMRA." It reasoned that "'in a civil proceeding' [the language of the pre-1988 statute] is much broader than 'in a judicial proceeding' [the current statutory language]," an interpretation underscored by a separate provision "in the [amended] statute for administrative proceedings."

[\*\*13] Petitioners assert that the "position of the United States" is determined solely by the notice of deficiency and cannot be redetermined at the litigation stage of the case. They advance several arguments, but we reject them and uphold the bifurcated approach adopted by the Tax Court.

#### ***The Plain Language Of Section 7430.***

Petitioners first argue that the 1988 amendment to section 7430, which added paragraphs (i) and (ii) to subsection (c)(7)(B) demonstrates that the "position of the United States" is established as of the date of the notice of deficiency and does not change for purposes of evaluating whether the United States' position in the judicial proceedings is "substantially justified." In other words, paragraphs (i) and (ii) not only modify subsection (c)(7)(B), but also modify subsection (c)(7)(A).

Second, even if paragraphs (i) and (ii) do not modify subsection (c)(7)(A), petitioners argue that the term "judicial proceeding" is an umbrella term which includes "administrative proceeding" and "court proceeding;" therefore, the "position of the United States" is still determined by the earlier of (i) or (ii), unless there [\*\*14] is no IRS appeals decision or notice of deficiency, in which case the "position of the United States" is determined by the answer in the litigation. Neither of these arguments has merit.

#### ***Effect Of Paragraphs (i) and (ii)***

The first contention is defeated by a facial reading of § 7430(c)(7), with due respect [\*\*1145] for grammar and punctuation, and leads to the conclusion that paragraphs (c)(7)(B)(i) and (ii) are alternative objects of the preposition "of," the final word of the introductory clause in (c)(7)(B), and modify only subsection (c)(7)(B) and not subsection (c)(7)(A). [HN4] As a general rule, a modifying clause applies only to its immediate antecedent. 2A Norman J. Singer, *Sutherland Statutory Construction* § 47.33 (5th ed. 1992); see e.g., *Pacificorp. v. Bonneville Power Admin.*, 856 F.2d 94, 97 (9th Cir. 1988). This conclusion is reinforced by the limitation set forth in subsection (c)(2)(B), which defines "reasonable administrative costs" and fixes those costs by reference to language identical to that in subsection (c)(7)(B)(i) and (ii).

#### ***Judicial Proceeding***

Petitioners' second contention is resolved by our reading [\*\*15] of the term "judicial proceeding" as synonymous with "court proceeding," and not as an umbrella term that includes the term "administrative proceeding." [HN5] Words with a fixed legal or judicially settled meaning, where the context so requires, must be presumed to have been used in that sense. 1 Mertens at § 3.36 (1991) citing *Real Estate-Land Title & Trust Co. v. United States*, 309 U.S. 13, 15, 84 L. Ed. 542, 60 S. Ct. 371. Words of both technical and common usage are construed in the latter sense unless the statute plainly indicates otherwise. 1 Mertens at § 3.36, citing, *Willcuts v. Milton Dairy Co.*, 275 U.S. 215, 218, 72 L. Ed. 247, 48 S. Ct. 71.

Dictionary definitions tend to support the construction of "judicial proceeding" as synonymous with "court proceeding." See, e.g., *Black's Law Dictionary*, 46 (6th ed. 1990) (defining "administrative procedure" as "methods and processes before administrative agencies as distinguished from judicial procedure which applies to courts. . . ." (emphasis added)). By contrast, courts have held that actions taken or proceedings by the IRS prior to initiation of litigation in the Tax Court or the district court are "non-judicial [\*\*16] in nature." See, *United States v. Baggot*, 463 U.S. 476, 479, 77 L. Ed. 2d 785, 103 S. Ct. 3164 (although a Tax Court petition for redetermination of tax or a suit for refund is a "judicial

proceeding," an IRS audit, including the IRS' informal internal appeal component, is not itself a "judicial proceeding."); *United States v. Ryan*, 455 F.2d 728, 733 (9th Cir. 1971) (IRS investigation is not a judicial proceeding.).

Petitioner's cases cited as contrary authority, e.g., *Alleghany Corp. v. Pomeroy*, 898 F.2d 1314 (8th Cir. 1990) concern the different issue of fixing the limits of the abstention doctrine. In that context a "judicial proceeding" can include any preceding and related "administrative proceeding." Broad principles of comity and federalism are not here implicated; rather, our focus is on the interpretation of the specific language of a technical statute. Both common usage and relevant case law require that "judicial proceeding" be interpreted as synonymous with "court proceeding" as defined in section 7430(c)(6). The terms "court" and "judicial" are hereafter used interchangeably.

#### *Interpretation [\*\*17] Of The Statute As A Whole*

In analyzing the plain meaning of section 7430, the guiding principle is that [HN6] a statute must be examined as a whole, with all of its sections and subsections in mind. See, *Hellmich v. Hellman*, 276 U.S. 233, 237, 72 L. Ed. 544, 48 S. Ct. 244. The section 7430(c)(4)(A) definition of "prevailing party" cannot be fully understood without reading section 7430(a). Subsection (c)(4)(A)(i) refers only to "the proceedings" (emphasis added) to which subsection (a) applies. In requiring that the prevailing party establish that the United States' position was not substantially justified. Subsection (a) refers alternatively to "any administrative or court proceeding," and to both administrative costs and litigation costs. Prior to the 1988 amendment, § 7430 referred only to "any civil proceeding" (7430(a) 1987); the amended version distinguished and separately defined "administrative proceedings" and "court proceedings." 7430(c)(5), (6). Looking at § 7430 as a whole, "the proceeding" must refer to either the court or [\*\*18] the administrative [\*\*1146] proceeding or both. It follows that [HN7] the prevailing party in both administrative proceedings and judicial proceedings who seeks administrative and litigation costs must separately establish that the United States' position in each of the proceedings was not substantially justified.

This interpretation is consistent with subsection (c)(7), which defines the position of the United States as the position taken in the administrative proceeding and the position taken in the judicial proceeding. Thus the position taken in the administrative proceeding does not automatically apply to the judicial proceeding. [HN8] According to the plain language of § 7430 and under the normal rules of statutory construction, a bifurcated analysis of "substantially justified" should be made in each proceeding.

#### *Legislative History*

[HN9] Although the starting point for analyzing a statute is with its language, the court may look beyond the language of the statute to the legislative history where the language is ambiguous, or where the literal application of the statute will produce a result demonstrably at odds with the intentions of its drafters. *United States v. Turkette*, 452 U.S. 576, 580, 69 L. Ed. 2d 246, 101 S. Ct. 2524. [\*\*19]

Petitioners urge that the legislative history of § 7430 reveals Congress' intent that the "position of the United States" is defined solely by the earlier of the notice of deficiency or the taxpayer's receipt of the IRS Office of Appeals' notice of decision. In support of this argument, Petitioners cite the House of Representatives Conference Report to Accompany H.R. 4333:

*Position of the United States.* - The conference agreement follows the Senate amendment, with the modification that the position of the United States is determined as of the earlier of (1) the date of the receipt by the taxpayer of the notice of the decision of the IRS Office of Appeals, or (2) the date of the notice of deficiency. *If neither is applicable, the position of the United States is that taken in the litigation.*

2 *Technical and Miscellaneous Revenue Act of 1988, Conference Report to Accompany H.R. 4333*, H.R. Rep. No. 1104, (Vol. 2) 100th Cong. 2d Sess. 226 (1988) (emphasis added), reprinted in 1988-3 C.B. 473, 716. Based on the last sentence quoted above, Petitioners argue that bifurcation is impermissible. They claim that only when [\*\*20] there is no IRS appeals decision or notice of deficiency is the "position of the United States" defined by the position taken in the

litigation. When, however, either an IRS appeals decision or a notice of deficiency exists, the "position of the United States" is defined by the earlier of these, and the position taken in the litigation is irrelevant.

The Conference Report, however, is more reasonably read to mean "that the position of the United States [in an administrative proceeding] is determined as of" the position taken in the earlier of (1) or (2). This interpretation is more in keeping with the plain language of § 7430. Nothing in the Report forecloses the possibility of a change in the position of the United States from the administrative to the court proceeding.

To permit a bifurcated analysis of the reasonableness of the Government's position does not undermine Congress' expressed intent in section 7430 to "deter abusive actions and overreaching by the Internal Revenue Service and . . . enable individual taxpayers to vindicate their rights regardless of their economic circumstances." H.R. Rep. No. 404, 97th Cong. [\*\*21] 1st Sess. 11 (1981). To the contrary, a bifurcated analysis not only ensures that the prevailing taxpayer is reimbursed for pre-litigation and litigation costs, but also supports Congress's intent that before an award of attorney's fees is made, the taxpayer must meet the burden of proving that the Government's position was not substantially justified. It affords another opportunity for the United States to reconsider an inappropriate position.

### Case Law

Although the Tax Court correctly found that *Sliwa* was not applicable to cases decided under TAMRA, that case is instructive. *Sliwa* rejects a narrow construction [\*1147] of the term "civil proceeding" which would limit the court's examination of government conduct to that following the initiation of litigation by the taxpayer, reasoning "that such a restrictive construction of section 7430 is unwarranted, and, indeed, undermines the legislative intent of the statute to enable taxpayers to 'vindicate their rights regardless of their economic circumstances.'" *Sliwa*, 839 F.2d at 607.

Petitioners erroneously argue that a construction of section 7430 [\*\*22] which permits a bifurcated analysis of "substantially justified" cannot be harmonized with the judicial concern expressed in *Sliwa*. That concern was that the prevailing taxpayer would be foreclosed altogether from reimbursement for attorney's fees, when the government's prelitigation position was unreasonable but its litigation position was reasonable. This concern was expressly addressed by the 1988 amendments, which we construe to permit a bifurcated analysis that examines the reasonableness of the government's position at both the administrative level *and* the court level.

*Estate of Merchant* is said by Petitioners to disapprove a bifurcated analysis of "position of the United States." That case held that, under the 1982 version of section 7430, in making the determination that the position of the United States in the proceeding was unreasonable, "the reasonableness of the government's prelitigation administrative actions, as well as that of its later litigating position, must be taken into account." *Estate of Merchant*, 947 F.2d at 1392, citing *Sliwa*, 839 F.2d at 605-07. In a footnote, [\*\*23] the court added: "[Section 7430(c)(7)(B) (1988)] now provides that the 'position of the United States' in tax proceedings is to be determined *from* the date of the receipt by the taxpayer of the notice of decision of the Internal Revenue Service Office of Appeals, or the date of the notice of deficiency, whichever is earlier." *Id.* at 1392, n.6 (emphasis added). Petitioners suggest that the juxtaposition of these two statements creates an inference that under the 1988 amendments to § 7430, the "later litigating position" of the United States is no longer relevant when the government's position at the earlier of the taxpayer's receipt of the notice of the IRS Office of Appeals decision or the notice of deficiency is unreasonable.

We disagree. The interpretation which comports with the plain language of section 7430 is that the phrase "*from* the earlier of the taxpayer's receipt of the notice of the IRS Office of Appeals decision or the notice of deficiency" marks the starting point, not the ending point, of the analysis of the United States' position. Under this interpretation, the position of [\*\*24] the United States *starts* with the earlier of the two, but has room to change toward reasonableness<sup>8</sup> between the administrative and court proceedings. The bifurcated analysis used by the Tax Court is consistent with this circuit's case law interpreting § 7430 prior to the 1988 amendments.

978 F.2d 1139, \*1147; 1992 U.S. App. LEXIS 28490, \*\*24;  
92-2 U.S. Tax Cas. (CCH) P50,570; 70 A.F.T.R.2d (RIA) 6016

8 Although the standard has changed from "reasonable" to "substantially justified," the standard is still measured by "reasonableness": "Substantially justified" means "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565, 101 L. Ed. 2d 490, 108 S. Ct. 2541 (1988).

