

Court Review

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EDITOR'S NOTE

This issue marks the start of a new layout and appearance for *Court Review*. We also introduce some new features, and have revised our organizational structure. We hope that you will find, over time, that these changes will result in more, and more useful, information coming your way through the pages of *Court Review*.

One of the new features is the Resource Page, which will be found on the last page of each issue (and, in many cases, continuing back another page or two from there). It will help you to find solutions to problems you may be facing, alert you to new publications, and generally try to provide some practical information you can use.

Another new feature is an interview piece. In this issue, we interview Professor Steven Lubet, a leading authority on judicial ethics. In an interview format, we can ask the sorts of questions you might ask if you had a chance to sit down for lunch or coffee with someone who has done work that would be of interest to judges. We think you'll find that his comments provide a good overview of current trends and issues in a highly readable format.

After the interview, we took the opportunity to recruit Professor Lubet for our new editorial board. We're appreciative that he accepted. Our new editorial board will include not only judges, but also law professors, attorneys and a psychiatrist. Its members will help us by identifying current topics of interest and in recruiting authors to write about those topics. Others who have accepted positions on our editorial board at present are: Judge B. Michael Dann of Maricopa County, Arizona, one of the leading jury reform advocates in the country and last year's winner of the William H. Rehnquist Award for Judicial Excellence; Professor Julie Kunce Field, who has written on domestic violence and directed law school legal clinics; Professor Philip P. Frickey, who is the co-author of widely used legislation and constitutional law casebooks and an expert in American Indian law; Judge Leslie G. Johnson, former *Court Review* editor, former president of the AJA and now the executive director of the American Academy of Judicial Education; Dr. C. Robert Showalter, a psychiatrist who lectures to law and medicine students and who has previously written for *Court Review*; and professor Charles H. Whitebread, whose presentations on criminal procedure and U.S. Supreme Court cases have been a favorite of AJA members.

We appreciate the assistance of Judge Gerald Elliott and the AJA Publications Committee as we implement these changes. We hope that you will find that these changes will help in achieving our goal of sending more, and more useful, information your way. – SL



Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth at page 38 of this issue. *Court Review* reserves the right to edit, condense or reject material submitted for publication.

Letters to the Editor, intended for publication, are welcome. Please send such letters to *Court Review's* editor: Judge Steve Leben, 100 North Kansas Avenue, Olathe, Kansas 66061, e-mail address: sleben@ix.netcom.com. Comments and suggestions for the publication, not intended for publication, also are welcome.

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President's Column

Greetings:

As was expected, 1998 has proven to be a truly exciting year for the American Judges Association. We've taken our first steps to expand our membership into Mexico. This expansion will be informative for many of us who are not familiar with the Mexican judiciary, and may be enlightening for our present members who are familiar with the Mexican judiciary. Either way, the opportunity to meet and greet, exchange information and ideas, and make friends will be fascinating for us all.

Our expansion has also included many opportunities to attend various judicial gatherings where major organization leaders met for the first time and discussed issues that they shared in common, as well as to discuss projects that may be shared. The National Center for State Courts hosted one such meeting in June in Washington, D.C. Twenty or more organizations were present. Surprisingly, many present were concerned about the same issues. Hopefully, this gathering will provide the basics necessary for eventually arriving at some positive conclusions.

While public trust and confidence continue to dominate most judicial concerns, I hope that, as members of the American Judges Association, we remain concerned about security in the courtroom. I remain committed to the idea

that our courtrooms must be safe places for all who visit them. Our efforts thus far have been met with positive support. The Ohio Supreme Court has already conducted a statewide survey that will determine what courts need security, and how it should be implemented. To further accomplish our goal of security in every courtroom, at our mid-year meeting in Portland, Oregon, our governors committed to contact their legislators, governors and chief justices to seek their aid and support for security. Thankfully, we have not received one negative response. It will be a great day for the judiciary when we accomplish our goal.

Our annual conference will be held in Orlando in September. This will surely be one of the best conferences yet. The seminars will be exciting and informative, and the entertainment will be unsurpassable for us and our families. I hope to see you all, and look forward to my final months as your president.

If you are in Orlando as a first-time attendee, please get involved in our organization. If you're a regular attendee, we need your input, no matter what. Please say hello. We need your involvement!

Shirley Strickland Saffold

On Federalism: Preserving Strong Federal and State Governments

Justice Sandra Day O'Connor

Most Americans recognize the term “federalism,” but an exact definition of the term is elusive. Disputes over the bounds of state and federal sovereignty implicate “perhaps our oldest question of constitutional law.”¹ I propose that recent decisions of the Supreme Court indicate the emergence of a definition of “federalism” that may guide legislators and judges in solving national and local problems in a spirit of cooperation.

Our country has come a long way since its most early days, when Federal power over individuals was severely constricted because the Articles of Confederation required the cooperation of state legislatures in achieving national goals. The Framers resolved that problem by permitting the Federal Government to act directly upon the people. In my view, the allowance for federal regulation of *individuals* and protection of their national interests, while preserving the sovereignty of *States* acting within their

own boundaries, is crucial to our constitutional framework.

The Framers recognized the need for a strong and functional government, but, as Justice Harlan once explained, they “were suspicious of every form of all-powerful central authority.”² By establishing two levels of government, the Framers sought to guarantee both national unity and individual liberty.

The framework they designed seems so deceptively simple that the Tenth Amendment has been described as “but a truism.”³ Nonetheless, “the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court’s most difficult and celebrated cases.”⁴ In part, this may be due to the fact that the Framers could not envision the problems of today’s world, in which interstate (or even international) commerce touches every product we use, and “technology [has] converted every local problem into a national one.”⁵

The modern expansion of federal

power rests on two major provisions of the Constitution, the Commerce Clause⁶ and the Spending Clause.⁷ Application of the Commerce Clause in what has become known as the “dormant” context permits federal review of state laws that impede national interests. Such provisions, when interpreted broadly together with the Supremacy Clause,⁸ have given the Federal Government “a decided advantage in the delicate balance” of power between the Federal and State Governments.⁹

But despite the Federal Government’s advantage, it is subject to one significant constraint. Congress lacks the power to compel the States to act. Thus, there is a balance: States cannot be forced into legislative or executive action and national interests cannot be unnecessarily compromised. The Supreme Court has attempted to give effect to this balance through a variety of approaches.

Most recently, the Court has focused on the view of federalism as a cooperative

Footnotes

1. *New York v. United States*, 505 U.S. 144, 149 (1992).
2. Harlan, “Thoughts at a Dedication: Keeping the Judicial Function in Balance,” 49 *A.B.A. J.* 943, 944 (1963).
3. *United States v. Darby*, 312 U.S. 100, 124 (1941).
4. *New York*, 505 U.S. at 155.
5. *Garcia v. SAMTA*, 469 U.S. 528, 581 (1985) (O’Connor, J., dissenting).
6. U.S. CONST. art. I, § 8, cl. 3.
7. U.S. CONST. art. I, § 8, cl. 1.
8. U.S. CONST. art. VI, cl. 2.
9. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).
10. *See Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).
11. *Gregory*, 501 U.S. at 458.
12. 117 S. Ct. 2365, 138 L.Ed. 2d 914 (1997).
13. *Id.* at 2379, 138 L.Ed. 2d at 938.
14. *Id.* at 2379-83, 138 L.Ed. 2d at 938-43.
15. 514 U.S. 549 (1995).
16. *Garcia*, 469 U.S. at 577 (Powell, J., dissenting).

enterprise, by which Congress may encourage state regulation in a manner that maintains the responsiveness and accountability of State Governments. The same cooperative notion allows Congress to regulate interstate commerce to avoid the economic Balkanization of any of the States.¹⁰

The benefits of this system should be real to each of us. We rightfully expect this country's national *and* local governments to accommodate our interests, and we must recognize that a robust balance of power reduces the risk of tyranny.¹¹ With this in mind, the courts must often tackle difficult issues, ones that strike at the heart of many people's beliefs. In a decision in the 1996-97 Term, *Printz v. United States*,¹² the Supreme Court struck down portions of the Brady Handgun Violence Prevention Act that obligated local officials to comply with federal standards in a manner akin to "Federal commandeering of state governments,"¹³ while forcing upon the States the financial and political impact of the federally compelled action.¹⁴

The boundaries of federal pre-emption power were at issue in *United States v. Lopez*,¹⁵ in which the Court struck down a federal statute punishing the possession of weapons near schools. Although there is interstate commerce in guns, by enacting a strictly criminal provision aimed at non-commercial schoolyard conduct, Congress went too far. In overstepping its bounds, Congress also usurped the traditional role of States as laboratories for solutions to local problems. That role is more than hypothetical. The Nation's workers compensation and minimum wage laws were derived from similar State laws. Wyoming granted women the vote thirty years before their federal right to the franchise was established. As Justice Powell explained, "[i]t is at ... state and

local levels — not in Washington ... — that 'democratic self-government' is best exemplified."¹⁶

Therefore, even though a concise definition of our federalism may be hard to come by, it is clear that our government was elegantly designed to accommodate individual freedoms, and we must treasure the protection provided by powerful Federal *and* State Governments.



Justice Sandra Day O'Connor became the first woman to serve on the United States Supreme Court when she was appointed by President Reagan in 1981. Previously, she had briefly had her own law practice and had served in all three branches of state government in Arizona. She served there as an Assistant Attorney General, as majority leader of the Arizona State Senate, and as a trial and appellate judge.

An Interview with Steven Lubet

Steven Lubet is one of the leading authorities in the country on judicial ethics. A professor of law at Northwestern University, he is the co-author, along with Jeffrey Shaman and James Alfini, of the book, *Judicial Conduct and Ethics*, now in its second edition. He is the director of the Northwestern Law School's program on advocacy and professionalism and publishes widely in the areas of legal ethics, litigation, international criminal law and dispute resolution.

Court Review: One of your specialties is judicial ethics. How did you get interested in that?

Steven Lubet: Well, I'm tempted to say that if you lived in Chicago for any period of time, you would necessarily become interested in judicial ethics. But that's not actually the answer. As with so many things in life, I got interested in it completely by accident.

The American Judicature Society is located in Chicago, and at one point in the early '80s they determined that they should publish a monograph on off-the-bench conduct as an issue in judicial ethics. Someone suggested to someone that I'd be a good person to write it. I had no background in the field at the time, but they called me and asked me to do it, and I think I was up for tenure at the time, and I needed all the publications I could get. So I agreed to write the monograph, and I got hooked.

CR: I noted you've done a variety of things, including testifying in judges' disciplinary proceedings. What would be the general scope of what you've done in the ethics area for judges?

Lubet: Well, of course I wrote the

book with Jeff Shaman and Jim Alfini. [It] ... grew directly out of the monograph. Jim and Jeff were both associated with the American Judicature Society, and I came to them with the idea that there ought to be a comprehensive treatise on judicial conduct and ethics. Starting in about 1986, we sat down and wrote the first edition, and then later on we wrote the second.



Over the years, I've been contacted by lawyers for dozens of judges who have been involved in disciplinary proceedings looking for counseling or consultation or perhaps opinion. I've eventually testified in probably four or five cases in judicial discipline, and I've also consulted on the other side with disciplinary organizations looking for my input or analysis before they proceeded in a disciplinary matter against a judge.

CR: What would you say are the hot

topics these days in the area of judicial ethics?

Lubet: Well, you'd really have to divide that into two categories. There are the hot topics in the area of judicial discipline: what are we seeing judges becoming personally involved in, what are the things that judges need to keep an eye on or watch out for? And then there would be what you might characterize as the broader social issues in judicial ethics. It's not necessarily that judges are getting in trouble or need to worry about getting in trouble, but there's a public debate going on about how judges should conduct themselves. So let's take those up one at a time.

CR: Since our audience is judges, first let's talk about the ones that might get them in trouble.

Lubet: Okay. Well, when judges tend to get in trouble — justifiably — it's mostly for off-bench conduct. Of course, we'll immediately put to one side questions of corruption or bribery because we don't need to tell people to avoid that — they know to avoid it, and nothing I say is going to make a difference to anybody.

But apart from that, really the two things that should most concern judges would fall in the categories of either intemperate conduct or misuse of authority. Those would be the two broad categories, and then you would break that down further.

What's intemperate conduct? Well, it's public displays or other sorts of activity that demean the bench and that adults should know better than to engage in. But judges, being human, sometimes lose their temper or lose their

sense of judgment or lose their sense of proportion and do things that they shouldn't do: getting into fights, getting drunk, getting into traffic accidents, and things of that nature.

And some of that leads directly into the second problem, which is misuse of authority. Trying to beat traffic tickets, trying to influence other judges on behalf of friends and family, engaging in charitable solicitation where that's prohibited by the Code. Basically it comes from perhaps a sense of entitlement, some of which is justified, and in the extreme cases judges go over the line.

CR: Is it fair to say that anything that a judge does as to which a reasonable person might perceive that the judge was getting something because he or she was a judge would be prohibited?

Lubet: No. I think that's going too far. I hope that's going too far. I've got a great personal respect for judges. Judges perform a tremendously important social role often at great personal expense in the sense of foregoing the opportunities for a more lucrative career.

Judges are among the smartest, most dedicated, most hardworking people in our country, and judges deserve things that ordinary people don't get in the way of respect and deference and courtesy. What they don't deserve is special privilege, and what they especially don't deserve is treatment that you would consider above the law. And that's really where the trouble arises.

CR: What are the social issues of note today?

Lubet: Well, I think the biggest ones center around questions of free speech and judicial independence. Those are often discussed together, but actually I think they're quite separate.

Up until recent years, it was widely thought that judges simply gave up the right to free speech or at least they agreed to drastic restrictions on free speech, and most judges either happily or grudgingly lived within those

bounds. It made for a constrained life, but people pretty much understood where the boundaries lay.

In recent years, we've seen judges become much more outspoken about political or legal-political issues, and judges have been asserting a greater right to speak out, and in some cases courts and judicial conduct organizations have been backing them up. I actually think that's rather unfortunate. It's not unfortunate that courts have backed up judges, but I think the tendency among judges to want to engage in broader political and social discussion is unfortunate. I think the public is better served when judges stay out of the political arena and avoid off-bench commentaries on controversial issues, whether or not it's constitutionally protected.

CR: Are you thinking about cases like those in which judges have been commentators on television about publicized cases recently, or other areas?

Lubet: Well, there are three areas, really. There's the judge/commentator, there's the question of campaign speech, and then there's the question of political speech in other contexts. The "judges as television commentators" situation is, I think, enormously unfortunate. There's a very well publicized case in New Jersey where the judge had been a commentator 50 times on Court TV, uncompensated, but a constant presence on television. And the New Jersey Supreme Court ordered him to stop. This really caused a lot of controversy because the judge was discussing cases outside of his own jurisdiction, so the suggestion was that he couldn't possibly be prejudicing anybody's rights; and being a judge, he had something interesting to add to the public discussion of other trials. So why not allow him to go ahead and speak? I agree that's a coherent argument.

On the other side, though, I think that the temptation to become a media figure is very powerful, and once judges sort of conflate the business of judging

with the avocation of being a commentator, you really run into a very significant risk that judges might [be] ... doing one job in order to enhance their ability to do the other. And by that I mean you have to think that the judge might come to work in the morning saying, "What can I do today that'll make me more desirable to CNN as a commentator? What can I do today that will make me more likely ... to get that phone call from Court TV or from 60 Minutes the next time they're looking for a judge to comment on a case in some other jurisdiction?" And of course that would affect the judging process. You couldn't be an objective, impartial judge if you have this secondary agenda of wanting to be a television commentator.

CR: Is it the medium that makes the difference? I ask that because judges are allowed under the Code of Ethics to write and teach about the law. Certainly judges have written law review articles for a long time, and most comments about cases, I think, could be made in a law review commentary, while the same comment made on CNN in an immediate forum might lead to your criticism.

Lubet: I wouldn't say it's the medium that makes the difference. I'd say it's the immediacy that makes the difference. The distinction between writing law review articles or teaching classes would be that you're not typically commenting on pending cases. Law reviews move very slowly. You almost never read a law review article that comments on a pending case. Typically, they discuss cases after they're over. Of course television and, to a lesser extent, newspapers and magazines work on short deadlines. So you're really looking at comments on cases as they proceed and as they're pending, and I would locate the distinction there. It's also no trick to get published in law reviews. It's the easiest thing in the world, so there wouldn't be much competition among judges to do it.

CR: Let's talk for a minute about the topic of judicial independence. There is often the argument made on the broad level that judges need to be independent so that they can protect rights of minorities against a majority, and there's general agreement on the broad principle. Do judges also need to be made more accountable than they are today?

Lubet: That's the way the discussion is usually phrased, the distinction between accountability and independence. I'll tell you this, if I had to choose one or the other, I'd pick independence over accountability every time. Our nation is best served by an independent judiciary. There's almost no higher value when it comes to protecting individual rights. And it's not just minorities, it's anybody who runs afoul of the people in power. You know it's often said that a liberal is just a conservative who's been indicted, and the single greatest guarantee against overuse of government power is an independent judiciary who will enforce the laws impartially without regard to political favor or economic power or popular pressure. I would choose a judiciary capable of playing that role over an accountable judiciary every single time.

It doesn't mean that judges should not be accountable. It doesn't mean that judges should be ignored when they take rogue action. Certainly, we need a judicial disciplinary machinery. There was a judge who was using his position to engage in sexual assault, and no matter how independent he was on the bench, obviously he had to be called to account for that kind of conduct. But between the two values, independence is more important than what is often called accountability.

CR: Where do you see threats to judicial independence today?

Lubet: I think people often overstate the threat to judicial independence. Newspaper criticism does not threaten judicial independence terribly.

Restrictions on judges' off-the-bench conduct or off-the-bench speech do not threaten judicial independence terribly. But there is, I think, an unfortunate trend among judicial conduct organizations to seek to discipline judges for the content of their rulings. And even when those rulings are wrong, even when the rulings are outrageous, if judges have to worry about personal jeopardy because of the way they ruled in a case, that will undermine judicial independence more quickly than anything else.

CR: Is there some standard to be applied in determining when a judge may be subject to discipline for an opinion?

Lubet: This is the trickiest and most complex question in all of judicial ethics, in my opinion. When can a judge be disciplined for the content or the nature of a ruling or on the basis of comments made in the course of a ruling? Now, in federal system, of course, the answer's simple. It's never. So that's easy. In the state systems, though, judges have faced discipline for saying or doing things in the course of ruling on cases, and in the common law system, you know, we work out the answer to that question one case at a time. So, for example, there have been sort of an astoundingly high number of judges who have decided cases by coin flips or throwing darts or, in one case, asking the people in the courtroom to vote. There the judge [has] really sort of abdicated the responsibility of doing the job, [and] wasn't judging at all in any real sense. So that's easy to say that discipline is available there, even though it's sort of on the basis of how the judge ruled in cases.

At the other end of the spectrum, you find a situation where judges made rulings seemingly in good faith, maybe they were novel, maybe they were at the extreme edge of the judge's authority. But it seems likely that the judge, from whatever anybody can tell, was trying to

enforce the law the way he or she saw it, and still the judicial conduct organization comes in and files charges. And I think that's truly chilling. That truly sends a message that judges need ... to toe the line, need to do things the accepted way, and can't follow their consciences.

