

Court Review

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EDITOR'S NOTE

Our issue begins with Judge Procter Hug, Jr.'s thoughts on judicial independence under pressure. We reprint the remarks he gave as the featured speaker at the American Judges Association's annual educational conference in October 2001. Judge Hug's comments, as well as those of AJA president Bonnie Sudderth in her president's column, deal with issues faced by judges in times of crisis, including in the aftermath of the September 11, 2001 terrorist attacks in the United States.

Our articles begin with an exchange regarding the suggestibility of children as a factor in assessing their credibility as witnesses. A bit of background will place these articles in context.

In our Summer 2000 issue, we featured an essay by Stephen J. Ceci and Maggie Bruck titled, "Why Judges Must Insist on Electronically Preserved Recordings of Child Interviews." In it, Ceci and Bruck presented their suggestion that child-witness interviews generally should be electronically recorded so that the extent to which poor interviewing techniques led the children to adopt suggested responses could be assessed. That essay was both an introduction to and an outgrowth of Ceci and Bruck's larger research, which is explained in detail in their book, *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony*, which won the 1999 William James Award of the American Psychological Association for best book.

Recently, the work of Ceci and Bruck has been criticized by USC law professor Tom Lyon. For the benefit of judges, we present an overview of this debate in a pair of articles. Forensic psychologist David Martindale, who frequently testifies in court as an expert witness, defends the Ceci-Bruck research and position. Martindale suggests that improperly suggestive interviewing techniques are sufficiently widespread to be of serious concern and that expert testimony can appropriately educate judges and jurors. Lyon, who is both a law professor and a psychologist, replies to Martindale, contending that current research does not show that improperly suggestive interviewing techniques are widespread and that expert testimony on that subject is not always appropriate. We think you'll find their exchange a helpful introduction to this subject. For those interested in greater depth, all of the leading articles are cited in the footnotes of the two pieces.

We also present Professor Whitebread's annual review of the civil decisions of the United States Supreme Court for the past term. As you will see, *Bush v. Gore* was far from the only significant case decided.

Last, we present the winning essay from the American Judges Association's law school essay contest for 2000. Roxana Cardenas, who went to law school while already employed as a court interpreter in Los Angeles, has both interesting experiences and suggestions, which she shares in this article. —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, Canada, and Mexico. 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 on page 25 of the Summer 2001 issue. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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President's Column

Bonnie Sudderth

July 4. December 7. September 11. Some dates, standing alone, and without more, convey meaning so profound that human words may serve only to limit the thoughts and emotions embodied therein.

Nevertheless, when Americans consider July 4, they say “the birth of our nation.” It was the birth date of a democratic form of government—of a nation based upon the principle of government by the people, of the people, and for the people—and of a nation founded on the concept that all men (and women) are created equal.

December 7, of course, is “a date which will live in infamy.” It is the date when the United States, which had theretofore attempted to isolate itself from the entanglements of other nations, was involuntarily thrust into the fray, into a great world war, from which it emerged an even greater nation, a leader among all nations.

September 11, 2001. How will historians characterize the significance of that date? Most likely it will be remembered as the date when the world went to war against terrorism. And if it is a war eventually won, it is certain that even in the centuries to come September 11 will have a special place in the history books.

But consider for a moment an even greater significance to this date. It may not be as exciting as the birth of a nation or as bold as a war fought and won. Just as, in the history books, when July 4 is remembered it is not so much about a document that was signed on that date as it is about ideas of a new nation expressed therein, likewise, it is possible that September 11 may not be remembered so much for the acts of terrorism that occurred on that date as it will be for how our nation, founded upon principles of liberty, fought to preserve the very liberties that were threatened by the terrorist acts.

Benjamin Franklin, one of America's founding fathers, was said to have remarked that anyone who would sacrifice liberty for the sake of safety deserved neither. Yet that is exactly the balancing act that the United States, and indeed other free nations, face as we endure the aftermath of September 11. Will September 11 be remembered as the day that our liberties were tested and lost? Or will it be the day that we began a serious debate over how much, if any, liberty we as a nation can sacrifice for the sake of safety and still be a nation of liberty rather than oppression?

There are those who say that if we allow September 11 to erode our constitutional freedoms, then the terrorists will have won. There are others who argue that safety can be achieved within the bounds of our constitutional principles without violating basic liberties. This debate is one that, according to our system of government, rightfully belongs in the legislative branch. And we, as judges, are watching as the debate ensues.

But we will be the ultimate arbiters of these issues. When the liberties of our nation are tested, they will be tested in the court systems across our country.

Our federal courts will grapple with questions of profiling and discrimination as new federal standards and restrictions are imposed on air and other forms of travel to reduce the opportunities for terrorism. State and local courts will labor over constitutional challenges to new state statutes and local ordinances designed to make our communities safer. The age-old issues of searches, seizures, and due process rights of the accused will take on added dimensions in criminal courts throughout the land as more citizens are accused of aiding and abetting terrorists or terrorist organizations.

Judges will be called upon to make difficult decisions, decisions that will potentially subject them to public ridicule or clamor. Yet, as judges, we know we can never yield to public pressure in circumvention of our duty to uphold the constitution—though our job security may be at stake.

As Alexander Hamilton explained in the Federalist Papers (No. 78), without oversight by courts of justice, all rights and privileges reserved in our Constitution are meaningless. It is not only the province but also the obligation of courts to conduct this exercise when properly called upon to do so, and to take our obligations seriously and somberly.

The history books may tell a story of how the horrific events of September 11 challenged the fundamental freedoms of our democracy. It is my earnest hope and most sincere expectation that the volumes will be replete with examples of brave and independent judges who labored over difficult decisions when called upon to do so—judges who did their part in our system of justice to preserve the constitution while helping to make the world a safer place for ourselves and our loved ones.



On Judicial Independence Under Pressure*

Procter Hug, Jr.

First, I would like to give my personal welcome to all of you to my home state and city, Reno, Nevada. It is a pleasure to have you here at this annual conference. The timing of the conference, of course, in these days following the terrorist strike in New York and Washington, D.C., made it difficult for those planning the conference and for those of you who traveled here with air traffic restricted the way it is. I am pleased to see the turnout and commend those of you that had to travel here from some distance.

Our President has emphasized the importance of restoring confidence in our air traffic and the importance of our nation in continuing its normal operations. Otherwise, we would be doing the very thing the terrorists would hope, that is, to create disruption of the functioning of our daily activities. Thus, I want to congratulate the American Judges Association for proceeding with this conference despite the difficulties presented by the terrorist attack.

When Judge Jim VanWinkle asked me to speak at the opening of your conference, I didn't realize that it would be billed as the Honorable Tom C. Clark Lecture. You know he was truly a great judge and a wonderful man. He left the bench so that his son, Ramsey Clark, could serve as U.S. Attorney General without conflicts. But when he stepped down he did some great things for judicial education. It was at his insistence that the Federal Judicial Center was created for federal judges and the National Judicial College, that is now here in Reno, was established for the continuing education of state judges. I remember participating in the groundbreaking ceremonies with Justice Clark for the National Judicial College building, which you will be visiting.

With so many visiting judges here it

reminds me of a story that I really just can't resist telling. It involves a northern judge who was sent down to a small southern community. It was quite hot, and it was a small courthouse with no air conditioning, so that all of the windows and doors were open for ventilation purposes. The lawyers seemed to be going on interminably, and the judge was getting rather exasperated. And he said, finally, "Let's get to the point. I don't want to hear any more about this. I just want to get to the point. Let's get this trial finished and your final arguments finished. And what are all these flies that are buzzing around my head?"

And the lawyer said, "Well, your Honor, down here we call them 'circle flies.'"

"Well why would you call them circle flies?" the judge asked.

"Well, your Honor, it's because they're known to circle around the rear end of a horse," the lawyer replied.

The judge shot back, "Counsel, I hope that you're not intimating that there is any resemblance in this Court to the rear end of a horse."

"Oh, no, Your Honor," replied the lawyer, "but it sure is hard to fool them circle flies!"

Well, now on to judicial independence. Although we recognize the importance of our independent judiciary in this country, it takes only a visit to a foreign country that is seeking to establish a democracy such as ours to emphasize that importance. So often the judiciary in these countries is answerable to an executive branch, thus, susceptible to controlled decisions or removal of the judge. High-handed actions by a powerful leader or local officials frequently determine the outcomes of cases. Without an independent judiciary there is no mechanism to serve as a brake to forestall such actions. When we meet with foreign judges in their

countries, judicial independence such as we have here in the United States is the hardest to understand and yet the aspect that the judges most admire in our judicial system. Judges who visit our country, through such programs as we have at the National Judicial College, are struck by that quality of independence that we have in this nation.

Although our legal system is the envy of much of the world, we hear much criticism in our own country of lawyers and judges. But we should take real pride in the contribution of judges and lawyers to the formation of our country. Of the 55 delegates to amend the Articles of Confederation, which we now call the Constitutional Convention, 60% were lawyers or judges. Throughout the succeeding years, lawyers and judges have guided the continuing development of our system of government. I stress *continuing* development because it is not something like climbing a hill when we can say, "Ah-hah! We have achieved the objective." It is more like adjusting a system of governance to the changing times, indeed, in this era it is *very* rapidly changing times, with the breathtaking advances in science and technology and our dependence on a global economy.

We as lawyers and judges have to take pride in the part the legal profession has played in the development of our nation. Lawyers and judges have caused citizens and institutions to face up to themselves, to consider important social changes when other institutions are not willing to do so. It has frequently been in the face of vigorous opposition and antagonism by those who have had a vested interest in the status quo. That's why lawyers, as a class, can be unpopular because they are frequently working for unpopular, though much needed, changes in society.

* Judge Procter Hug, Jr., presented the Tom C. Clark lecture at the annual education conference of the American Judges Association

on October 1, 2001 in Reno, Nevada. We reprint his remarks here.

As a result of the efforts of lawyers and judges, segregated schools are a thing of the past; the ballot box has been freed of racial and property-based exclusions; standards of treatment and care in prisons and mental institutions have been established where inhumane conditions have existed; exclusion of students from universities on the basis of race has been eliminated; and expanded opportunities for employment have been opened up for women and minorities. This highlights just a few of the social changes in which lawyers and judges have been at the forefront.

There are judges who have had truly heroic roles in some of these changes in the social order. Look to some of the federal judges in the South during the Civil Rights movement. Judge John Godbold, the former chief judge of the Eleventh Circuit, pointed this out in a recent law review article.* There are Frank Johnson and Richard Rives of Alabama, and Elbert Tuttle of Georgia, just to name a few. At a time of great difficulty in the history of our country, judges of the South stood up and recognized the rights of all our people. Some of them faced extreme criticism and ostracism in their communities. They and their families endured threats and lived under the protection of guards. The home of Judge Johnson's mother was bombed. Judge Rives' local newspaper demanded that he not be buried in Alabama soil; and the gravestone of his only son was painted red and garbage was heaped on it. Judge Rives loved his church, where he had been a lay official, where his daughter was married and his son was buried from. He left it for another when it posted ushers at the door to bar a few black citizens of the faith who wished to enter. In 1933, Alabama Circuit Judge James Horton set aside a guilty verdict in the second, famous Scottsboro trial. That involved a charge against a young African-American for raping white women. He did so with the sure expectation that it would cost him his seat at the next election. It did. These judges refused to duck their responsibility. They upheld the law and enforced the Constitution. The best

description that I know of them is expressed in the words of Maxwell Anderson's play, *Valley Forge*: "There are some men who lift the level of the age in which they live, so that all men stand on higher ground." And, indeed, the term *men* as used there includes both genders—men and women—because it is true of both.