***Did The Tax Court Abuse Its Discretion In Determining That Respondent's Position In The Judicial Proceeding Was Substantially Justified?***

{HN10} In order to recover an award of attorney's fees from the Government, a tax litigant must qualify as a "prevailing party" under section 7430(c)(4)(A). "First, the litigant must 'establish that the position of the United States.. [\*\*25] . . . was not substantially justified.' Second, the taxpayer must also 'substantially prevail[]' with respect to *either* 'the amount in controversy' or 'the most significant issue or set of issues presented.' § 7430(c)(4)(A)(ii)." *Heasley v. Commissioner*, 967 F.2d 116, 120 (5th Cir. 1992) (emphasis in original).

The statutory phrase "substantially justified" means "'justified in substance or in the main' - that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. at 565. "That is no different from the 'reasonable basis both in law and fact' formulation . . . To be 'substantially justified' [\*\*1148] means, of course, more than merely undeserving of sanctions for frivolousness . . ." *Id.* at 565-66.

***Commissioner's Concession Of Liability.***

Generally, the position of the United States in the judicial proceeding<sup>9</sup> is established initially by the Government's answer to the petition. *See, e.g., Sher v. Commissioner*, 861 F.2d 131, 134-35 (5th Cir. 1988). Here, the Tax Court concluded that the position [\*\*26] taken in the judicial proceeding was substantially justified because the Commissioner, in his answer:

9 The parties now agree that the United States' position in the administrative proceeding was not substantially justified and that a portion of the attorneys' fees award to Petitioners was proper.

admitted that petitioners had no tax liability, but denied that the issuance of the notice of deficiency was improper. . . . Thus, it is clear that [the Commissioner's] position in the judicial proceeding (without regard to actions pertaining to the Motion) was not only not substantially justified, but was in clear recognition of the applicable provisions of the law.

Case law holds that [HN11] if the Government concedes the petitioner's case in its answer, its conduct is reasonable. *See, Bertolino*, at 761 (Government's settlement of the case "with reasonable dispatch" after the complaint was filed was reasonable); however, Petitioners correctly note that, while the Commissioner's answer in part admitted that Petitioners owed [\*\*27] no tax liability, his denial that the issuance of the original deficiency notice was improper was wrongful.

Normally, most of the elements, evidence and other insights gleaned from pretrial activities bearing on whether the Government's position was substantially justified may be known only to the Tax Court, and can only be revealed to the appellate court through "the unaccustomed task of reviewing the entire record, not just to determine whether there existed the usual minimum support for the merits determination made by the factfinder below, but to determine whether *urging of the opposite merits determination was substantially justified.*" *Pierce*, 487 U.S. at 560. [HN12] Because of the fact-bound nature of the inquiry, a deferential abuse of discretion review of the Tax Court's finding of substantial justification is appropriate. *See, id.; Estate of Merchant*, 947 F.2d at 1393.

The Commissioner's opposition to Petitioners' motion for attorney's fees was based upon Revenue Officer Penny's declaration under penalty of perjury that Penny personally mailed a "no change" letter to Petitioners. At a later hearing on the fees issue, [\*\*28] the Commissioner admitted that the Penny declaration was false as the alleged "no change"

letter had in fact never issued. The Tax Court looked to the concession of the substantive tax issues and did not examine the reasonableness of the Commissioner's simultaneous assertion in the answer that the deficiency notice was substantially justified, which extended the dispute. The parties agree that the Commissioner's administrative proceeding position was substantially unjustified. Petitioners' attorney was compelled to incur costs to prove the Commissioner was unjustified in his administrative proceeding position.

#### **Attorney's Fees And Costs**

The Congressional intent behind section 7430 is not served by looking only to the answer to determine whether the government's position in the judicial proceeding was "substantially justified." The better approach is to examine the parties' conduct within each stage of the case. Here, most of Petitioners' attorney's fees arose from the dispute over entitlement to and the amount of recoverable attorney's fees and costs. This kind of satellite litigation is generally referred to as "fees for fees litigation." *Buchanan v. United States*, 765 F. Supp. 642 (D. Or. 1991). [\*\*29] The Tax Court awarded Petitioners some attorney's fees associated with "preparing, filing, discussing, and defending the Motion [for attorney's fees and costs]." Here, the Tax Court appears to have divided the time spent "preparing, filing, discussing, and defending the Motion" between the administrative proceeding and the judicial proceeding [\*\*1149] and allowed 10 of Petitioners' 50 hours spent on the attorney's fees motion. No explanation is provided for the calculation of this allowance.

Certainly the Commissioner may be justified in disputing a claim for excessive fees in some situations. Here, however, the Commissioner refused in both proceedings to acknowledge that Petitioners were entitled to fees or costs whatsoever. This was unjustified. As a result, Petitioners' attorney incurred costs to prove that the Commissioner was unjustified in refusing to acknowledge that any fees should be awarded. [HN13] So long as the government's position justifies recovery of fees, any reasonable fees to recover such fees are recoverable. See, e.g., *Powell v. Commissioner*, 891 F.2d 1167, 1172 (5th Cir. 1990) ("Where the government's underlying position is not substantially [\*\*30] justified, plaintiff is entitled under the EAJA [and § 7430] to recover all attorney's fees and expenses reasonably incurred in connection with the vindication of his rights, including those related to any litigation over fees, and any appeal."); *Russell v. Heckler*, 814 F.2d 148, 155 (3d Cir. 1987) (Where the sole basis for the government's opposition to the fee petition "is the alleged substantial justification of the government's position in the underlying proceedings . . . the petitioner will almost always, if not always, be entitled to fees for litigation over an EAJA fee petition if she is entitled to fees for the underlying litigation;" (vacated on other grounds sub nom. *Bowen v. Russell*, 487 U.S. 1229, 101 L. Ed. 2d 925, 108 S. Ct. 2891 ).

It cannot be determined whether the Tax Court correctly applied these principles in awarding fees for only one-fifth of the alleged time spent to recover fees. We therefore reverse and remand for the determination of the proper recovery of fees incurred to recover fees.

#### **Did The Tax Court Abuse Its Discretion In Refusing To Award Petitioners Attorney's Fees In Excess Of The Statutory Rate Of \$ 75.00 Per Hour?**

[HN14] The [\*\*31] measure of reasonable attorney's fees awarded as administrative or judicial proceeding costs under § 7430(a) is "based upon prevailing market rates for the kind or quality of services furnished" but "shall not be in excess of \$ 75.00 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for such proceeding, justifies a higher rate." § 7430(c)(1)(B)(iii).

Petitioners argue that they are entitled to an award of attorney's fees in excess of the statutory limit because: (1) the prevailing rate in Ventura County is \$ 125.00 per hour; (2) Petitioners' attorneys are specialists in tax; and, (3) such specialists are of limited availability in Ventura County. In this appeal, Petitioners go further. They suggest this Court adopt a rule that "recognizes tax specialists" by enhancing attorney's fees in every § 7430 case in which a taxpayer is represented by a tax lawyer.

978 F.2d 1139, \*1149; 1992 U.S. App. LEXIS 28490, \*\*31;  
92-2 U.S. Tax Cas. (CCH) P50,570; 70 A.F.T.R.2d (RIA) 6016

In *Pierce*, the Supreme Court interpreted a substantially identical provision of the EAJA and held that "the prevailing market rate" is not a "special [\*\*32] factor" which would justify an upward departure from the \$ 75.00 hourly rate set by Congress:

The "special factor" formulation suggests Congress thought that \$ 75 an hour was generally quite enough public reimbursement for lawyers' fees, whatever the local or national market might be. . . . The exception for "limited availability of qualified attorneys for the proceedings involved" must refer to attorneys "qualified for the proceedings" in some specialized sense, rather than just in their general legal competence. We think it refers to attorneys having some distinctive knowledge or specialized skill *needful for the litigation* in question - as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation.

487 U.S. at 572 (emphasis added).

Here, the Tax Court interpreted *Pierce* to mean that, to qualify for a higher than statutory rate, the attorney must possess not just general training in tax, but rather special training in an area "needful for the litigation in question." The Tax Court concluded [\*\*1150] that while attorney Staker Possessed Specialized skill and knowledge in the area of TEFRA partnerships, [\*\*33] the Commissioner conceded the underlying TEFRA issue; thus the only issues litigated by Staker in the Tax Court were the focs issues, which did not require his specialized skills. Accordingly, Staker's specialized skills in TEFRA were not "needful for the litigation."

The Tax Court's holding that [HN15] general tax expertise does not qualify as a "special factor" warranting an enhancement of the statutory fee award is in keeping with the language of § 7430, logic, and the case law. As the Second Circuit has explained:

Section 7430 applies only to tax cases; therefore most of the applications for attorney's fees under it would be to pay attorneys who have brought or defended tax cases. Such lawyers presumably all have a certain degree of "tax expertise." To suppose that Congress intended them all to be paid at a higher than \$ 75 an hour rate would allow this "special factor" exception to swallow the \$ 75 an hour rule.

*Cassuto v. Commissioner*, 936 F.2d 736, 743 (2d Cir. 1991). *Accord Bode v. United States*, 919 F.2d 1044, 1050 (5th Cir. 1990) ("Clearly, counsel's expertise [\*\*34] in tax law, in and of itself, is not a special factor warranting a fee award in excess of \$ 75 per hour under section 7430."). In light of the foregoing, it is unnecessary to discuss Petitioners' contention that tax specialists are allegedly not available in Ventura County.

#### ***What Is The Effective Date From Which To Measure The Cost-Of-Living Adjustment (COLA) Provided in § 7430?***

Based on a COLA pursuant to § 7430(c)(1)(B)(iii), the Tax Court awarded Petitioners a higher rate than the \$ 75 per hour statutory attorney's fee. The Tax Court based the adjustment on the Consumer Price Index (CPI) since October 1, 1981, the date of the enactment of the EAJA's \$ 75 hourly cap. The Commissioner cross-appeals the Tax Court's application of the 1981 CPI and argues that the proper starting point for calculating the COLA is from the January 1, 1986, the effective date of the § 7430 COLA provision.

Petitioners counter by asserting the cross-appeal is improper due to the Commissioner's alleged failure to raise the issue before the Tax Court. The Commissioner responds that his objection to Petitioners' costs as unreasonable [\*\*35] preserved the issue. Moreover, Petitioners failed "expressly" to argue that October 1, 1981, was the starting point for calculating the COLA until their reply to the Commissioner's objection. The Commissioner asserts that he was effectively prevented from addressing the issue by this failure.

The Commissioner did not dispute Petitioners' evidence of cost-of-living figures for the greater Los Angeles area, did not object when the Tax Court held that it was going to use the CPI from the greater Los Angeles area, and did not submit any evidence of its own on the issue. Nevertheless, the Commissioner argues that a remand for the proper cost-of-living adjustment is unnecessary because those calculations already have been done by the Commissioner in

978 F.2d 1139, \*1150; 1992 U.S. App. LEXIS 28490, \*\*35;  
92-2 U.S. Tax Cas. (CCH) P50,570; 70 A.F.T.R.2d (RIA) 6016

another case, *Bayer v. Commissioner*, 1991 Tax Ct. Memo LEXIS 325, 61 T.C.M. (CCH) 2980, 1991 T.C. Memo 282 (1991), *motion for reconsideration denied*, 98 T.C. 19 (1992).

[HN16] Generally, a party may not raise new issues on appeal. *Taylor v. Sentry Life Ins. Co.*, 729 F.2d 652, 655 (9th Cir. 1984) (*per curiam*). However, the COLA issue is important to the future application of section 7430, [\*\*36] and we have discretion to hear it because it is solely a matter of statutory construction. *Abex Corp. v. Ski's Enterprises, Inc.*, 748 F.2d 513, 516 (9th Cir. 1984)

To calculate the COLA from October 1, 1981, the Tax Court relied on its own precedent in *Cassuto v. Commissioner*, 93 T.C. 256, 272-273 (1989) as well as on cases decided under the EAJA. *See, e.g., Animal Lovers Volunteer Assn., Inc. v. Carlucci*, 867 F.2d 1224, 1227 (9th Cir. 1989); *Ramon-Sepulveda v. Immigration & Naturalization Service*, 863 F.2d 1458, 1463-64 (9th Cir. 1988). After the Tax Court filed its decision in the instant case, *Cassuto* [\*\*1151] was overturned by the Second Circuit. That Court reasoned as follows:

Congress clearly intended § 7430 to follow the same fee structure as the EAJA when it amended the statute in 1986 to "conform . . . more closely to the Equal Access to Justice Act." Before that time, § 7430 set forth no hourly fee reimbursement rate, but allowed simply for a maximum award of \$ 25,000 in undifferentiated litigation costs. [\*\*37] The 1986 amendment established the \$ 75 an hour fee rate, and allowed courts to subsequently add colas to that rate. There is no evidence, however, that Congress intended to pre-date § 7430's new structure to the date of the EAJA. If that had been Congress' intent, it would have been easy for Congress to make this known, or to have simply calculated a COLA from 1981 to 1986, and made that the new base hourly rate.