CR: In your book, one of the criteria mentioned for distinguishing misconduct from mere legal error is the degree of egregiousness of the error.

Lubet: Want some examples?

CR: Well, that would be good, and then if you could tell me how a judge would know in advance how egregious their error was likely to be.

Lubet: Of course that's a value judgment, and really when we talk about the degree of the egregiousness of the error, what we're really talking about is competence — whether the judge is showing sufficient competence in the law. But the situations arise where judges, for example, refuse to appoint counsel for defendants in felony cases. And on the one hand that's a legal error, the defendant says please appoint a lawyer for me and the judge says, no, you're going to go to trial without a lawyer. The Supreme Court rulings could not be clearer that an indigent defendant is entitled to appointment of a lawyer on a felony case. So I think anyone who doesn't know that is failing as a judge, and that's [the] sort of egregious error that can lead to discipline.

CR: Let me ask you about another example. There are a lot of jury reform techniques that are being tried out in courts throughout the country now, whether it be letting jurors ask questions or even note-taking by jurors, that in some states there may be fairly recent authority from the state's highest court suggesting that these are not good practices. If a district judge wants to adopt some jury reform measures for their own court, even though the state supreme court has made some disap-

proving comments about those measures in a fairly recent opinion, what ethical considerations should the judge think about?

Lubet: The question would be the clarity of the supreme court statement. [If the] state supreme court says don't do it, then no matter how good an idea it is, I think a trial-level judge is playing with fire if he or she goes ahead and doesn't heed the warning. On the other hand, the whole way the common law system works is that ideas come from the bottom up, and [the] supreme court isn't necessarily the best judge of how trial courts are going to work, and I think supreme court justices tend to know that. So if a state supreme court disapproves something or suggests that it's not a good idea, [in] incidental comments, and a trial court judge wants to try a variation on the theme, that is, do something that seems to resolve the state supreme court's objections even though the conduct falls in the same category, I would not think that that would be disciplinable.

CR: Earlier you mentioned that campaign speech often creates some tricky issues. Do you have an opinion as to whether partisan political elections may be inconsistent in any way with having an independent judiciary? The argument would be that it's easy to challenge a judge on the basis of an unpopular opinion in a partisan election.

Lubet: I'm familiar with the argument that partisan, or even nonpartisan, elections necessarily undermine judicial independence. Let's just say there's an unresolvable tension there when judges serve limited terms subject to either a retention vote or a contested election. Obviously, there is some. You can't avoid feeling that these subsequent elections are referendums on — or possible referendums on — the content of the judge's opinion. On the other hand, it's a democracy, and no judge stands election following every verdict. Elections are

four, six, sometimes ten years apart, and I think the cost to judicial independence of the electoral system is not unsurvivable. If I were writing a state constitution, I wouldn't have partisan political elections for judges, and I think you'd get better, more independent judges if we didn't have elections. But I think one can preserve judicial independence within an electoral system.

CR: Are there any other campaign speech topics that are worthy of note today?

Lubet: Well, the federal courts have been expanding the permissible scope of campaign speech, and I think that's too bad. I think we're better off if we stay as far away from the sort of political campaigning that we've seen in other sorts of elections. The content of that discourse tends to race to the bottom. On the other hand, I don't know what the answer is if we're going to be electing judges: they're going to have to be campaigning, they're going to have to be raising funds, and, quite apart from judicial independence, I think that's one of the real drawbacks for an elected judiciary.

CR: The fundraising?

Lubet: Well, the fundraising, the campaigning, the fact that you can't really restrain someone's ability to speak to the electorate once you've decided to have full-bore campaigns. Not that they do it anywhere else in the world. I don't think there are elected judiciaries like we have in the other countries that we tend to compare ourselves to. [They] don't do it in the United Kingdom or Canada or Western Europe.

CR: Let me talk about finances for a minute. *The Kansas City Star* recently ran an investigative series in which it showed that federal district judges in more than one district that it surveyed had failed to recuse themselves in cases involving companies in which the judges owned stock, contrary to ethics requirements, and that the disclosures of

assets of federal judges were often difficult to get. In addition, the federal rules require that the judge be notified each time anyone requests their disclosure form, causing many not to seek it in the first place. In the series of articles, you were quoted as saying that these ethics rules are intended to be picky because the integrity of the system is so important. Did you find it surprising, with a bright-line rule prohibiting a judge from sitting in a case involving a company in which the judge owned any stock at all, that several judges had failed to carefully police this on their own?

Lubet: I didn't find it surprising, and I don't even find it inexcusable. Of course it's wrong. Judges should be careful. Judges sentence people to jail sometimes for technical violations of the law, and judges, I think, have an obligation to view these things carefully. But everyone makes mistakes. Federal court dockets consist of hundreds and hundreds of cases, some of the cases have hundreds of parties, so you're really looking at sort of thousands of decisions along that line in the course of a year. Some people don't manage their own portfolios, so the fact that there would be a slip-up here and there is not surprising, although one would feel better if judges were being more careful to make sure that they adhere to that [recusal] requirement.

CR: Do you think there's a need for any greater disclosure regarding state court judges financially?

Lubet: The financial disclosure requirements for state court judges are all over the map. They run from being very, very demanding and very exacting to being almost nonexistent. And what I would prefer to see is something more approaching a uniform practice geared toward allowing litigants to make meaningful requests for disqualification. And then the best thing would be if there were some sort of audit for compliance. What I've noticed in my research is

sometimes [in] states that have [these] extraordinarily detailed disclosure requirements, judges more or less ignore them, and no one says anything because no one looks at the forms when they come in. So then the judges who are complying, spending 10 or 15 hours filling out the forms every year, are doing it for nothing because the other judges who sort of blow it off don't even get a phone call about it.

CR: One of the most ambiguous provisions in the code of judicial conduct is the requirement that a judge avoid the appearance of impropriety. Are there any reliable guides to conduct in that area?

Lubet: I don't think there are, I have to say. I wrote a law review article¹ a number of years ago suggesting six factors² to think about when judging the appearance of impropriety, and that's what I would look at, but I don't know that one could count on state supreme courts or judicial conduct organizations to consider those same six factors. I think the best guide for judges is to ask themselves, "Could somebody else think that this might lead to unfairness or lack of respect or inability for me to do the job that the robe requires?" And if the only answer is [that] someone who knows me would understand that I'm not doing anything wrong, then the conduct should be avoided, because judges are not only going to be reviewed by people who know them, they have to worry about public appearance as well.

CR: An *ABA Journal* article a couple of years ago suggested that civility on the bench was becoming a greater prob-

lem area. I know that you teach trial advocacy and have commented on civility among the legal profession. Do you have any feeling for whether civility on the bench is a growing problem?

Lubet: I don't know if it's growing. Actually, my guess would be that it's diminishing as a problem. But it's still a problem. The reason I think the incivility issue is diminishing as a problem is because in the past, much of it was directed at women and minorities. Fortunately there's been a tremendous increase of women and minorities as judges, and there's also been a great educational process going on among judges of the need to avoid that sort of behavior. So, I wouldn't call it a problem of the past, but that's a problem that has greatly diminished. Then we have the other problem about judges just being mean and nasty, and, you know, there's tens of thousands of judges in the country. A certain percentage of them are going to be mean and nasty. We have to do what we can to get those people to change their ways, or remove them from the bench if they won't.

CR: Do you keep track of numbers of judicial complaints to have any knowledge as to whether complaints are higher or lower these days?

Lubet: I don't keep close track of that, and I don't know the answer. It wouldn't really tell you that much about conduct, though, even if you did know the answer, because complaints go up when public awareness rises and the ability to complain [rises], even if the general level of conduct has been

improving. So, for example, you might find more complaints these days about sexist remarks by judges, but I'm fairly certain that the actual quantum of sexist remarks has gone down. But people's willingness and interest in complaining about it has gone up.

CR: You seem to have caused a bit of a stir recently with regard to an issue that most of us didn't even know was an issue: whether items are admitted *in* evidence or *into* evidence. You've written an article on it and gotten a reply by another professor. What's the deal?

Lubet: Well, it's probably the single most important question in litigation today. I think if we could really resolve this problem once and for all, we could ease the litigation explosion, increase the quality of justice, lower taxes, probably end the trade deficit, and resolve three or four foreign policy crises all at once.

CR: You're speaking to America's judges. Give us the answer.

Lubet: Well, the answer, I'm afraid, is that exhibits are offered "into" evidence, they are admitted "as" evidence, and thereafter they are "in" evidence.

CR: Want to give a quick rationale, or is there one?

Lubet: You'll have to take my word for it.³

CR: All right. Thank you.

¹ See Steven Lubet, *Judicial Impropriety: Love, Friendship, Free Speech, and Other Intemperate Conduct*, 1986 ARIZ. ST. L. J. 379 (1986). The discussion of these factors is updated and explored further in JEFFREY M. SHAMAN, STEVEN LUBET & JAMES J. ALFINI, JUDICIAL CONDUCT AND ETHICS §§ 10.23 to 10.38 (2d ed. 1995).

² The six factors are: (1) the public or private nature of the act when done; (2) the extent to which the conduct is protected as an individual right; (3) the degree of discretion exercised by the judge; (4) whether the conduct was harmful or offensive to others; (5) the degree of respect or lack of respect for the public or individual

members of the public that the conduct demonstrates; and (6) the degree to which the conduct is indicative of bias, prejudice, or improper influence. *Id.* at § 10.23.

³ For those wanting a more extended discussion, see Steven Lubet, *Into Evidence*, 81 CORNELL L. REV. 154 (1995); Martha M. Ertman, *The In/Into Controversy: Rising to Lubet's Bait: Vive No Difference*, 91 NW. U. L. REV. 642 (1997); and Steven Lubet, *The In/Into Controversy: Rising to Lubet's Bait: A Reply to Critics of Into Evidence*, 91 NW. U. L. REV. 662 (1997).

The Myth of Epidemic False Allegations of Sexual Abuse in Divorce Cases

by Merrilyn McDonald

It is commonly believed that false allegations of sexual abuse in the context of divorce are epidemic, that most allegations made in the context of divorce are made by vindictive mothers and that these allegations are almost always false. These beliefs are not supported by scientific evidence.¹

It is widely believed that at least 50 percent of all allegations of child sexual abuse are false, and that an accused person appearing in a court of law is quite likely to have been falsely accused. Those who defend accused child sexual offenders want us to believe that 50 percent of individuals brought to trial are innocent. These beliefs are not supported by scientific evidence, either.²



children were reported.⁶ In simpler terms, that means that out of 10,000 kids, seven reported sexual abuse that year. The number of reports is rising every year due to mandatory reporting laws, better public education and greater public awareness of the problem. Even so, the rate for 1996 was only 1.8 per 1,000 children.⁷ Sexual abuse happens to about one in four girls and a bit less than one in six boys, yet only about 1.8 cases are reported per 1,000 children every year. Even if you multiply by 18 (the number of years in childhood), that would be

only 33 reports of sexual abuse per 1,000 children over their full childhood. Clearly, child sexual abuse is extremely underreported. Most child sexual abuse victims never report the crime.

I. CHILD SEXUAL ABUSE IS A COMMON EXPERIENCE.

Social scientists have done numerous studies to determine what percentage of the population has experienced child sexual abuse. Typically, a researcher gives out anonymous questionnaires to adults that ask a number of questions which allow the researcher to determine whether the person was sexually abused as a child. Usually, there are about 10 to 15 questions that ask about quite specific experiences, though some of the more thorough researchers have several pages of questions.³

These studies show that between 6 and 62 percent of females and 3 to 30 percent of males have had a sexual abuse experience before age 18. The higher rates are from studies with less stringent criteria for sexual abuse and the lower rates are from studies that looked at violent sexual assaults.⁴ A more recent national survey found that 27 percent of women and 16 percent of men reported sexual abuse as a child.⁵ The rates of 27 percent of women and 16 percent of men are considered to be solid, accurate rates by most researchers. Given these rates, there would be about 35 million women and 21 million men in the United States who had been sexually abused.

II. THE INCIDENCE OF CHILD SEXUAL ABUSE REPORTING IS LOW.

Sexual abuse happens to many people. How often does it get reported? In 1986, about .7 cases of sexual abuse per thousand

III. ALLEGATIONS OF CHILD SEXUAL ABUSE IN DIVORCE CASES ARE INFREQUENT.

An excellent study on the incidence of sexual abuse in divorce was done by Thoennes and Tjaden of the Association of Family and Conciliation Courts Research Unit in Denver, with funding from the National Center on Child Abuse and Neglect. Data was gathered from domestic relations court staff in eight jurisdictions, during a six-month period. Staff in these jurisdictions completed a questionnaire each time there was an allegation of sexual abuse in a custody or visitation dispute. More than 9,000 families in these areas had custody or visitation disputes. Of these 9,000 families, less than 2 percent had allegations of sexual abuse.⁸

While it is popularly believed that all allegations of sexual abuse in divorce involved the mother accusing the father, that was not the case. Mothers accused biological fathers in only 48 percent of the cases. Stepfathers were accused by mothers in 6 percent of cases. Fathers accused mothers or mother's new partner in 16 percent of cases and dads accused third parties in another 6 percent of cases. The remainder of accusations were made by third parties.⁹

Half of the allegations of sexual abuse among the custody/visitation dispute group, overall, were considered founded. In 33 percent of cases, no abuse was believed to have occurred and in 17 percent no determination could be reached.¹⁰ These figures

are about the same as validation rates for cases reported to child protective agencies.¹¹ Mother's allegations against father were considered likely to have been accurate in 49 percent of cases and unlikely in 33 percent. Father's allegations against mother were considered likely in 42 percent of cases and unlikely in 41 percent. The remainder of the cases were indeterminate.¹²

To get a different view of this issue, consider that approximately 1,000,000 divorces are granted per year. About 600,000 of divorcing couples have minor children, but only about 90,000 have custody disputes.¹³ If only 2 percent of disputed custody or visitation cases have allegations of sexual abuse, then only about 3 out of every 1,000 divorces involving children have allegations of sexual abuse. This is not an epidemic.

Research in Australia has had similar findings. Allegations of sexual abuse were present in only 1.7 percent of custody or visitation dispute cases.¹⁴

In Canada, the hospital records of all children who were seen for suspected physical or sexual abuse were reviewed at large hospital. In cases where sexual abuse was suspected, children who were involved in custody or visitation disputes had just as much physical evidence of sexual abuse as children who were not the object of a custody or visitation dispute. Interestingly enough, there was evidence of physical battering more often in children who were part of a custody or visitation dispute, than in children who were not.¹⁵

The beliefs that false allegations of sexual abuse in divorce are epidemic and that it is mothers who falsely accuse fathers is not supported by good, methodologically sound research.

IV. WHY MANY PEOPLE BELIEVE THAT FALSE ALLEGATIONS OF ABUSE IN DIVORCE ARE EPIDEMIC.

A number of articles have been published that purport to prove that many, if not most, allegations of sexual abuse in

divorce are false. These articles were based on anecdotal reports of what various clinicians had observed in their private practices. Reports based solely on anecdotal reports cannot be considered as hard science and the findings cannot be used to prove anything about the overall rates of false allegations in divorce or any other situation. These anecdotal reports are merely what a few individuals saw in a non-representative sample of cases. They tell us nothing about what is happening in general in our country.

The impression that rates of false allegations of sexual abuse are enormous has been created by a number of psychologists and doctors who have written up a selection of their cases in which all or most described a false allegation of sexual abuse.¹⁶ These articles have been frequently referenced in other articles where the limitations of anecdotal case studies have not been mentioned. These anecdotal case studies took on the illusion of being hard science and of being supported by factual findings because they were so frequently referred to. Descriptive case studies are nothing more than a tiny slice of reality that tell us nothing about all of the other cases in existence.

One of the case studies commonly cited is that of Arthur Green. He described five cases, four of which he concluded involved false allegations of sexual abuse.¹⁷ Benedek and Schetky described cases involving 18 children referred to them during custody or visitation disputes. They found sexual abuse in only 8 of the children, giving a false accusation rate of 55 percent.¹⁸ Schuman described seven cases, all of which he claimed were false accusations.¹⁹ Wakefield and Underwager claimed

[A]necdotal reports ... tell us nothing about what is happening in general in our country.

Footnotes

1. Nancy Thoennes & Patricia G. Tjaden, "The Extent, Nature, and Validity of Sexual Abuse Allegations in Custody/Divorce Disputes," 14 CHILD ABUSE & NEGLECT 151, 153-54 (1990).
2. David P. H. Jones & J. Melbourne McGraw, "Reliable and Fictitious Accounts of Sexual Abuse to Children," 2 J. INTERPERSONAL VIOLENCE 27, 30 (March 1987).
3. David Finkelhor, SEXUALLY VICTIMIZED CHILDREN 157 (1979).
4. David Finkelhor, et al., A SOURCEBOOK ON CHILD SEXUAL ABUSE 19-21 (1986).
5. David Finkelhor, Gerald Hotaling, I.A. Lewis & Christine Smith, "Sexual Abuse in a National Survey of Adult Men and Women: Prevalence, Characteristics, and Risk Factors," 14 CHILD ABUSE & NEGLECT 19, 19 (1990).
6. Finkelhor, et al., *supra* note 4, at 17.
7. U.S. Department of Health and Social Services, CHILD MALTREATMENT 1996: REPORTS FROM THE STATES TO THE NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM (1998), as reported in National Child Abuse and Neglect Statistical Fact Sheet (visited July 7, 1998) <<http://www.calib.com/nccanch/pubs/stats.htm>>.
8. Thoennes & Tjaden, *supra* note 1, at 153.
9. *Id.* at 154.
10. *Id.* at 151.
11. P. Solomon, TRACING OF SEXUAL ABUSE CASES REPORTED TO THE CUYAHOGA COUNTY DEPARTMENT OF SOCIAL SERVICES, JANUARY 1983

THROUGH NOVEMBER, 1984 (publication of the Cleveland, Ohio, Federation for Community Planning); Jones & McGraw, *supra* note 2, at 27.

12. Thoennes & Tjaden, *supra* note 1, at 159.
13. Bureau of Vital Statistics, MONTHLY STATISTICAL REPORTS (1985).
14. S. Bordow, A Survey of Sexual Child Abuse Cases, Sydney, Counselling Service, Family Court of Australia, 1987.
15. L.J. Hlady & E.J. Gunter, "Alleged Child Abuse in Custody Access Disputes," 14 CHILD ABUSE & NEGLECT 591, 592 (1990).
16. For another author's criticism of these anecdotal studies, see P. Susan Penfold, "Questionable Beliefs about Child Sexual Abuse Allegations during Custody Disputes," 14 CAN. J. FAM. L. 11, 13-15 (1997) (concluding that false allegations of sexual abuse are not common, even in custody disputes, despite anecdotal reports).
17. Arthur H. Green, "True and False Allegations of Sexual Abuse in Child Custody Disputes," 25 J. AM. ACAD. CHILD PSYCHIATRY 449, 453-56 (1986).
18. E. Benedek & D. Schetky, "Allegations of Sexual Abuse in Child Custody Cases," paper presented at the Annual Meeting of the American Academy of Psychiatry and the Law, Nassau, Bahamas (Oct. 1984).
19. Daniel C. Schuman, "False Accusations of Physical and Sexual Abuse," 14 BULL. AM. ACAD. PSYCHIATRY LAW 5, 6-20 (1986).