We federal judges with life tenure have a great advantage in maintaining judicial independence. It's not as difficult for us as it is for state judges. Most of you as state judges have to face election in regular terms. Thus, an unpopular decision can not only lead to ostracism and criticism in a community, but can end a judicial career. Powerful politicians or interest groups can raise large sums of money to defeat a judge who has rendered a decision that is con-



trary to those interests. In such instances, it takes more courage to render the right, but unpopular decision.

The long-term respect for the judiciary is vital to maintaining judicial independence. That respect is built in many small ways, as well as through the high-profile decisions. Those of you who are trial judges have frequent contact with the general public, whether as parties, witnesses, jurors, or persons involved in traffic offenses. The impression that you make on a daily basis as to fairness and civility is more important than the abstract opinions of we who are appellate judges.

The steps that you are taking to

improve the methods of operation and dealing with the public are very important, including alternate dispute resolution, drug courts, mental health courts, different ways of handling domestic violence, and other innovations you are discussing at this conference. Outreach into the community through schools, talks at service clubs, and, indeed, with the media are important in enhancing the reputation of the judiciary and, in turn, in maintaining judicial independence.

With the terrorist threat that has now become evident in our society since September 11, the role of the judiciary will be exceptionally important. Additional security from such terrorist attacks is clearly required, but our constitutional civil liberties must also be protected. It is a delicate balance to be struck, and the judiciary will play a vital role in doing so. Our President has warned against bigotry toward those that are of Mideast descent or of the Muslim religion. It is up to us, as judges, to guard against such bigotry.

We have not always done that well in times of crisis. A prime example is the internment of Japanese-Americans during World War II, which was approved by the Supreme Court in the *Korematsu* decision. Initially, there was a curfew set up for Japanese-Americans, which was a precursor to the internment program. A young Japanese-American intentionally did not comply with that curfew, believing it was a violation of his constitutional rights. He was convicted of the crime. And what was astounding—the government in those restricted travel times had no way to send him to prison in Arizona—so he hitchhiked to prison and there spent two years incarcerated. Eventually, our court reviewed his case and directed the issuance of a writ of coram nobis, which overturned that conviction. The government did not seek certiorari, so we have the unusual circumstance at our Ninth Circuit Court of Appeals of reversing the Supreme Court (which makes me a little happy given the fact that we've been reversed so much by the Supreme Court).**

Today, we have two significant issues

* John C. Godbold, "Lawyer" — *A Title of Honor*, 29 CUMB. L. REV. 301, 309 (1998-1999). This paragraph in the text is based on Judge Godbold's excellent article.

** *Editor's Note*: The case to which Judge Hug refers is *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987). In it, Gordon

Hirabayashi obtained a writ of coram nobis vacating his 1942 conviction for violating a military curfew that required persons of Japanese ancestry, whether citizens or not, to remain within their residences from 8:00 p.m. until 6:00 a.m. The Ninth Circuit based its decision in part on the suppression back in

bearing on our civil liberties. The first is the terrorist threat where there will be pressure to loosen protections on civil liberties. The second is the exponential increase in technology that can easily invade privacy in ways that we never dreamed of. There is currently a case in Tampa, Florida, where there was a scan of faces at the Super Bowl and a use by law enforcement to link that scan to wanted criminals. So, if you sneaked off to the Super Bowl, you've been found out!

Recently, the Supreme Court decided a case that held that it was an unlawful search to calibrate the heat emanating from a roof of a building to detect marijuana-growing activity within. This indicates there will be some brakes put on the utilization of this newly invasive technology of various sorts. Then, we have the

rental car company monitoring the speed of drivers of their cars by satellite, with the driver's consent buried somewhere in the small print of the contract, which I know you all read, just as I do, before you rent a car. It will be important for us in the judiciary to determine whether technology or the law will define the contours of civil liberty.

Ours is an important calling to be able to serve in an independent judiciary that is so vital to our democracy. Each of us in our various types of judgeships have the important responsibility to maintain the respect of the public for the manner in which we perform our duties. Hopefully, we will be exhibiting fairness, impartiality, understanding, courage in our decisions, and an awareness that the people have entrusted us to do this important judicial

function to the very best of our abilities. It is in that way that the independence of the judiciary can best be maintained.



Procter Hug, Jr., is a senior judge on the United States Court of Appeals for the Ninth Circuit. At the time he took senior status on January 1, 2002, he had served on the Ninth Circuit for 24 years, which ranked third among the longest-serving active circuit judges in the nation. Hug served as chief judge of the Ninth Circuit from 1996 to 2000. A 1958 graduate of Stanford Law School, he was appointed to the Ninth Circuit in 1977 by President Carter. Judge Hug's chambers are in Reno, Nevada.

1942 and 1943 of portions of a military report and other intelligence materials that might have supported the view that mass actions against people of Japanese ancestry were unnecessary for military purposes and racially motivated. The United States Supreme Court had affirmed Hirabayashi's curfew conviction in 1943 in *Hirabayashi v. United States*, 320 U.S. 81 (1943). A year later, in *Korematsu v. United States*, 323 U.S. 214 (1944), the Court upheld the forced exclusion of citizens of Japanese ancestry from the West Coast on grounds of military emergency. In its

1987 decision vacating Hirabayashi's conviction, the Ninth Circuit found that the United States Supreme Court would not have ruled as it did in *Hirabayashi* and *Korematsu* had it been advised of the full record as it had been developed in succeeding decades by archival historians. The United States did not seek review of the Ninth Circuit's decision by the United States Supreme Court. As of 1987, according to the Ninth Circuit's opinion, Hirabayashi, an American citizen who had been born in Seattle, Washington, in 1918, was a professor emeritus of sociol-

On the Importance of Suggestibility Research in Assessing the Credibility of Children's Testimony

David A. Martindale

In the spring of 1999, Professor Thomas Lyon of the University of Southern California Law School published a lengthy law review article in which he argued that the introduction into evidence of research on the suggestibility of child witnesses was not of assistance to triers of fact.¹ Lyon's article has found its way into judicial training packets and has been posted to electronic bulletin boards sponsored by organizations with interest in custody evaluations, psychology and law, and related topics. Because judges are soon likely to encounter arguments based upon Lyon's article, I wish to alert judges to what I believe to be significant fallacies in his critique of children's suggestibility research.

Lyon is critical of what he refers to as the "new wave in children's suggestibility research." As the term is used by Lyon, the new wave refers to a body of research conducted by Stephen Ceci, Maggie Bruck, and others.² It is my contention that the new-wave research has added much to our earlier understanding of memory processes. The professional recognition that the new-wave researchers have received suggests that the contribution made by their work to our understanding of children's suggestibility has been widely appreciated.

Although Stephen Ceci, the developmental psychology professor who has spearheaded research in this area, and law professor Richard Friedman have already responded to Lyon's critique,³ my perspective on this matter is somewhat different and, I believe, much like a judge's might be. I am not a researcher—rather, I am a "consumer" of research data. For 15 years, I have been a court-appointed evaluator of comparative custodial suitability; in that capacity, I have encountered a significant number of abuse allegations. Knowledge of the cognitive dynamics demonstrated in the new-wave research has been helpful to me on many occasions. It is for this reason that I believe it to be

information of potential use to triers of fact.

Lyon's primary criticisms are: (1) that the new-wave researchers have overstated the frequency with which suggestive questioning occurs and, in their proposals for methodological changes, have failed to address the risk that abusers will be acquitted; (2) that new-wave research conditions have failed to replicate real-world phenomena closely enough, thereby making it unreasonable to presume that we have gained meaningful knowledge of the real-world phenomena through the research on their artificial analogues; (3) that Maggie Bruck in particular has erred in statements made during testimony and that her decision to offer didactic as opposed to case-specific testimony is flawed; and, finally, (4) that jurors are already aware that children are suggestible and that testimony concerning the new-wave research causes jurors to overestimate the probability that testimony from a particular child witness has been distorted by suggestive questioning.

HOW SERIOUS IS THE PROBLEM?

Though Lyon asserts in his opening that the new-wave researchers assume that highly suggestive interviewing techniques are the norm, he later acknowledges that Ceci and Bruck have alerted their readers to the possibility that materials reviewed by them may not be representative. The various researchers mentioned by Lyon are surely aware that where their involvement has been sought it was because someone believed that the interviews being brought to their attention were conducted improperly. There is no basis for suggesting either that the researchers are unaware that they have been examining an unrepresentative sample of interview transcripts or that they have endeavored to conceal this fact from their readers.

Footnotes

1. Thomas D. Lyon, *The New Wave in Children's Suggestibility Research: A Critique*, 84 CORNELL L. REV. 1004 (1999).
2. The new-wave research is represented in the following works: Maggie Bruck, Stephen J. Ceci, & Helene Hembrooke, *Reliability and Credibility of Young Children's Reports: From Research to Policy and Practice*, 53 AMER. PSYCHOL. 136 (1998); Stephen J. Ceci & Maggie Bruck, *The Suggestibility of the Child Witness: A Historical Review and Synthesis*, 113 PSYCHOL. BULL. 403 (1993); Stephen J. Ceci & Maggie Bruck, *Child Witnesses: Translating Research into Policy*, SOC. POL'Y REP., Fall 1993 at 1; STEPHEN J. CECI & MAGGIE

BRUCK, JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY (1995); STEPHEN J. CECI & HELENE HEMBROOKE, EXPERT WITNESSES IN CHILD ABUSE CASES: WHAT CAN AND SHOULD BE SAID IN COURT (1998); Stephen J. Ceci, David F. Ross, & Michael P. Toglia, *Suggestibility in Children's Memory: Psychological Implications*, 116 J. EXPERIMENTAL PSYCHOL.: GEN. 38 (1987); STEPHEN J. CECI, MICHAEL P. TOGLIA, & DAVID F. ROSS, CHILDREN'S EYEWITNESS MEMORY (1987); JOHN DORIS, THE SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS (1991); and, Elizabeth F. Loftus & Graham M. Davies, *Distortions in the Memory of Children*, 40 J. SOC. ISSUES 51 (1984).

As we contemplate the relative risks associated with different interview techniques, we must be mindful of the fact that some of the emotional distress experienced by children involved in sexual-abuse investigations is attributable to the methods we employ in the course of our interactions with them. It is, I believe, recognized that some children are unable to ascertain the difference between events that have actually occurred and events about which they have been involved in detailed discussions. It is, therefore, likely that in our well-intentioned (but sometimes incompetent) attempts to protect children, we have left some nonabused children with memories of abuse that, in fact, never occurred.

Unfortunately, there is no foundation for the sanguine view held by some that the practitioners whose tactics have been discredited in highly publicized cases represent a small minority of the mental health professionals who have become involved in evaluating children believed to have been the victims of sexual abuse. In a study of appellate court decisions handed down in sex-abuse cases between 1980 and 1990, it was found that 46% of the interviewing experts had been treating the child who was the focus of the case.⁴ Within the mental-health professions there is general agreement that the performance of each activity (conducting therapy and conducting a forensic assessment for the purpose of formulating an objective professional opinion with respect to abuse) compromises one's effectiveness in the performance of the other activity.⁵ The presence among the testifying experts of so many treating practitioners suggests that many of the mental-health professionals who have been performing investigations of alleged sexual abuse are not among those who are familiar with generally accepted standards of practice.

IS THE NEW-WAVE RESEARCH APPLICABLE TO REAL-WORLD CASES?