936 F.2d at 742. (citation omitted). Petitioners argue that the Second Circuit opinion should not be followed by this Court because, in its subsequent opinion in *Bayer*, the Tax Court declined to follow *Cassuto*. In addition, the Fifth Circuit has also applied the § 7430 COLA. *See, Heasley*, 967 F.2d at 125.

We find the Second Circuit's reasoning compelling. If Congress intended the EAJA COLA to apply in § 7430 cases, it could have so provided very easily. The express language of the statute, § 7430(c)(1)(B)(iii) does not support the opinion in *Cassuto*. [HN17] The correct starting point for calculating [\*\*38] the COLA is January 1, 1986.

#### ***Amount Of Fees And Costs Awarded***

The Tax Court awarded Petitioners fees for only 15.9 of 67.2 hours of attorney time and \$ 20.00 in costs for all of the work done on the case. The Tax Court correctly applied a bifurcated analysis, but provided no detailed explanation as to how the award of fees and costs was calculated. Already mentioned was the court's failure to offer any explanation as to why 10 hours were awarded for the judicial proceeding concerning fees. Likewise, the \$ 20.00 award for costs appears arbitrary, as no deference to a cost in that amount or an explanation of how it was calculated appears in the record. Finally, the cost of the filing fee in the judicial proceeding should be allowed because the petition was necessitated by the Commissioner's unjustified failure to respond in a timely fashion in the administrative phase.

#### ***CONCLUSION***

The decision of the Tax Court is reversed and remanded for a redetermination of Petitioners' entitlement to, and the amount of, costs and attorney's fees in the judicial proceeding. The decision finding Petitioners entitled to attorney's fees and costs in the administrative proceeding is affirmed, [\*\*39] except that the Tax Court must recalculate the amount of attorney's fees and costs. The decision enhancing attorney's fees and costs by the EAJA 1981 COLA is reversed. On remand, the Tax Court shall apply the section 7430 COLA as of January 1, 1986.

Each party shall bear its own costs on appeal; Petitioners' request for fees and costs associated with this appeal under section 7430 is denied.

AFFIRMED in part, REVERSED in part, and REMANDED.

EXHIBIT No. 12

12. The Chief Justice of the Washington State Supreme Court (1995-2001), and previously a member of the Washington State Senate (1979 to 1995), the Honorable Philip A. Talmadge, wrote a 13,000 word article in the Seattle University Law Review, "A New Approach to Statutory Interpretation in Washington." Attached in the Appendix as **Exhibit 12**.

28 of 1000 DOCUMENTS

Copyright (c) 2001 Seattle University Law Review  
Seattle University Law Review

Summer, 2001

25 Seattle Univ. L. R. 179

**LENGTH:** 13555 words**ARTICLE:** A New Approach to Statutory Interpretation in Washington**NAME:** Philip A. Talmadge\*

**BIO:** \* B.A. Yale University, J.D. University of Washington. The author was a member of the Washington State Senate from 1979 to 1995 and a Justice of the Washington State Supreme Court from 1995 to 2001. He gratefully acknowledges the assistance of Natalee Fillinger, Kimberley Gore-Galbraith, and Bernard H. Friedman in the research and preparation of this article.

**SUMMARY:**

... Finally, I will recommend a new paradigm for statutory construction so that legislative intent may be more accurately conveyed to the courts, abandoning many of the time-encrusted canons in favor of principles of interpretation adhering more specifically to the legislature's actual statutory language. ... Particular legislators, by virtue of their key leadership positions as committee chairs, will have a greater say in the creation of legislation, as well as its content. ... This same concept has been applied to legislative intent: ... However, an operating definition of legislative intent is possible. ... Since the men were charged under the explosives statute, the dissent found the Explosive Act unambiguous, and the search for legislative intent by employing the canon of *in pari materia* was improper, warning that "to broaden the use of *in pari materia* beyond these narrow boundaries - i.e., using it as a vessel to navigate beyond distinct statutory enactments - is to usurp the sought-after legislative intent by judicial construction out of whole cloth. ... An additional source of legislative intent is found in the action of the governor. ... Thus, veto messages of the governor are significant sources of legislative intent. ...

**TEXT:**

[\*179]

When the legislature enacts a statute, it intends to accomplish a particular purpose. Such a purpose may be shrouded in imprecise drafting, legislative jargon, or political compromise.<sup>n1</sup> Nevertheless, it is the constitutional role of the courts in a particular case to implement the legislative purpose expressed in statute. It is in this practical application that the problems with the enactment arise.

[\*180] In a case or controversy, the courts use a variety of principles of statutory interpretation to assess precisely what the legislature meant in enacting a statute. Unfortunately, the canons of statutory construction developed by courts across the United States, including those in Washington, are often result-driven. There are literally so many canons of statutory construction, often diametrically opposed to one another, that the courts may pick and choose those canons most favorable to the ultimate disposition the court wishes to achieve. This leaves considerable power in the hands of the judiciary to make policy as the judges deem fit without regard to the legislature's actual intent in enacting a statute.

In this article, I will first explore Washington's existing law, both statutory and judicial, on statutory interpretation. I will then evaluate the mechanisms for construing statutes derived from common law and legislative sources. Finally, I

will recommend a new paradigm for statutory construction so that legislative intent may be more accurately conveyed to the courts, abandoning many of the time-encrusted canons in favor of principles of interpretation adhering more specifically to the legislature's actual statutory language.

### I. Washington Law on Statutory Construction

Washington law on statutory construction is found in statute, court rule, and case law. However, the common law rules of construction have been the predominant analytical force for interpreting statutes. Each aspect of interpretation is treated here in turn.

#### A. Statutes

A little known aspect of Washington law on statutory construction is that the legislature itself has established certain rules of construction in statute. As early as 1891, the legislature determined that the Washington Revised Code was to both be "liberally construed" and "not be limited by any rule of strict construction."<sup>n2</sup> The courts have not specifically employed this statutory provision, instead choosing generally to utilize common law rules of statutory construction, applying statutes *liberally or strictly*.

Where statutes are amended, the legislature has adopted a general policy against implied repealers; statutory provisions substantially the same as those of a statute existing when the provisions were enacted are deemed a continuation of that statute.<sup>n3</sup>

**[\*181]** If the legislature has amended the same code section more than once in the same legislative session without internal reference, the various amendments may be given effect if they do not conflict; if they conflict, the last enacted amendment controls.<sup>n4</sup> The legislature delegated authority to the code reviser to publish the Washington Revised Code section with all of the amendments incorporated into that section, as well as to decodify repealed code sections which were repealed without reference to an amendment to the section.<sup>n5</sup>

References to time,<sup>n6</sup> certified mail use,<sup>n7</sup> and numbers and gender<sup>n8</sup> are also addressed by legislative rule.

In recognition of separation of powers concerns,<sup>n9</sup> the legislature adopted a statute indicating court rules in conflict with statutory provisions render the statutory enactments of "no further force or effect."<sup>n10</sup> This statute has been found constitutional,<sup>n11</sup> but the courts have limited its application to procedural statutes.<sup>n12</sup> Wherever possible, however, the courts endeavor to harmonize conflicts between rules and statutes to give effect to both within their appropriate spheres.<sup>n13</sup>

The legislative enactments on statutory construction, though not extensive in scope, are significant because they confirm a critical principle: **[\*182]** the legislature may take an active role in directing how the courts are to interpret legislative enactments. By statute, the legislature may direct particularized expansive or restrictive interpretations of its work, or generally mandate that certain information regarding the enactment is authoritative. This is vital to the later discussion in this article of a new approach to statutory interpretation.

#### B. Court Rules

A second significant source of rules on statutory construction is found in court rules. In adopting procedural rules for Washington's courts, the Washington State Supreme Court has established policies for construction of statutes in a narrow band of circumstances.

By court rule, procedural statutes are superseded by the civil and criminal rules for superior court.<sup>n14</sup> In certain specific instances, the judiciary has preserved a statutory enactment on what is ostensibly a procedural matter.<sup>n15</sup> Whether the courts have the power to invalidate legislative enactments by judicial fiat is an open question in Washington constitutional law.<sup>n16</sup>

### C. Case Law

The final and most significant source of rules in Washington on statutory construction is case law. The Washington judiciary claims the exclusive power to authoritatively interpret the acts of the legislature. <sup>n17</sup> This claim rings a bit hollow in light of the legislature's power to amend a statute after the judicial interpretation of the legislature's act. <sup>n18</sup> Regardless of the exclusivity of the authority, the consequences [\*183] of the judicial interpretation are very significant: the judiciary's interpretation of the statute becomes a part of the enactment as if it had been there since the legislature enacted the legislation. <sup>n19</sup>

*The Washington courts have developed a paradigm for analyzing a statute; the centerpiece of this paradigm is that the courts analyze a statute to carry out the intent of the legislature.* <sup>n20</sup> If the statute is plain and unambiguous, the courts enforce the statute as written. <sup>n21</sup> If the statute is ambiguous, susceptible to two or more reasonable interpretations, the courts resort to an interpretive process to ascertain the legislature's meaning. <sup>n22</sup> Each aspect of the paradigm is reviewed here in turn.

#### 1. Legislative Intent

In numerous cases, Washington courts have indicated that their purpose in analyzing a statute is the implementation of legislative intent. <sup>n23</sup> [\*184] This purpose has been described variously as the court's "primary goal" <sup>n24</sup> or "paramount duty." <sup>n25</sup>

But in practical application, Washington courts have taken two distinct approaches to the intent of the legislature. On the one hand, the courts have adopted a literalist approach: take the words as the legislature stated them. <sup>n26</sup> The second approach evaluates the "spirit" or "purpose" of the enactment and interprets the statute so as to avoid an absurd result compelled by the actual legislative language. <sup>n27</sup> Neither [\*185] approach is exclusive, as Washington courts have used both. If, on the one hand, the courts say they lack the power to insert words into a statute that the legislature did not enact, it is difficult to then reconcile case law indicating the courts will supply language to avoid absurd results and to carry out the legislature's spirit instead of the strict letter of the law. If Washington courts have been troubled by these divergent models of statutory interpretation, they have not articulated such concern in a written opinion.

*The difficulty inherent in the seemingly simple exercise of ascertaining the legislative body's "intent" is striking.* Of course, it is very difficult to discern precisely what 147 legislators and the governor or 535 members of Congress and the President had in mind, if anything, with regard to a piece of legislation. Not all legislators are actively involved in the enactment of a bill; not all legislators necessarily know the contents of a bill on which they voted. <sup>n28</sup>

By its nature, the legislative process expects legislators will develop expertise in certain types of legislation. Legislators serve on committees organized by subject matter and bills are directed to those committees for the critical initial work, including public hearings. <sup>n29</sup> Particular legislators, by virtue of their key leadership positions as committee chairs, will have a greater say in the creation of legislation, as well as its content. <sup>n30</sup> While the language of a statute expresses the collective judgment of the legislature, it is also true that this collective judgment may be the actual product of a single legislator or small group of legislators.

Many commentators contend that it is possible to discern legislative intent from a statute. <sup>n31</sup> They argue that groups are capable of forming intent; in fact, collective intent is common. Examples of where collective intent commonly occurs are within the military, an orchestra, a sports team, and a large corporation.