Good samples look at large numbers of people that are likely to represent society in general.

that nearly all allegations of sexual abuse are false. They reported that three-fourths of the cases they had seen had involved false allegations.²⁰

There are some striking similarities in all of these anecdotal reports. All described cases in the private practices of the author. Cases were few in number and there was no reason to believe they were representative of *all* disputed custody cases. There has

been harsh criticism of the work of Underwager and Wakefield²¹ as well as Green²² among respected social scientists.

A good scientist simply cannot claim that anecdotal case descriptions tell us about the population in general. If I were a forensic psychiatrist or psychologist who had a practice devoted exclusively or almost exclusively to serving those who have been accused of child sexual abuse, and if my criteria for determining that an allegation was false was to accept the declarations of the accused, then I could quite easily arrive at findings that 50 or 75 or even 100 percent of allegations of sexual abuse were false. My findings, however, would never be accepted by good scientists as anything more than a description of the people in my own practice. No good scientist would agree that my findings could tell them anything about all people or about all contested custody cases.

To put it another way, if I were to go to a prison and interview twenty men in maximum security, I might conclude, based on that sample of men, that 50 percent of men are murderers.²³

Good samples look at large numbers of people that are likely to represent society in general. The study that found that only

two percent of contested custody cases involved allegations of sexual abuse consisted of *all* of the cases of contested custody and visitation in eight legal jurisdictions situated in several different states. There were 9,000 cases in the sample of contested custody or visitation.²⁴ This is a sample a good scientist can trust. What we see in this sample is very likely to be true in other areas and in the population in general.

The criteria used for sexual abuse are extremely important when doing research. Ralph Underwager never defines his criteria for sexual abuse, but one of his statements might give some insight as to what he might consider sexually abusive. He gave an interview in 1991 to a journal called PAIDIKA, which labels itself as the Journal of Pedophilia. In it, he said: "Pedophiles need to become more positive and make the claim that pedophilia is an acceptable expression of God's will for love and unity among human beings."²⁵

V. ON MONEY, ETHICS AND EXPERT TESTIMONY.

When reading journal articles or hearing the testimony of a forensic psychologist, it is always interesting to discover who the individual usually serves in his/her practice.

An expert who is receiving \$250 per hour to defend those accused of child sexual abuse might be willing to "give the defendant the benefit of the doubt" in making determinations regarding sexual abuse. In the words of Judge Pierre A. Michaud, assistant judge in chief of the Quebec Superior Court in Canada:

In matters of child custody and access rights, the experts would have us believe that science changes as needed to serve the purpose of the prosecution or the defense. Too often, the only objective of the expertise seems to be to knowingly support the point of view of the client.²⁶

20. Hollida Wakefield & Ralph Underwager, "Sexual Abuse Allegations in Divorce and Custody Disputes," 9 BEHAV. SCI. & LAW 451, 455 (1981).

21. Criticism of Underwager and Wakefield is summarized in *Underwager v. Salter*, 22 F.3d 730 (7th Cir. 1993), cert. denied, 513 U.S. 943 (1994). In that case, in which Underwager and Wakefield unsuccessfully sued critics for defamation, the court noted that their books had "not been well received in the medical and scientific press," 22 F.3d at 731, that "Underwager's approach [had] failed to carry the medical profession," *id.* at 732, that Underwager had served on the board of the False Memory Syndrome Foundation "until resigning after being quoted as telling a Dutch journal that sex with children is a 'responsible choice for the individual,'" *id.* at 734, and that the Supreme Court of Washington had upheld Underwager's exclusion as an expert on the ground that his views were not accepted by the scientific community. *Id.* at 735 (citing *State v. Swan*, 790 P.2d 610, 632 (Wash. 1990)). See also John E.B. Myers, "The Child Sexual Abuse Literature: A Call for Greater Objectivity," 88 MICH. L. REV. 1709, 1711-17 (1990)(criticizing a book by Underwager and Wakefield for, among other things, "abdication of objectivity," "unbalanced thinking," and misuse and distortion of the research of others).

22. For criticism of Green's work, see Penfold, *supra* note 16, at 14 (citing study "[s]uggesting that Green's paper was likely to be misused in judicial settings").

23. A classic book on statistics notes this problem of making conclusions based upon data from an unrepresentative sample:

A psychiatrist reported once that practically everybody is neurotic. Aside from the fact that such use destroys any meaning in the word "neurotic," take a look at the man's sample. That is, whom has the psychiatrist been observing? It turns out that he has reached this edifying conclusion from studying his patients, who are a long, long way from being a sample of the population. If a man were normal, our psychiatrist would never meet him.

Darrell Huff, HOW TO LIE WITH STATISTICS 19 (1954).

24. Theonnes & Tjaden, *supra* note 1, at 153.

25. Ralph Underwager, PAEDIKA, The Journal of Pedophilia, Amsterdam, Holland (1991), reprinted on line (visited July 8, 1998) <<http://www.igc.apc.org/nemesis/ACLU/NudistHallofShame/Underwager3.htm>>.

26. Pierre A. Michaud, Le Psychologue Expert Tel Que Percu Par Le Juge [The Psychological Expert as Perceived by the Judge], Conference Paper, Montreal Bar family law conference at 4 (April 29, 1993)(quotation translated from original French).

At the same Montreal conference at which Judge Michaud spoke, local forensic psychologist Raymond David noted:

The saying "don't bite the hand that feeds you" gets in the way of professional objectivity and morals, when experts turn off their consciences and morals to be assured of getting a continuing flow of referrals from lawyers. Their recommendations are dominated and completely controlled by the client.

..... The expert might also yield to the more or less open pressures of the client, or of his attorney who push the expert to produce recommendations which are in the client's favor.²⁷

VI. FALSE ALLEGATIONS OF SEXUAL ABUSE ARE NOT WIDESPREAD.

There are a number of articles that give what social scientists agree is an acceptably accurate picture of the rates of false allegations of sexual abuse in general.

In a study that looked at all reports of sexual abuse received by the Denver child protective services in 1983, child protective social workers reported that 53 percent of allegations were well founded, 24 percent didn't have enough information to allow substantiation, 17 percent were made in good faith and involved a legitimate concern, but had other explanations, and 6 percent were probably false.²⁸

In another study, researchers looked at results from the child protective files of 100 county social service agencies in North Carolina. They were interested in the false allegation rates of different age groups of children. They found rates between 4.7 and 7.6 percent, with rates of false allegations rising with the age of the child.²⁹

A good number of other researchers have found false allegation rates between 2 and 8 percent.³⁰ These studies have the disadvantage of being clinical studies, and of having relatively small, non-random samples.³¹ Even so, their findings agree with those previously cited, which were methodologically sound research projects using large, naturally occurring samples.³²

Some of the confusion regarding false allegations of sexual abuse has been caused by a misunderstanding of what some of the terms mean. Child Protective Services (CPS) agencies receive a great number of calls. Mandatory child abuse reporting laws have caused the number of calls received by CPS to increase a great deal. These laws have also caused the percentage of reports that are substantiated to drop. Because many professions are required to report even a suspicion of child abuse, a great number of calls naturally will be determined to be unfounded. This does not mean that they are false, or that there was any

malicious intent on the part of the reporter. Many people are simply obeying the law.

Jones and McGraw looked at all of the reports of sexual abuse received in Denver for one year. They concluded that 53 percent of all allegations of sexual abuse were well founded. In 24 percent of the cases, they found that there was not enough information to make a decision as to whether there was any abuse. No one was accused, no one was charged, nothing was done.

These cases might turn up later with enough information to declare them well founded, but they might not. Another 17 percent were considered to be unsubstantiated suspicions. This meant that a suspicion was reported by an adult about sexual abuse. There was not necessarily any malice in the reporting of a suspicion. An alternate explanation for the cause of the suspicion was found and the reporter accepted that decision. No accusations were made. No abuse was alleged, but a suspicion was voiced. In 5 percent of reports, the researchers determined that abuse had not taken place. An adult had made a report, but the caseworker came to the conclusion that sexual abuse had not happened. It might have been a deliberate falsification, a faulty perception or a confused interpretation of events. In 1 percent of the cases, a child made a report of sexual abuse that was thought to be false. This category included deliberately false allegations, faulty perceptions, and confused interpretations, as well as "coaching" by an adult to make a false report.³³

VII. THE TIMING OF ALLEGATIONS OF SEXUAL ABUSE IN DIVORCE CASES.

Much has been written about the timing of allegations of sexual abuse. Allegations that arise in the context of divorce are immediately suspect in many people's minds. The belief that women frequently make false allegations to take revenge on ex-spouses is false but well entrenched in popular culture.

K.C. Faller described four situations that might lead to allegations of sexual abuse arising in the context of a divorce case:

1. Abuse leads to divorce.
2. Abuse is revealed during a divorce.
3. Abuse is precipitated by divorce.
4. Improbable allegations are made during a divorce situation.³⁴

A good number of other researchers have found false allegation rates between 2 and 8 percent.

27. Raymond David, *La Position du Psychologue Comme Temoin-expert Devant la Cour Superieure* [The Position of the Psychologist as an Expert Witness before the Superior Court], Conference Paper, Montreal Bar family law conference at 4 (April 29, 1993) (quotation translated from original French).

28. Jones & McGraw, *supra* note 2, at 30.

29. Mark D. Everson & Barbara W. Boat, "False Allegations of Sexual Abuse by Children and Adolescents," 28 *AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY* 230, 232 (1989).

30. K.C. Faller, *CHILD SEXUAL ABUSE: AN INTERDISCIPLINARY MANUAL FOR DIAGNOSIS, CASE MANAGEMENT, AND TREATMENT* 22, 126 (1988); Jean Goodwin, Doris Sahd & Richard T. Rada, "False Accusations

and False Denials of Incest: Clinical Myths and Clinical Realities," *reported in* *SEXUAL ABUSE: INCEST VICTIMS AND THEIR FAMILIES* 17, 17-26 (1982) J. Horowitz, P. Salt, Z. Gomes-Schwartz, & M. Sauzier, "Unconfirmed Cases of Sexual Abuse," Unpublished Manuscript, Division of Child Psychiatry, Tufts-New England Medical Center, Boston (on file with the author).

31. These studies included from 46 to 181 total cases.

32. See notes 28-29 *supra*.

33. Jones & McGraw, *supra* note 2, at 30.

34. Kathleen Colborn Faller, "Possible Explanations for Child Sexual Abuse in Divorce," 61 *AM. J. ORTHOPSYCHIATRY* 86, 87 (1991).

There are many reasons why legitimate allegations of sexual abuse will arise in the divorce situation.

A consideration of the dynamics of families during divorce shows that each of these situations is, indeed, likely to occur, with some more common than others.

Abuse May Lead to Divorce

Sirles & Lofberg found that about half of non-offending parents decided to divorce the offending parent after the disclosure of sexual abuse was made to the authorities.³⁵ The protective

parent probably informed child protective services prior to the divorce and tried to get them to prevent visitation. The protective parent may have been told by the authorities that if divorce was not initiated the children could be placed outside the home.

A protective parent may have become aware of the sexual abuse and have decided to divorce, but failed to mention sexual abuse because of shame for having married a molester, discomfort with the prospect of CPS investigations (and court hearings) or a desire to protect the children from the stigma of being labeled sexually abused. Most protective parents do not want the world to know that their child was abused or that they married a child molester. Such a parent may naively hope to get custody and restricted visitation without mentioning the sexual abuse. When this does not happen, they are forced to bring up sexual abuse to protect their children. Some protective parents may have been abused themselves during the marriage and may fear revenge from the offender if allegations of sexual abuse are brought up.

Abuse May Be Revealed for the First Time During a Divorce

There are many reasons why legitimate allegations of sexual abuse will arise in the divorce situation. Some children feel less protected during a divorce. The child may feel anxious about having to spend more time alone with the offending parent, and disclose as a result. A child who is very afraid of the offender may feel safer when the offender is not around so much and finally feel able to tell. The child may feel that the perpetrator is no longer able to punish her/him for telling. Some children are told that if they tell, it will destroy the family. When the divorce occurs, there is no longer any reason to keep the secret.

Some non-offending parents are reluctant to believe a genuine disclosure of sexual abuse as long as they are still invested in keeping their marriages. When they divorce, they may be more open to hearing their child's disclosure. The child may sense that their non-offending parent will now believe them if they tell.

Abuse May Be Precipitated by the Divorce

There are a number of individuals who become distressed during a divorce with resulting regressive behavior. They may

sexually offend as result. Such individuals may not have offended prior to the divorce. In a situation of divorce, they not only have more opportunity to offend, but fewer resources to resist the urge to sexually offend. The individual may have had a sexual attraction to children all along, but had been able to resist it during the marriage. With the emotional losses of the marriage, the individual is likely to become dependent and needy. With the spouse unavailable, the individual may turn to the child to get needs met. Because of the underlying sexual attraction and the absence of external hindrances, sexual abuse is able to happen. In some cases, the offender may be expressing anger at the non-offending spouse for leaving the marriage. Sexually offending may be a way of punishing the non-offending spouse for the divorce.

False Allegations May Be Made During Divorce Proceedings

While Thoennes and Tjaden have shown that false allegations of sexual abuse are no more common in divorce than in non-divorce situations, they do exist. A divorcing spouse may adopt a distorted perception of what is happening with the children and believe that sexual abuse is happening as a result. Divorcing parents are often willing to see the worst in their spouses and this may lead to a belief in sexual abuse. Some divorcing parents are simply angry and want revenge. While cases of revenge are very rare, they do occur.

VIII. WHY CHILD VICTIMS MAY ACT AS THEY DO.

Sexually abused children do not always act as we think they should. I was involved in a case in Montreal in which the father had been regularly raping the teen-age daughters. Mother knew something was wrong and finally got one of the girls to tell her about the rapes. The offender had threatened the girls that he would kill both them and the mother if they told. He found out that one of the girls had told and he tried to kill the mother. The mother was too afraid to press charges and the silence was enforced. For a while, anyway. During the period of "silence," the mother told me that she was totally bewildered by the fact that her daughters would laugh and joke with their offender at the dinner table as if nothing were wrong. Eventually, the man was convicted of child rape and served several years in prison. It is important to understand that this is not unusual behavior in a sexually abused child.

It is very threatening for a child to perceive his parent as evil or bad. If his parent is bad, then he is not safe. He depends on his parents to feed, clothe, protect, love and shelter him. If her parent is bad, she is in danger. It is easier for the child to see herself as bad. Offenders may eagerly reinforce this natural tendency in the child to see the parent as good and themselves as bad and many children become convinced that it is because they are bad that the abuse is happening. The child victim is usually deeply ashamed of the abuse and probably completely convinced that he has caused it. She may have been told that no one will believe her if she tells.

35. Elizabeth A. Sirles & Colleen E. Lofberg, "Factors Associated with Divorce in Intrafamily Child Sexual Abuse Cases," 14 CHILD ABUSE & NEGLECT 165, 168 (1990).

Abused children are often extremely attached to their offenders. It would seem that intermittent love and abuse produces some extremely strong bonds between a victim and an offender. One need only consider how often most battered adult women go back to their batterers to realize that this is so.

Even if a child is not strongly attached to his offender, he may pretend to be because he feels the offender is in control and it is safest to do as the offender says. Who among us has not pretended to like someone whom we disliked because that person had power over us and we needed to have his or her approval? Parents have enormous power over children and children are hard-wired to love their parents, regardless of what the parent does. While there are some children who come to hate and avoid their abusive parents, many do not. A child's affection and seeming lack of fear of a parent does not prove that there has been no abuse of that child. Most abusers do not abuse a child constantly, and the child may be eager, sometimes desperately eager, to gain the approval of the abusing parent. The fact that a child shows no fear of the accused does not mean that there has been no abuse.

Why Don't Kids Tell?

Sexual abuse is a very private crime and there are seldom any witnesses. Those who may have seen the crime are often too intimidated to speak up. The child seldom feels able to tell about the crime. The victim is almost always told not to tell. Children in our society are taught to obey adults. All children need love and approval from their parents. It may be enough that the offender makes it clear that the victim will no longer be loved and accepted unless she/he submits and says nothing.

Some children are told that if they submit to the abuse, their sister or brother will be spared. The child may disclose when she or he discovers that the sister or brother is also being abused, and there is no reason to keep silent.

Some kids try to tell their mothers and are not believed. Some mothers get angry at the child. These kids have a hard time. Their feelings of betrayal are enormous.

Some children are told that they will go to jail if they tell because they are as guilty as the offender. Children tend to believe what adults say.

Most children are ashamed of the abuse. If you had done something that you believed was bad and felt very ashamed about and you believed it was your fault and that if you told it would destroy your family, would you tell? If you had been threatened that your cat, mother, sister, or school friends would be killed if you told, would you tell? If you thought no one would believe you if you told and you knew that your offender would be extremely angry at you and would probably punish you harshly, would you tell? What if your offender told you that you would go to jail because you were just as guilty?

I think one of the cruelest things that has happened to many sexually abused children has been to be punished for being seductive. It is believed that most sexually seductive young children have been sexually abused. It is insult to injury when an

accused offender is acquitted because the child "asked for it" by being sexually seductive. No matter how seductive a child is, the adult must refrain. No child has the ability to give informed consent to having sex with an adult. No child has equal power to say no to an adult.³⁶

Male victims may refuse to tell because of the pervasive homophobia in our society. They do not want to be labeled a homosexual. Fortunately, the fact that the accused is heterosexual is no longer considered "proof" that he did not offend a child. Unfortunately, the child may not know this and still be unwilling to tell.

All things seem to favor the keeping of the secret. The child who tells is incredibly brave and very rare.

Why Do Kids Recant?

If you were brave enough to tell about sexual abuse and your offender threatened you, would you recant? What if, after your disclosure, your whole world came crashing down? Your mother became angry with you, your father was taken away from your home by the police, there was no money for food. What if everyone was pressuring you to say it didn't happen? You feel ashamed of what you did. You are told that your disclosure is destroying everyone's lives. The whole world is upside down and it is all your fault. You can make it all go away if you just say it never happened. Would you recant?

The fact that a child recants does not mean that abuse never happened. It often means that pressure has been applied to the child and the child submitted. A child may also recant when he feels he is not being believed. Naturally reluctant to talk about abuse, a child may become silent or recant if those interviewing him seem skeptical of his disclosure.

IX. THE MOTHER WHO REPORTS ABUSE.

A common defense tactic in sexual abuse cases is to discredit those who act to defend the child. Most people do not like to see a child attacked, discredited or emotionally destroyed in a court of law. It is much more successful to discredit and destroy the child's defenders, especially the mother. Focusing on the mother instead of on the offender has a long history in our society and our legal system. It does not serve the best interest and protection of children.