An assessment of the applicability of research to a particular case must be based upon the amount of overlap between the characteristics of the situations created by researchers and the characteristics of the real-world situation that is the focus of the case. To borrow from the Supreme Court's ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁶ vigorous cross-examination and the introduction into evidence of opposing views are the traditional means by which to address such issues.

It is Lyon's position that if children are suggestible, they are also counter-suggestible and that false allegations arising from leading questions can be ferreted out through effective cross-examination. He cites data from a study in which an attempt was made to convince three and four year olds that they had witnessed the theft of money from a purse. According to Lyon, under cross-examination only one of the five children maintained that he had witnessed the theft. This finding does not

persuade me that suggestive interviewing is a tactic the consequences of which are minimal.

Few would argue that some very serious errors have been made in some high-profile cases. In discussions of the new-wave research and its applicability, attention frequently shifts to the case of *State v. Michaels*,⁷ a case in which the investigative techniques employed by Eileen Treacy, the state's expert, were criticized in an amicus brief submitted by Ceci, Bruck, and 43 other researchers.⁸ The New Jersey Supreme Court declared that no amount of cross-examination could have undone the harm caused by Treacy's interviews.

Lyon implies that cases like the *Michaels* case are to unpublicized evaluations as airplane crashes are to routine air travel. He seems to suggest that, for that reason, our energy is misdirected when we scrutinize such cases. While I acknowledge my lack of expertise in the area of flight safety, it is my impression that in its examination of disasters, the NTSB frequently uncovers problems the solutions to which make day-to-day air travel relatively uneventful, as we wish it to be.

IS MAGGIE BRUCK DOING IT RIGHT?

Lyon has faulted Bruck for offering didactic testimony without familiarizing herself with case-specific details and has criticized her testimony in two particular cases. The offering of expert testimony intended to educate triers of fact concerning phenomena with which they may be insufficiently knowledgeable is generally considered to be among the most useful of the types of testimony offered by mental-health professionals. Such testimony provides a context within which evidence can be evaluated. The applicability of the anticipated framework testimony can be considered in pretrial proceedings, can be alluded to in a judge's instructions to a jury, and can be contemplated by the jurors. Though Lyon suggests that Bruck's desire to simply function as an educator is inappropriate, many seasoned experts would endorse her position. Immersing oneself in case-specific details can compromise one's objectivity.

Though experts are reasonably expected to be effective communicators, an analysis of an expert's testimony provides more information about the expert's performance under pressure than it does about the expert's findings, theories, and conclusions.

Unfortunately, there is no foundation for the sanguine view . . . that the practitioners whose tactics have been discredited in highly publicized cases represent [only] a small minority

3. Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33 (2000).
4. Mary Ann Mason, *A Judicial Dilemma: Expert Witness Testimony in Child Sex Abuse Cases*, J. PSYCHIAT. & LAW, Fall/Winter 1991 at 185.
5. Stuart A. Greenberg & Daniel W. Shuman, *Irreconcilable Conflict between Therapeutic and Forensic Roles*, 28 PROF. PSYCHOL.: RES. & PRACTICE 1 (1997).

6. 509 U.S. 579 (1993).

7. 625 A.2d 489 (N.J. Super. Ct. App. Div. 1993), *aff'd*, 642 A.2d 1372 (N.J. 1994).

8. Maggie Bruck & Stephen J. Ceci, *Amicus Brief for the Case of State of New Jersey v. Michaels Presented by Committee of Concerned Social Scientists*, 1 PSYCHOL. PUB. POLY & L. 272 (1995).

When we prepare our thoughts for publication, we choose our words with care: we have ample time in which to review and contemplate what we have written; we are able to obtain input from respected colleagues; and, when our words appear in print, we are not required to disclose how many drafts we discarded. When offering testimony, the situation, as we are all well aware, is quite different. An accurate picture of a researcher's position with respect to her own work or the work of others is better obtained by examining the researcher's writings than by reviewing transcripts of her testimony in the course of an emotionally charged trial.

TESTIMONY CONCERNING NEW-WAVE RESEARCH: PREJUDICIAL OR PROBATIVE?

Ascertaining what evidence has been critical in juror decision making is not as simple as it might appear. Even if we presume that jurors endeavor to be forthright when responding to inquiries concerning the manner in which they arrived at their decisions, the best they can do is share with us those aspects of their decision making of which they are aware. Even among trained professionals, decision making can be influenced by factors of which we are not consciously aware.⁹

Even undisputed facts can, under certain circumstances, be more prejudicial than probative. Lyon correctly calls attention to the fact that when asked to estimate the frequency with which an event occurs, individuals conduct a mental search for instances of that event. Our estimate of the frequency is strongly influenced by the number of and/or the impact of examples that come to mind. To illustrate, ever since the May 1979 disappearance of Etan Patz on his first unaccompanied two-block walk from home to school, child abduction has received widespread publicity. It is likely that people asked to quantify various risks to the health and well-being of children would overestimate the incidence of abduction—particularly by strangers.

In an apparent endeavor to minimize the importance of suggestive interviewing techniques, Lyon cites studies from which the data indicate that approximately 10% of interviewers' questions are suggestive. The deleterious effect of one strong suggestion from an authoritative source is not likely to be diminished simply because it is followed by numerous non-suggestive questions. Thus, we should endeavor to ascertain the percentage of interviews that are undistorted by any suggestive questions. That figure would have more meaning.

It has been well established that a proffer of evidence must be accompanied by confirmation of its authenticity. It must be shown that it is what it is presented as being. If the prosecution wishes to introduce testimony concerning what is purported to be a memory of an actual event, the defense should be afforded the opportunity to question the authenticity of the memory.

SHOULD NEW-WAVE RESEARCH GUIDE POLICY MAKING?

Lyon argues that we should not permit our concern with regard to tactics such as those of Eileen Treacy to influence pol-

icy decisions that might set standards for all child interviews. As we consider whether or not we should permit our discomfort concerning one evaluator's actions in one case to influence policy decisions, we should bear in mind that the *Michaels* case was neither Eileen Treacy's first case nor was it her last. Treacy functioned as the state's expert in many uncomplicated cases that were adjudicated without fanfare and without offsetting expert testimony concerning the new-wave research. It would be naive to presume that the methods employed by her in the *Michaels* case were unique to that case.

Lyon suggests that investigators must move beyond open-ended questions when asking young children about possible abuse because of the powerful disincentives to disclosure. Accused felons, when being interrogated by police, are strongly motivated not to confess. Should we, therefore, accept the use by police officers of coercive tactics when they are confident that the individual being questioned is guilty?

Lyon opines that the interview strategy changes suggested by the new-wave researchers would hamper the detection of true cases of abuse. Those who share Lyon's concern might consider the arguments that were mounted against *Miranda* warnings. There was widespread concern that advising individuals of their rights prior to questioning them would alter the interrogation process in such a way as to make it more difficult to gather evidence, secure indictments, and prosecute wrongdoers. We have lived with the terms of the *Miranda* decision since 1966 and I believe it safe to say that our country is comfortable with the concept.

While accepting the validity of one of Lyon's concerns (that testimony concerning the new-wave research may cause juror's to overestimate its importance in evaluating the testimony of a particular child witness), it remains my strongly held view that the probative value of such testimony far outweighs any prejudicial effect that it might cause.



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9. Randy Borum, Randy K. Otto, & Stephen Golding, *Improving Clinical Judgment and Decision Making in Forensic Evaluation*, 21 J. PSYCHIAT. & LAW 35 (1993).

Let's Not Exaggerate the Suggestibility of Children

Thomas D. Lyon

I'm grateful to Dr. Martindale for introducing the reader to an important and lively debate among practitioners and academics over the relevance of recent research on children's suggestibility. In my *Cornell Law Review* article, I argued that the recent research on suggestibility was inspired by highly coercive interviewing techniques in widely publicized cases that are not the norm in child sexual abuse investigations. These techniques include telling children that they have been abused, telling children that a particular person is the abuser, and asking children to imagine details regarding how abuse could have taken place. Moreover, I argued that the research fails to mirror factors in real-world sexual-abuse cases that reduce the likelihood that false allegations will occur. These factors include the age of the child, children's reluctance to accuse loved ones of immoral acts, and children's embarrassment regarding sexual topics.

My goal was to alert judges, attorneys, and child-abuse professionals to the importance of carefully examining the methods used by researchers before concluding that research applies to a particular case. Certainly there are cases in which highly coercive tactics have been used, and in which expert testimony on the dangers of such tactics is justified. But it is just as certain that the "suggestibility defense" will be overutilized.

THE ADMISSIBILITY OF EXPERT TESTIMONY

When expert testimony on the suggestibility of children is offered, the court must consider whether the research the expert will discuss sufficiently fits the facts of the case to be helpful to the jury.¹ Jurors are likely to be influenced by expert testimony even if it fails to fit the facts of the case, in part because they are less adept at detecting a lack of fit, and in part because they naturally assume that an expert testifying for the defense is sympathetic to the defense.² Moreover, unlike cases involving adult eyewitnesses, most jurors come to court ready to doubt the reliability of a child witness.³

The need for screening potentially unhelpful and prejudicial expert testimony is accentuated when an expert knows little about the case in which he or she is testifying. As Dr. Martindale notes, experts routinely testify without familiarizing themselves with case-specific details, in order to retain objectivity. Moreover, experts will almost inevitably make

claims on the stand that they would be hesitant to make were their words subject to peer review and publication: as Dr. Martindale argues, "an analysis of an expert's testimony provides more information about the expert's performance under pressure than it does about the expert's findings." The judge must therefore scrutinize the applicability of the expert's findings before the expert is allowed to take the stand. If the expert is allowed to testify, the court should limit his or her discussion to research that applies to the case at bar.

WHAT ARE THE RESEARCH FINDINGS?

Dr. Martindale defends the applicability of the research to real-world abuse cases and the relevance of expert testimony on suggestibility without describing any of the research itself. In the hands of a less conscientious expert than Dr. Martindale, this argument can lead to mischief. Testifying experts will often make blanket claims about the unreliability of children, or report the results of research without describing the methodology or the potential limits of the research's applicability to the real world.

Let's consider one of the most oft-cited studies demonstrating the suggestibility of children—the Sam Stone study, which was published in *Developmental Psychology*, a peer-reviewed scientific journal of the American Psychological Association.⁴ The study showed that a combination of suggestive interviewing techniques led 72% of younger children to assert falsely that a stranger named Sam Stone had come to their preschool and committed various misdeeds. Children often embellished their false stories with perceptual details and nonverbal gestures, making their reports highly credible. Experts often cite the study as evidence that children can be led to make false yet highly convincing allegations of sexual abuse.

Closer examination reveals the lengths to which the researchers worked to obtain false reports, and the extent to which false allegations of sexual abuse are less likely in the real world. One of the suggestive techniques the researchers used was "stereotype induction," which they analogized to negative statements that adults might make about an ex-spouse. Research assistants visited each child on four consecutive weeks before Sam Stone came to the preschool, and provided the child with details of 12 different misdeeds that the assis-

Footnotes

1. See, e.g., Fed. R. Evid. 702.
2. See M.B. Kovera, A.W. Gresham, E. Borgida, E. Gray & P.C. Regan, *Does Expert Psychological Testimony Inform or Influence Juror Decision Making? A Social Cognitive Analysis*, 82 J. APPLIED PSYCHOL. 178 (1997).
3. See, e.g., David F. Ross et al., *Age Stereotypes, Communication*

Modality, and Mock Jurors' Perceptions of the Child Witness, in PERSPECTIVES ON CHILDREN'S TESTIMONY 37 (Stephen J. Ceci et al., eds., 1989).