Philosopher Gilbert Ryle addressed this question decades ago. Ryle used the example of a person who, on visiting Oxford University and being shown the various "colleges, libraries, playing fields, museums, [\*186] scientific departments and administrative offices, ... then asks, 'But where is the University.'" <sup>n32</sup> After discussing two other examples, Ryle writes:

These illustrations of category-mistakes have a common feature, which must be noticed. The mistakes were made by people who do not know how to wield the concepts University, division, and team-spirit. Their puzzles arose from [an] inability to use certain items in the English vocabulary.

The theoretically interesting category-mistakes are those made by people who are perfectly competent to apply concepts, at least in the situations with which they are familiar, but are still liable in their abstract thinking to allocate those concepts to logical types to which they do not belong. <sup>n33</sup>

This same concept has been applied to legislative intent:

To refuse to ascribe a "purpose" to Congress in enacting statutory language simply because one cannot find three or four hundred legislators who have claimed it as a personal purpose[] is rather like (to use Professor Ryle's old example) refusing to believe in the existence of Oxford University because one can only find colleges. <sup>n34</sup>

Legislatures can and do form an intent, which may be objectively discovered. To understand an individual's true intent, it would be necessary to inspect the inner workings of the person's decision-making process, because individual intent is both objective and subjective. Individual intent is formed by internal values and impulses as well as external dynamics. By contrast, a legislature's intent is objective and external. "A legislature is an intrinsically public body and wears its inner thoughts on its sleeve, so to speak." <sup>n35</sup> Analyzing credible documentation of the legislature's process regarding a statute may enable a court to find legislative intent.

The fact that legislators have divergent degrees of input on legislation has lead commentators to conclude it is impossible to discern a single intent from a collective body. <sup>n36</sup> In federal parlance, this analysis has been described as the "Busy Congress Model." <sup>n37</sup> Legislators are [\*187] busy people who lack personal knowledge about most of the bills on which they vote. Just as a corporate board member must rely on colleagues for information and advice about the issues that he or she votes on, so a legislator must rely on trusted colleagues when casting a vote. It is a common and acceptable practice to vote based on the advice of others rather than personal knowledge about the contents of bills. No large institution could function if its decision makers could not rely on the advice of others. Voting based on advice rather than personal knowledge is a common and perfectly appropriate way of managing massive decision making responsibilities. That some legislators lack personal knowledge related to the contents of bills in no way diminishes the potency of the statute's legislative intent.

In response to the views that intent may be discerned from a collective body, or that legislative intent is appropriately gleaned from the working of a busy legislative institution, some commentators not only contend that it is impossible to discover a single intent from a group as diverse as a legislative body, <sup>n38</sup> but also argue that to rely on the institutional processes associated with a legislative body may be demeaning to the democratic process. For example, Justice Antonin Scalia of the United States Supreme Court criticizes the "Busy Congress Model" as degrading the legislative process because it acknowledges that staff and lobbyists create laws with their accompanying legislative history; this diminishes the role of the people elected to make those judgments. According to Scalia, "the legislative power ... is nondelegable. Congress can no more authorize one committee to 'fill in the details' of a particular law in a binding fashion than it can authorize a committee to enact minor laws." <sup>n39</sup> Scalia and others would go farther and dispense [\*188] with the concept of legislative intent entirely, contending that the statutory text is the only real manifestation of legislative intent. This approach has been termed "textualism" and has powerful historical antecedents.

<sup>n40</sup>

The importance of textualism rests in its simplicity. Such an approach rests on the language of the legislation rather than arcane judicial rules of construction or unreliable legislative history materials. The meaning is more accessible and comprehensible to officials and citizens affected by the legislation. The textual approach also tends to constrain judicial tendencies to engage in policymaking by construction. <sup>n41</sup>

The debate on legislative intent has raged in federal circles, but Washington cases reveal little attention to the issue. While numerous Washington cases speak of legislative intent, they are devoid of serious discussion of the definition of the concept; by the very absence of definition to legislative intent, intent is what the courts say it is. This is hardly a satisfying articulation of a key concept in statutory interpretation. [\*189] Apparently, Washington courts *have not been troubled in the least about a definition of legislative intent while the debate about the concept rages elsewhere.*

However, an operating definition of legislative intent is possible. For the judiciary to speak in terms of legislative intent as a monolithic concept may be erroneous, but not fatal to the effort to discern the "intent" of the legislature. The intent of the legislature is the aim or purpose of the enactment as objectively indicated in the language of the statute; the intent may be revealed in the process of a bill's enactment by the legislature. Although the subjective statements of individual legislators may contribute to understanding the legislature's objective intent as expressed in the statute's language, the touchstone for the judiciary's interpretive role must still be, first and foremost, the language of the statute. <sup>n42</sup>

This concept of legislative intent derived from the language of the statute may be flexible. If the legislature is seeking to remedy a very specific problem, its intention may be easy to discover. By contrast, if the problem is of greater magnitude, the legislature may envision a variety of potential ways of achieving the larger legislative goal and may afford the judiciary or the administrative agencies wider discretion in achieving the necessary goal. <sup>n43</sup>

[\*190] In any event, it is still appropriate to speak of the judiciary's obligation, based on separation of powers analysis, to effectuate the Legislature's intent in interpreting an enactment as the touchstone of statutory construction. <sup>n44</sup>

## 2. Ambiguous/Unambiguous Enactments

### a. Plain Meaning Rule

Washington courts have long indicated that they will not construe a plain and unambiguous statute, that is, they will not resort to canons of construction or legislative history to analyze the meaning of a statute. This is often described as the plain meaning rule. <sup>n45</sup>

The concept of judicial reluctance to construe unambiguous legislative enactments runs deep in the Anglo-American legal tradition. Some commentators contend the plain meaning rule may be traced to nineteenth century England. <sup>n46</sup>

Early English cases indicated the courts would attempt to understand the "mischief" Parliament was seeking to suppress and then would construe the statute in the fashion most advantageous to the suppression of the mischief. <sup>n47</sup> Later English cases employed both a literal rule <sup>n48</sup> and a so-called golden rule <sup>n49</sup> in interpreting statutes. In [\*191] the United States, the plain meaning rule was effectively adopted by the United States Supreme Court as early as 1889, <sup>n50</sup> but was not adopted by name until 1929. <sup>n51</sup>

The plain meaning rule has been applied by Washington courts since territorial days, but the courts did not articulate the origin of the rule. <sup>n52</sup> In *Board of Trade v. Hayden*, <sup>n53</sup> Justice Dunbar, who was present at the constitutional convention, implied the plain meaning rule was an essential public policy. <sup>n54</sup> He contended the courts *must give statutes their full effect, even if the result is unjust, arbitrary, or inconvenient.* <sup>n55</sup>

In recent years, Washington courts routinely apply the plain meaning rule to avoid interpretation of clear and unambiguous statutes. <sup>n56</sup>

#### b. Elements of Ambiguity

The flaw in the plain meaning rule is that the Washington decisional law offers little guidance as to what a plain meaning is. A careful reading of Washington State Supreme Court authority indicating a statute is plain or unambiguous reveals precious little guidance as to how the court arrived at such a belief. Even in the face of dissenting views as to the plain and unambiguous meaning of the statute, the court has held to its paradigm. <sup>n57</sup> In truth, in the absence of any clear [\*192] articulation of what distinguishes a plain and unambiguous enactment from a murky, ambiguous statute, <sup>n58</sup> it is clear that the court has imposed a value judgment in choosing a particular interpretation of a statute. Indeed, perhaps the legislative history or interpretative canons would reveal the statute is neither plain nor ambiguous. <sup>n59</sup>

Perhaps it is best to acknowledge this rule for what it is: a device by which the judiciary can impose its normative choice on the Legislature's act. Favored statutes contain plain and unambiguous language and contrary legislative history materials can be ignored; unfavored ambiguous statutes require in-depth judicial construction of the legislature's true intent. <sup>n60</sup>

## II. Tools for Statutory Construction

Once a Washington court determines a statute is ambiguous, it may resort to canons of statutory construction, principles developed in the common law, to give meaning to the legislative action. In fact, the courts assume the legislature is aware of its rules of construction. <sup>n61</sup> [\*193] The court may also resort to legislative history materials, materials generated inside and outside of the legislative process with respect to legislation, to attempt to discern what the legislature meant in enacting a law. Both the canons and legislative history materials have been used in Washington cases. Each is examined in turn.

### A. Canons of Statutory Construction

Like other courts, the Washington judiciary makes reference to canons of judicial construction as if there were a tidy little volume in a judicial bookshelf some place that neatly sets forth all the applicable canons with their precise meaning. Unfortunately, no such exhaustive authoritative compilation of interpretive rules exists. Washington courts are free to invent or subtract canons at whim. The best that one can say about Washington law in this area is that certain canons have been used repeatedly by Washington courts. I attempt to highlight only a few of these many rules here.

Generally, courts seem to have a love-hate relationship with the statutory interpretive canons. <sup>n62</sup> Canons are intended to function as a basis for decision making, theoretically elevating decisions above mere result-oriented analysis because the rulings appear grounded in a historically tested maxim. Most members of the legal community appreciate the notorious and fundamental defects intrinsic to the canons such as their inconsistency and vagueness. <sup>n63</sup>

Despite these deeply rooted defects, courts seem unable to resist relying on them. Washington courts are no exception, and the canons are frequently invoked in Washington cases. While frequently invoked, the precise place of the canons in statutory interpretation is unclear. For example, the cases are not consistent on whether the canons may be invoked at any point in the statutory analysis or only if the statute is ambiguous and requires construction. <sup>n64</sup>

[\*194] One may divide Washington's canons of statutory construction into two broad canons: textual and extrinsic source.

#### 1. Textual Canons

Textual canons are used to divine the meaning of a statute within the statute itself by looking to the words of the

statutory text as well as linguistics, grammar, syntax, and the structure of the text for their strength.

Washington courts have used a variety of linguistic canons including *espressio unius*, which says that the expression of one thing suggests the exclusion of others;<sup>n65</sup> *noscitur a sociis*, which says "the meaning of words may be indicated or controlled by those with which they are associated";<sup>n66</sup> *eiusdem generis*, which provides a specific statute will generally supercede a more general one or a general term must be interpreted to reflect the class of objects reflected in more specific terms accompanying it;<sup>n67</sup> the ordinary usage rule which indicates that "an undefined term should be given its plain and ordinary meaning unless a contrary legislative intent is indicated";<sup>n68</sup> the dictionary definition rule, which says a court should follow a recognized dictionary's definition of terms unless the legislature has provided a specific definition;<sup>n69</sup> [\*195] and the "shall" rule, which indicates that the term "may" is permissive, and does not create a statutory duty,<sup>n70</sup> but the term "shall" usually creates an imperative obligation<sup>n71</sup> unless unconstitutional<sup>n72</sup> or contrary to legislative intent.<sup>n73</sup>

The Washington State Supreme Court has also applied the grammar and syntax canons on several occasions, even to the point of examining the legislature's use of commas and hyphens.<sup>n74</sup>

Finally, the Washington State Supreme Court routinely relies upon certain canons pertaining to the structure of the statutory text when it is doing its textual analysis. These structural maxims provide that each statutory provision should be read by reference to the whole act;<sup>n75</sup> a court must avoid interpreting a provision in a way that would render other provisions of the act superfluous or unnecessary;<sup>n76</sup> a court should interpret the same or similar terms in a statute the same way;<sup>n77</sup> [\*196] a court should read provisos and statutory exceptions narrowly;<sup>n78</sup> a court must not create exceptions in addition to those specified by the Legislature;<sup>n79</sup> and a court may treat silence as acquiescence by the Legislature in judicial interpretations of a statute.<sup>n80</sup>

The textual canons are assumptions about legislative meaning derived from the use of language, grammar, and sentence structure of the statute itself. They are generally useful maxims that hue most closely to the statutory text. It is only when these textual canons rely upon extrinsic sources such as dictionary definitions that their reliability becomes questionable.

## 2. Extrinsic Source Canons

In contrast to the textual canons, the extrinsic source canons look to evidence outside the words of the statute to determine the meaning of a statute, rendering these canons somewhat less reliable than the textually based canons previously discussed. These canons look to information derived from the executive branch agencies, the attorney general, other statutes, the common law, and the constitution to interpret a statute.