Many women are very reluctant to share the disclosures of their children because of the enormous backlash against women who have made allegations of sexual abuse during divorce in the past. Many women tell me they know of at least one horror story where a mother has lost custody of her children because she (in good faith) brought up a sexual abuse allegation during a divorce.

Mothers have told me that they feel no matter what they do

The fact that a child recants does not mean that abuse never happened.

36. David Finkelhor, *CHILD SEXUAL ABUSE: NEW THEORY AND RESEARCH* 19 (1984).

[A] woman can be angry, malicious and mentally ill, but ... her allegations of sexual abuse still may be genuine.

it is considered wrong by the legal system. If they react to their child's disclosure of sexual abuse with anger and take measures to insure the safety of their children, they are called mean, vindictive and hysterical. Mothers who suppress their rage and calmly go through the tasks needed to protect their children say they are accused of falsely accusing their child's offender. The defense says that if it had really happened, she would be enraged. And then there are the mothers who either don't

believe their children or are so emotionally dependent and/or subjugated by their child's offender that they are unable to act to protect the child. They, too, are harshly viewed. An additional subset of mothers are those who have believed their child but are disbelieved by the those who evaluated the allegations. If such mothers continue to believe and support their child, they are labeled hysterical and paranoid. I know of a case in which a mother was declared insane by the psychologist of the accused and court-ordered into psychiatric treatment for believing her toddler had been molested when CPS declared that it had not happened. The sexual abuse of her child was confirmed a couple of years later, but not before the child nearly succeeded in committing suicide. Such mistakes are costly in terms of human suffering.

Failures of the system to protect children have prompted the creation of a number of underground organizations that hide children believed not to be protected by our judicial system. Protective mothers and fathers make huge sacrifices to protect their children when they go underground. If the child has genuinely been abused and this measure is the only way to protect the child, these parents feel the risks are worth it. How many parents would be willing to give up their career, their families, their homes and their safety to punish an ex-spouse? I do not believe that many parents choose this option unless they feel there are no other options left to protect their child.

The urge to protect one's offspring is overwhelming in most parents. Parents have been known to enter burning buildings and risk almost certain death in a variety of situations to protect their children. It is naive of us to believe they will obey court orders if they genuinely believe their child is in danger.

Mothers who choose to divorce a husband when sexual abuse is disclosed often lose much and pay a high price for protecting their children. The mother may lose her source of financial support. She may be threatened with violence if she supports her child and takes legal action against the offender. If the man has been violent with the mother, she may have a very difficult time doing what she needs to do to protect her child. If she is met by

a high-powered legal team hired by her child's offender, and she has no resources to fight, she may give up. She may feel a divided loyalty between her child and the offender. If she has been battered herself, she is likely to be isolated from social support and may have a hard time getting through the court appearances and other ordeals involved in protecting her child. She may be tempted at every juncture to abandon the protection of her child and give in to the offender. If such a mother is not supported by the legal and social services systems, the risk is great that she will capitulate and abandon her children to the offender.

Many times when a mother believes and defends her children, she is accused of being insane by the offender's defense team. It seems easier to believe that a mother is insane than that a clean-cut, handsome man would sexually offend his children. The mother may present to the court as anxious, stressed and upset about the situation, which in some minds seems to support the idea of her insanity. If she has been battered by the accused herself, she may have a number of psychological issues and may, indeed, be in need of therapy. This does not mean that the allegations are false or that any pathology in the mother negates the existence of sexual abuse to the children. If there is pathology in the woman, it is important to have a competent, neutral professional determine first, whether the pathology has been caused by domestic violence, and second, whether the pathology has any relationship to the allegations of abuse. It must be understood that even seriously mentally ill women may have children who have been sexually abused. In fact, Finkelhor found that having a mother who is ill or unavailable was a risk factor for sexual abuse.³⁷ Mentally ill women may be less available, less able to protect their children against sexual abuse and less likely even to know it is happening.

We seem very uncomfortable with the idea that a woman can be angry, malicious and mentally ill, *but* that her allegations of sexual abuse still may be *genuine*. Yet, this is probably quite often the case. Should the children of the mentally ill have less adequate protection from sexual abuse than the children of the mentally healthy? Should a child's disclosure of abuse be ignored because the mother is angry it happened or wants revenge on the offender because of it? Should a child's disclosure of sexual abuse be dismissed because her parents are divorcing?

The situation of mothers is made even more difficult by the existence of instruments that claim to be able to determine if a mother is falsely accusing. Richard Gardner created the "Sex Abuse Legitimacy Scale," which he claims can ferret out falsely accusing mothers and children.³⁸ This scale is often used against mothers and children. Jon Conte, editor of the respected "Journal of Interpersonal Violence," had this to say about the Sex Abuse Legitimacy Scale: "Probably the most unscientific piece of garbage I've seen in the field in all my life."³⁹ It must be noted that Gardner self-published this scale (and most of his other writings as well),⁴⁰ and that this scale has never been subjected to peer review or any kind of scientific scrutiny. There is

37. *Id.* at 32.

38. Richard Gardner, *SEX ABUSE LEGITIMACY SCALE* (1987).

39. Catherine Humphreys, "Child Sexual Abuse Allegations in the Context of Divorce: Issues for Mothers," 27 *BRIT. J. SOC. WORK* 529, 534 (1997).

40. Gardner's books are self-published by Creative Therapeutics, his own publishing company, which has a mail-order catalog and a toll-free telephone number for sales in the United States and Canada. His works are not peer reviewed. Cheri L. Wood, "The Parental Alienation Syndrome: A Dangerous Aura of Reliability," 27 *LOYOLA L.A. L. REV.* 1367, 1367 (1994). For a criticism of Gardner's self-announced "parental alienation syndrome," see *id.*

no basis in published, peer-reviewed research for anything claimed in this scale. Using it, many, if not most, mothers who behaved in a very typical, normal way after hearing a disclosure of sexual abuse would fail to meet the "criteria" for a genuinely accusing mother. Some of the criteria for inclusion in the category of false accusers are initial belief of the child's disclosure, disclosure during custody or divorce dispute, anxiety about the child being seen alone with a psychiatrist or psychologist, and anger or suspicion toward the accused.⁴¹

I looked to Gardner's own writings to glean a bit of insight into his ideological position regarding sexual abuse. In his book, *True and False Accusations of Sexual Abuse*, Gardner, who does a great deal of forensic work for the accused, nationwide, said:

My final position on this matter is this: a pedophile is the name given to a person whom the judge and/or jury decides they want to put away. It is of interest that of all the ancient peoples it may very well be that the Jews were the only ones who were punitive toward pedophiles. Early Christian proscriptions against pedophilia appear to have been derived from earlier teachings of the Jews, and our present overreaction to pedophilia represents an exaggeration of Judeo-Christian principles and is a significant factor operative in Western society's atypicality with regard to such activities.⁴²

There are those who make much of the fact that women report sexual abuse more frequently against their husbands than men report sexual abuse against their wives. Since 95 percent of sexual abuse against girls and 80 percent of abuse against boys is perpetrated by men, it would only seem natural that women report more frequently.⁴³

It is one of the sad realities of our society that both child victims and society often tend to blame mothers when a child is sexually abused. Victims blame mother because mothers are expected to protect children. Victims may be eternally seeking the approval and love of the offender and may not feel it is safe to blame the offender. If mother's love is unconditional (and it often is), then it is safer to blame her and be angry at her than at the offender. Mothers are often placed in impossible, no-win situations. No matter what she does, it seems wrong.

Protectiveness in a mother may be considered paranoia, and reporting abuse may be seen as vengeful. Mothers may be forced to accept situations that put themselves and their children in jeopardy in order not to be seen as vengeful and difficult. Many fear ultimately losing custody if they do not do as they are told. Most know, or believe they know, a mother to whom this has happened.

One can pose the question of what would be a normal

response to the information that one's child had been raped or molested. Rage seems to me to be a pretty 'normal' response. Does discovering that one's child has been abused and that one is unable to protect him cause some women to develop symptoms of neurosis?

Rage seems to me to be a pretty 'normal' response.

SUMMARY

False allegations of sexual abuse in divorce are a rare occurrence. False allegations of sexual abuse in general are rare. Unsubstantiated is not the same as false. Child sexual abuse is a common experience. Child sexual abuse is grossly underreported. There is a belief that allegations of sexual abuse in divorce is epidemic because a number of anecdotal reports of allegations of sexual abuse were repeatedly referenced by various authors without listing the limitations of such reports, creating an image of "hard science" that did not exist. Allegations of sexual abuse are more likely to occur in divorce situations and must be taken just as seriously as allegations that arise at any other time. Sexually abused children behave in a manner that is hard for most of us to understand. It is extremely hard for a child to disclose sexual abuse and any child who does so must be seen as extremely brave. Children recant because of pressure or a desire to get their family back. Mothers of sexually abused children experience many conflicts and difficulties in our present system.



Merrilyn McDonald, M.S.W., earned her master's degree in social work from the University of Washington School of Social Work. She works as a family preservation therapist and also does forensic work and work as a guardian ad litem in Bremerton, Washington. In addition, she works in pain management in Seattle, Washington, along with a medical doctor. McDonald has had a life-long interest in issues of child protection and well-being, with an emphasis on sexual abuse.

41. Gardner, *supra* note 38.

42. Richard Gardner, *TRUE AND FALSE ACCUSATIONS OF CHILD SEXUAL ABUSE* 46-47 (1992).

43. David Finkelhor, *CHILD SEXUAL ABUSE: NEW THEORY AND RESEARCH* 12 (1984).

Courtroom Technology from the Judge's Perspective

by Fredric I. Lederer*

[I]t becomes quite clear that the courtrooms of this state cannot sit idly by, in a cocoon of yesterday, while society and technology race towards the next millennium. Fortunately, the courtrooms of this state have not been idle, nor are they speeding at a reckless pace. Recent changes in the courtroom have included the use of audiotape stenographers as well as video transmission of first appearances, arraignments, and appellate oral arguments, just to name a few.

We recognize that there are generally costs associated with change. Nevertheless, technological changes in the courtroom cannot come at the expense of the basic individual rights and freedoms secured by our constitutions.¹

We live in a technological age, and the technology of everyday life is affecting case dispositions increasingly quickly. Technology came to our courthouses long ago, and jurisdictions throughout Australia, Canada, and the United States today are using case management systems and experimenting with electronic filing and electronic case information accessibility. Judges are using personal computers, including notebook machines on the bench and even the pocket-sized new generation of sub-laptop data retrieval systems such as the US Robotics PalmPilot. Now technology is coming to our courtrooms. Whether we consider extraordinary matters such as the Exxon Valdez or O.J. Simpson cases, the increasing number of technology-equipped courtrooms,² or just the anecdotal experiences of judges, blossoming judicial experience with and interest in courtroom technology is apparent. Indeed, during 1997-98 the Electronic Courtroom Project of the Administrative Office of the United States Courts has been evaluating different technologies in up to thirty different United States federal courtrooms. After all, "[t]he judicial system is the most expensive machine ever invented for finding out what happened and what to do about it,"³ and it is our responsibility to continually consider whether we might improve that system.

If nothing else, courtroom technology holds the promise of effecting significant direct and indirect financial savings. Anecdotal evidence suggests that electronically presented trials save from one-fourth to one-third of the time normally taken to try a similar case in a traditional fashion. But what of the judge's perspective? After all, the judge, especially the trial judge, holds a unique position with special responsibility. Although all participants in adjudication are at least theoretic-

ally united in some common systemic goals, it would be dangerously unrealistic for those considering the adoption of courtroom technology to ignore the disparate viewpoints held. However much litigants may want economy and rapidity, for example, they usually prefer most to win. Ethical lawyers may take a more systemic position, but are necessarily focused on the moment's case, its likely result, and the hope for further, successful, cases. The court administrator wishes for all good things, but is increasingly under financial pressure to accomplish today's needs, to say nothing of tomorrow's, with yesterday's budget. Ultimately it will come down to the judge, for who else is sufficiently concerned with both the short- and long-term need to do justice?

In an ideal world, adjudicative changes would improve the administration of justice by making it more certain, more accurate, faster, and less expensive. Before we can reasonably ask judges to sign on for what some reasonably fear to be a distracting high technology roller coaster ride, we ought to briefly examine some of the courtroom technologies now in use and ask fundamentally whether they can help the judge. This is not to suggest that changes that assist court administrators, lawyers, court reporters, litigants, jurors, citizens generally, and the like are unimportant. Quite the contrary. To hazard an analogy, the adjudicative process can be compared to an exploration voyage into an unknown sea characterized by questionable facts and ambiguous law.⁴ If we are to remodel, reequip, and reprovision the vessel, it would be foolhardy indeed not to ensure that the changes satisfy our captain's experienced judgment.

Our enhanced vessel is likely to come equipped with the latest in technology-based chambers and courtroom case record systems, document imaging and retrieval equipment, information and evidence review and presentation systems, and video and document-conferencing capabilities. To what extent can they prove useful to the judge?

TECHNOLOGY BASED COURT RECORD

Most of our appellate systems require verbatim records when serious cases are appealed. Judges have two interests in the court record: that it is accessible in a timely fashion for them to clarify factual and legal matters during trial, including the preparation of jury instructions, and that the record be accurate.⁵ Conscientious and competent judges are best supported by accurate trial records. The more accurate the record, the less likely that the case will be reversed. Indeed, one study by the National Center for State Courts has determined that comprehensive video records increase appellate affirmances.⁶ Current technology presents three alternative ways of making

more useful records: real-time; video, and digital audio.

Real-time transcription by trained stenographic court reporters permits accurate immediate access to the transcript. Judge and counsel each have access immediately to a draft quality transcript that can be privately and secretly annotated. Current technology even permits incorporation in the digital record of evidentiary images; we lack only a simple, commercially available system to do so. Instead, various firms now make this capability available for pretrial depositions. Real-time also easily permits the hard-of-hearing who can read to serve as judge, counsel, witness, or juror. Although real-time has only been available through stenographic court reporters, new voice recognition technology permits real-time production by stenomask reporters. No "open mike" automatic voice recognition systems exist and none are likely in the immediate future. Whether – and when – automated transcription will be available is speculative at best.

Video records are routinely used directly in the United States only in Kentucky. In the numerous other jurisdictions

that use videotape, the records are transcribed. Although their potential accuracy is of great significance,⁷ video records presently are not of great direct value to the judge, as a separate index must be made of the tape's contents.

Digital audio creates a more useful audio record than traditional analog tape recorder systems do. The new digital systems record on computer hard disk and can be backed up to other media. These systems are often characterized by a monitor (a person who needs far less training than a traditional court reporter) who can make text annotations, *i.e.*, a text index, which becomes part of the digital record and which can be searched in order to rapidly locate the nearest audio recording in time to that index item. Although entirely dissimilar to real-time stenographic reporting and far less useful, these systems are more useful to the judge than are traditional tape recoding systems. As these systems are now available for laptop computer systems, judges can now maintain their own electronic records.

LEGAL MATERIALS AT THE BENCH

Today's technology permits immediate access to legal materials from the bench. Whether based upon LEXIS or Westlaw, via direct connection or Internet, or via CD-ROM augmented by either of those services, the judge now has an enormous law library available.⁸ When the judge presides over a high technology courtroom, this permits the judge to engage in an immediate visual discussion of legal authority with counsel. Rather than relying upon notes, memory, or waiting for a book from the library, judge – or counsel – can display the actual authority on the appropriate monitor immediately in order to resolve any questions that may exist.

DOCUMENT IMAGING

Document imaging refers to the practice of "scanning" a document, photograph, or other image so that a computer picture of the image is stored for later retrieval. When scanned with optical character recognition, "OCR," the computer ver-



Photo courtesy of William & Mary Law School.

Defense counsel in a simulated trial delivers closing argument using a variety of in-courtroom technologies, while a deaf juror follows counsel by viewing a real-time transcript on the monitor.

Footnotes

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* Although I spent seven years as a limited jurisdiction trial judge and now preside over moot cases in Courtroom 21, I make no claim of significant judicial perspective.

1. Harrell v. State, 709 So. 2d 1364 (Fla. 1998); 1998 Fla. LEXIS 620, *21.
2. Of course, there have been many cases in which counsel brought equipment into the courtroom for the duration of the case. What is new is the "high technology courtroom," which we define as one with a high technology court record system, a high technology evidence presentation system, and soon, remote witness testimony capabilities. By May 1998, the Courtroom 21 Project had identified eight state high technology courtrooms, including some courts able to move equipment about different courtrooms. Although we do not have current exact figures, there are likely between fifteen and thirty federal courtrooms that now qualify. The number of state and federal facilities is increasing rapidly.
3. Judge Irving R. Kaufman, United States Court of Appeals for the Second Circuit, TIME, May 5, 1980, as quoted in JAMES B. SIMPSON, WEBSTER'S II NEW RIVERSIDE DESK QUOTATIONS 70 (1992).

4. We will not ordinarily equip our vessel, however, for a "five year mission to boldly go where no man has gone before." The nature of ordinary adjudication must place real resource constraints on us.
5. In theory, trial judges do their best at trial, and care not about any appeals. Being human, of course, and valuing their professional reputations, many judges do not wish to be unnecessarily reversed, and unnecessary reversals burden everyone when they occur.
6. JAMES A. MAHER, NATIONAL CENTER FOR STATE COURTS, DO VIDEO TRANSCRIPTS AFFECT THE SCOPE OF APPELLATE REVIEW? AN EVALUATION IN THE KENTUCKY COURT OF APPEALS (1990).
7. The primary difficulty in assuring accurate video records is assuring adequate audio. Proper courtroom audio is unusually difficult to install, and there are surprisingly few proper experts in the field.
8. As well as access to the entire world-wide-web. Of course, access can sometimes be distracting. Web access can prove highly tempting when faced with long-winded counsel.

sion can be searched by its word content just as lawyers and judges now regularly conduct electronic computer research. Many judges have tried cases in which counsel have used imaged documents, usually recorded on a CD-ROM disk and played back in court by computer. Anecdotal evidence indicates that judges have found this method of presenting evidence to be highly efficient and desirable. Lawyers are impelled to use imaging because it is an extraordinarily useful litigation support tool. Judges usually find that it decreases courtroom clutter and increases disposition speed. When imaged evidence is used electronically in the courtroom, our experience has been that a significant time savings results. This occurs because the usual counsel mechanics of obtaining a document and walking about the courtroom showing it to opposing counsel, the witness, and the judge, accompanied in a jury trial with jury publication, can all be eliminated in favor of controlled display on monitors. Of course, this not only requires installed technology display systems, but also sometimes requires that the trial judge require that counsel change long established patterns of evidence handling and presentation. Whether judges should encourage or require imaging in cases, including criminal cases, in which counsel do not intend to use it for litigation support is unclear. We believe, however, that an inexpensive court installed and operated system can be created that would permit imaging conducted solely for the judge's and clerk's convenience.⁹

EVIDENCE PRESENTATION SYSTEMS

The judge's primary responsibility is to ensure that justice is done under the law. Accuracy of fact-finding is thus a matter of real judicial concern. Anything that can improve the quality of that fact-finding should be of judicial importance. Current evidentiary display systems permit the easy and clear use and display of photographs, charts, documents, pictorial graphics, and computer-based material, including animations. Often instantaneous side-by-side comparisons, electronic underlining or circling of evidence is available, and whiteboard systems permit witnesses to sketch intersections and other matters with instant computer recording so that alteration by adverse witnesses doesn't destroy the evidence. New whiteboard systems permit witnesses and counsel to annotate or write upon documents, photographs, previously prepared computer graphics, and even live remote transmissions.