4. Michelle D. Leichtman & Stephen J. Ceci, *The Effects of Stereotypes and Suggestions on Preschoolers' Reports*, 31 DEVELOPMENTAL PSYCHOL. 568 (1995).

tants had purportedly witnessed Sam perform. Sam Stone's visit was two minutes long, and he did not interact with individual children. Another suggestive technique the researchers used was suggestive questioning. For four weeks after Sam's visit, an interviewer questioned each child each week. In the first interview, the interviewer showed the child a soiled teddy bear and a ripped book and asked the child to speculate who might have done it. In the next three interviews the interviewer asked a series of highly suggestive questions. These questions presupposed that Sam Stone had ripped the book or soiled the teddy bear, did not give the child an opportunity to deny that he had done so, and asked the child to choose among details of the fictitious events. For example, "Did Sam Stone rip the book with his hands, or did he use scissors?" "When Sam Stone got the bear dirty, did he do it by accident, or on purpose?" These questions were asked regardless of whether the child affirmed or denied that Sam Stone had performed any misdeeds. Ten weeks later, all children were interviewed in a nonleading fashion. At that time, 72% of the three and four year olds implicated Sam in one or both misdeeds.

The high rates of false reports are impressive. But equally impressive are other details of the study that are often overlooked. First, the authors report "dramatic developmental trends" in children's susceptibility to the suggestive techniques.⁵ The rate of false reports among the older preschoolers, who were five to six years of age, was about half of that of the younger children. School-age children would be even less likely to succumb to the interviewer's pressures. One of the most consistent findings in the suggestibility literature is that preschool children are particularly vulnerable to suggestive questioning, and preschool children predominate in recent research documenting the unreliability of children's testimony.

Second, the study was unusual in that the final interview contained two questions mildly skeptical of the children's claims. Asking children if they saw the events reduced the number of false reports by about half. Asking the children, "You didn't really see him rip the book (or soil the bear), did you?" cut the number by half again. Having been exposed to four trials of stereotype induction and three trials of suggestive questioning, 21% of the three and four year olds (and only 5% of the five and six year olds) maintained that the misdeeds had occurred.

Dr. Martindale might respond that he is not reassured by these numbers, and I would agree that any false allegation of sexual abuse is devastating, not only for the accused, but also for the child and his or her family. Yet these percentages exaggerate the likelihood that a child will accuse a familiar adult of

sexual abuse, compared to the likelihood that a child will accuse a stranger of ripping a book or soiling a teddy bear. How close the numbers get to zero is anybody's guess.

The Sam Stone study illustrates a number of important facts about suggestibility research. First, there are large age differences in suggestibility. I am struck by how many experts appear to overlook the truism that just as preschoolers are much more suggestible than school-age children, school-age children are much less suggestible than preschoolers. Second, children are both suggestible *and* counter-suggestible. Researchers often fail to test the persistence of their suggestions; Sam Stone is an exception, and dramatically reduced the number of false reports. Third, much of the suggestibility research elicits false narratives from young children by telling them that the events occurred (as opposed to merely asking them), and by providing them with details with which they can imagine the events. Indeed, these are the techniques researchers have used to create substantial numbers of false childhood memories in adults. But the issue is not whether children *can* be led to make false allegations, but whether they *are* being led by current investigative methods.

[T]he issue is not whether children can be led to make false allegations, but whether they are being led by current investigative methods.

WHAT SORT OF INTERVIEWS ARE OCCURRING IN THE REAL WORLD?

Leichtman and Ceci asserted that the techniques in the Sam Stone study were based on "real-world forensic conditions."⁶ In my 1999 paper, I questioned the applicability of the Sam Stone study and other studies to the real world, pointing out that the research on actual interviews had not documented the widespread use of techniques such as stereotype induction. What *had* been documented was that interviewers were asking very few open-ended questions, and relying heavily on closed-ended questions (yes-no questions and forced-choice questions).⁷ Closed-ended questions are often considered "leading," and I believe they are being overused. In my presentations to child interviewers, I emphasize the need for structured interview protocols and the potential benefits of rapport building and greater use of open-ended questions as means of increasing information without reducing reliability. All the same, closed-ended questions are far less leading than the kind of questions asked in studies like Sam Stone.⁸ They are

5. *Id.* at 568.

6. *Id.* at 569.

7. See, e.g., Amye R. Warren et al., "It Sounds Good in Theory, But...." *Do Investigative Interviewers Follow Guidelines Based on Memory Research?*, 1 CHILD MALTREATMENT 231 (1996). Michael Lamb, Kathleen Sternberg, and colleagues at the National Institute of Child Health and Development have conducted a number of studies demonstrating how interviewers tend to ask closed-ended rather than open-ended questions. For one of the most recent examples, see Kathleen J. Sternberg, Michael E. Lamb, Graham M.

Davies, & Helen L. Westcott, *The Memorandum of Good Practice: Theory Versus Application*, 25 CHILD ABUSE & NEGLECT 669 (2001).

8. See Maggie Bruck, Stephen J. Ceci, & Helene Hembrooke, *Reliability and Credibility of Young Children's Reports: From Research to Policy and Practice*, 53 AM. PSYCHOL. 136, 139 (noting increase in suggestibility as one moves from yes/no questions to questions that presuppose the truth of the suggested information, e.g., "Is there a cabinet in the room?" to "Isn't there a cabinet in the room?" to "Is the door open in the cabinet in the room?").

less offensive than many of the techniques documented in the notorious day-care cases like Kelly Michaels and the McMartin case. Closed-ended questions are also necessary in some cases.⁹ Abused children are often quite reluctant to describe abuse that was painful, shameful, and embarrassing.¹⁰

After my article appeared, Amye Warren and her colleagues set out to test my claims on a sample of 42 child abuse interviews conducted in the late 1980s and early 1990s. Their conclusion? “We believe that our results regarding the frequency of problematic techniques in ‘typical’ child sexual abuse interviews are encouraging. It appears that the assumptions made by Lyon (1999) about the rarity of some of the most egregious interviewing practices (e.g. referring to what other people have said) in ‘typical’ interviews may be well-founded.”¹¹ The authors issued several caveats: the interviews might not be representative of all interviews, and the researchers might have both missed some suggestive techniques, and counted some harmless interactions as suggestive.¹² Most importantly, the authors stressed that the infrequent use of improper techniques does not make an interview a good interview. Nevertheless, the study supported my basic assertion: studies like Sam Stone exaggerate the suggestiveness of real-world interviews.

In response to the relative infrequency of the highly suggestive techniques favored by suggestibility researchers, Dr. Martindale argues that the “deleterious effect of one strong suggestion from an authoritative source is not likely to be diminished simply because it is followed by numerous non-suggestive questions.” I know of no research to support this assertion, and Dr. Martindale does not offer any. The recent research on preschool children’s suggestibility does not stop with “one strong suggestion.” It is the dogged persistence of coercive interviewers that reliably produces false narratives in young children. The cases that inspired the research involved unrelenting suggestion over long periods of time by interviewers utterly convinced that abuse had occurred. The mistakes committed by investigative interviewers in less sensational cases tend to be much more mundane.

We clearly need to improve the quality of interviewing: we should provide more training, more supervision, and more resources. But the liberal receipt of expert testimony on the effects of highly suggestive interviewing techniques on preschool children is more likely to simply increase the number of acquittals across the board than to improve interviewing practice.

CONCLUSION

I agree with Dr. Martindale that the recent research on children’s suggestibility has done a lot of good. It has spawned

several research programs aimed at improving the process by which children are interviewed about abuse. In appropriate cases, it can educate judges and jurors about the dangers of highly suggestive interviewing with young children. It has largely silenced extremist claims that children’s abuse allegations are never false or that children are no more suggestible than adults.

However, we must not forget that the extremist claims were founded on overgenerous interpretations of research finding surprisingly low rates of false reports among young children. Research highlighting high rates of error can easily lead to similarly unfounded claims about children’s reliability. These claims, in turn, can reinforce commonsense doubts about children’s reliability and inherent reluctance to confront child sexual abuse.

The solution is quite straightforward: judges must take care to assess the applicability of suggestibility research on a case-by-case basis. Experts seeking to testify must describe the research with sufficient specificity to allow the court to assess whether the research fits the fact of the case. If it doesn’t fit, you don’t admit. Similarly, suggestibility research offered for other purposes (such as for assessing the reliability of hearsay) should be scrutinized with similar care. Judges should keep in mind the importance of the child’s age, the suggestive influences at issue, and the relationship of the child to the alleged offender. Through judicious gatekeeping, extremist claims about suggestibility can be kept out of the courtroom.



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9. See Stephen J. Ceci and Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33, 46 (2000) (“There is no serious doubt that directed questioning will often be far more effective than requests for free recall in securing disclosure of abuse.”).

10. See Thomas D. Lyon, *The New Wave in Children’s Suggestibility Research: A Critique*, 84 CORNELL L. REV. 1004, 1046 (1999).

11. Amye R. Warren, Sena Garven, Nancy E. Walker, & Cara E.

Woodall, *Setting the Record Straight: How Problematic Are ‘Typical’ Child Sexual Abuse Interviews?* (paper presented at the biennial meeting of the American Psychology-Law Society, New Orleans, Louisiana, March 2000) (copy on file with author).

12. For example, using the phrase “do you think” was classified as an example of asking the child to speculate about past events or to use imagination or solve a mystery. *Id*

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Recent Civil Decisions of the United States Supreme Court: The 2000-2001 Term

Charles H. Whitebread

The Supreme Court's role in the 2000 presidential election sparked intense national debate and will be the sole decision for which this term will be remembered. Although no other decisions rose to same level of political or popular significance, the Court confronted various civil-law topics of particular interest. Among them were issues concerning immigrant rights, interpretation of significant statutes such as the Americans with Disabilities Act, and important matters regarding the First Amendment and federalism.¹

ELECTIONS

On November 8, 2000, the Florida Division of Elections reported that George W. Bush won the preceding day's presidential election, defeating Al Gore by a margin of victory that was less than one-half of a percent of the votes cast. Pursuant to Florida's election code, an automatic machine recount was subsequently carried out. The recount indicated that Bush was still the victor, though by an even smaller margin. Al Gore then requested manual recounts in four Florida counties. After a dispute arose between Florida's secretary of state and the Florida Supreme Court over the deadline for the submission of the recounted votes, the United States Supreme Court in *Bush v. Palm Beach County Canvassing Board*² vacated the Florida Supreme Court's imposed deadline due to the "considerable uncertainty as to the grounds on which it was based." The Florida Supreme Court reinstated its deadline of November 26, at which time Bush was declared the winner of Florida's 25 electoral votes based on the certified recount results. Gore contested the certification relying on the Federal election code, "which provides that 'receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election' shall be grounds for a contest."