Washington courts have frequently relied on administrative agency rules implementing statutory policy and opinions of the attorney general in construing statutes. Administrative agency rulemaking pursuant to the Administrative Procedure Act,<sup>n81</sup> and quasi-judicial administrative decisions<sup>n82</sup> are common sources of interpretation of statutes. Separate quasi-judicial administrative bodies also exist.<sup>n83</sup> Courts often defer to the agency interpretation of a statute unless that interpretation is contrary to the plain meaning of a statute or is unreasonable in the eyes of the court.<sup>n84</sup>

[\*197] The Washington State Attorney General has the authority to give formal opinions upon the law by request of elected officials.<sup>n85</sup> Just as the courts have deferred to agency interpretation of a statute, Washington courts have given some deference to formal attorney general opinions on the interpretation of a statute.<sup>n86</sup>

A second group of extrinsic canons focuses on the relationship of an enactment to the larger body of Washington statutory law and interprets the enactment in a fashion designed to render that statutory law a consistent whole.[su'87'] These canons include the following: the borrowed statute rule, which indicates that where the legislature borrows a statute, it impliedly adopts the statute's judicial interpretations;<sup>n87</sup> the reenactment rule, which says that when the

legislature reenacts a statute, it incorporates settled interpretations of the reenacted statute;<sup>n88</sup> *in pari materia*, which says similar statutes should be interpreted similarly;<sup>n89</sup> the presumption against repeals by implication;<sup>n90</sup> the rule requiring [\*198] interpretation of provisions consistently with subsequent statutory amendments;<sup>n91</sup> the rule of continuity, which assumes that the legislature did not create discontinuities in legal rights and obligations without some clear statement;<sup>n92</sup> and courts presume when the legislature acts, it intends to change existing law.<sup>n93</sup>

A third group of extrinsic source canons addresses the relationship of a statute to the common law and include: a presumption in favor of following common law usage where the legislature has employed words or concepts with well-settled common law traditions;<sup>n94</sup> a presumption that the legislature is aware of prior law including judicial or administrative interpretations of statutes;<sup>n95</sup> and a presumption in favor of prospective application of a statute and its corollary canon, which rejects retroactive application of statutes.<sup>n96</sup>

[\*199] A final group of extrinsic canons addresses the relationship of statutory enactments to overarching constitutional principles. Courts generally interpret a statute so as to avoid constitutional problems.<sup>n97</sup> Courts also interpret statutes to favor judicial review, especially for constitutional questions.<sup>n98</sup> In the criminal context, principles of lenity<sup>n99</sup> may have their roots in constitutional concerns.<sup>n100</sup>

### 3. A Detailed Example of a Canon in Operation

To place these canons of statutory interpretation in appropriate perspective, it is useful to view a canon in application in an actual case. The doctrine of *in pari materia* is a useful example of such a canon in operation.

*In pari materia* is an old canon, which has been used in Washington for at least eighty-seven years.<sup>n101</sup> In fact, it is held in such high regard, the Washington State Supreme Court has called it "a cardinal rule,"<sup>n102</sup> describing it as follows:

In ascertaining legislative purpose, statutes which stand in *in pari materia* are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes. Also, the entire sequence of statutes relating to a given subject matter should [\*200] be considered, since legislative policy changes as economic and sociological conditions change.<sup>n103</sup>

The Court has relied on the canon in numerous instances, even where the provisions were passed in different bills in the same session:

Statutes in *in pari materia* should be harmonized as to give force and effect to each[,] and this rule applies with peculiar force to statutes passed at the same session of the Legislature... . Although the two provisions had been acted on under separate bills, this court found that its obligation to harmonize statutes in *in pari materia* was even greater when the two statutes had been enacted in the same legislative session."<sup>n104</sup>

As with so many canons, *in pari materia* may be manipulated to achieve a particular result.<sup>n105</sup> The rule was applied in different cases involving the same set of facts, for example a sting operation was conducted and the two defendants were arrested for manufacturing 40,000 M-80's and 200 tennis balls filled with flash powder, or tennis ball bombs. The sting operation was undertaken after an eight-year-old both blew his hand off and had sheetrock and ceiling pieces imbedded into his fingers and bones after he found a tennis ball bomb in his brother's closet and lit it in the family's fireplace.<sup>n106</sup>

An issue on review was whether the device was regulated under the Explosives Act or the Fireworks Act. The

Explosives Act specifically does not regulate fireworks,<sup>n107</sup> hence the fireworks that the defendants were manufacturing might have been exempt from the fireworks law.<sup>n108</sup> Thus, the defendants sought to avoid punishment under either act.

The defendants initially pled guilty to violations of the Explosives Act,<sup>n109</sup> but later sought to withdraw their plea, arguing that what [\*201] they had actually manufactured were legal fireworks under section 70.77 of the Washington Revised Code.<sup>n110</sup> The majority found the Explosives Act and the Fireworks Act should be read in *pari materia* because they each "govern the manufacture, purchase, sale, possession, transportation, et cetera, of potentially dangerous explosive devices, [and so] stand in *pari materia* due to the fact that they relate to the same person or thing, or the same class of persons or things."<sup>n111</sup> In so holding, the majority in effect agreed with the lower court's decision to ignore the plain meaning rule, reasoning that it would be "absurd" for the explosives that the defendants manufactured to be unregulated by both the Explosives Act and the Fireworks Act.<sup>n112</sup>

The dissent disagreed with the treating of the Explosives Act and the fireworks law in *pari materia*, arguing that it could not read the statutes in *pari materia* because one statute (the Explosives Act) predated the other (the Fireworks Act).<sup>n113</sup> The dissent asserted that the fireworks and explosives statutes could not be within the same statutory scheme because of the *time difference in their enactment*. *Since the men were charged under the explosives statute, the dissent found the Explosive Act unambiguous, and the search for legislative intent by employing the canon of in *pari materia* was improper, warning that "to broaden the use of in *pari materia* beyond these narrow boundaries - i.e., using it as a vessel to navigate beyond distinct statutory enactments - is to usurp the sought-after legislative intent by judicial construction out of whole cloth."n114*

There is no direct link between the Explosives Act and the Fireworks Act. Consequently, different philosophies of statutory interpretation were used by the majority and dissent. Ultimately, the result in the case may be dictated by the tragedy that befell the child, rather than a clear articulation of the canon.

By plucking out useful canons and utilizing their rhetorical skill, different judges steer the same facts in different directions. This ability to achieve different results by using different canons is both the genius and curse of the canons.

To the uninitiated, or perhaps the cynical, Karl Llewellyn's acute observation that for each canon of statutory interpretation, there is an equal and opposite canon of judicial interpretation bears repetition.<sup>n115</sup> [\*202] Llewellyn was thus prompted to observe that the canons held little meaning:

When it comes to presenting a proposed construction in court, there is an accepted conventional vocabulary. As in argument over points of case-law, the accepted convention still[] unhappily requires discussion as if only one single correct meaning could exist. Hence[,] there are two opposing canons on almost every point. An arranged selection is appended. Every lawyer must be familiar with them all: they are still needed tools of argument. At least as early as Fortescue[,] the general picture was clear, on this, to any eye which would see.

Plainly, to make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the canon: the good sense of the situation and a simple construction of the available language to achieve that sense, by tenable means, out of the statutory language.<sup>n116</sup>

Llewellyn's observation was echoed by Justice Finley in *Schneider v. Forcier*.<sup>n117</sup> Llewellyn's criticism may be apt.

[\*203] If there are often conflicting interpretive canons for virtually every eventuality, the canons offer little practical guidance to the courts in their interpretive role. No single interpretive canon appears to have greater moment

than another. This leaves the judiciary extremely wide latitude to substitute its own normative values for those of the legislature, the ostensible authors of the legislation. As noted earlier, the canons are not analytically precise in number, scope, or usage. The Washington State Supreme Court should decide with greater precision when the canons should be used in statutory construction, what canons should be employed, and the relative authoritative value of the canons in the judiciary's function of statutory analysis.

#### B. Legislative History

The ultimate extrinsic canon of statutory interpretation is found in the materials of the legislative process itself. When *the language of the statute is ambiguous or the standard rules of interpretation are not helpful*, Washington case law has recognized a variety of possible sources to discover the intent of the legislature in enacting a statute.<sup>n118</sup> However, the courts have not been entirely consistent in their treatment of these sources.

Of greatest utility are legislative findings in a preamble section of a bill as the findings represent an affirmative statement of legislative intent enacted by the legislature.<sup>n119</sup> Similarly, official section-by-section comments adopted by the legislature as part of the journal of one or both houses also retain a sense of official imprimatur to a particular interpretation of an enactment.<sup>n120</sup> Plainly, these contemporaneous, collective expressions of legislative purpose are more significant than the individual, non-contemporaneous thoughts of legislators and others. After all, when divining legislative intent, the courts are looking to the collective decision of 147 legislators in a particular legislative session. The thoughts of a legislator or lobbyist expressed long after that session may have been affected by bias or the sheer passage of time.

**[\*204]** Courts have also looked to official documents of the legislature such as bill reports, which are the product of the legislative staff, as authoritative sources of legislative intent.<sup>n121</sup> Similarly, an official document used by the legislature in its deliberations such as a fiscal note, detailing the financial implications of a bill may be used to determine legislative intent,<sup>n122</sup> but some caution here may be in order as fiscal notes are ordinarily prepared by the executive or judicial branch agency charged with administration of the proposed law,<sup>n123</sup> and the note may reflect agency bias with regard to the bill.<sup>n124</sup>

Transactional materials, those materials generated in the course of the enactment of the legislation, may also serve as a basis for understanding the legislature's work. Various drafts of a proposed bill can be very revealing as to the legislature's intent with regard to the final statutory language.<sup>n125</sup> The court may look to model or uniform acts as sources where the legislature enacts such legislation.<sup>n126</sup> Committee work, including statements of legislators during committee sessions; both oral and written testimony of witnesses before the relevant legislative committees; contemporaneous letters of legislators; and staff memoranda on the legislation can be of assistance in learning legislative [\*205] intent.<sup>n127</sup> Materials pertaining to activities on the floor of each house of the legislature are also significant interpretive tools. Washington courts have used legislative debates in construing statutes,<sup>n128</sup> but have been more reluctant to use the colloquy of legislators reported in legislative journals<sup>n129</sup> as these colloquies are often staged for the benefit of the courts.<sup>n130</sup>

It is difficult to reconcile the disparate judicial treatment of floor colloquies in the case law. In Johnson,<sup>n131</sup> the Washington State Supreme Court found value in the exchange between the former chair of the Senate Select Committee on Product Liability and Tort Reform and the vice-chair of the Senate Judiciary Committee on an issue involving the 1981 Product Liability and Tort Reform Act.<sup>n132</sup> However, in North Coast Air Services,<sup>n133</sup> the court declined to give pay significant heed to the exchange of two key members of that same select committee on the interpretation of that same 1981 legislation even though the exchange related to the precise issue before the court and indicated a clear legislative intent to overrule the court's decision in Ohler.<sup>n134</sup>

**[\*206]** An additional source of legislative intent is found in the action of the governor. A gubernatorial veto is deemed part of the legislative process.<sup>n135</sup> Thus, veto messages of the governor are significant sources of legislative intent.<sup>n136</sup>

The least significant legislative construction tools are those materials created after the enactment of the legislation. Generally, the courts have not valued declarations of legislative intent offered by legislators<sup>n137</sup> or lobbyists;<sup>n138</sup> however, law review articles prepared by legislators commenting on legislation have been used to construe statutes.<sup>n139</sup>

In this discussion of interpretive sources for legislative intent, the author has intentionally grouped the materials in descending order of persuasive force. For example, legislative materials expressing an official, contemporaneous, and collective intention, such as the preamble to a bill, have greater persuasive force than a lobbyist's declaration submitted years after the bill's enactment. But it is important to note that no statute or case law gives official sanction to such an ordering of the persuasive power of legislative source materials.