Judges and lawyers have known for centuries that "pictures are worth a thousand words," and there is general agreement that jurors retain far more information when it is presented visually as well as orally. Some testimony is almost useless without a visual component. The workings of a machine, interior of the body, or even a complicated street intersection cry



Plaintiff's counsel examines a witness by video-conferencing as the remote witness testifies in Norwegian (with AT&T LanguageLine translation), while United States District Judge Roger Strand looks on.

out for visual explanation. The new technologies, primarily DOAR Communicator/ELMO-type TV document camera systems that display photos and documents, and computer-based systems largely obviate the need for large (and expensive) courtroom demonstrative evidence exhibits. Further, Courtroom 21 experimentation confirms that the display systems significantly improve the speed of evidence presentation.

This is not to suggest that technological evidence presentation systems are trouble-free.¹⁰ Judges have always had to determine whether visual information is misleading or overly prejudicial, and technology-based evidence presentation can increase the number of and difficulty of such rulings. Further, there are any number of questions concerning how we display evidence that have inadequate scientific answers at present. Is a document or photograph unduly prejudicial because it is displayed on a 10-foot diameter screen in front of a jury? Do jurors react differently in some manner to material presented on a television or monitor rather than physically? There is much that we do not know. What we may know unscientifically is that evidentiary comprehension can improve and time in presentation can be saved.

VIDEO FIRST APPEARANCES, HEARINGS AND TESTIMONY

Throughout the world, courts are increasingly using remote video for judicial uses. Perhaps the most widespread use is remote testimony by victims in child abuse cases.¹¹ In the United States, the most common use is for remote first appearances in criminal cases. Defendants appear before magistrates via two-way television, thus saving the cost and risk of transportation to the courthouse. These uses are only the proverbial

9. This would obviate document storage.
 10. Sometimes apparently serious problems are actually unexpected routine behavior. In our last Laboratory Trial, Defense Counsel planned an opening to be augmented by Corel Presentation slides that included photographs of the key witnesses. When counsel went to use his computer mouse nothing happened, and counsel went into a rather real form of shock. After a brief moment (that I gather felt like forever) of indecision, counsel prepared to launch

into a traditional opening statement only to find the entire system live and functioning. Counsel had failed to realize that the computer had a power-saver feature that, having turned the system effectively off, took between 30 and 60 seconds to respond to mouse use.
 11. See *Maryland v. Craig*, 497 U.S. 836 (1990) (given case-specific finding of necessity, one-way video testimony by child victim didn't violate the Sixth Amendment)

tip of the iceberg. Courts have used two-way television for remote testimony in at least civil cases in Australia, Canada, and the United States. Indeed, the Federal Rules of Civil Procedure were amended in the United States on December 1, 1996, to permit the use of remote testimony when approved by the judge.¹² In one famous case, Judge Jeffrey Rosinek presided over a Florida criminal trial in which critical prosecution witnesses, husband and wife robbery victims, testified from Argentina via two-way satellite. One of the witnesses was suffering from cancer; neither was willing to return to Florida. The jury convicted, and the conviction has been sustained by both the intermediate appellate court and, more recently, the Supreme Court of Florida,¹³ despite legal challenges regarding witness confrontation.

12. In every trial, the testimony of witnesses shall be taken in open court, unless a federal law, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise. The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.

Fed. R. Civ. P. 43(a)

The Advisory Committee Notes to the amendment explain:

The requirement that testimony be taken "orally" is deleted. The deletion makes it clear that testimony of a witness may be given in open court by other means if the witness is not able to communicate orally. Writing or sign language are common examples. The development of advanced technology may enable testimony to be given by other means. A witness unable to sign or write by hand may be able to communicate through a computer or similar device.

Contemporaneous transmission of testimony from a different location is permitted only on showing good cause in compelling circumstances. The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truth-telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.

The most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place.

Contemporaneous transmission may be better than an attempt to reschedule the trial, particularly if there is a risk that other—and perhaps more important—witnesses might not be available at a later time.

A party who could reasonably foresee the circumstances offered to justify transmission of testimony will have special difficulty in showing good cause and the compelling nature of the circumstances. Notice of a desire to transmit testimony from a different location should be given as soon as the reasons are known, to enable other parties to arrange a deposition, or to secure an advance ruling on transmission so as to know whether to prepare to be present with the witness while testifying.

No attempt is made to specify the means of transmission that may be used. Audio transmission without video images may be suffi-

cient in some circumstances, particularly as to less important testimony. Video transmission ordinarily should be preferred when the cost is reasonable in relation to the matters in dispute, the means of the parties, and the circumstances that justify transmission. Transmission that merely produces the equivalent of a written statement ordinarily should not be used.

Safeguards must be adopted that ensure accurate identification of the witness and that protect against influence by persons present with the witness. Accurate transmission likewise must be assured. Other safeguards should be employed to ensure that advance notice is given to all parties of foreseeable circumstances that may lead the proponent to offer testimony by transmission. Advance notice is important to protect the opportunity to argue for attendance of the witness at trial. Advance notice also ensures an opportunity to depose the witness, perhaps by video record, as a means of supplementing transmitted testimony.

Other possible justifications for remote transmission must be approached cautiously. Ordinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving difficulties in scheduling a trial that can be attended by all witnesses. Deposition procedures ensure the opportunity of all parties to be represented while the witness is testifying. An unforeseen need for the testimony of a remote witness that arises during trial, however, may establish good cause and compelling circumstances. Justification is particularly likely if the need arises from the interjection of new issues during trial or from the unexpected inability to present testimony as planned from a different witness.

Good cause and compelling circumstances may be established with relative ease if all parties agree that testimony should be presented by transmission. The court is not bound by a stipulation, however, and can insist on live testimony. Rejection of the parties' agreement will be influenced, among other factors, by the apparent importance of the testimony in the full context of the trial.

13. *Harrell v. State*, 709 So. 2d 1364 (Fla. 1998). See also *United States v. Gigante*, 971 F. Supp. 755 (E.D.N.Y. 1997) (RICO case witness authorized to testify by television).

14. The Courtroom 21 Project uses 384K, six channel Tandberg equipment. This ISDN system uses the equivalent of six telephone lines. Ordinarily we consider a lesser video connection to be unacceptable for in-court use. Four-channel use is likely to be fine for other purposes. As a rough rule of thumb, telecommunications charges equal the cost per minute of an ordinary long distance call multiplied by the number of phone line equivalents used.

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Witness is impeached during testimony before the jury with computer presented multi-media deposition record, which shows text transcript on the monitor along with synchronized audio and video.

21 staff, determined by experiment in 1997 that video may be especially useful in judge-conducted alternative dispute resolution. Inexpensive video communications also enable judge-to-judge and court administration communications.

Yet, again, we must concede that the judge, concerned above all with accuracy of fact-finding, must have a substantial concern. What are the real *human* consequences of remote video communications? Are remote trial witnesses, for example, more or less credible in actuality *and* perception than witnesses in the courtroom? Four separate experiments conducted in conjunction with the Courtroom 21 Project consistently show that jurors perceive remote witness testimony as being neither better nor worse than in-court testimony. Unfortunately, we have no data as to whether remote witnesses are more or less likely to lie than in-court witnesses.

What we do know about video conferencing is that the convenience and cost savings are substantial. Ultimately, we expect remote testimony, from courthouse to courthouse, to be routine, if only because of the cost savings. Whether it should actually be permitted will rest on judicial decisions dealing with fundamental questions of human behavior.

CONCLUSION

My intent in this brief article has been to briefly review courtroom technology from the judge's special perspective. As is all too often the situation, we can say with certainty that technology is not a panacea for the judge. Initially we would be wise to remember Chief Justice Burger's reflection:

"Concepts of justice must have hands and feet . . . to carry out justice in every case in the shortest possible time and the lowest possible cost. This is the challenge to every lawyer and judge in America."¹⁵

Yet, at the same time there are other and weightier considerations: "A good and faithful judge prefers what is right to [what is] expedient."¹⁶ And as much as we might sometimes care to play ostrich, any one familiar with technology would be forced to concur with C.P. Snow's observation: "Technology . . . is a queer thing. It brings you great gifts with one hand, and it stabs you in the back with the other."¹⁷

Accordingly, we are left with the judge's ongoing responsibility to assure justice. We know that technology *can* improve adjudicative accuracy while increasing disposition speed and effecting potentially substantial economies. Yet we can also guarantee that courtroom technology will not be trouble-free. Rather than justifying those few judges who would much prefer to keep the computer and television outside the courtroom, however, this real and important concern justifies only the same type of individual, case-by-case concern that has characterized implementation of every evidentiary and procedural change. Our exploration vessel will not plunge starward at warp speed. Rather, we will probe the legal and factual sargasso seas with the type of careful analytical progress customary to judicial probes. Ultimately, technology will provide extraordinarily useful tools for our judicial captains, but it will be imperative that they play a major role in the selection and implementation of those tools.



Fredric Lederer is the Chancellor Professor of Law and Director of Courtroom 21 at the William & Mary School of Law. The Courtroom 21 Project, "The Courtroom of the 21st Century Today," includes in the McGlothlin Courtroom what is believed to be the world's most technologically advanced trial and appellate courtroom. Located in Williamsburg, Virginia, the Courtroom 21 Project is a joint project of the William & Mary Law School and the National Center for State Courts. Professor Lederer will be making a demonstration presentation of Courtroom 21 technology at the American Judges Association educational conference on August 31 in Orlando.

15. Chief Justice Warren E. Burger, Speech to the American Bar Association, October 1, 1972, as quoted in JAMES B. SIMPSON, WEBSTER'S II NEW RIVERSIDE DESK QUOTATIONS 70 (1992).

16. Carmina Horace, *et al.*, THE QUOTABLE LAWYER 142 (1986).

17. C.P. Snow, N.Y. TIMES, March 15, 1971, as quoted in JAMES B. SIMPSON, WEBSTER'S II NEW RIVERSIDE DESK QUOTATIONS 158 (1992).

BMW of North America, Inc. v. Gore:

An Explanation of Standards or A Mere Examination of the Constitutional Boundaries of Punitive Damage Awards

by Donnie E. Martin

I. FACTS AND HISTORY OF THE DISPUTE

BMW of North America (BMW) appealed the conditional affirmance by the Alabama Supreme Court of punitive damages awarded to Dr. Ira Gore, Jr. in the amount of \$2,000,000.¹ The United States Supreme Court granted certiorari in an effort to “illuminate” the standards to identify unconstitutionally excessive punitive damage awards.² This comment will address whether the Supreme Court has adequately addressed the constitutional boundaries of punitive damage awards and also whether the Court has established a sufficient standard which can be properly applied by courts in future cases.

This dispute arose between Dr. Gore and BMW following Gore's 1990 purchase of a black BMW 535i sports sedan from a Birmingham, Alabama dealership.³ Upon learning from a car detailer that the automobile had been repainted, Dr. Gore brought suit against BMW of North America alleging that the failure to disclose such fact constituted statutory fraud.⁴ BMW, the American distributor of BMW automobiles, acknowledged that the company had a nationwide policy of repairing damage which did not exceed 3 percent of the car's suggested retail price without informing the dealers, and hence the purchasers.⁵ The damage to Dr. Gore's car was only 1.5 percent of the retail price, or \$601.37.⁶ However, Dr. Gore asserted that his repainted car was worth \$4,000 less since it had been refinished⁷ and his complaint asked for \$500,000 in compensatory and punitive damages for BMW's failure to disclose this alleged material fact.⁸ BMW defended its disclosure policy alleging

that it was under no duty to disclose the minor repairs and that a good-faith belief that the value of the car was not impaired made a punitive damage award inappropriate.⁹

The jury returned a verdict in the trial court finding BMW liable for \$4,000 in compensatory damages and \$4,000,000 in punitive damages for its “fraudulent” conduct.¹⁰ The trial judge denied BMW's post-trial motion to set aside the punitive damages award on the basis that the award was not excessive.¹¹ In light of prior U.S. Supreme Court and Alabama Supreme Court decisions regarding punitive damage evaluations, the Alabama Supreme Court performed an extensive excessiveness inquiry and, only after “thoroughly and painstakingly reviewing” the jury decision, conditionally affirmed the trial court by reducing the punitive damages from \$4 million to \$2 million.¹² The Alabama Supreme Court decided to reduce the punitive damage amount based upon the jury's incorrect computation of the award.¹³ Following their own comprehensive examination of prior decisions and concentrating primarily on a three-prong analysis,¹⁴ the Supreme Court reversed the Alabama judgment holding that even the reduced award of \$2,000,000 was “grossly excessive” and “transcends the constitutional limit.”¹⁵

II. HISTORY OF THE CONSTITUTIONAL BOUNDARIES OF PUNITIVE DAMAGES

During the last ten years, the American judicial system has struggled with the concept of the constitutionality of punitive damage awards.¹⁶ Punitive damages essentially serve two func-

Footnotes

1. BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996).
2. *Id.* at 568.
3. BMW of North America, Inc. v. Gore, 646 So.2d 619 (Ala. 1994).
4. *Id.* at 622.
5. BMW of North America, 517 U.S. at 564.
6. *Id.*
7. *Id.*
8. *Id.* at 563.
9. *Id.* at 564.
10. *Id.* at 565.
11. *Id.* at 566.
12. *Id.* at 559.
13. *Id.* at 567.

14. *Id.* at 575-85. The court emphasized the following three factors: the defendant's degree of reprehensibility, the ratio of the punitive damage award to the actual damages incurred, and the available sanctions for comparable misconduct. See, *infra* notes 61-72.
15. *Id.* at 585-86.
16. This can be ascertained by the Supreme Court's extensive review of five cases since 1989 dealing primarily with the constitutionality of a punitive damage award. See cases cited *infra*, notes 23, 27, 46 and 59 and accompanying text. In addition to the cases cited herein, the Supreme Court also reviewed the constitutionality of another punitive damages award in *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) (Supreme Court reversed and remanded because Oregon provided for no judicial review of punitive award).

tions in society: the punishment and deterrence of wrongdoing.¹⁷ “The punishment function penalizes the conduct of a particular defendant, while the deterrent function discourages the defendant from repeating the same conduct in the future and makes an example of the defendant for others similarly situated.”¹⁸

American courts employ a traditional common-law approach to determine the amount of punitive damages. Under this approach “[t]he amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury’s determination is then reviewed by trial and appellate courts to ensure that it is reasonable.”¹⁹ The validity of an award is evaluated to determine whether it is violative “either because its amount is excessive or because it is the product of an unfair procedure.”²⁰ Every American court to critique the common-law method of assessing and reviewing punitive damages has held that the common-law method does not procedurally violate due process.²¹ On the contrary, the aspect which currently troubles the judiciary is whether a punitive damage award substantively is unconstitutional in violation of the Due Process Clause.²²

The first case in the recent series of decisions reviewing awards of punitive damages was *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, which was decided in 1989.²³ A majority of the Court held that “on the basis of the history and purpose of the Eighth Amendment,...its Excessive Fines Clause does not apply to awards of punitive damages in cases between private parties.”²⁴ Additionally, the Court noted that an excessiveness claim under the Fourteenth Amendment’s Due Process Clause was not properly preserved for appeal and thus was not considered by the Court.²⁵ The Court declared that “[t]hat inquiry must await another day.”²⁶

Two years later, in *Pacific Mutual Life Insurance Co. v. Haslip*, the Supreme Court stated “the Fourteenth Amendment due process challenge is here once again.”²⁷ Pacific Mutual chal-

lenged an award of punitive damages imposed upon the company, which emanated from the fraudulent acts of their insurance agent.²⁸ The primary challenge by Pacific Mutual, premised on procedural grounds, was that the award was “the product of unbridled jury discretion and..violative of its due process rights.”²⁹ The Supreme Court proceeded to complete a detailed examination of the procedures carried out by the Alabama judiciary during their course of review.³⁰ The Court set forth specific guidelines followed by the Alabama Supreme Court during their review of the case, including the “Hammond criteria” used in Alabama to evaluate the relation of the punitive damage award to the state’s goals of retribution and deterrence.³¹ The Court rejected Pacific Mutual’s challenge, holding that the Alabama review procedures satisfied due process.³² In addition, the Court stated,

Every ... court to critique the common-law method of assessing ... punitive damages has held that [it] does not procedurally violate due process.

We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.³³

Justice O’Connor criticized the majority’s conclusion in her dissent by attacking their failure to apply the due process test set out in *Mathews v. Eldridge* for determining whether a set of procedures was constitutionally adequate.³⁴ Moreover,

17. Tamara Elayne MacLeod, *Excessiveness Review: Giving Substance to a Standardless Tool*, 31 WILLIAMETTE L. REV. 789 (1995).

18. *Id.* (citations omitted).

19. *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991).

20. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 446 (1993).

21. *Haslip*, 499 U.S. at 17.

22. *See, e.g., Id.* at 18; *TXO Production Corp.*, 509 U.S. at 446.

23. 492 U.S. 257 (1989).

24. *Id.* at 260.

25. *Id.* at 276-77.

26. *Id.* at 277.

27. *Haslip*, 499 U.S. at 12.

28. *Id.* at 4-7.

29. *Id.* at 7.

30. *Id.* at 19-24.

31. *Id.* at 21-22. The Court noted that the Alabama Supreme Court had announced seven factors to be used in the post-trial review of a punitive damage award. These criteria were established in *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986) and later approved in *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989). The criteria to be taken into consideration included: (a) whether

there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant’s conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant’s conduct, the duration of that conduct, the defendant’s awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the “financial position” of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

32. *Haslip*, 499 U.S. at 22-24.

33. *Id.* at 18.

34. *Id.* at 53 (O’Connor, J., dissenting). O’Connor noted three factors set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976): (1) the private interest at stake; (2) the risk that existing procedures will wrongly impair this private interest, and the likelihood that the additional procedural safeguards can effect a cure; and (3) the governmental interest in avoiding these additional procedures.

Numerous jurisdictions took notice of ... *Haslip* and patterned their review process after that used by Alabama courts.