The Florida Supreme Court defined a "legal vote" as one that provides a "clear indication of the intent of the voter." The Florida Supreme Court recognized 9,000 ballots from Miami-Dade County alone that had failed to detect a vote for president. Because these "undervotes" were "sufficient to place the results of the election in doubt," the Florida Supreme Court ordered an immediate manual recount "in all Florida counties where so-called 'undervotes' had not been subject to manual tabulation" and also ordered the inclusion of votes for Gore that failed to meet the November deadline. In *Bush v. Gore*,³ the 5-4 *per curiam* decision of the United States Supreme Court held that the

Florida Supreme Court's order for a statewide, manual recount of the presidential election ballots violated the Equal Protection Clause absent specified procedural standards. The Court explained that though considering the "intent of the voter" from ballot cards "is unobjectionable" in the abstract, the recount procedure in this case, which had no specific and uniform standard of interpretation to be used throughout the Florida counties, "is not a process with sufficient guarantees of equal protection." It emphasized, "When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." However, the Court held that inclusion of vote counts resulting from standards of interpretation that vary in each county does not satisfy these requirements. In conclusion, the Court referred to 3 U.S.C. section 5's requirement "that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12." Since the Court delivered its opinion on that date, and there were no recount procedures in place that could meet the requisite constitutional standards, "any recount seeking to meet the December 12 date will be unconstitutional" and therefore the Court vacated the recount order, thus bringing the election to an end.

In Chief Justice Rehnquist's concurring opinion, he stressed several additional grounds for reversing the Florida Supreme Court's decision. One reason he suggested was that the Florida Supreme Court's interpretation of the federal election code "impermissibly distorted" Florida's "detailed if not perfectly crafted statutory scheme" for appointing presidential electors by "frustrat[ing] the legislative desire to attain the 'safe harbor' provided by § 5." Ultimately, he concluded that the Florida Supreme Court's order to recount "tens of thousands of so-called 'undervotes'" four days before the December 12 deadline was not an "appropriate" remedy as authorized by the Florida legislature because it "could not possibly be completed by that date."

Justice Stevens filed a dissenting opinion because he did not believe that the Florida Supreme Court's failure "to specify in detail the precise manner in which the 'intent of the voter' . . . is to be determined rises to the level of a constitutional violation." He suggested that the Court's decision was based instead on "an unstated lack of confidence in the impartiality and capacity of the state judges." He concluded, "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It

1. For a more in-depth review of the decisions of the past term, see CHARLES H. WHITEBREAD, RECENT DECISIONS OF THE UNITED STATES SUPREME COURT, 2000-2001 (Amer. Acad. Jud. Educ. 2001).

2. 531 U.S. 70 (2000).

3. 531 U.S. 98 (2000).

is the Nation's confidence in the judge as an impartial guardian of the rule of law."

Justice Souter dissented because he disagreed with the Court's decision to stop the recount and instead believed the "political tension could have worked itself out in the Congress following the procedure provided in 3 U.S.C. § 15." Also, he saw "no warrant for this Court to assume that Florida could not possibly comply with [equal protection] requirement[s] before the date set for the meeting of electors, December 18."

In her dissent, Justice Ginsburg criticized the Court for its intervention into the Florida Supreme Court's interpretation of its own state's law. She asserted that the "core of federalism" is the principle that "Federal courts defer to state high courts' interpretations of their state's own law." She also suggested that even if there were an equal protection violation, "the Court's conclusion that a constitutionally adequate recount is impractical is a prophecy the Court's own judgment will not allow to be tested."

In Justice Breyer's dissenting opinion, he asserted that "there is no justification for the majority's remedy, which is simply to reverse the lower court and halt the recount entirely." He also suggested that the federal claims, if any, could have been fixed on remand. Though a constitutional recount could not take place by December 12, he concluded that it should be up to the state courts to determine whether one could be conducted before the electors were scheduled to meet on December 18. He ultimately disagreed with the Court's role in resolving the dispute because "Congress is the body primarily authorized to resolve [such] disputes." He suggested, "Congress, being a political body, expresses the people's will far more accurately than does an unelected Court." He concluded by expressing his apprehension that "in this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself."

IMMIGRATION

In *Zadvydas v. Davis*,⁴ a divided Court held that the Constitution "does not permit indefinite detention" of deportable aliens, but "limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States," even if the government is unable to find a recipient country. The detention statute states that if an alien falls within a certain statutory category, then that alien "may be detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision." Despite the fact that there is "no 'limit on the length of time beyond the removal period that [such] an alien . . . may be detained,'" the Court "read an implicit limitation into the statute." Though the statute uses the discretionary term "may," the Court said that did "not necessarily suggest unlimited discretion." It continued, "[I]f Congress had meant to authorize long-term detention of unremovable aliens, it certainly could have spoken in clearer terms." The Court emphasized that "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United

States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." The Court considered it "practically necessary to recognize some presumptively reasonable period of detention." Therefore, it instructed, "After [a] 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." In his dissent, Justice Kennedy complained that the Court's imputation of an "implied, nontextual limitation . . . has no basis in the language or structure of the [statute] and in fact contradicts and defeats the purpose set forth in the express terms of the statutory text." He also explained, "When an alien is removable, he or she has no right under the basic immigration laws to remain in this country," because "[a]n alien's admission to this country is conditioned upon compliance with our laws, and removal is the consequence of a breach of that understanding."

Justice Stevens, writing for a divided Court in *Immigration and Naturalization Service v. St. Cyr*,⁵ held that federal courts have jurisdiction under 28 U.S.C. section 2241 to review a deportable alien's challenge to deportation policies. Also, the Court held that the Attorney General's discretionary relief to waive deportation of eligible aliens, granted by section 212(c) of the Immigration and Nationality Act of 1952, remains available to aliens whose convictions were obtained through plea agreements and who would have been eligible for waiver prior to the effective dates of the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA). Those statutes have been interpreted to withdraw his discretion to grant waivers of deportation. Regarding federal courts' review jurisdiction, the Court stated that the INS's interpretation of these statutes "would entirely preclude review of a pure question of law by any court . . . [and thus] give rise to substantial constitutional questions." The Court agreed with the Second Circuit's holding that Congress's intentions "are ambiguous and that the statute imposes an impermissible retroactive effect on aliens who, in reliance on the possibility of § 212(c) relief, pled guilty to aggravated felonies." "Finally," he wrote, "the fact that § 212(c) relief is discretionary does not affect the propriety of our conclusion [because t]here is a clear difference . . . between facing possible deportation and facing certain deportation."

In another 5-4 decision, the Court in *Nguyen v. Immigration and Naturalization Service*⁶ held that an immigration law that establishes different citizenship rules for children born out of wedlock depending on whether the citizen parent is the mother or father is consistent with the Fifth Amendment's guarantee of equal protection. The disputed statutory provision requires "one of three affirmative steps . . . be taken if the citizen parent is the father, but not if the citizen parent is the mother." The Court stated that this decision by Congress "is based on the significant difference between [the parents'] respective relationships to the potential citizen at the time of birth." The Court advised that even a "facially neutral rule would sometimes require fathers to

4. 533 U.S. 678 (2001).

5. 533 U.S. 289 (2001).

6. 533 U.S. 53 (2001).

take additional affirmative steps which would not be required of mothers.” Moreover, “Just as neutral terms can mask discrimination that is unlawful, gender specific terms can mark a permissible distinction.” The Court concluded that “the [statute’s] use of gender specific terms takes into account a biological difference between the parents.” It also cautioned, “Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real.” Justice O’Connor condemned the manner in which the Court explained and applied the heightened scrutiny standard appropriate to legislative classifications based on sex. Though she agreed that “the failure to recognize relevant differences is out of line with the command of equal protection,” she argued that “so too do we undermine the promise of equal protection when we try to make our differences carry weight they simply cannot bear.”

THE FIRST AMENDMENT

Justice Thomas, writing for the Court in *Good News Club v. Milford Central School*,⁷ held that the exclusion of a religious club’s access to a school’s limited public forum is impermissible viewpoint discrimination in violation of the Free Speech Clause of the First Amendment. A public school enacted a community use policy designating appropriate purposes for which residents may use its building after school. Among the permissible purposes were uses for “social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public.” However, when the Good News Club, a Christian organization for children, requested permission to hold weekly after-school meetings in the school cafeteria, it was denied because its activities “were not a discussion of secular subjects such as child rearing, development of character and development of morals from a religious perspective, but were in fact the equivalent of religious instruction itself.” The Court, however, asserted that “it is clear that the club teaches morals and character development to children . . . even if it does so in a nonsecular way.” The Court also “disagree[d] that something that is ‘quintessentially religious’ or ‘decidedly religious in nature’ cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint.” Instead, the Court said “we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons.” In his dissenting opinion, Justice Stevens asserted, “School officials may reasonably believe that evangelical meetings designed to convert children to a particular religious faith” may well “introduce divisiveness and tend to separate young children into cliques that undermine the school’s educational mission.” Justice Souter also dissented criticizing the Court’s holding, which he cautioned could potentially “stand for the remarkable proposition that any public school opened for civic meetings must be opened for use as a church, synagogue, or mosque.”

In *United States v. United Foods, Inc.*,⁸ the Court held that

mandatory assessments used to fund generic mushroom advertisements violate the First Amendment right against compelled speech. In doing so, the Court declined to rethink the relative position of commercial speech in the free speech hierarchy. The Court observed that United Foods, Inc. “wants to convey the message that its brand of mushrooms is superior to those grown by other producers,” but is forced to subsidize the message “that mushrooms are worth consuming whether or not they are branded,” which is “favored by a majority of producers.” The Court distinguished this case from its prior decision in *Glickman v. Wileman Brothers & Elliot, Inc.*,⁹ which allowed mandated assessments for speech regarding the marketing of California tree fruits. The Court points out that in that case, competition among producers was displaced and they “were compelled to contribute funds for use in cooperative advertising . . . ‘as part of a broader collective enterprise in which their freedom to act independently was already constrained by the regulatory scheme.’” In the present case, however, the sole purpose for the mandatory assessment was the “generic advertising” of mushrooms. Beyond this regulation, mushroom producers were not similarly constrained in their freedom to act independently nor were they bound by the statute to “associate as a group which makes cooperative decisions.” The Court found this absence of a “broader regulatory system” a “fundamental” difference that required it to depart from *Glickman*. In Justice Breyer’s dissent, he asserted that the Court’s reliance on the level of regulation was inapposite and stated, “It is difficult to see why a Constitution that seeks to protect individual freedom would consider the absence of ‘heavy regulation’ . . . to amount to a special, determinative reason for refusing to permit this less intrusive program.” He concluded that the Court “sets an unfortunate precedent” that will only be an incentive for heavier governmental regulation and restrictions.

In a 6-3 decision, the Court, in *Bartnicki v. Vopper*,¹⁰ held that the First Amendment protects speech that discloses the content of an illegally intercepted communication concerning a public matter. Here, an unidentified person intercepted a conversation between two representatives of a teachers union discussing bargaining negotiations with a school board. The conversation was recorded and given to media representatives who ultimately published it. Federal and state wiretapping statutes prohibit the disclosure of communications that one “knew or had reason to know” were illegally intercepted. The Court stated the statute’s “naked prohibition against disclosures is fairly characterized as a regulation of pure speech.” Though the statutes’ restrictions intend to remove “the incentive for parties to intercept private conversations, and . . . minimize[e] the harm to persons whose conversations have been illegally intercepted,” the Court noted that in this case the information disclosed was lawfully obtained and concerned “a matter of public concern,” and the media representatives “played no part in the illegal interception.” Given these facts, the Court concluded that “it by no means follows that punishing disclosures [of this kind] is an acceptable means of serving those ends.” Ultimately, the Court asserted, “privacy concerns give way when balanced against the interest in pub-

7. 533 U.S. 98 (2001).

8. 533 U.S. 405 (2001).

9. 521 U.S. 457 (1997).

10. 532 U.S. 514 (2001).

lishing matters of public importance.” The key to the Court’s decision is the importance of the matter: the Court indicated that it might not feel the same way if the intercepted conversation concerned private gossip or personal matters.