In his excellent article on legislative history in Washington, former Representative Art Wang argued for greater legislative attention to its materials designed to describe the legislature's intention in enacting a bill. Specifically, Wang suggested the creation of a joint select legislative committee to study the issue of legislative history. This committee would examine such diverse suggestions as publication of bill reports and fiscal notes in the legislative journal, create conference committee reports, and provide for a legislatively controlled repository [\*207] for legislative history materials.<sup>n140</sup> Wang did not describe how the courts should approach the interpretation of legislation. Although the joint select committee was never appointed, Wang's suggestions remain valuable recommendations of a thoughtful legislator.

While Washington courts have resorted to legislative history materials when in doubt about a statute's meaning, this approach has generally not been criticized. In contrast, interpretation of federal statutes by the United States Supreme Court has spawned a firestorm of controversy on the Court itself and by legal scholars.

Justice Antonin Scalia has been the foremost Court proponent of a new statutory interpretation style that eschews any reliance on legislative history. Justice Scalia's most succinct articulation of this view is found in *Green v. Bock Laundry Machine Co.*:

The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which [sic] voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated - a compatibility which [sic], by a benign fiction, we assume Congress always has in mind. I would not permit any of the historical and legislative material discussed by the Court, or all of it combined, to lead me to a result different from the one that these factors suggest.<sup>n141</sup>

Scalia's approach, often termed "formalism" or "new textualism,"<sup>n142</sup> is allegedly more democratic, relying on the proper role of legislative bodies in a democratic system.

In contrast, many commentators argue in response to Scalia for a more normative-based statutory interpretive model with the judiciary enjoying the power to ignore legislative history materials in favor of selecting certain key interpretive canons to make the best policy decision.<sup>n143</sup>

The apparent flaw in all of the interpretive approaches, however, is the omission of the legislative branch, the very body whose intent the judiciary is in theory executing. The legislative branch certainly [\*208] has a stake in how its views are interpreted. This stake is nowhere discussed in most statutory interpretation theories.

The legislature has not taken steps to better ensure that the courts truly execute its purpose in adopting legislation. Recognizing statutory interpretation as a key feature of separation of powers, it is crucial that the legislature address both the legislative history materials it generates and the interpretation of its enactments by the courts. Similarly, it is

important for the court to treat the interpretation of statutes in a more coherent and realistic fashion. Toward these goals, a new paradigm for statutory interpretation in Washington is appropriate and possible.

### III. A New Paradigm for Statutory Interpretation in Washington

The responsibility for developing a better system for interpreting statutes is jointly that of the legislature and the courts, each within their respective constitutional spheres. Although the courts may be the final authority on the interpretation of a statute, <sup>n144</sup> the legislature can prescribe what its objectives were in passing a law, indicate how a particular statute is to be treated by the courts, and express what materials regarding the legislative history of an enactment are authoritative. In turn, the courts can adopt more coherent, and less result-driven, principles of statutory interpretation, adhering more directly to the textual language employed by the legislature.

#### A. Legislature

The legislature should address statutory interpretation in several significant ways: by modifying how it drafts legislation, by amending section 1.12 of the Washington Revised Code to establish specific principles for guiding courts in their interpretation of the legislature's intent, and by carefully analyzing court decisions interpreting statutes to ensure that the judicial interpretation comports with the legislature's aims.

With respect to the first issue, the legislature, including members, legislative staff, and code reviser staff, can do more to advise the courts as to the reasons for a bill's enactment and the legislature's intent with regard to the bill. While not necessary for routine legislation, for significant legislative acts, the legislature should employ a preamble with findings as to the problems that the legislature hopes to address and the solutions intended. The legislature should consider [\*209] incorporation of an official section-by-section analysis of the bill in the final bill report on a bill. <sup>n145</sup> Finally, the bill should contain a section with specific directions - such as liberal or strict construction - for specific sections of the legislation.

Apart from legislative direction as to specific legislation, the legislature should amend section 1.12 to provide general guidance to the courts in interpreting a statute. At a minimum, the legislature should indicate to the courts the hierarchy of interpretive tools beginning with the official bill reports. The legislature may even choose to direct the courts to disregard certain interpretive tools; for example, the non-contemporaneous testimony of legislators, lobbyists, and others may be rendered inadmissible on legislative intent. The decision about which of its own materials - bill reports, fiscal notes, committee materials and testimony, floor debates, or post-enactment declarations - reveals the actual collective intention of the legislature in enacting a bill is peculiarly within the purview of the legislature itself. <sup>n146</sup>

Finally, the most significant power of the legislature to ensure that judicial interpretations of its enactments are consistent with the legislature's intent is its amendatory power. If the legislature disagrees with a judicial decision interpreting a statute, it should immediately amend the statute to make the interpretation consistent with its views. <sup>n147</sup> Indeed, the failure of the legislature to amend a statute in the face of a judicial interpretation has been viewed by the courts as acquiescence in the judicial construction of the statute. <sup>n148</sup>

#### B. The Judiciary

The decisional law of Washington's judiciary on statutory interpretation suffers from the lack of coherent and consistent principles. The standard treatment of statutes - evaluate the statute to determine if it is ambiguous and construe it using a variety of interpretive canons [\*210] if ambiguous - is highly artificial. No real rigorous principles guide the differentiation of plain from ambiguous statutes.

The better approach to judicial interpretation of statutes is to adhere to a standard previously expressed in Washington case law and elsewhere. The courts should simply deduce the legislature's collective intent from what the

legislature said in the text of the statute, using any other official expressions of intent the legislature sets forth in the bill itself or in section 1.12 of the Washington Revised Code generally for all statutes.

To a degree, this approach to statutory interpretation means the courts should undertake to construe a statute, regardless of whether the courts believe the statute is plain or ambiguous. Instead, the courts should endeavor to ascertain the legislature's intent from the statutory language or any other official interpretive guides sanctioned by the legislature itself. The courts may employ the traditional judicial canons of statutory interpretation in such an analysis, but the courts should articulate which canons have primacy in the interpretation of statutes.

Finally, the judiciary may wish to consider a new doctrine of abstention in statutory construction. If a court's interpretation of a statute requires it to adopt one of two or more legitimate and competing policy viewpoints, the better course for the court may be to abstain from deciding the case and allow the legislature to resolve the controversy. For example, in *National Electrical Contractors Ass'n v. Riveland*,<sup>n149</sup> various contractors and unions challenged the use of inmate labor on prison facilities when such inmate laborers were not licensed electricians and the Department of Corrections did not specifically comply with workplace safety laws. In response, the legislature not only enacted section 19.28 of the Washington Revised Code pertaining to licensure of electricians and section 42.17 relating to workplace safety, but also enacted section 72.10.110, encouraging use of inmate labor on correctional facilities, and section 72.09.100, which directed the Department of Corrections to operate a comprehensive inmate work program and to "remove statutory and other restrictions which have limited work programs in the past."<sup>n150</sup> The majority of the Washington State Supreme Court held that the licensure and workplace safety laws applied. The dissent disagreed, asserting the case was not justiciable in light of the diametrically competing policies; the [\*211] dissent contended that the legislature should properly resolve such issues.<sup>n151</sup>

#### IV. Conclusion

Washington courts have uncritically employed an artificial paradigm for statutory construction. Despite ferment in the federal courts and scholarly journals on the proper role of the judiciary in interpreting statutes, Washington courts have not assessed whether its existing paradigm adequately implements legislative intent, the theoretical touchstone for the courts. Moreover, the courts' application of the paradigm is inconsistent and episodic. Hence, it is difficult to determine what rules actually apply at what time.

Moreover, the legislature, despite grumbling about courts' misconstruction of its enactments, has done little to give courts guidance with respect to the interpretation of particular enactments or statutes generally.

Both the legislative and judicial branches of government need to critically assess issues relating to statutory construction, each within its respective sphere. Each branch can do far more to improve its treatment of laws enacted by the first branch of our government.

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
 GovernmentsCourtsRule Application & InterpretationGovernmentsLegislationExpirations, Repeals &  
 SuspensionsGovernmentsLegislationInterpretation

#### FOOTNOTES:

n1. Used in this context, I mean political compromise over the purpose or sections of the enactment. Some commentators, none of whom have been legislators, imply that legislative bodies intentionally make statutory language vague to achieve a political compromise. See, e.g.,

EXHIBIT No. 13

13. Resulting list of Law Review articles from a Lexis-Nexus Search for "Legislative Intent" which returned the titles of over 3,000 articles. The first 50 titles of that list are attached in the Appendix as **Exhibit 13**. This shows that Legislative Intent is a very active field of Constitutional Law, which would profit from decisions and guidance from the Ohio Supreme Court

LEXIS-NEXIS SEARCH ON "LEGISLATIVE INTENT"

- RESULTS RETURNED 3000+ TITLES. THESE ARE THE FIRST 50.
1. Copyright (c) 1983 University of Miami Law Review University of Miami, May, 1983 - September, 1983, 37 U. Miami L. Rev. 493, 31583 words, ARTICLE: Legislation in Legal Imagination: Introductory Exercises, PATRICK O. GUDRIDGE \*
  2. Copyright (c) 1991 University of Wisconsin Law School Wisconsin Law Review, May, 1991 / June, 1991, 1991 Wis. L. Rev. 491, 24083 words, COMMENT: WISCONSIN'S RECREATIONAL USE STATUTE: TOWARDS SHARPENING THE PICTURE AT THE EDGES., STUART J. FORD
  3. Copyright (c) 2006 University of Wisconsin Law School Wisconsin Law Review, 2006, 2006 Wis. L. Rev. 843, 24636 words, ARTICLE: BAD LEGISLATIVE INTENT, Richard L. Hasen\*
  4. Copyright (c) 1993 American Association of Law Libraries Law Library Journal, SUMMER, 1993, 85 Law Libr. J. 545, 11772 words, GENERAL ARTICLE: STATE LEGISLATIVE HISTORIES: A SELECT, ANNOTATED BIBLIOGRAPHY \*, Jose R. Torres \*\* and Steve Windsor \*\*\*
  5. Copyright © 1985 Florida State University Law Review. Florida State University Law Review, FALL, 1985, 13 Fla. St. U.L. Rev. 485, 13389 words, REVIEW OF FLORIDA LEGISLATION; ARTICLE: THE SEARCH FOR INTENT: AIDS TO STATUTORY CONSTRUCTION IN FLORIDA -- AN UPDATE, Robert M. Rhodes \* and Susan Seereiter \*\*
  6. Copyright (c) 2006 University of Colorado Law Review, Inc. University of Colorado Law Review, Summer, 2006, 77 U. Colo. L. Rev. 595, 23835 words, ARTICLE: DOUBLE JEOPARDY AND MULTIPLE PUNISHMENT: CUTTING THE GORDIAN KNOT\*, Anne Bowen Poulin \*\*
  7. Copyright (c) 2003 Utah Law Review Society Utah Law Review, 2003, 2003 Utah L. Rev. 1019, 12813 words, COMMENT & NOTE: Gallivan v. Walker: An Example of Statutory Surgery and Severability Malpractice, Timothy K. Conde
  8. Copyright (c) 1990 University of Wisconsin Law School Wisconsin Law Review, March, 1990/April, 1990, 1990 Wis. L. Rev. 553, 14867 words, NOTE: MULTIPLE PUNISHMENT IN WISCONSIN AND THE WOLSKE DECISION: IS IT DESIRABLE TO PERMIT TWO HOMICIDE CONVICTIONS FOR CAUSING A SINGLE DEATH?, CRAIG ALBEE
  9. Copyright (c) 1997 The Regents of the University of California U.C. Davis Law Review, Winter, 1997, 30 U.C. Davis L. Rev. 569, 20324 words, U.S. DAVIS LAW REVIEW: COMMENT: Say What You Mean and Mean What You Say: The Resurrection of Plain Meaning in California Courts, Russell Holder
  10. Copyright (c) 1997 Drake University Drake Law Review, 1997, 46 Drake L. Rev. 299, 35420 words, ARTICLE: STATUTORY REASONING, M.B.W. Sinclair \*
  11. Copyright (c) 2005 University of Maryland School of Law Maryland Law Review, 2005, 64 Md. L. Rev. 1239, 17470 words, THE MARYLAND SURVEY: 2003-2004: Recent Decision, Amir R. Zaidi
  12. Copyright (c) 2006 The Trustees of The University of Pennsylvania University of Pennsylvania Law Review, April, 2006, 154 U. Pa. L. Rev. 983, 20758 words, COMMENT: FOR ALL INTENTS AND PURPOSES: WHAT COLLECTIVE INTENTION TELLS US ABOUT CONGRESS AND STATUTORY INTERPRETATION, Abby Wright +
  13. Copyright (c) 2005 New York University Law Review New York University Law Review, June, 2005, 80 N.Y.U.L. Rev. 1050, 13268 words, NOTE: STATUTORY INTERPRETATION IN A CHOICE OF LAW CONTEXT, Lindsay Traylor Braunig\*
  14. Copyright (c) 2005 Loyola of Los Angeles Law Review Loyola of Los Angeles Law Review, December, 2005, 38 Loy. L.A. L. Rev. 2131, 6007 words, SYMPOSIUM: THEORIES OF STATUTORY INTERPRETATION: STATUTORY INTERPRETATION AND THE INTENTIONAL(IST) STANCE, Cheryl Boudreau, Mathew D. McCubbins, and Daniel B. Rodriguez\* n1
  15. Copyright (c) 1983 University of California, Hastings College of Law Hastings Law Journal, MAY, 1983 / JULY, 1983, 34 Hastings L.J. 969, 20075 words, PUBLIC INTEREST LAW: A SYMPOSIUM; ARTICLE: Implying Rights of Action For Minorities and the Poor