O'Connor noted that she would declare Alabama's common-law scheme for imposing punitive damage awards as "void for vagueness"³⁵ because of the lack of guidance given to juries prior to their deliberations.³⁶ O'Connor explained that the criteria used by Alabama courts during their "post hoc" review of the award are not articulated to the jury and thus "the jury has standardless discretion to impose punitive damages whenever and in whatever amount it wants."³⁷

Justice O'Connor expressed her concern that the Green Oil factors would only be applied on appeal and would not be considered by the jury.³⁸ Furthermore, she noted that Alabama's procedures may be an adequate test to determine if the award is excessive; however, she argued that the focus of the inquiry should be on procedural due process.³⁹ Justice O'Connor identified specific safeguards which were available to provide due process protection, including a heightened evidentiary standard, instructing the jury with specific criteria like those set forth by the Alabama Supreme Court, imposing permissible ranges of punitive damage awards, and bifurcation of the trial into liability and punitive damages stages.⁴⁰

Numerous jurisdictions took notice of the Supreme Court's opinion in *Haslip* and patterned their review process after that used by Alabama courts.⁴¹ For example, the Supreme Court of

Texas, noting that the specificity of Texas's jury instructions on punitive damages contained detailed factors for the jury's evaluation similar to those used for post-verdict review in Alabama, adopted trial bifurcation and a more extensive appellate review process regarding punitive damage awards.⁴² However, the Texas court refused to require a change in the evidentiary standard or to require a more extensive post-verdict review by the trial court.⁴³

The Supreme Court of Oregon also applied the process set forth in *Haslip* to evaluate a punitive damage award. In *Oberg v. Honda Motor Co.*, the Oregon Court held that a heightened evidentiary standard and detailed guidance for jury, even in light of the lack of a post-verdict review of the amount of the award, satisfied due process pursuant to the *Haslip* standards.⁴⁴ Consequently, various interpretations of the Supreme Court's decision in *Haslip* and of Alabama's review process have been taken by several states to constitute a threshold requirement for the constitutionality review of a procedural due process challenge to a punitive damages award.⁴⁵

In 1993, two years after the *Haslip* decision, the Supreme Court had an opportunity to address yet another due process challenge to a punitive damages award. In *TXO Production Corp. v. Alliance Resources Corp.*, the Court evaluated a punitive award which was 526 times greater than the compensatory damages.⁴⁶ The award arose from a counterclaim for slander of title following a claim by TXO concerning rights conveyed by an assignment executed by Alliance.⁴⁷ Both parties proposed guidelines to the Court regarding the proper review process for a punitive damages award.⁴⁸ However, the Court rejected both proposals and refused to set forth a "mathematical bright line" to govern the review of every case.⁴⁹ While noting that the

35. *Id.* at 53. Justice O'Connor stated, "Due Process requires that a State provide meaningful standards to guide the application of its law...A state law that lacks such standards is void for vagueness. The void-for-vagueness doctrine applies not only to laws that proscribe conduct, but also to laws that vest standardless discretion in the jury to fix a penalty." *Id.* at 44. "Alabama, making no pretensions whatsoever, gives civil juries complete, unfettered, and unchanneled discretion to determine whether or not to impose punitive damages. Not only that, the State tells the jury that it has complete discretion. This is a textbook example of the void-for-vagueness doctrine." *Id.* at 46.

36. *Id.* at 44.

37. *Id.* at 52.

38. The Justice referred to the aforementioned Hammond criteria as the "Green Oil factors." See *supra* note 31.

39. *Id.* at 55-56 (emphasis added).

40. *Id.* at 57-58. Bifurcation is the division of a trial into two separate proceedings to provide for differing instructions and evidentiary standards.

41. See, e.g., *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 32 (Tex. 1994).

42. *Id.* at 27-31.

43. *Id.* at 31-33. The Texas Supreme Court refused to adopt the "clear and convincing" evidence standard in light of the Legislature's rejection of the proposal during its 1987 tort-reform legislation. Consequently, the Court declined to adopt the change reasoning that determining whether the dispute was governed by tort-reform

would be unnecessarily confusing. Additionally, the Court also refused to require trial courts to articulate their reasons for upholding or refusing to uphold a punitive damages award. The Court considered the demands already placed upon Texas trial courts, "which are overworked and understaffed." While noting that such a practice would be meaningful, the Court declined to require such findings as a "prerequisite for a judgment including punitive damages."

44. *Oberg v. Honda Motor Co., Ltd.*, 851 P.2d 1084 (Or. 1993).

45. See *Transportation Ins. Co.*, 879 S.W.2d at 30-33. The Texas Supreme Court provided a detailed listing of jurisdictions which had patterned their trial court and review procedures after Alabama pursuant to the *Haslip* decision.

46. 509 U.S. 443 (1993).

47. *Id.* at 450-51.

48. *Id.* at 455-56. In consideration of each party's proposal, the Court noted that the "parties' desire to formulate a 'test' for determining whether a particular punitive award is 'grossly excessive' is understandable. Nonetheless, we find neither formulation satisfactory. Under respondent's rational basis standard, apparently any award that would serve the legitimate state interest in deterring or punishing wrongful conduct, no matter how large, would be acceptable. On the other hand, we reject the premise underlying TXO's invocation of a heightened scrutiny." *Id.* at 456.

49. *Id.* at 458 (quoting *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 18 (1991)).

analysis should focus on the “reasonableness” of the punitive damage award in relation to the state’s interests in punishment and deterrence, the Court considered a number of specific factors in their analysis.⁵⁰ In holding that the award was neither “grossly excessive” nor a violation of due process, the Court took into account the substantial amount of potential profits which TXO stood to gain from the fraudulent transaction; the bad faith of TXO; the size and wealth of the company; and the fact that this transaction was “part of a larger pattern of fraud, trickery and deceit.”⁵¹

In a concurring opinion, Justice Kennedy criticized the plurality’s focus on the “reasonableness” of the award: “To ask whether a particular award of punitive damages is grossly excessive begs the question: excessive in relation to what?”⁵² Kennedy advocated an inquiry into the motive for the punitive damage award, not on the amount.⁵³ Additionally, in a substantial dissenting opinion, Justice O’Connor, joined by two justices, again attacked the plurality decision with a concentration on the jury instructions and the lack of guidance offered to the jury by the trial court.⁵⁴ She stated that the Court’s “inability to discern a mathematical formula does not liberate [it] altogether from [its] duty to provide guidance to courts that, unlike this one, must address jury verdicts such as this on a regular basis.”⁵⁵ In another concurring opinion which was joined by Justice Thomas, Justice Scalia declared that federal courts had no business in evaluating the amount of punitive award.⁵⁶ He insisted that the only function for federal courts in this area was to “assure that due process (i.e., traditional procedure) has been observed.”⁵⁷ In addition, Scalia proclaimed that by following the plurality’s standard, “the great majority of due process challenges to punitive damages awards can henceforth be disposed of simply with the observation that ‘this is no worse than TXO.’”⁵⁸

III. BMW OF NORTH AMERICA, INC. V. GORE

In *BMW v. Gore*, the Supreme Court finally attempted to clarify the confusion associated with prior review of punitive damage awards.⁵⁹ The Court stated, “Only when an award can fairly be categorized as ‘grossly excessive’ in relation to [the state’s interests in punishment and deterrence] does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.”⁶⁰ The Court noted that the first consideration in a punitive damages excessiveness review is to determine the state’s interest which the award is designed to serve.⁶¹ After analyzing Alabama’s state interests at issue, the

Court proceeded to identify three “guideposts” to lead the excessiveness critique: the degree of reprehensibility of the defendant’s conduct, the ratio of punitive to actual damages, and other possible sanctions for comparable misconduct.

First, the Court stated that “[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.”⁶² The Court compared the facts of the present case to those in *Haslip* and *TXO*, noting that in those cases the parties were engaged in fraudulent activities, acts of affirmative misconduct and concealment of evidence.⁶³ Accordingly, the Court held that “BMW’s conduct was not sufficiently reprehensible to warrant [the] imposition of a \$2 million exemplary damages award.”⁶⁴

Next, the Court explored the ratio of punitive to actual damages,⁶⁵ stating that a comparison between the actual damages or compensatory award and the punitive damages award is “significant”.⁶⁶ The Court clarified the reasonable relationship standard set forth in *Haslip* and relied upon in the *TXO* decision to include the “harm likely to result from the defendant’s conduct as well as the harm that actually has occurred.”⁶⁷ After once again rejecting the notion to mark the constitutional boundary by a simple mathematical formula, “even one that compares actual and potential damages to the punitive award,” the Court declared that the disparity in the present case, based upon the insignificance of any potential additional harm from BMW’s conduct, was much greater than in either *Haslip* or *TXO*.⁶⁸ Accordingly, the Court declared that the award, which was 500 times the amount of Dr. Gore’s actual harm as determined by the jury, did not satisfy this “guidepost” of excessiveness review.⁶⁹

Last, the Court compared the punitive damages with other possible sanctions for comparable misconduct, such as civil or criminal penalties.⁷⁰ In contrast to the potential penalties which could have been imposed in *Haslip*, the Court expressed that the economic sanction exacted against BMW was far in excess of any applicable statutory fine available for similar “malfeasance.”⁷¹ Therefore, the Court noted that the excessive award imposed in this case could not be justified as punish-

... the Court proceeded to identify three “guideposts” to lead the excessiveness critique ...

50. Transportation Insurance Co., 509 U.S. at 459-62.

51. *Id.* at 462.

52. *Id.* at 466 (Kennedy, J., concurring).

53. *Id.* at 467.

54. *Id.* at 474 (O’Connor, J. dissenting).

55. *Id.* at 480.

56. *Id.* at 470 (Scalia, J., concurring).

57. *Id.* at 472.

58. *Id.*

59. *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

60. *Id.* at 568.

61. *Id.*

62. *Id.*

63. *Id.* at 579-80.

64. *Id.* at 580.

65. *Id.* at 580-83.

66. *Id.* at 581.

67. *Id.* (citations omitted).

68. *Id.* at 582.

69. *Id.*

70. *Id.* at 583.

71. *Id.* at 583-84.

I ... would advocate detailed instructions for juries with comparable criteria to those applied by ... Alabama ...

ment or to “deter future misconduct” in light of the less drastic remedies available to the state.⁷²

The Court concluded by reiterating a refusal to “draw a bright line marking the limits of a constitutionally acceptable punitive damages award.”⁷³ However, based upon the application of the three “guideposts,” the court found the \$2 million punitive damage award “grossly excessive” and “transcend[ing] the constitutional limit.”⁷⁴ The Court then remanded the judgment to the state court for a rede-

termination of damages.⁷⁵

In a concurring opinion joined by two other justices, Justice Breyer noted that the review process previously applied by the Alabama judiciary, and approved in *Haslip*, realistically imposed little actual restraint when applied by the lower courts.⁷⁶ Justice Scalia again dissented on the basis that the decision was “an unjustified incursion into the province of state governments.”⁷⁷ Justice Ginsberg, joined by the Chief Justice, echoed a similar concern in her dissenting opinion regarding the judiciary’s unwise and unnecessary venture “into territory traditionally within the States’ domain.”⁷⁸

IV. CONCLUSION

The Supreme Court has made an adequate examination of the substantive boundaries of punitive damage awards. However, the Court has failed to effectively “illuminate” a standard to guide lower courts in their review of punitive awards. The Court did not remedy the objection of Justice Kennedy following *TXO*; thus, a reviewing court is essentially left to rely upon nothing more than its own “subjective reaction to a particular punitive damages award.”⁷⁹ Although the Court has recognized the confusion associated with procedural objections, the Court failed to address such concerns in its disposition of this case. Moreover, by reversing the Alabama Supreme Court, whose procedures it had previously approved, the Court has left lower courts without any guidance with which to deal with future procedural challenges.⁸⁰

I am persuaded by the theories set forth by Justice O’Connor in her dissent following the *Haslip* decision.⁸¹ As she noted in

her dissent, guiding the jury with instructions similar to the criteria used for post-verdict review in Alabama would ensure that neither procedural nor substantive due process is violated by the imposition of a punitive damages award.⁸² I agree with Justice O’Connor and would advocate detailed instructions for juries with comparable criteria to those applied by the Alabama judiciary in post-verdict review, an establishment of permissible ranges of awards, and the bifurcation of the liability and punitive damage stages of the trial, with a heightened evidentiary requirement for the punitive damage portion of the proceeding. However, I agree with the Texas Supreme Court in rejecting the requirement of a more extensive post-trial review and detailed articulation by trial courts of the reasons for upholding or refusing to uphold a punitive award due to the extraneous demands already faced by the trial court system.⁸³

Although the Supreme Court has repeatedly declined to “draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable” punitive damages award,⁸⁴ the opinions presented thus far have failed to adequately offer the guidance needed to ensure the consistent protection of due process of law.



Donnie Martin is an associate with Stoll, Keenon & Park, LLP, in Lexington, Kentucky. He won third place in the American Judges Association writing contest for law students with this article. Martin received his J.D. this year from the University of Kentucky law school, where he was an associate editor for the Kentucky Law Journal. He received his B.A. in 1993 from Transylvania University, also in Lexington, Kentucky.

72. *Id.* at 584.

73. *Id.* at 585.

74. *Id.* at 585-86.

75. *Id.* at 586.

76. *Id.* at 589 (Breyer, J., concurring).

77. *Id.* at 598 (Scalia, J., dissenting).

78. *Id.* at 607 (Ginsberg, J., dissenting).

79. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993).

80. See *supra* notes 30-32 and accompanying text.

81. See *supra* notes 34-40 and accompanying text.

82. See *supra* note 40 and accompanying text.

83. See *supra* note 41 and accompanying text.

84. See *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

1998 Annual Educational Conference

American Judges Association/American Judges Foundation

August 30-September 4, 1998

Hotel Royal Plaza, Orlando, Florida

Sunday, August 30

Noon - 6:00 p.m.

Registration

1:00 - 3:00 p.m.

Executive Committee Meeting

3:00 - 5:00 p.m.

Board of Governors Meeting

6:00 - 7:00 p.m.

Welcome Reception

Monday, August 31

8:00 a.m. - 5:00 p.m.

Registration

7:30 - 8:30 a.m.

Welcome/Orientation for new members and first-time attendees

8:30 - 9:00 a.m.

Opening Ceremonies

Speakers: Hon. Shirley Strickland-Saffold, President, AJA

Hon. Jeffrey Rosinek, Immediate Past President, AJA

Governor Lawton Chiles, Florida (invited)

9:00 a.m. - 10:00 a.m.

The Honorable Tom C. Clark

Lecture

Speaker: TBD

Topic: TBD

10:00 a.m. - 11:00 a.m.

Educational Session

Speakers: Hon. Mark I. Bernstein and Samuel H. Solomon

Topic: Better Trials Through Evidence Technology

11:00 a.m. - Noon

Educational Session

Speaker: Dr. Robert Showalter

Topic: Stress and Judicial Ethics

Noon - 1:15 p.m.

Awards Luncheon

1:30 - 3:30 p.m.

Educational Session - Panel

Presentation by the Roscoe Pound Foundation

Panelists: Howard Twigg, President, Roscoe Pound Foundation

Mark Mandell, Esq., Member,

Roscoe Pound Foundation

Prof. Sheila Jasanoff, Cornell University

Prof. Michael Gottesman, Georgetown University

Hon. Bonnie Sudderth, District Court, Fort Worth, Texas

Hon. Steve Leben, Johnson County District Court, Olathe, Kansas

Topic: Scientific Evidence in the Courts: Concepts and

Controversies

3:30 - 5:30 p.m.

Educational Session

Speaker: Prof. Frederic I. Lederer

Topic: Demonstration of Courtroom 21

Tuesday, September 1

7:30 - 9:00 a.m.

AJF Officers & Trustees Meeting

7:30 - 9:00 a.m.

House of Delegates Meeting

9:00 - 10:00 a.m.

Educational Session

Speaker: Hon. Peter McDonald

Topic: Domestic Violence

10:00 a.m. - Noon

Educational Session - Panel

Discussion

Panelists: Hon. Michael McCormick, Presiding Judge, Texas Court of Criminal Appeals

Dr. Ronald D. Stephens, Executive Director, National School Safety Center, Pepperdine University

Justice Melvin Tanenbaum, Supreme Court of New York

Hon. Jeffrey Rosinek, 11th Judicial Circuit Court, Miami, Florida

Topic: Safe Schools, Playgrounds, and Parks

Noon - 1:15 p.m.

AJF Luncheon/Installation of Officers

1:15 - 4:30 p.m.

Committee Meetings

4:30 - 6:00 p.m.

Vendor Show Reception

Wednesday, September 2

9:00 a.m. - 2:00 p.m.

Vendor Show

2:00 - 3:30 p.m.

Educational Session

Speaker: Prof. Charles H.

Whitebread II

Topic: Recent Decisions of the U.S. Supreme Court

3:30 - 5:00 p.m.

Educational Session - Panel

Discussion

Panelists: Hon. Robert Pirraglia, District Court, Providence, Rhode Island

Hon. Hiller B. Zobel, Associate Justice, Trial Court of Massachusetts

Paul Tash, *St. Petersburg Times*

Raymond M. Brown, Court TV, Newark, New Jersey

Topic: Courts, Media and the Community

6:45 p.m. - Evening (with dinner) at Pleasure Island (The park stays open until 2:00 a.m.; you may take the free bus back to the hotel whenever you choose.)

Thursday, September 3

9:00 a.m. - Noon

General Assembly Meeting

7:00 - 8:00 p.m.

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The Hyde Bill:

An Attempt to Resurrect the 1910 Three-Judge Court Act.

by Tamara Hall

*“What has been is what will be:
What has been done is what will be done:...and
There is no remembrance of former things among
those who come after.”*
Ecclesiastics 1:9,11

INTRODUCTON

On the front page of the June 5, 1997, *Recorder* edition, the story entitled, “New Front Opens Judge Wars,” was probably scanned in cursory fashion by most readers.¹ However, the content of the story will have lasting effects if its Republican supporters have their say. The judge front at issue is the current plan to push legislation² that will erode judicial power, notwithstanding strong objections from the nation’s judiciary.³

This essay focuses on the second section of the Judicial Reform Act of 1997, as introduced by Representative Henry Hyde. The “Hyde Bill” purports to erode judicial power by requiring a three-judge court when certain equitable remedies are sought. This exposition begins with a background section that examines the cause and rationale of the 1910 Three-Judge Court Act, its significant revisions, and its 1976 abrogation. The background is followed by a three-part discussion section. Part A summarizes and gives the pro and cons of the bill. Part B provides two nationally known examples that gave the incentive for the proposed legislation. Finally, Part C analyzes the legal and practical ramifications if resurrection of the 1910 Act, via Hyde Bill § 2, occurs.