In *Legal Services Corp. v. Velazquez*,¹¹ a divided Court held that a congressional funding condition on the Legal Services Corporation that prohibited it from representing indigent clients attempting to challenge or amend existing welfare law violates the First Amendment. The Legal Services Corporation (LSC) distributes funds to grantee organizations “for the purpose of providing financial support for legal assistance in noncriminal proceedings to persons financially unable to afford legal assistance.” Though indigent clients could challenge welfare determinations based on existing law, “grantees could not accept representations designed to change welfare laws, much less argue against the constitutionality or statutory validity of those laws.” The Court noted that here “the Government seeks to use an existing medium of expression and to control it . . . in ways which distort its usual functioning.” The Court asserted that the government “may not design a subsidy to effect this serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary.” The Court concluded that the statutory condition impairs the authority of the judiciary to interpret law and the Constitution because it prohibits “speech and expression upon which courts must depend for the proper exercise of the judicial power.” Furthermore, the Court explained that the restriction is inconsistent with separation of powers principles because it is used “to insulate the Government’s laws from judicial inquiry” by excluding “from litigation those arguments and theories Congress finds unacceptable but which by their nature are within the province of the courts to consider.”

In a 5-4 decision, the Court in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*¹² held that limitations on a political party’s independent expenditures violate the First Amendment, but that limitations on the party’s spending when coordinated with a candidate are constitutional. The Court explained that “limits on political expenditures deserve closer scrutiny than restrictions on political contributions,” because “[r]estraints on expenditures generally curb more expressive and associational activity than limits on contributions do.” The Court pointed out that it has “routinely struck down limitations on independent expenditures by candidates, other individuals, and groups, while repeatedly upholding contribution limits.” Moreover, “treating coordinated expenditures as contributions ‘prevent[s] attempts to circumvent the [Federal Election Campaign Act] through prearranged or coordinated expenditures amounting to disguised contributions.” The Court concluded, “There is no question about the closeness of candidates to parties and no doubt that the Act affected parties’ roles and their exercise of power.” But “there is little evidence to suggest that coordinated party spending limits adopted by Congress have frustrated the ability of political parties to exercise their First Amendment rights to support their candidates.” The Court considered the limitation on a party’s coordinated spending as

“closely drawn’ to match . . . the ‘sufficiently important’ government interest in combating political corruption.”

STATE ACTION

Justice Souter, writing for a divided Court in *Brentwood Academy v. Tennessee Secondary School Athletic Association*,¹³ held that a statewide athletic association’s regulatory activity may be treated as state action due to the “pervasive entwinement” of state school officials in its structure absent an offsetting reason to consider the activity otherwise. A nonprofit membership association regulated interscholastic sport of its member schools, both public and private, throughout Tennessee. However, public schools made up 84% of the association’s membership. Also, though the association’s officials are not paid by the state, they are eligible for the state retirement system. The Court relied on dictum in *National Collegiate Athletic Association v. Tarkanian*,¹⁴ which suggested “that statewide interscholastic athletic associations are state actors” if their “membership consisted entirely of institutions located within the same state, many of them public institutions.” The Court concluded that “to the extent of 84% of its membership, the Association is an organization of public schools represented by their officials acting in their official capacity to provide an integral element of secondary public schooling.” Demonstrating the “pervasive entwinement,” the Court continued, “[t]here would be no recognizable Association, legal or tangible, without the public school officials, who do not merely control but overwhelmingly perform all but the purely ministerial acts.” The Court recognized that other tests like the “public function” or State “coercion” tests would not permit a finding of state action. However, it said that “the implication of state action is not affected by pointing out that the facts might not loom as large under a different test.” In response to concerns that a finding of state action here would “somehow trigger an epidemic of unprecedented federal litigation,” the Court noted that in the numerous jurisdictions that have already declared “statewide athletic association[s] like the one here” to be state actors, there has been “no evident wave of litigation.”

FEDERALISM

Chief Justice Rehnquist, writing for another divided Court in *Board of Trustees of the University of Alabama v. Garrett*,¹⁵ held that the Eleventh Amendment bars suits in federal court by state employees seeking money damages from the state for its failure to comply with Title I of the Americans with Disabilities Act (ADA). Title I of the ADA “prohibits certain employers, including the States, from ‘discriminat[ing in various ways] against a qualified individual with a disability because of the disability of such individual.” It also requires employers to “mak[e] reasonable accommodations” unless they “would impose an undue hardship on the operation of the [employer’s] business.” The Court explained, “The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court.” The Court indicated that Congress may use the ADA to abrogate this immunity pursuant

11. 531 U.S. 533 (2001).

12. 533 U.S. 431 (2001).

13. 531 U.S. 288 (2001).

14. 488 U.S. 179 (1988).

15. 531 U.S. 356 (2001).

to a valid exercise of its enforcement power under section 5 of the Fourteenth Amendment. Also, the ADA “must exhibit ‘congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.’” Identifying the “scope of the constitutional right at issue,” the Court cited *Cleburne v. Cleburne Living Center, Inc.*,¹⁶ which held that mental retardation was not a “quasi-suspect” classification and legislation using such a classification was subject only to “rational-basis” review. The Court concluded that “the result of *Cleburne* is that States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational.” Pointing out that the burden is on Congress to negate “any reasonably conceivable state of facts that could provide a rational basis for the classification,” the Court determined that “[t]he legislative record of the ADA . . . simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled.” Furthermore, the Court concluded that despite the ADA’s “undue hardship” exception, “the accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternate responses that would be reasonable but would fall short of imposing an ‘undue burden’ upon the employer.” In Justice Breyer’s dissent, he asserted that “Congress reasonably could have concluded that the remedy before us constitutes an ‘appropriate’ way to enforce this basic equal protection requirement. And that is all the Constitution requires.”

In an 8-0 decision, the Court in *United States v. Oakland Cannabis Buyers’ Cooperative*¹⁷ held that there is no medical necessity exception to the Controlled Substances Act’s prohibitions on manufacturing and distributing marijuana. Under the Controlled Substances Act, marijuana is a “schedule I” drug, which is the most restrictive of the five schedules designated in the statute. Under this federal law, the only exception to its prohibition on the manufacture and distribution of such a drug is government-approved research. However, California’s Compassionate Use Act of 1996 provided “seriously ill Californians . . . the right to obtain and use marijuana for medical purposes” upon the recommendation of a physician. Thus, though the actions of organizations created to provide marijuana to seriously ill Californians were legal under state law, they remained in violation of federal law. The Court refused to add to the federal statute an “implied exception” of medical necessity even though “necessity was a defense at common law.” The Court asserted that it “need only recognize that a medical necessity exception for marijuana is at odds with the terms of the Controlled Substances Act[, . . . which] leave no doubt that the defense is unavailable.” Ultimately, the Court noted that in the present case Congress had made the determination that “marijuana has ‘no currently accepted medical use’ at all” and has classified it accordingly.

In *Lorillard Tobacco Co. v. Reilly*,¹⁸ a divided Court held that the Federal Cigarette Labeling and Advertising Act (FCLAA) preempts Massachusetts’s regulations on outdoor and point-of-sale cigarette advertising. However, all of the justices agreed that

those same regulations on smokeless tobacco and cigars violate the First Amendment. Examining the FCLAA’s preemption provision, the Court explained that its “sweeping language” prohibited states from imposing restrictions “based on smoking and health with respect to the advertising and promotion of cigarettes.” Though the Massachusetts regulations are aimed to “prevent access to such products by underage consumers,” the Court concluded that “the concern about youth exposure to cigarette advertising is intertwined with the concern about cigarette smoking and health.” Despite the contention that the advertising regulations on cigarettes “fall squarely within the State’s traditional powers to control the location of advertising and to protect the welfare of children,” the Court asserted that this argument “cannot be squared with the language of the pre-emption provision, which reaches all ‘requirements’ and ‘prohibitions’ imposed under state law.” Also, it “cannot be reconciled with Congress’ own location-based restriction, which bans advertising in electronic media, but not elsewhere.” In support of its ruling that the outdoor regulations on smokeless tobacco and cigars violate the First Amendment, the Court asserted that Massachusetts’s “Attorney General did not ‘carefully calculate the costs and benefits associated with the burden on speech imposed’ by the regulations,” which “unduly impinge on the [tobacco retailers’] ability to propose a commercial transaction and the adult listener’s opportunity to obtain information about [tobacco] products.” Regarding the restrictions on indoor, point-of-sale advertising, which prohibit tobacco advertisements from being lower than five feet from the floor, the Court explained, “The 5 foot rule does not seem to advance [the State’s interest in preventing minors from using tobacco products]. Not all children are less than 5 feet tall, and those who are certainly have the ability to look up and take in their surroundings.”

PROPERTY RIGHTS

In another 5-4 decision, the Court in *Palazzolo v. Rhode Island*¹⁹ held that a claim under the Takings Clause of the Fifth Amendment is ripe when a final decision is made regarding the extent of permitted development on the property at issue. The Court also held that the date of title transfer does not bar an individual from raising a takings claim. Anthony Palazzolo was the sole shareholder of a corporation that owned the title to 20 acres of land, most of which was considered “coastal wetlands” under state law. Some time later, the Rhode Island Coastal Resource Management Council promulgated regulations that were to greatly limit development on “coastal wetlands” in Rhode Island. After the promulgation of the regulations, title of the 20 acres was transferred to Palazzolo. All proposals to develop on the land, submitted by the corporation and Palazzolo, were denied because their impact on the wetlands would conflict with the regulation scheme. The Court explained that the final decision requirement was adopted because whether a regulatory taking has occurred “cannot be resolved in definitive terms until a court knows ‘the extent of permitted development’ on the land in question.” Though the council claimed that the extent of permissible development on the property was still in doubt, the Court dis-

16. 473 U.S. 432 (1985).

17. 532 U.S. 483 (2001).

18. 533 U.S. 525 (2001).

19. 533 U.S. 606 (2001).

agreed because the “extent of permissible development on petitioner’s wetlands” was identifiable given “the unequivocal nature of the wetland regulations at issue and by the Council’s application of the regulations to the subject property.” Holding that Palazzolo’s post-regulation acquisition of title was not fatal to his claim, the Court rejected the State’s “sweeping rule” that pronounced “[a] purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking.” “Were we to accept the State’s rule,” the Court concluded, “the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable,” thus allowing the state, “in effect, to put an expiration date on the Takings Clause.”

STATUTORY INTERPRETATION

In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*,²⁰ a divided Court held that the U.S. Army Corps of Engineers’ extension of the definition of “navigable waters” under the Clean Water Act (CWA) to include intrastate waters used as a habitat by migratory birds exceeded the authority granted by the Act. An association of Chicago cities sought to develop a disposal site for nonhazardous solid waste on a parcel of land that had been used for sand and gravel pit mining until it was abandoned. The excavation trenches had since become a “scattering of permanent and seasonal ponds of varying size” on which a number of migratory birds have been observed. Under section 404(a) of the CWA, the corps may regulate “navigable waters” defined as “the waters of the United States, including territorial seas.” The corps clarified its jurisdictional reach by extending the definition of “navigable waters” to include “intrastate waters . . . which are or would be used as habitat by . . . migratory birds which cross state lines.” The Court concluded, however, that this interpretation “is not fairly supported by the CWA.” The Court recognized that in *United States v. Riverside Bayview Homes, Inc.*,²¹ it had extended the corps’ jurisdiction under section 404(a) to wetlands adjacent to a “navigable waterway,” noting “that the term ‘navigable’ is of ‘limited import’ and that Congress evidenced its intent to ‘regulate at least some waters that would not be deemed navigable under the classical understanding.’” The Court found that decision “was based in large measure upon Congress’ unequivocal acquiescence to, and approval of, the Corps’ regulations interpreting the CWA to cover wetlands . . . ‘inseparably bound up with the ‘waters’ of the United States.’” The present case, however, lacks that “significant nexus between the wetlands and ‘navigable waters.’” Though Congress failed “to pass legislation that would have overturned the corps’ 1977 regulations and the extension of jurisdiction,” the Court explained that the failure to pass legislation was insufficient to demonstrate that Congress acquiesced to the corps’ expansive interpretation of section 404(a). The Court also refused to accept the corps’ interpretation because the expanded jurisdiction “would result in a significant impingement of the States’ traditional and primary power over land and water use.”