Through Presumptions of Legislative Intent., By STEPHEN E. RONFELDT \*

- 16. Copyright (c) 2007 University of Notre Dame Notre Dame Law Review, June, 2007, 82 Notre Dame L. Rev. 12812 words, ESSAY: THE SIGNIFICANCE OF STATUTORY INTERPRETIVE METHODOLOGIES, Frank B. Cross\*
- 17. Copyright (c) 2005 University of San Francisco School of Law University of San Francisco of Law Review, Summer, 2005, 39 U.S.F. L. Rev. 1045, 14205 words, Comment: Imaginary Intent: The California Supreme Court's Search for a Specific Legislative Intent That Does Not Exist, By Jason M. Horst \*
- 18. Copyright (c) 2007 Idaho Law Review Idaho Law Review, 2007, 43 Idaho L. Rev. 585, 6377 words, ARTICLE: USE OF LEGISLATIVE HISTORY: WILLOW WITCHING FOR LEGISLATIVE INTENT, Bart M. Davis,\* Kate Kelly,\*\* and Kristin Ford\*\*\*
- 19. Copyright (c) 2005 University of San Diego School of Law The Journal of Contemporary Legal Issues, 2005, 14 J. Contemp. Legal Issues 585, 12827 words, NEW PERSPECTIVES ON STATUTORY INTERPRETATION: Lost in Translation: Social Choice Theory is Misapplied Against Legislative Intent, ARTHUR LUPIA \*, MATHEW D. MCCUBBINS \*\*
- 20. Copyright (c) 2000 Board of Trustees of Southern Illinois University Southern Illinois University Law Journal, Fall, 2000, 25 S. Ill. U. L. J. 95, 22340 words, ARTICLE: Armstead and its Progeny: the Illinois Supreme Court's "Vested Rights" Approach to the Application of Statutory Amendments to Pre-existing Cases or Causes of Action , Robert C. Feldmeier\*
- 21. Copyright (c) 1997 New York Law School Law Review New York Law School Law Review, 1997, 41 N.Y.L. Sch. L. Rev. 1329, 28062 words, REVIEW ESSAY: LEGISLATIVE INTENT: FACT OR FABRICATION?, M. B. W. Sinclair \*
- 22. Copyright (c) The Columbia Law Review 2000. Columbia Law Review, March, 2000, 100 Colum. L. Rev. 558, 11963 words, BOOK REVIEW ESSAYS: THE CIRCUMSTANCES OF POLITICS AND THE APPLICATION OF STATUTES, William N. Eskridge, Jr.\*
- 23. Copyright (c) 1998 The Board of Trustees of Leland Stanford Junior University Stanford Law Review, July, 1998, 50 Stan. L. Rev. 1833, 26584 words, ARTICLE: Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church, Adrian Vermeule \*
- 24. Copyright (c) 1994 The University of Baltimore Law Review University of Baltimore Law Review, Fall, 1994, 24 U. Balt. L. Rev. 251, 11418 words, NOTE: THE UNCERTAIN STATUS OF THE REQUIRED-EVIDENCE TEST IN RESOLVING MULTIPLE-PUNISHMENT QUESTIONS IN MARYLAND. Eldridge v. State, 329 Md. 307, 619 A.2d 531 (1993), Robert A. Scott
- 25. Copyright (c) 2006 Washburn Law Journal Washburn Law Journal, Fall, 2006, 46 Washburn L.J. 189, 19680 words, Note: Avoiding Judicial In-Activism: The Use of Legislative History to Determine Legislative Intent in Statutory Interpretation, Matthew B. Todd\*

Search Terms [(LEGISLATIVE INTENT)](1000) [View search details](#)

Source  [US Law Reviews and Journals, Combined]

Show List

Sort Relevance

Date/Time September 19 2008 09:11:43

  1 2 3 4 5 6 7 8 9 10  

[Back to Top](#)



[About LexisNexis](#) | [Terms & Conditions](#) | [My ID](#)

Copyright © 2008 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

- Results
- 26. Copyright (c) 2005 Georgetown Law Journal Georgetown Law Journal, January, 2005, 93 Geo. L.J. 427, 33484 words, ARTICLE: Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation, LAWRENCE M. SOLAN \*
- 27. Copyright (c) 1997 University of Chicago University of Chicago Law Review, Summer, 1997, 64 U. Chi. L. Rev. 903, 9775 words, COMMENT: Inseverability Clauses in Statutes, Israel E. Friedman \*
- 28. Copyright (c) 2001 Seattle University Law Review Seattle University Law Review, Summer, 2001, 25 Seattle Univ. L. R. 179, 13555 words, ARTICLE: A New Approach to Statutory Interpretation in Washington, Philip A. Talmadge\*
- 29. Copyright (c) 1997 University of Oregon Oregon Law Review, Spring, 1997, 76 Or. L. Rev. 47, 25032 words, ARTICLE: The Intended Meaning of "Legislative Intent" and Its Implications for Statutory Construction in Oregon, JACK L. LANDAU \*
- 30. Copyright (c) 2006 Vanderbilt University Vanderbilt Law Review, October, 2006, 59 Vand. L. Rev. 1501, 26772 words, ARTICLE: State Courts and the Interpretation of Federal Statutes, Anthony J. Bellia Jr.\*
- 31. Copyright (c) 2006 National Association of Administrative Law Judiciary Journal of the National Association of Administrative Law Judiciary, Fall, 2006, 26 J. Nat'l Ass'n L. Jud. 597, 18101 words, ARTICLE: Turning Back the Clock -- The California Supreme Court's Decision in *McClung v. Employment Development Department* and the Difficulty of Determining Legislative Intent in Retroactive Rulemaking, By Jeffrey R. Groendal \*
- 32. Copyright © 1988 Virginia Law Review Association. Virginia Law Review, MARCH, 1988, 74 Va. L. Rev. 423, 17165 words, SYMPOSIUM ON THE THEORY OF PUBLIC CHOICE: LEGISLATIVE INTENT AND PUBLIC CHOICE., Daniel A. Farber \* and Philip P. Frickey \*\*
- 33. Copyright (c) 1987 The University of Pittsburgh Law Review University of Pittsburgh Law Review, SPRING, 1987, 48 U. Pitt. L. Rev. 639, 10646 words, SPECIAL ISSUE ON LEGISLATION: STATUTORY AND CONSTITUTIONAL INTERPRETATION: LEGISLATIVE PROCESS AND ITS JUDICIAL RENDERINGS: A STUDY IN CONTRAST. +, Eric Lane \*
- 34. Copyright (c) 2007 Texas Review of Law & Politics Texas Review of Law & Politics, Spring, 2007, 11 Tex. Rev. Law & Pol. 479, 7234 words, NOTE: UNOFFICIAL OFFICIAL COMMENTS, Nigel Stark\*
- 35. Copyright (c) 2006 Florida International University, School of Law FIU Law Review, Spring, 2006, 1 FIU L. Rev. 239, 29392 words, COMMENT: Implying Against Intent: A New Test for Congressional Intent Under *Cort v. Ash*, Michael Hirschowitz+
- 36. Copyright (c) 1996 Texas Wesleyan Law Review Texas Wesleyan Law Review, Spring, 1996, 2 Tex. Wesleyan L. Rev. 593, 17407 words, NOTE AND COMMENT: DE FACTO MERGER IN TEXAS: REPORTS OF ITS DEATH HAVE BEEN GREATLY EXAGGERATED, Frank William McIntyre
- 37. Copyright (c) 2008 The George Washington Law Review The George Washington Law Review, April, 2008, 76 Geo. Wash. L. Rev. 639, 26001 words, Article: Severability as Judicial Lawmaking, David H. Gans\*
- 38. Copyright (c) 1992 The Board of Trustees of Leland Stanford Junior University Stanford Law Review, January, 1992, 44 Stan. L. Rev. 383, 26098 words, ARTICLE: Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law., W. David Slawson \*
- 39. Copyright (c) 1994 College of William & Mary William & Mary Law Review, SPRING, 1994, 35 Wm and Mary L. Rev. 1177, 27816 words, NOTE: THE CIVIL RIGHTS ACT OF 1991: A CONTINUATION OF THE WARDS COVE STANDARD OF BUSINESS NECESSITY?, PHILIP S. RUNKEL
- 40. Copyright (c) 2003 Brigham Young University BYU Journal of Public Law, 2003, 17 BYU J. Pub. L. 367, 12594 words, NOTES AND COMMENTS: Utah at the Crossroads: The Role of the Judiciary in Initiative and Severability Law after *Gallivan v. Walker*, Jaysen Oldroyd

- 41. Copyright (c) 2008 Wayne State University The Journal of Law in Society, Winter, 2008, 9 J.L. Soc'y 211, 14059 words, ARTICLE: CONSPIRACY! SECTION 1985(3) POLITICAL-PATRONAGE DISCRIMINATION AND THE QUEST FOR PURPOSE, BENJAMIN LIN \*
- 42. Copyright (c) 2007 Louisiana Law Review Louisiana Law Review, Winter, 2007, 67 La. L. Rev. 599, 13735 words, COMMENT: A Wolf in Sheep's Clothing: Dressing-Up Substantive Legislation to Trigger the Interpretive Exception to Retroactivity Violates Constitutional Principles , Rebecca Barrett Hall\*
- 43. Copyright (c) 1994 Idaho Law Review Idaho Law Review, 1994, 30 Idaho L. Rev. 369, 6449 words, LEGISLATIVE REVIEW OF ADMINISTRATIVE RULES UNDER THE IDAHO ADMINISTRATIVE PROCEDURE ACT, Florence A. Heffron \*
- 44. Copyright (c) 2002 New Mexico Law Review New Mexico Law Review, Spring, 2002, 32 N.M.L. Rev. 313, 12033 words, NOTE: CRIMINAL LAW: Applying the General/Specific Statute Rule in New Mexico-State v. Santillanes , QUENTIN SMITH \*
- 45. Copyright (c) 1995 California Law Review California Law Review, July, 1995, 83 Calif. L. Rev. 1027, 24588 words, ARTICLE: A Blameworthy Act Approach to the Double Jeopardy Same Offense Problem, George C. Thomas III \*
- 46. Copyright (c) 1996 Cumberland Law Review Cumberland Law Review, 1996, 26 Cumb. L. Rev. 459, 23618 words, ARTICLE: STATUTORY DECONSTRUCTION: AN EXAMINATION OF CRITICAL LEGAL STUDIES IN CONTEXT, GREGORY G. SCHULTZ \*
- 47. Copyright (c) 1998 California Law Review California Law Review, July, 1998, 86 Calif. L. Rev. 919, 10724 words, BOOK REVIEW: The Unintentional Fallacy A Matter of Interpretation. By Antonin Scalia. \* Princeton: Princeton University Press, 1997. Pp. xii, 159. \$ 19.95 cloth., Reviewed by David Sosa \*\*
- 48. Military Law Review, Fall, 1991, 134 Mil. L. Rev. 45, 17527 words, ARTICLE: MULTIPLICITY IN THE MILITARY., MAJOR THOMAS HERRINGTON \*
- 49. Copyright © 1984 The Harvard Law Review Association. Harvard Law Review, MARCH, 1984, 97 Harv. L. Rev. 1182, 7330 words, NOTE: SEVERABILITY OF LEGISLATIVE VETO PROVISIONS: A POLICY ANALYSIS
- 50. Copyright (c) 1998 The School of Law Texas Tech University Texas Tech Law Review, 1998, 29 Tex. Tech L. Rev. 97, 19204 words, ARTICLE: "NEIGHBORS BEWARE": THE CONSTITUTIONALITY OF STATE SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION LAWS, by Stephen R. McAllister \*