BACKGROUND

Ex Parte Young

At the beginning of this century, big business and the railroads were in a stage of vigorous expansion.⁴ In response, states enacted regulatory statutes in an attempt to exercise control over these enterprises.⁵ However, these attempts proved futile when federal courts would, in turn, issue injunctions, preventing enforcement of such statutes.⁶ In 1908, the United States Supreme Court held, in *Ex Parte Young*,⁷ that state officials could indeed be enjoined by federal courts from enforcing unconstitutional state statutes. Accordingly, federal judges had unbridled discretion to issue temporary restraining orders *ex parte* and interlocutory injunctions based on affidavits alone.⁸ Moreover, such measures could be continued indefinitely, as there was no statutory restraint on the judges’ power to do so.⁹ As a response to the *Young* decision, Congress enacted the Three-Judge Court Act of 1910.¹⁰

THREE-JUDGE COURT ACT OF 1910

Under the 1910 Act, a federal district court could not grant an injunction restraining the enforcement of a state statute on the ground of unconstitutionality unless the application for the injunction had been heard and determined by three judges.¹¹ Appeal from the three-judge decision could be made directly to the United States Supreme Court for a speedy review of the case.¹² It was hoped that this legislation would curtail the imprudent issuance of injunctions against state statute enforcement.¹³ Furthermore, the 1910 Act was enacted to relieve the fears of the states that important regulatory programs would be precipitously enjoined.¹⁴

FOUR SIGNIFICANT REVISIONS

In its original enactment, the 1910 Act provided for three-judge courts only in suits in which interlocutory injunctions were sought against the enforcement of state statutes by state officers on the ground of unconstitutionality.¹⁵ Moreover, the original Act dealt only with interlocutory, and not permanent, injunctions.¹⁶ The first significant revision occurred in 1913 when the Act was amended to include cases that sought to enjoin enforcement of an administrative order made by an administrative board or commission acting under a state statute.¹⁷ The second significant revision was enacted in 1925 with an amendment to the Act that expanded the convention of three judges to cases of permanent injunction.¹⁸ In 1937, the Act was further amended to require a three-judge court and direct review for injunctions against claimed unconstitutional acts of Congress.¹⁹ Finally, the fourth significant revision occurred in 1975 when the American Law Institute proposed a series of amendments to three-judge court proceedings that would eliminate a number of jurisdictional questions so that these courts could function more smoothly.²⁰

Although these four major revisions made a good faith effort to foster the Act’s purposes of “the saving of state and federal statutes from improvident doom at the hands of a single judge,”²¹ mere tinkering with procedures was insufficient to remedy the unforeseen problems that the Act created. Consequently, the Judicial Conference’s strong recommendation that three-judge courts in suits challenging the constitutionality of state or federal law should be eliminated led to the 1976 abrogation of the Act.²²

1976 ABROGATION

To better understand the pitfalls of the three-judge court, it is useful to look to the reasoning behind Congress’ 1976 decision to repeal the requirement of the three-judge court after over a half-century of its use. Such reasoning is thoroughly dis-

cussed in the legislative history of the 1976 repeal.

In addition to the Judicial Conference, several notable opponents of the Act's abrogation advocated their concerns in hearings before the Subcommittee on Improvements in Judicial Machinery.²³ Those opponents included the chief judges of the Second, Third, Fourth and Fifth Circuit Courts of Appeal, Judge Skelly Wright from the U.S. Court of Appeals for the District of Columbia, and Professor Charles Alan Wright of the University of Texas Law School.²⁴ Presumably, the strongest advocate for the Act's abrogation was the then Chief Justice of the United States Supreme Court, Warren E. Burger. In Chief Justice Burger's annual report on the State of the Judiciary to the American Bar Association in the Summer of 1972, he asserted:

We should totally eliminate the three-judge district courts that now disrupt district and circuit judges' work. Direct appeal to the Supreme Court, without the benefit of intermediate review by a court of appeals, has seriously eroded the Supreme Court's power to control its workload, since appeals from three-judge district courts now account for one of five cases heard by the Supreme Court. The original reasons for establishing these special courts, whatever their validity at the time, no longer exist.²⁵

Four years after Chief Justice Burger's remarks, Congress abrogated the Act requiring three-judge courts in all cases for four major reasons: (1) to relieve the burden of three-judge court cases; (2) to remove procedural uncertainties; (3) because the original reasons for the Act were eliminated by

statutory and rule changes; and (4) because decisional law had provided its own safeguards against precipitous injunctive action by federal judges.²⁶

The Burden of Three-judge Courts

Three-judge courts burdened all three levels of the federal courts. For example, from 1955 to 1959, the average number of three-judge courts convened in the district courts were 48.8 per year.²⁷ Further, this number almost doubled to 95.6 per year between the years of 1960 to 1964.²⁸

In addition to the increase in the number of three-judge court cases, the convening of three-judges meant disruption of other court calendars. Whenever a three-judge court was required, a second district judge and a judge on the Circuit Court of Appeals were summoned to hear and determine the case along with the district judge in whose court the case was filed.²⁹ This quasi re-location caused the court calendar of these other judges to become subordinated to this special court's calendar.³⁰

Finally, the Act's provision of direct appeal to the Supreme Court from the decrees of a three-judge court granting or denying injunctions burdened the Supreme Court's docket.³¹ Although the three-judge cases were a small portion of all cases docketed in the Supreme Court, they consumed a disproportional

Three-judge courts burdened all three levels of the federal courts.

Footnotes

1. Naftali Bendavid, *New Front Opens in Judge Wars*, THE RECORDER (California), June 5, 1997, at 1.
2. H.R. 1252, 105th Cong. (1997).
3. Bendavid, *supra* note 1, at 1.
4. See S. REP. NO. 94-204, reprinted in 1976 U.S.C.C.A.N 1988, 1989 [hereinafter Senate Report].
5. *Id.*
6. *Id.*
7. Ex Parte Young, 209 U.S. 123 (1908).
8. Comment, *The Three-Judge Federal Court in Constitutional Litigation: A Procedural Anachronism*, 27 U. CHI. L. REV. 555, 558 (1960) [hereinafter Three-Judge Constitutional Litigation].
9. *Id.*
10. *Id.*
11. Act of June 18, 1910, ch. 309, § 17, 36 Stat. 577 (codified at 28 U.S.C. §2281 (1948)).
12. Comment, *The Three-judge Court Act of 1910: Purpose, Procedure and Alternatives*, 62 J. CRIM. L. & CRIMINOLOGY 205 (1971).
13. At the congressional debate on the proposed Three-judge Act, Senator Overman of North Carolina stated: "Whenever one judge stands up in a State and enjoins the Governor and the Attorney General, the people resent it, and public sentiment is stirred, as it was in my state, when there was almost a rebellion, whereas if three-judges declare that a state statute is unconstitutional the people would rest easy under it..... The whole purpose of the proposed statute is for peace and good order among the people of the States." Three-Judge Constitutional Litigation, *supra* note 8, at 558 n. 11.
14. In response to the *Young* decision, Senator Bacon of Georgia stated: "[T]he decision trampled on the rights of the State of

- Minnesota, and I may add that if it trampled on the rights of Minnesota, it necessarily trampled upon the rights of every other State.... If these subordinate courts can exercise such power, then, indeed, the States are but provinces and dependencies." *Id.*
15. CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4234 at 596-97 (1988).
16. Senate Report, *supra* note 4, at 1989.
17. Wright, *supra* note 15, § 4234 at 598.
18. Senate Report., *supra* note 4, at 1989.
19. *Id.*
20. *Id.* at 1990.
21. Wright, *supra* note 15, § 4234 at 600.
22. *Id.* at 600-01.
23. Senate Report, *supra* note 4, at 1990.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 1991.
28. *Id.* Since the 1968 fiscal year, the number of three-judge court cases continued to grow at alarming rates as illustrated below.
1968.....179
1969.....215
1970.....291
1971.....318
1972.....310
1973.....320
Id.
29. *Id.*
30. *Id.*
31. *Id.*

[T]he Act's abrogation occurred because of two jurisdictional uncertainties created by its vague drafting.

tionate amount of the limited time for argument.³² For instance, from October 1969 through November 1971, the Court heard arguments from 366 cases. Of these, 22 percent were from three-judge courts.³³

Jurisdictional Uncertainties

In large part, the Act's abrogation occurred because of two jurisdictional uncertainties created by its vague drafting. First, the threshold question of whether a three-judge court was required was an onerous inquiry

for a single district court to decide.³⁴ Before deciding this threshold question, four statutory elements were required.³⁵ In practice, these elements proved difficult to ascertain.³⁶

Because a three-judge court was warranted only when a complaint sought injunctive relief, in those cases in which declaratory relief was essentially equivalent to an injunction, a three-judge court was deemed inappropriate.³⁷ Moreover, a three-judge court was warranted only if the injunction was sought on federal constitutional grounds.³⁸ Yet embedded in this vague limitation were slippery distinctions. On the one hand, three judges were warranted if it was asserted that a statute's application was unconstitutional, notwithstanding concessions that the statute, in general, was valid.³⁹ On the other hand, three judges were not required if it was possible to enjoin state officials without holding a state statute unconstitutional.⁴⁰ This occurred when a claim asserted that officials were administering a constitutional statute in an unconstitutional manner.⁴¹

If any one of the statutory elements was incorrectly decided, a second jurisdictional uncertainty arose: the complexities of appellate review.⁴² According to Professor Wright, a leading scholar on federal courts, the proper channels for appealing jurisdictional issues were wasteful and confusing.⁴³ To illustrate:

The court of appeal may review if the single judge regards the Federal claim as so insubstantial as to require dismissal for want of jurisdiction or if the sin-

gle judge correctly concludes that three-judges are not required and decides the merits of the case. If the single judge incorrectly believes that three-judges are not required and proceeds to the merits, the remedy once was mandamus from the Supreme Court, but now appears to be an appeal to the court of appeals. If the court of appeals should fail to see that the case was one for three-judges, and reviews on the merits, its decision is void. If a three-judge court is convened, but it determines that three judges were not necessary, appeal is to the court of appeals. If the special court is correctly convened and gives judgment on the merits, appeal lies directly to the Supreme Court. If judgment is given on the merits by a three-judge court but such court was not required, appeal should be to the court of appeals rather than to the Supreme Court.⁴⁴

Original Reasons for Act Eliminated by Statutory and Rule Changes

The Act was intended to end the arbitrary exercise of authority illustrated in the situation created by *Ex Parte Young* discussed above.⁴⁵ However, these original problems became obsolete when the Federal Equity Rules were revised.⁴⁶ The revision extended to all injunctive cases the same protective procedures that the 1910 Act provided via three-judge courts.⁴⁷ The Equity Rules were changed to prohibit federal courts from granting ex parte temporary restraining orders for extended periods of time and to make federal judges accept some evidence before preliminary injunctions were granted to block enforcing state statutes.⁴⁸

Moreover, two other statutes were enacted to further restrain the power of federal courts to enjoin state action.⁴⁹ In the Johnson Act of 1934,⁵⁰ Congress restrained the federal courts' injunctive power with respect to state public utility rate orders.⁵¹ In the Tax Injunction Act of 1937,⁵² Congress restrained the federal courts' injunctive power with respect to state taxes.⁵³ The purposes of these statutes were to limit the ability of a federal court to interfere precipitously with the operation of state tax and public utility programs whenever there was a "plain, speedy, and efficient remedy" available in a state court.⁵⁴

32. *Id.* at 1991-92.

33. *Id.* at 1992.

34. *Id.*

35. *Id.* The four statutory elements were 1) state statute, 2) state officers, 3) request for injunctive relief, and 4) alleged unconstitutionality of the statute. *Id.*

36. *Id.* at 1992-93.

37. *Id.* (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963)).

38. Senate Report, *supra* note 4, at 1993

39. *Id.* at 1993 (citing *Department of Employment v. U.S.*, 385 U.S. 355 (1966)).

40. Senate Report, *supra* note 4, at 1993.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* (quoting C. WRIGHT, *FEDERAL COURTS*, § 50, at 193 (2d ed. 1970)). The complexity of the appellate review is analyzed in greater length in part three of the discussion section.

45. Senate Report, *supra* note 4, at 1995.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. codified in 28 U.S.C. § 1342 (1993).

51. Senate Report, *supra* note 4, at 1995.

52. This act is codified in 28 U.S.C. § 1341 (1993).

53. Senate Report, *supra* note 4, at 1995.

54. *Id.*

Decisional Law Provided Safeguards against Federal Judges

Case law also precluded the sort of precipitous intrusion in the state legal process by a single federal judge, that the 1910 Act purported to control. In *Younger v. Harris*,⁵⁵ the Supreme Court had held that injunctive relief against a pending state criminal prosecution was only available in exceptional circumstances, as when the prosecution is in the nature of a bad faith harassment of the defendant in the exercise of his or her federal rights.⁵⁶ Furthermore, in *Askew v. Hargrave*,⁵⁷ the Court had clarified the application of the abstention doctrine.⁵⁸ The Court held that under the abstention doctrine, a federal court will stay the exercise of state law that, if decided, could avoid the necessity of deciding any constitutional claims asserted.⁵⁹

For the above four reasons, on August 2, 1976, Congress abrogated the requirement for special three-judge courts in cases that sought to enjoin the enforcement of state or federal laws on the ground of unconstitutionality.⁶⁰ The trade off for that abrogation was an increase in the efficiency of the United States judicial system which benefits litigants, lawyers, and judges alike.⁶¹ Presently, to the extent that this trade off has been successful, the Hyde Bill § 2 is a return to the status quo ante.

DISCUSSION

Hyde Bill §2 and its Pros and Cons

Hyde Bill § 2 provides that “[a]ny application for an anticipatory relief against the enforcement, operation, or execution of a State law adopted by referendum shall not be granted by a United States district court or judge thereof upon the ground that the State law is repugnant to the Constitution, treaties, or laws of the United States unless the application for anticipatory relief is heard and determined by a court of three judges...”⁶² According to Representative Hyde, it was originally developed by Congressman Sonny Bono of California.⁶³ However, Hyde Bill § 2 reads and is vaguely drafted very similar to the original Act.

Moreover, according to Representative Hyde, Hyde Bill § 2 “is not intended to interfere with the Federal court’s ability to carry out its duty to review the constitutionality of United States laws.”⁶⁴ Nevertheless, as history has indicated, interference will occur. Furthermore, according to Representative Charles Canady, “it is appropriate to have more than one person looking at a challenge to the constitutionality of an act that has been adopted by the people of a state.”⁶⁵ Yet Representative

Canady fails to address the jurisdictional uncertainties a single district judge will face before the three judges reach, if they ever do, the constitutional challenge.

Further, according to California State Senator Richard Mountjoy, Hyde Bill § 2 “will restore confidence in our judiciary...because there is a loss of public confidence in those [federal] courts.”⁶⁶ This contention was most compelling when it was asserted by Senator Overman in the 42nd Congress held in 1908.⁶⁷ Then, the Act’s major problems as discussed above were unforeseeable. Over a period of 65 years, these problems became apparent. Once such problems manifested, the Act was abrogated. Yet, the problems were not resolved. Hence, this contention, reasserted 89 years later in the 105th Congress, loses its forcefulness. To enact Hyde Bill § 2, which does not resolve these problems but, rather, requires the judiciary to repeat the process in which these problems arose, will destroy, not restore, public confidence in the judiciary.

**Hyde Bill § 2
... requires
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Two National Examples That Influenced Hyde Bill § 2

Proposition 209

On November 5, 1996, California voters approved Proposition 209, which prohibited the state, local governments, districts, public universities, colleges, and schools, and other government instrumentalities from discriminating against or giving preferential treatment to any individual or group in public employment, public education, or public contracting on the basis of race, sex, color, ethnicity, or national origin.⁶⁸ However, before the enactment of Proposition 209, litigation commenced challenging its constitutionality.⁶⁹ The district court judge promptly blocked the enactment of Proposition 209 by granting a temporary restraining order.⁷⁰ The Ninth Circuit reversed and declared that “[a] system which permits one judge to block with the stroke of a pen what 4,736,180 state residents voted to enact as law tests the integrity of our constitutional democracy.”⁷¹

Proposition 187

On November 8, 1994, California voters approved Proposition 187, which prohibited illegal aliens from receiving

55. 401 U.S. 37 (1971).

56. Senate Report, *supra* note 4, at 1995.

57. 401 U.S. 476 (1971).

58. Senate Report, *supra* note 4, at 1995.

59. *Id.*

60. Wright, *supra* note 15, § 4234 at 603.

61. Senate Report, *supra* note 4, at 1994.

62. H.R. 1252, 105th Cong. §2(a) (1998).

63. *The Judicial Reform Act of 1997: Hearings on behalf of the judicial conference of the United States Before the Capitol Hill Hearing*, 105th Cong., 1st Sess. (1997)(statement of Henry H. Hyde, Congressman).

64. *Id.*

65. Bendavid, *supra* note 1, at 12.

66. *Judicial Overhaul 1997:Hearings on the Judicial Subcommittee on courts and intellectual property Before the House Committee chaired by Rep. Howard Coble*, 105th Cong., 1st Sess. (1997)(statement of Senator Richard Mountjoy, California State Senator).

67. See *supra* note 13.

68. *Coalition for Econ. Equity v. Wilson*, 946 F.Supp. 1480,1488 (N.D. Calif. 1996).

69. *Id.*

70. *Id.* at 1520-21.

71. *Coalition for Econ. Equity v. Wilson*, 122 F3d 692, 699 (9th Cir. 1997).

A federal district court judge blocked the enactment of Proposition 187....

public social services such as social security income and welfare subsidies.⁷² Moreover, Proposition 187 prohibited illegal aliens from receiving health care services from publicly funded health care facilities.⁷³ Further, Proposition 187 prohibited the admission or attendance of illegal aliens in public elementary or secondary school.⁷⁴ A federal

district court judge blocked the enactment of Proposition 187 when its constitutionality was challenged.⁷⁵ [Ed. note: On March 13, 1998, the District Court for the Central District of California found sections 1,4,5,6,7 and 8 of Proposition 187 unconstitutional and permanently enjoined its implementation and enforcement.⁷⁶]

Outraged by “the unjust effects the preliminary decision of a single federal district court judge may have on the voting rights of the entire population of a particular state,”⁷⁷ as illustrated by these national examples, the Republican position is that Hyde Bill § 2 will control “unelected judges from twisting the Constitution beyond any reasonable meaning in order to abrogate to themselves the ability to decide any significant issue in a way they prefer.”⁷⁸ In an attempt to control “an imperious judiciary,”⁷⁹ on its face, Hyde Bill § 2 does not take into consideration the legal and practical ramifications that will result if resurrection of the Act occurs.

LEGAL & PRACTICAL RAMIFICATIONS

Legal Ramifications

Provided that Hyde Bill § 2 is enacted, the legal ramifications federal courts will encounter are twofold. First, a district judge will have to decide whether to convene a three-judge court.⁸⁰ This inquiry is based on applying the substantial question test set forth in *Ex Parte Poresky*.⁸¹ Under *Poresky*, an insubstantial question is one that is either “obviously without merit” or because “its unsoundness so clearly results from previous Supreme Court decision as to foreclose the subject and leave no room for the inference that the question raised can be

the subject of controversy.”⁸² The *Poresky* substantiality test is vague and ambiguous. Classifying a claim as “obviously without merit” falls short of a helpful construction of the meaning of “insubstantial question.”⁸³ Further, the phrase, “foreclosed by previous decisions” of the Supreme Court, has often resulted in conflicting Supreme Court rulings since these decisions are based on different factual situations and new constitutional theories.⁸⁴ Thus, a district judge is not provided with a clear standard by which to convene a three-judge court.⁸⁵

If Hyde Bill § 2 is enacted, a district judge deciding a state referendum similar to Proposition 209 must first ascertain whether the constitutional claim is a substantial one before deciding that a three-judge court has jurisdiction to hear the case.⁸⁶ Yet, because these standards lack clarity, what constitutes a substantial question will depend heavily on the predilections of individual judges.⁸⁷ Two historical cases illustrating the variation that could occur between federal courts are *National Mobilization Committee to End the War in Vietnam v. Foran*⁸⁸ and *Hargrave v. McKinney*.⁸⁹

In *Foran*, a district judge denied a three-judge court hearing on the ground that the celebrated Anti-Riot Act raised no substantial constitutional question.⁹⁰ Based on a Supreme Court decision upholding an Arkansas disorderly conduct statute, which foreclosed any constitutional question with respect to the Anti-Riot Act, the Seventh Circuit found the two statutes sufficiently similar to preclude a three-judge hearing even though the statutes were, arguably, different.⁹¹ To reach such a conclusion, the Seventh Circuit implicitly gave the *Poresky* holding a narrow construction and, in so doing, sanctioned the right of district judges to construe challenged statutes in order to obviate their raising substantial constitutional questions.⁹²

In contrast, when the *Hargrave* district judge found no substantial question in a constitutional attack on a Florida educational tax requirement,⁹³ the Fifth Circuit, taking a more liberal approach than the Seventh Circuit, overruled the district court’s decision.⁹⁴ Based on its construction of *Poresky*, the Fifth Circuit held that a claim need only be arguable to merit the invocation of a three-judge court.⁹⁵ It reasoned:

Regardless of our personal reactions to the merits of plaintiffs’ position and regardless of the novelty of the

72. *League of United Latin American Citizens v. Wilson*, 131 F3d 1297, 1300 (9th Cir. 1997).