In a 5-4 decision, the Court in *Circuit City Stores, Inc. v. Adams*²² held that section 1 of the Federal Arbitration Act (FAA) confines an exemption from arbitration to employment contracts of transportation workers. The Court noted that section 1 of the FAA exempts from the statute’s coverage “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” The Court rejected the Ninth Circuit’s construction of section 1, which reasoned that all employment contracts are excluded as “contracts of employment of . . . any other class of workers engaged in . . . commerce.” The Court explained that the phrase “any other class of workers engaged in commerce” is “a residual phrase following . . . explicit reference to ‘seamen’ and ‘railroad employees.’” To construe it “to exclude all employment contracts fails to give independent effect to the statute’s enumeration of the specific categories of workers which precedes it.” The Court also rejected the argument that the use of “engaged in commerce” was intended to invoke Congress’s commerce power to the full extent because it has consistently reaffirmed the relatively limited scope of that phrase. The Court concluded its opinion by endorsing the “real benefits to the enforcement of arbitration provisions,” which include the avoidance of litigation costs to parties and the courts.

Justice Scalia, writing for a divided Court in *Alexander v. Sandoval*,²³ held that there is no private right of action to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964. Section 601 of the Civil Rights Act provides “that no person shall, ‘on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity’ covered by Title VI.” Federal agencies are authorized under section 602 “to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability.” The Court explained that “private individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages.” The Court “assume[s] for purposes of deciding this case that regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601.” The Court recognized “that regulations applying § 601’s ban on intentional discrimination are covered by the cause of action to enforce that section . . . [because] if valid and reasonable, [they] authoritatively construe the statute itself.” Thus, there is no need “to talk about a separate cause of action to enforce the regulations apart from the statute.” However, the Court indicated that “the disparate-impact regulations do not simply apply § 601—since they indeed forbid conduct that § 601 permits—and therefore [it is] clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations.” If section 602 does not confer a private right to enforce the disparate-impact regulations, then “a failure to comply with regulations promulgated under § 602 that is not also a failure to comply with § 601 is not actionable.” Examining the text of section 602, the Court concluded that it clearly lacks the “rights-creating language” present in section 601. Instead, “the focus of § 602 is

20. 531 U.S. 159 (2001).
21. 474 U.S. 121 (1985).

22. 121 S.Ct. 1302 (2001).
23. 532 U.S. 275 (2001).

twice removed from the individuals who will ultimately benefit from Title VI's protection," because it "focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating." The Court indicated that § 602 merely prescribes how federal agencies may enforce the provisions of § 601 and applies restrictions on that enforcement. In dissent, Justice Stevens asserted, "The plain meaning of [section 602's] text reveals Congress' intent to provide the relevant agencies with sufficient authority to transform the statute's broad aspiration into social reality." Accordingly, "the regulations are inspired by, at the service of, and inseparably intertwined with § 601's antidiscrimination mandate." Therefore, he argued that "it makes no sense to differentiate between private actions to enforce § 601 and private actions to enforce § 602. There is but one private action to enforce Title VI, and we already know that such an action exists." Stevens concluded, "[T]oday's decision is the unconscious product of the majority's profound distaste for implied causes of action rather than an attempt to discern the intent of the Congress that enacted Title VI of the Civil Rights Act of 1964."

In yet another 5-4 decision, the Court in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*²⁴ held that to be a "prevailing party" for the purposes of fee-shifting statutes, there must be a judgment on the merits or a court-ordered consent decree. Therefore, the "catalyst theory," which had been accepted by most courts of appeal, is an impermissible basis for awarding attorney's fees. The Court began its opinion by asserting the predominance of the "American Rule," which is a "general practice of not awarding fees to a prevailing party absent explicit statutory authority." The Court said that the "view that a 'prevailing party' is one who has been awarded some relief by the court can be distilled from our prior cases." It indicated that precedent reveals the common thread "that enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." Under the "catalyst theory," a prevailing party is one whose lawsuit brought about the voluntary change in the other party's conduct, for which it hoped. The Court held the catalyst theory inconsistent with the Court's prior decisions because "it allows an award where there is no judicially sanctioned change in the legal relationship of the parties." Despite the contention that the Civil Rights Attorney's Fees Awards Act's legislative history supports a "broad reading of 'prevailing party,'" the Court "doubt[s] that legislative history could overcome what [it] think[s] is the rather clear meaning of 'prevailing party'—the term actually used in the statute." Justice Ginsburg dissented, arguing that the Court's decision not only "upsets long-prevailing Circuit precedent" and "allows a defendant to escape a statutory obligation to pay a plaintiff's counsel fees, even though the suit's merit led the defendant to abandon the fray," but also "impede[s] access to court for the less well-heeled, and shrink[s] the incentive Congress created for the enforcement of federal law." In her opinion, "the judicial decree is not the end but the means," and "if a party reaches the 'sought-after destination,"

then the party 'prevails' regardless of the 'route taken.'"

In a 7-2 decision, the Court in *PGA Tour, Inc. v. Martin*²⁵ held that Title III of the Americans with Disabilities Act (ADA) protects access to professional golf tournaments by a qualified entrant with a disability. Further, permitting that entrant's use of a golf cart does not "fundamentally alter the nature" of the tournaments. Casey Martin is a golfer with a degenerative circulatory disease that is covered by the ADA and prevents him from walking the length of a golf course. The PGA Tour refused to waive its tournament's walking requirement despite Martin's well-documented medical condition. Title III of the ADA prohibits the discrimination of disabled individuals in places of public accommodation. After examining the text Title III, the Court then looked to the facts of this case, which "fit comfortably within the coverage of Title III, and Martin within its protection." The PGA Tour, as a lessor and operator of "golf courses," which are "specifically identified by the Act," cannot prevent Martin's "full and equal enjoyment" of those courses. The Court rejected the argument that Title I, which prohibits discrimination by employers, is more appropriate because Martin's claim is "job-related" since he is not a "client or customer," but is instead like an independent contractor. Since Title I does not protect independent contractors, the argument went, his claim necessarily fails. However, the Court asserted that "it would be entirely appropriate to classify the golfers . . . as petitioner's clients or customers" because they pay for the chance to compete. Further, the PGA Tour "simultaneously offer[s] . . . two 'privileges' to the public—that of watching the golf competition and that of competing in it." The Court also concluded that Martin's use of a golf cart, which is a "necessary" and "reasonable modification," would not "fundamentally alter the nature" of petitioner's tournaments because "the essence of [golf is] shot-making" and the walking rule "is not an essential attribute of the game itself . . . [nor an] indispensable feature of tournament golf."

In *Whitman v. American Trucking Associations, Inc.*,²⁶ the Court held that the Environmental Protection Agency may not consider implementation costs in setting national ambient air quality standards under section 109(b) of the Clean Air Act (CAA). Section 109(b) instructs the EPA to set primary ambient air quality standards "the attainment and maintenance of which . . . are requisite to protect the public health' with 'an adequate margin of safety.'" According to section 109(b)(1), "the EPA . . . is to identify the maximum airborne concentration of a pollutant that the public health can tolerate, decrease the concentration to provide an 'adequate' margin of safety, and set the standard at that level." However, "nowhere are the costs of achieving such a standard made part of that initial calculation." The Court asserted, "Congress was unquestionably aware" that "the economic cost of implementing a very stringent standard might produce health losses sufficient to offset the health gains achieved in cleaning the air." As a matter of fact, Congress "not only anticipated that compliance costs could injure the public health, but provided for that precise exigency" in "other provisions [that] explicitly permitted or required economic costs to be taken into account in implementing the air quality standards." Such is not the case

24. 532 U.S. 598 (2001).

25. 532 U.S. 661 (2001).

26. 531 U.S. 457 (2001).

with section 109(b)(1). The Court “therefore refused to find implicit in ambiguous sections of the CAA an authorization to consider costs that has elsewhere, and so often, been expressly granted.” The Court suggested that the cost of implementation is a factor “that . . . is *both* so indirectly related to public health *and* so full of potential for canceling the conclusions drawn from direct health effects that it would surely have been expressly mentioned in §§ 108 and 109 had Congress meant it to be considered.”

OTHER SIGNIFICANT DECISIONS

In an 8-1 decision, the Supreme Court in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*²⁷ held that courts of appeals should apply a *de novo* standard when reviewing district court determinations of the constitutionality of punitive damages awards. Cooper Industries used photographs of Leatherman’s multifunction pocket tool in its own posters, packaging, and advertising materials; Cooper Industries ultimately was found guilty of unfair competition. Leatherman was awarded \$50,000 in compensatory damages and \$4.5 million in punitive damages. On appeal, the Ninth Circuit held that “the district court did not abuse its discretion in declining to reduce the amount of punitive damages.” Noting that “legislatures enjoy broad discretion in authorizing and limiting permissible punitive damages awards,” the Court affirmed that when juries determine awards within those limits and “[i]f no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court’s ‘determination under an abuse-of-discretion standard.’” However, the Fourteenth and Eighth Amendments place “substantive limits on that discretion.” The Court indicated that in order to determine whether a punitive damages award violates the Constitution, a court must determine if it is “grossly disproportional to the gravity of . . . [the] defendant’s offense.” While “the factual findings made by the district courts in conducting the excessiveness inquiry . . . must be

accepted unless clearly erroneous,” the Court has “expressly noted that the courts of appeals must review the proportionality determination *de novo*.” The Court concluded, “Independent review is . . . necessary if appellate courts are to maintain control of, and to clarify, the legal principles.” Furthermore, “*de novo* review tends to unify precedent” and “stabilize the law.”

CONCLUSION

As can be seen from the cases addressed by the Supreme Court this term, the ideological balance was extremely influential in many decisions. Some of the most important cases, like *Alexander v. Sandoval* and *Board of Trustees of the University of Alabama v. Garrett*, were decided by votes of 5-4. Even in the highly politicized *Bush v. Gore*, the Supreme Court was unable to unite and speak with one voice, which, as Justices Stevens and Breyer seem to agree, may ultimately undermine the public’s confidence in the Supreme Court. The significance of the numerous 5-4 decisions lies not only in how the Court is perceived by the public, but also in the stability of constitutional jurisprudence. As many anticipate, several justices will retire in the coming years. Due to the closeness of some of the most significant cases, this may completely change the ideological course on which the Supreme Court has traveled for the last several years.



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27. 532 U.S. 424 (2001).

"You Don't Have to Hear, Just Interpret!":

How Ethnocentrism in the California Courts Impedes Equal Access to the Courts for Spanish Speakers

Roxana Cardenas

The judge sat on the bench. He proceeded to read the sentence into the microphone in front of him in a barely audible, monotone voice. I interrupted, "Excuse me, Your Honor, the interpreter cannot hear you. Can you please check the microphone?" He replied, "You don't have to hear, just interpret!"