Search Terms [(LEGISLATIVE INTENT)](1000) [View search details](#)

Source  [US Law Reviews and Journals, Combined]

Show [List](#)

Sort [Relevance](#)

Date/Time September 19 2008 09:13:06

  1 2 3 4 5 6 7 8 9 10 11  

[Back to Top](#)



[About LexisNexis](#) | [Terms & Conditions](#) | [My ID](#)

Copyright © 2008 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

EXHIBIT No. 14

**14.** The timeline of Washington State Rules of Appellate Procedure is attached in the Appendix as **Exhibit 14.**

# WASHINGTON STATE APPELLATE COURT OFFICIAL GUIDELINE & TIMELINE

## MOTIONS THAT MAY BE FILED

1. Motion to allow late notice of appeal/discretionary review
2. Motion to consolidate
3. Motion to determine appealability  
(a) guilty plea/standard range sentence  
(b) no final order  
(c) CR 64 (no findings of no just reason for delay)
4. Motion for abandonment for failure to pay filing fee or order of indigency
5. Motion for abandonment for no service
6. Motion to dismiss or withdraw appeal
7. Motion for extension
8. Motion to waive sanction
9. Notice to substitute counsel or party
10. Motion to accelerate review (general)
11. Motion to stay (trial court/court of appeals)
12. Motion to allow out-of-state counsel to appear on appeal
13. Motion to take additional evidence (RAP 9.11)
14. Motion to review bail/supersedeas decision
15. Motion to stay
16. Clerk's motion for sanctions and ruling

1. Motion to strike brief
2. Motion to amend brief
3. Motion to supplement (RP)
4. Invoice from counsel
5. motion for accelerated review - Juvenile/adult (sentencing)
6. Motion on the merits to affirm
7. Motion on the merits to reverse
8. Motion to withdraw (RAP 19.3(a)(2), (3), & (4))
9. Motion to continue argument

1. Motion for attorney's fees
2. Motion to modify
3. Motion to reconsider
4. Motion to recall mandate

**NOT. OF DISCRETIONARY REVIEW**  
Filing Fee/Order of Ind. Affidavit of Service

15 Days  
RAP 6.2(b)

**Motion for Discretionary Review**

If Denied

**Cert. Of Finality**

**NOTICE OF APPEAL**  
Filing Fee/Order of Ind. Affidavit of Service

Perfection Notice

30 Days  
RAP 9.8(e)

30 Days  
RAP 9.2(e)

**DESIGNATION OF CLERK'S PAPERS**

**STATEMENT OF ARRANGEMENTS**

If Granted

**VERBATIM RPT (VP)  
NARRATIVE RPT (NRP)  
AGREED RPT (ARP)**

80 Days  
RAP 9.5(e)

If VRP No VRP

RAP 9.2(a)

**CIVIL CASES**

**CRIMINAL CASES**

45 Days  
RAP 10.2(a)

45 days  
RAP 10.2(a)

**App's Opening Brief Affidavit of Service**

**Motion to Withdraw**

30 Days  
RAP 10.1(d)

30 Days  
RAP 10.2(b)

**App's Opening Brief Affidavit of Service**

**Notice & RP Sent to Defendant**

**Respondent's Brief Affidavit of Service**

80 Days  
RAP 10.2(c)

If Yes If N

30 Days  
RAP 10.2(d)

**Respondent's Brief Affidavit of Service**

**Statement of Additional Grounds**

**App's Reply Brief Affidavit of Service**

30 Days  
RAP 10.2(D)

30 Days

**App's Reply Brief Affidavit of Service**

**Resp's Reply Brief (if directed) Affidavit of Service**

**Oral Argument Additional Authorities**

**OPINION/RULING**

20 Days  
RAP 12.4(b)

**Motion to Reconsider**

30 Days  
RAP 13.4(a)

**Petition for Review (PRV)**

30 Days  
RAP 13.4(e)

30 Days  
RAP 12.5(b)(1)

**MANDATE**

10 Days  
RAP 14.4(a)

**Cost Bill**

30 Days  
RAP 12.5(b)(2)

113

EXHIBIT 15

15. Common Pleas Court Case 07EP-05-229, Decision and Entry Granting Defendant's Application to Seal Record of Conviction, Filed May 7, 2007, is attached in the Appendix as **Exhibit 15**.

FILED  
COMMON PLEAS COURT  
IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO  
CRIMINAL DIVISION

2007 SEP 28 AM 9:29

STATE OF OHIO,

CLERK OF COURTS  
Plaintiff/Respondent,

v.

GUY L. METTLE,

Defendant/Applicant.

Case No. 07EP-05-229  
Case No. 96CR-05-2848)

Judge Schneider

**DECISION AND ENTRY GRANTING DEFENDANT'S APPLICATION TO SEAL  
RECORD OF CONVICTION, FILED MAY 7, 2007**

Rendered this 26 day of September, 2007.

Schneider, J.

On May 7, 2007, defendant filed his motion for expungement of the record of conviction in case no. 96CR-05-2848 under O.R.C. 2953.32. The State opposes defendant's motion.

O.R.C. 2953.36(D) bars expungement of any felony conviction in which the victim was under eighteen years of age.

In case no. 96CR-05-2848, defendant was convicted of non-support of dependants, a fourth-degree felony. The State argues that the victim is the child and so applicant's record is not eligible for expungement.

However, the Court does not believe that the Legislature intended non-support cases to be included among the cases excluded from the possibility of expungement under O.R.C. 2953.36(D). After consideration of the merits of defendant's motion, the

**Court finds that expungement is warranted.**

Therefore, defendant's motion is GRANTED.



---

**CHARLES A. SCHNEIDER, JUDGE**

Copies to:

Kimberly M. Bond, Esq.  
373 S. High Street, 14<sup>th</sup> Floor  
Columbus, Ohio 43215  
Assistant Prosecuting Attorney

Guy L. Mettle  
2715 Collinsford Drive #K  
Dublin, Ohio 43016  
Defendant Pro Se

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO  
CRIMINAL DIVISION

FILED  
COMMON PLEAS COURT  
FRANKLIN CO. OHIO  
2007 OCT -2 PM 1:55  
CLERK OF COURTS

IN THE MATTER OF:  
**Guy L Mettle**

SEALING CASE NUMBER:  
**07EXP-05-229**

**ENTRY**

In accordance with section 2953.32, Ohio Revised Code, The Court finds the applicant **Guy L Mettle**, is a first offender, that there are no criminal proceedings pending against him/her, that his/her rehabilitation has been attained and that the sealing of the record of his conviction in case number 96CR-05-2848 is consistent with the public interest.

It is, **THEREFORE ORDERED** that all official records pertaining to the applicant conviction in case number 96CR-05-2848, be sealed and all index references deleted.

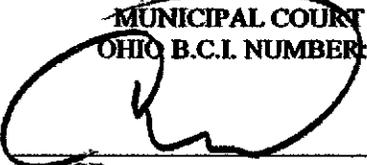
It is **FURTHER ORDERED** that no officer or employee of the State, or any political subdivision thereof, except as authorized by Division (D) and (E) of Section 2953.32 of the Ohio Revised Code, shall release, disseminate or make available for any purpose involving employment, bonding, or to any department, agency, or other division thereof, any information of other data concerning any arrest, indictment, trial, hearing, conviction, or correctional supervision.

For purpose of identification, the following information is provided for the arresting agency and any custodians of arrest and conviction data.

APPLICANTS FULL NAME: **Guy L Mettle**  
ADDRESS: 2715 Collinford Dr # K CITY: Dublin ZIP: 43016  
SEX: Male RACE: White DATE OF BIRTH: 06/16/2049 SSN: 130-386-6239

CHARGE: NON SUPPORT(F4)3CTS CONVICTED OF: NON SUPPORT(F4)1CT

DATE OF ARREST: 5-14-96 ARRESTING AGENCY: FCSO  
MUNICIPAL COURT CASE NUMBER:  
OHIO B.C.I. NUMBER: F.B.I.:

  
\_\_\_\_\_  
JUDGE

\_\_\_\_\_  
**RON O'BRIEN, FRANKLIN COUNTY  
PROSECUTOR**

THE STATE OF OHIO  
Franklin County, ss } I, JOHN O'GRADY, Clerk  
OF THE COURT OF COMMON  
PLEAS, WITHIN AND FOR  
SAND COUNTY.

HEREBY CERTIFY THAT THE ABOVE AND FORE-  
GOING IS TRULY TAKEN AND COPIED FROM THE  
ORIGINAL Entry  
NOW ON FILE IN MY OFFICE.  
WITNESS MY HAND AND SEAL OF SAND COUNTY  
THIS 2 DAY OF Oct A.D. 2007  
JOHN O'GRADY, Clerk  
J. Shade Deputy

## **EXHIBIT 16**

16. Transcripts of Proceedings, Common Pleas Case No. 07EP-229, on Sept. 5, 2007, is attached in the Appendix as **Exhibit 16**. In this hearing Judge Schneider ordered the case record sealed.

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO  
CRIMINAL DIVISION

State of Ohio, :  
Plaintiff, :  
vs. : Case No. 07EP-229  
Guy Mettle, :  
Defendant. :

TRANSCRIPT OF PROCEEDINGS

Before Hon. Charles Schneider, Judge, on  
Wednesday, September 5, 2007.

APPEARANCES:

Ms. Nancy Moore, Assistant Prosecuting Attorney,  
On behalf of the Plaintiff, State of Ohio.

Mr. Guy Mettle, Defendant Pro Se.

**COPY**



1 copy of my response to the State's objections?

2 THE COURT: Oh, I imagine it is in here  
3 someplace. Whether I got it or not --

4 THE DEFENDANT: I do cite several cases that  
5 are of the same opinion that you just expressed.

6 THE COURT: Well, good. You mean somebody  
7 else who thinks like I do?

8 THE DEFENDANT: Yes, 12th District Appellate  
9 Court does, sir. The State, specifically, the Ohio  
10 Supreme Court follows on with rules of construction  
11 and found about a dozen cases.

12 THE COURT: And I did it just off of the top  
13 of my head. All right. Well, the Court is going to  
14 take this matter under advisement. I do now see your  
15 response. I did not see it before. I am going to  
16 review the same, take it under consideration.

17 It would be my opinion unless I am convinced  
18 that indeed that is what the legislature intended, and  
19 absent some specific statement in the statute, that it  
20 is likely -- "likely" being the operative word -- that  
21 I will conclude that it is not a bar to expungement, I  
22 will likely be granting the same.

23 Anything else on this matter today?

24 MS. MOORE: No, Your Honor. Thank you.

25 THE COURT: Anything else?



CERTIFICATE

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I do hereby certify that the foregoing is a true and correct transcript of the proceedings held in this matter on Wednesday, September 5, 2007, taken by me in machine shorthand and thereafter reduced to computerized transcription under my direction and supervision.

**COPY**



LINDA S. SHUPE, RPR, RMR  
Assistant Court Reporter

---