73. *Id.*

74. *Id.*

75. *League of United Latin American Citizens v. Wilson*, 908 F.Supp. 755, 764 (C.D.Cal. 1995).

76. *League of United Latin American Citizens v. Wilson*, No. 94-7569 MRP, 1998 WL 141325, at *1 (C.D.Cal. March 13, 1998).

77. Statement of Representative Hyde, *supra* note 63.

78. Senator Orrin Hatch, quoted in Bendavid, *supra* note 1, at 12.

79. Representative Hyde, quoted in Bendavid, *supra* note 1, at 12.

80. The Three-Judge Court Act of 1910, *supra* note 12 at 208.

81. 290 U.S. 30 (1933). In *Poresky*, the Supreme Court held that a three-judge court is warranted if there is a substantial constitutional challenge to a state statute. *Id.* at 32.

82. *Id.*

83. The Three-Judge Court Act of 1910, *supra* note 12 at 208-09.

84. The Three-Judge Court Act of 1910, *supra* note 12 at 209.

85. *Id.* at 209.

86. *Poresky*, 290 U.S. at 32. Absent a case or controversy, federal question jurisdiction cannot be invoked. However, the Court reasoned that if federal jurisdiction existed independently of federal question jurisdiction, then the substantiality test is inapplicable. *Id.*

87. Three-Judge Court Act of 1910, *supra* note 12 at 209.

88. 411 F2d 934 (7th Cir. 1969).

89. 413 F2d 320 (5th Cir. 1969).

90. *Foran*, 411 F2d at 395.

91. *Id.* at 938.

92. Three-Judge Court Act of 1910, *supra* note 12 at 209.

93. *Hargrave*, 413 F2d at 322.

94. *Id.* at 328.

95. *Id.* at 328-29.

theories which support their position, we cannot say that their view of the taxing scheme is beyond challenge.... All we decide is that the claim is such an arguably one as to be “substantial” within the *Poresky* definition.⁹⁶

The second legal ramification federal courts will encounter is the appellate review to appeal three-judge court decrees. Because the Act itself failed to provide a review of questions relating to three-judge courts, the Supreme Court is credited for creating an orderly appeal system.⁹⁷ For instance, where a district judge refused to convene a three-judge court for any reason, the Supreme Court strongly implied in *Idlewild Bon Voyage Liquor Corp. v. Epstein*⁹⁸ that all questions of three-judge court decrees are reviewable in the court of appeals.⁹⁹ This implication was turned into fact in *Schackman v. Arnebergh*.¹⁰⁰ In *Schackman*, *Idlewild* was cited as authority for the proposition that review of three-judge court decrees are in the court of appeals.¹⁰¹

Practical Ramifications

Provided that Hyde Bill § 2 is enacted, its procedure is identical to the procedure the original Act followed.¹⁰² This procedure has proven to be an intolerable burden on the courts and a dangerous source of pitfalls for litigants.¹⁰³ Hence, it must follow that under Hyde Bill § 2, federal courts will confront the same intolerable burdens the Act presented in the past; litigants will confront the same procedural pitfalls the Act presented in the past.

Similar to the Act, Hyde Bill § 2 will cause disruption at the trial level.¹⁰⁴ Under Hyde Bill § 2, if a state referendum like Proposition 187 is filed in a district court, a second district judge and a judge of the court of appeals will have to leave their own benches. While the argument that district judges are too few and far between to travel is not as compelling in 1997 as it was in 1908,¹⁰⁵ the argument that very serious inconvenience can result in a court that has a crowded docket is more compelling in 1997 than in 1908.¹⁰⁶ Moreover, because it, like the original Act, imposes a direct appeal to the Supreme Court, Hyde Bill § 2 carves out a large class of cases in which the Court is prohibited from exercising its judicial discretion of granting or denying certiorari.¹⁰⁷

Finally, similar to the Act, litigants will confront procedural pitfalls under Hyde Bill §2. For instance, if a single district judge decides that a state referendum like Proposition 187 lacks a substantial constitutional claim, that judge will not convene a three-judge court.¹⁰⁸ Like the original Act, Hyde Bill § 2 is silent on review of such orders.¹⁰⁹ Alternatively, if that district judge decides that there is a substantial question and convenes a three-judge court, the three judges could decide that a three-judge court is not warranted.¹¹⁰ Again, like the original Act, Hyde Bill § 2 is silent on review of such orders. Consequently, confusion prevails as to how such review may properly be obtained.¹¹¹

In the first instance, the Supreme Court has held that the exclusive remedy is a writ of mandamus from the Supreme Court.¹¹² Despite this rule, some court of appeals may review the order denying a three-judge court on appeal from the final decree of the district judge.¹¹³ At this point, to be safe, litigants will have to pursue both of these procedures simultaneously weighing the advantages and disadvantages of each remedy.¹¹⁴

With respect to a writ of mandamus, the major advantage and disadvantage are as follow. The mandamus remedy allows for interlocutory review of the order denying a three-judge court.¹¹⁵ However, the court can consider only the question of whether the three-judge court was required.¹¹⁶ In either event, the parties will be sent back for a new trial or for an appeal on the merits to the court of appeals.¹¹⁷

With respect to an appeal to the court of appeals, the major advantage and disadvantage are as follow. If the court of appeals decides that a three-judge court was nor required below, it will proceed to review the merits of the decree which was entered, disposing of the entire case at once.¹¹⁸ However, some courts of appeal will dismiss an appeal because of the “rule” that mandamus from the Supreme Court is the exclusive remedy.¹¹⁹ Despite the advantages and disadvantages of both remedies, a litigant who decides to pursue one remedy risks having the other remedy barred by limitations.¹²⁰

This procedure has proven to be ... a dangerous source of pitfalls for litigants.

96. *Id.* at 328.

97. Three-Judge Court Act of 1910, *supra* note 12, at 210.

98. 370 U.S. 713 (1962).

99. *Id.* at 716.

100. 387 U.S. 427 (1967).

101. *Id.*

102. H.R. 1252, 105th Cong. §2 (1997).

103. *Three-Judge Constitutional Litigation*, *supra* note 8, at 563.

104. *Id.*

105. *See id.* at 563-64.

106. *See id.*

107. *See id.* at 564.

108. *See id.* at 566.

109. *See id.* at 566 n. 56.

110. *See id.* at 566 n. 55 (*citing* *Ex Parte Gray*, 342 U.S. 517 (1952), and *Ex Parte Public National Bank*, 278 U.S. 101 (1928)).

111. *See* *Three-Judge Constitutional Litigation*, *supra* note 8, at 566-67.

112. *Id.* at 567 (*citing* *Ex Parte Metropolitan Water Co.*, 220 U.S. 539 (1911)).

113. *Three-Judge Constitutional Litigation*, *supra* note 8, at 567 (*citing* *Carrigan v. Sunland-Tujung Telephone Co.*, 263 F.2d 568 (9th Cir. 1959)).

114. *Three-Judge Constitutional Litigation*, *supra* note 8, at 567.

115. *Id.* at 569.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 567 (*citing* *Waddell v. Chicago Land Clearance Comm'n.*, 206 F.2d 748, 750 (7th Cir. 1953)).

120. *Three-Judge Court Constitutional Litigation*, *supra* note 8, at 568.

In the second instance, where there is a decree of an erroneously convened three-judge court, the decree is not void for want of jurisdiction.¹²¹ However, the Supreme Court will dismiss an appeal from such a court once the defect is discovered.¹²² This creates the delay and expense of a second appeal to the court of appeals.¹²³ Yet, this second appeal may not be feasible.¹²⁴ By the time the Supreme Court dismisses the first appeal, the time for appealing to the court of appeals will probably expire.¹²⁵ To remedy this problem, a litigant will have to secure an order from the Supreme Court directing the district court to enter a new decree from which a timely appeal can be taken.¹²⁶ But, the Court could deny the secured order, thereby leaving the appellant remediless.¹²⁷

CONCLUSION

Representative Hyde testified that Hyde Bill § 2 “reforms the procedures of the federal courts to ensure fairness in the hearing of cases, without stripping jurisdiction or reclaiming any powers granted by Congress to the district court.”¹²⁸ Based on the judicial history created by the original Act, it is highly likely that the converse of Representative Hyde’s statement is true. You be the judge!

121. *Id.* at 570-71.

122. *Id.* at 571.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. Bendavid, *supra* note 1, at 12.



Tamara Hall won second place in the American Judges Association writing competition for law students with this article. She received her J.D. in December 1997 from the Golden Gate University School of Law. She received a B.S. in business administration in 1993 from the University of Southern California. Ms. Hall’s career goal is to prosecute white collar crime.

Editor’s Note: After final submission of Ms. Hall’s article as part of the law student writing competition, there has been significant activity in Congress involving H.R. 1252, now known as the Judicial Reform Act of 1998. It was favorably reported by the House Judiciary Committee, chaired by Representative Hyde, on April 1, 1998, and was passed by the House on April 23, 1998. In the Senate, the bill has been assigned to the Judiciary Committee, but has not yet been reported out by the committee. As passed by the House, H.R. 1252 contains several provisions beyond the three-judge court section discussed in this article. Other sections include revised procedures for processing complaints against federal judges; random assignment of habeas corpus applications in each district; rules governing media coverage of federal court proceedings; and limits on the powers of federal courts over suits concerning prison conditions.

Court Review Author Submission Guidelines

Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work.

Court Review is received by the 3,500 members of the American Judges Association (AJA), as well as many law libraries. About 40 percent of the members of the AJA are general jurisdiction, state trial judges. Another 40 percent are limited jurisdiction judges, including municipal court and other specialized court judges. The remainder include federal trial judges, state and federal appellate judges and administrative law judges.

Articles: Articles should be submitted in double-spaced text with footnotes, preferably in WordPerfect format (although Word format can also be accepted). The suggested article length for *Court Review* is between 18 and 36 pages of double-spaced text (including the footnotes). Footnotes should conform to the 16th edition of *The Bluebook: A Uniform System of Citation*. Articles should be of a quality consistent with better state bar association law journals and/or other law reviews.

Essays: Essays should be submitted in the same format as articles. Suggested length is between 6 and 12 pages of double-spaced text (including any footnotes).

Book Reviews: Book reviews should be submitted in the same format as articles. Suggested length is between 3 and 9 pages of double-spaced text (including any footnotes).

Pre-commitment: For previously published authors, we will consider making a tentative publication commitment based upon an article outline. In addition to the outline, a comment about the specific ways in which the submission will be useful to judges and/or advance scholarly discourse on the subject matter would be appreciated. Final acceptance for publication cannot be given until a completed article, essay or book review has been received and reviewed by the *Court Review* editor or board of editors.

Editing: *Court Review* reserves the right to edit all manuscripts.

Submission: Submissions may be made either by mail or e-mail. Please send them to *Court Review’s* editor: Judge Steve Leben, 100 North Kansas Avenue, Olathe, Kansas 66061, e-mail address: sleben@ix.netcom.com, (913) 764-8484 ext. 5582. Submissions will be acknowledged by mail; letters of acceptance or rejection will be sent following review.

The Resource Page: Focus on Drug Courts

WHAT IS A DRUG COURT?

The mission of drug courts is to stop the abuse of alcohol and other drugs and related criminal activity. Drug courts offer a compelling choice for individuals whose criminal justice involvement stems from [alcohol or drug] use: participation in treatment. In exchange for successful completion of the treatment program, the court may dismiss the original charge, reduce or set aside a sentence, offer some lesser penalty, or offer a combination of these.

Drug courts transform the roles of both criminal justice practitioners and ... treatment providers. The judge is the central figure in a team effort that focuses on sobriety and accountability as the primary goals. Because the judge takes on the role of trying to keep participants engaged in treatment, providers can effectively focus on developing a therapeutic relationship with the participant. In turn, treatment providers keep the court informed of each participant's progress so that rewards and sanctions can be provided.

Excerpt from U.S. Dept. of Justice, Office of Justice Programs, Drug Policy Office, *Defining Drug Courts: The Key Components* (1997).



DRUG COURT ACTIVITY

No. of programs today	275
No. of programs planned	155

Source: Drug Court Programs Office, U.S. Department of Justice (as of June 1998).

Court Review thanks Marilyn McCoy Roberts of the Drug Court Programs Office, Judge Peggy Fulton Hora and Judge William G. Schma for their contributions of information for this page.

CLINTON ANNOUNCES DRUG COURT GRANTS

WASHINGTON, July 11 (AP) – Testing of criminal defendants in 23 of the nation's biggest cities shows a strong connection between drugs and crime, a government study found. But drugs of choice vary widely by region, and President Clinton said today he is releasing \$32 million in grants to help local officials tailor local responses.

Clinton used his weekly radio address to announce \$27 million in federal grants to create special drug courts in 150 new jurisdictions. There are now more than 270 drug courts around the country, combining supervision with sanctions, testing and drug treatment to coerce criminals to end their drug habit.



CONTACT LIST

American University Drug Court Clearinghouse

Caroline Cooper, Director
Brandywine 660,
4400 Massachusetts Ave., NW
Washington, DC 20016
(202) 885-2875
(202) 885-2885 (fax)

National Association of Drug Court Professionals

901 N. Pitt Street #370
Alexandria, CA 22314
(703) 706-0576
(703) 706-0577 (fax)

Drug Courts Program Office USDOJ Office of Justice Programs

Marilyn McCoy Roberts, Director
810 7th Street, NW #6240
Washington DC 20531
(202) 616-5001
(202) 514-6452 (fax)



INTERNET SITES FOR INFORMATION ABOUT DRUG COURTS

American University Drug Court Clearinghouse

<http://www.american.edu/justice>

This is the place to start for information about drug courts. Under an agreement with the Justice Department, American University maintains this information base on drug courts. If you don't find what you want on-line, contact them and they can get you to the right place.

National Association of Drug Court Professionals

<http://www.drugcourt.org>

This group has the text of lots of publications about drug courts available on-line, as well as lists of resources and contacts throughout the country.

Drug Courts Program Office, US Justice Department

<http://www.ojp.usdoj.gov/dcpo>

The Drug Courts Program Office administers the federal grants program. Information about the grants, including application packets, are available on-line.

Related Sites:

National Clearinghouse for Alcohol and Drug Information

<http://www.health.org/index.htm>

National Institute on Drug Abuse

<http://www.nida.nih.gov>

Office of National Drug Control Policy

<http://www.whitehousedrugpolicy.gov>



The Resource Page



NEW PUBLICATIONS OF INTEREST

G. Thomas Munsterman, et al., *Jury Trial Innovations* (1997) (334 pp.).

All of the proposals for jury reform are catalogued here with pros, cons and citations to cases and articles discussing each one. Topics covered include juror questioning of witnesses, juror note-taking, and juror discussion of evidence during trial. To order, send \$18 (which includes postage & handling) to National Center for State Courts, Fulfillment Dept., P. O. Box 580, Williston, VT 05495-0580 - or call 1-888-228-NCSC - or e-mail: ncsc.orders@aid-cvt.com.

Jona Goldschmidt, et al., *Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Court Managers* (1998) (113 pp. plus 30-page appendix).

This guidebook is a thorough, readable manual for helping *pro se* litigants, with an appendix of additional resources, including contact names and a bibliography. Detailed information is provided about successful programs throughout the country. The book is available for \$15 plus \$3.50 postage and handling from the American Judicature Society, Suite 600, 180 N. Michigan Ave., Chicago, Illinois 60601 - (312) 558-6900. Other AJS publications are listed on their web site at <http://www.ajs.org/pubs1.html>.

Juries for the Year 2000 and beyond: Proposals to Improve the Jury System in Washington, D.C. (1998) (112 pp.).

Who ever heard of a committee report so well written, thorough and timely that it was a "must read?" For those interested in reform and improvement of the jury system, it

has happened. Led by D.C. Superior Court Judge Gregory Mize and D.C. U.S. District Judge Thomas Hogan, this committee has prepared thorough recommendations for jury system improvements in D.C. that are worthy of study throughout the nation. The report, which contains detailed references and analysis, expands on jury research projects previously undertaken in Arizona and elsewhere. Copies are available from the Council for Court Excellence, 1150 Connecticut Ave., N.W., Suite 620, Washington, D.C. 20036-4104 - (202) 785-5917. The Council asks for a \$5 payment to cover postage and handling. A summary of the recommendations can be viewed at <http://www.courtexcellence.org/recommendations.html>.



INTERNET SITES OF INTEREST

Internet sites won't provide the ease of searching and breadth of case law, statutes and law review coverage of LEXIS and Westlaw, but they do provide coverage of U.S. Supreme Court, federal courts of appeals, recent state decisions and access to legal organizations, government web sites, federal and many state statutes and even on-line CLE. Here are some of the best sites:

findlaw.com
<http://www.findlaw.com>

Findlaw is very easy to use. Federal and state materials are easy to locate. On-line CLE will teach you how to do legal research on the Internet, using findlaw and other primary Internet legal research sites.

WashLaw
<http://washlaw.edu>

The Washburn University School of Law Library staff keeps this site up-to-date. Provides links to lots of other

useful sites as well, ranging from legal and government sites to one at which you can find the 9-digit zip code for any address.

Cornell's Legal Information Institute
<http://www.law.cornell.edu>

One of the first Internet legal research sites and still one of the best, most of what's accessible on the web is listed or linked here somewhere. However, some of the links we checked on state law weren't fully up-to-date.

alllaw.com
<http://www.alllaw.com>

A good layout and easy-to-use search screen make this a user-friendly site.

National Center for State Courts
<http://www.ncsc.dni.us>

Aside from providing an overview of the work of the National Center for State Courts, this site also provides links to other sites of interest, including local courts throughout the country that have web sites.



DRUG COURT RESOURCES

Resources on drug courts are found on page 39.

SUGGESTIONS FOR THE RESOURCE PAGE

Please let us know of resources you have found useful in your work as a judge so that we can tell others. Write to the editor, Judge Steve Leben, 100 N. Kansas Ave., Olathe, Kansas 66061, e-mail: sleben@ix.netcom.com.