In shock and disbelief, I interpreted whatever I was able to hear. I occasionally turned to look at the defendant's attorney, but he just sat there silent and motionless. As soon as the criminal sentence was read into the record, I gathered the case information I had not heard. I then shouted out pertinent dates and numbers to the Spanish-speaking man in custody as he was led away by the bailiffs.

Court interpreters in the United States are privy to scenes such as this one on a monthly, weekly, or even daily basis, depending on the court where one works.¹ Similar occurrences were documented in a court interpretation services study conducted by a New York committee composed of attorneys and judges.² The New York study concluded, "A system of justice that allows a litigant to move through the courts without a complete understanding of the proceedings because of a language barrier, is an affront to the concepts of due process and equal protection."³

At national court interpreter conventions, the author has discussed with others perceptions about court interpreters that impact equal access to the courts. A pertinent, but mistaken, assumption is that a court interpreter's mere presence at a proceeding automatically fulfills the requirements of the law. Therefore, the interpreter is expected to play a purely passive, unobtrusive role. Voicing a concern to the court, as the author did by asking the judge to raise his voice, may be erroneously perceived by the court staff as inappropriate or even unnecessary.

A judge or an attorney may not know that an interpreter takes an oath to interpret faithfully.⁴ If she feels that she cannot render a true interpretation, due to a hearing or vocabulary problem, she is obligated to notify the judge. This obligation

stems from the fact that the defendant's due process rights are at stake. If the interpreter does not understand or hear a word, there results one fewer word that a Spanish-speaking defendant is unable to hear, as compared to an English-speaking defendant who hears for himself. The interpreter, by virtue of her skill, can put the Spanish speaker in the shoes of the English-speaking defendant. But when the interpreter's request to facilitate her interpretation to a defendant falls on a judge's deaf ears, it cannot be said that, relative to an English-speaking defendant, equal access to the courts has been afforded to the purely Spanish-speaking defendant.

California's justice system must work arduously to guarantee due process rights to its large Spanish-speaking population. One way to accomplish this is by educating bench officers and court staff about the court interpreter's role. Thanks to recent efforts by the Advisory Panel to the California Judicial Council to pass court rules addressing interpreter-related issues, there is hope on the horizon.

This article analyzes the legal field's apparent lack of interest in interpreter-related problems as a major barrier to ensuring equal access to the courts for Spanish speakers. It also seeks to dispel certain myths or misinformation about the function of interpreters by delving into a particular infamous case that involved the misuse of interpreters: the O.J. Simpson case.

I. PRIMARY STUMBLING BLOCK: A LACK OF CULTURAL-LINGUISTIC EXPERTISE AMONG JUDICIAL OFFICERS

A. IGNORANCE ABOUT THE ROLE OF COURT INTERPRETERS DEFEATS THE PURPOSE OF THE COURT INTERPRETERS ACT OF 1978

1. Court Interpreters Act of 1978

The Court Interpreters Act of 1978⁵ (hereinafter "the Act") establishes that a non-English speaker has the right to a court

Editor's Note: This article was the winning entry in 2000 in the American Judges Association's annual essay contest for law school students. Each year, we publish the winning entry in that contest in Court Review.

Footnotes

1. Mark Hansen, *Litigant Language Barrier: In New York, Court Interpreters Can Be Quickly Recruited, Poorly Trained*, A.B.A. J.,

May 1994 at 38.

2. The New York City Bar Association's Committee on Legal Needs of the Poor spent 15 months studying this subject in its local courts prior to May 1994. *Id.*

3. *Id.*

4. See FED. R. EVID. 604.

5. Pub. L. No. 95-539, 92 Stat. 2040, codified in pertinent part as amended at 28 U.S.C. §§ 1827-28.

interpreter in the federal courts, but does not itself address the state courts.⁶ Approximately twenty-two states recognize a criminal defendant's right to a court interpreter, via statutes or state constitutions.⁷ The Act's purpose is twofold: to ensure that the criminal defendant can communicate with his attorney and understand the proceedings, and to ensure that a testifying witness understands and answers the questions propounded by counsel or the judge.⁸ The dual purpose behind the Act is, in fact, intertwined with the Sixth Amendment⁹ guarantees of the right to counsel and right to confront witnesses.¹⁰ By reaching non-English speakers via the use of interpreters in the court system, the Act guarantees important constitutional rights that transcend the Sixth Amendment alone.¹¹

The Act does not automatically bestow an interpreter upon a defendant who requests language assistance. It is sometimes incumbent upon a judge, who may know little about assessing English proficiency, to use his discretion in appointing an interpreter.¹² The exercise of judicial discretion may not guarantee the non-English speaker access to an interpreter if a lack of linguistic assessment skills ultimately leads to an uninformed decision on the matter.¹³ For this reason, and because decisions to deny an interpreter rarely get appealed, a judge's discretion in appointing an interpreter has been the subject of severe criticism.¹⁴

2. Cultural Sensitivity

Is the denial of equal access to the courts to Spanish-speaking defendants more likely to occur if the judicial officer involved in his case has had little exposure to different cultures? Most certainly. A judicial officer who fails to take an interest in the importance that languages and trained interpreters have in a courtroom may unknowingly violate a defendant's constitutional rights—a situation I will document below. The creation of a standard by which judges could assess interpreter need would help to prevent such unknowing violations.

Although only a handful of reported federal court cases

have been appealed to the circuit level due to the denial of an interpreter,¹⁵ they exemplify a lack of cultural-linguistic awareness. In a 1994 California case,¹⁶ the judge withdrew an interpreter from the trial because the defendant testified to the jury, through his interpreter, that he had lived in the U.S. longer than he had lived in Cuba.¹⁷ The judge suggested, "Let's try it in English."¹⁸ When the defense attorney objected because his client could not express himself in English properly, the judge retorted, "Try it."¹⁹ On appeal, the Ninth Circuit held that the defendant's Fifth Amendment rights had been violated.²⁰ The judge's error had been the use of the defendant's length of U.S. residency as the singular factor in assessing English proficiency.²¹

[A]n immigrant will first learn to communicate his biographical information in the second language, perhaps by memorizing it. This does not mean that he speaks the foreign language in question.

Another mistake a judge may make during his evaluation of English proficiency is to simply ask the Spanish-speaker biographic information in English, without inquiring if the defendant understands English.²² A culturally aware person might readily understand that an immigrant will first learn to communicate his biographical information in the second language, perhaps by memorizing it. This does not mean that he speaks the foreign language in question. A sound judicial evaluation would have to include open-ended questions such that a non-English speaker could not anticipate an answer.

The epitome of cultural-linguistic unawareness is to hold a bilingual person to the standard of a certified court interpreter, as some judges do when they encourage a bilingual family member to interpret criminal proceedings to the defendant,

6. ROSEANN DUENAS GONZALEZ ET AL., FUNDAMENTALS OF COURT INTERPRETATION: THEORY, POLICY AND PRACTICE 37 (1991) [hereinafter "FUNDAMENTALS OF COURT INTERPRETATION"].

7. Leslie V. Dery, *Disinterring the "Good" and "Bad Immigrant": A Deconstruction of the State Court Interpreter Laws for Non-English-speaking Criminal Defendants*, 45 U. KAN. L. REV. 837, 840 n.23 (1997).

8. Mollie M. Pawlosky, Case Note, *When Justice Is Lost in the "Translation": Gonzalez v. United States, An "Interpretation" of the Court Interpreters Act of 1978*, 45 DEPAUL L. REV. 435, 445 (1996).

9. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . to be confronted with the witnesses against him; . . ." U.S. Const. Amend. VI.

10. FUNDAMENTALS OF COURT INTERPRETATION, *supra* note 6, at 158-59.

11. Duenas explains that Fourth and Fifth Amendment rights are also protected by the use of interpreters. In the case of searches and seizures (Fourth Amendment), court interpreters may play a role in transcribing and translating non-English documents that result in warrants. During arraignment, court interpreters aid the court in determining entitlement to the services of a public

defender (Fifth Amendment). *Id.*

12. Dery, *supra* note 7, at 843.

13. *Id.* at 846.

14. Critics from the different disciplines of linguistics, philosophy, and the law disfavor judicial discretion when there is a lack of linguistic ability to recognize a particular defendant's need for an interpreter, and the competency of such an interpreter in the English-language hegemony that is our justice system. *Id.*

15. Pawlosky, *supra* note 8, at 448, 490. As of 1996, only the Fifth, Sixth, and Ninth Circuits had decided interpreter denial cases. *Id.*

16. *United States v. Mayans*, 17 F3d 1174 (9th Cir. 1994).

17. Pawlosky, *supra* note 8, at 453.

18. *Id.*

19. *Id.*

20. *Id.* at 455.

21. In U.S. cities with large Hispanic populations, a Spanish speaker can survive without the use of English in his everyday life. The author's mother, a homemaker who rarely left the house, waited 20 years before she felt the need to learn conversational English.

22. Pawlosky, *supra* note 8, at 461.

As Jon Leeth noted, merely being bilingual does not qualify one to interpret, just like having two hands does not qualify one to be a concert pianist.

rather than request the services of a trained interpreter. To assume that the ability to speak two languages means you can interpret judicial proceedings is, as Jon Leeth has noted, analogous to assuming that all people with two hands can automatically become concert pianists.²³

In fact, though, the courts have a history of relying on non-appointed Spanish speakers to act as interpreters for the defendants—case in point, *United States v. Sanchez*.²⁴ In *Sanchez*,

the judge allowed the defendant's common-law wife to act as interpreter, finding that the arrangement was acceptable because it did not "inhibit comprehension"²⁵—vague phraseology, indeed. In New York, a court clerk kept a trial going by enlisting the help of a neighborhood Korean grocer.²⁶ Just as egregious, in *Montoya v. Texas*,²⁷ the court held that since the defendant in this murder case never objected at trial, he had no right to appeal the fact that the court bailiff filled in as the interpreter when a certified interpreter was unavailable. The trial court based its belief that the bailiff was an adequate interpreter on the bailiff's self-proclaimed competence.²⁸ *Montoya* concluded that even if appointing the bailiff as interpreter had been an error, it was harmless error.²⁹

These decisions point to a lack of understanding of the court interpreter's role, a basic lack of linguistic-cultural awareness. This lack of awareness, coupled with a lack of procedures³⁰ by which to evaluate interpreter need or interpreter competency, makes the Act easier to violate.

Why not simply make the right to an interpreter automatic upon request, as a number of critics suggest?³¹ This would certainly ease the burden of those judges who feel unqualified to make linguistic-related decisions. Is it because judges feel obligated to make such decisions? The answer may be that absent

ethnocentrism in our justice system, we would already have appropriate interpreter regulations in place, or no need for them.

B. DEBUNKING INTERPRETER MYTHS: ONE STEP CLOSER TO EQUAL ACCESS

By enacting the Court Interpreters Act of 1978, Congress acknowledged the specialized nature of court interpretation as a skill that falls outside the classification of merely being bilingual.³² At the same time, court interpreters are occasionally seen as "yet another piece of furniture in the well of the court."³³ It is the latter perception of interpreters that is dangerous to the Spanish speaker. To correct these and other mistaken assumptions about languages by judges or attorneys, common myths about interpreters must be dispelled; namely, that interpreters are merely bilingual, that an interpreter is the same thing as a translator, and that a perfect translation is a literal translation.

1. Myth #1: Interpreters are Merely Bilingual

As Jon Leeth noted, merely being bilingual does not qualify one to interpret, just like having two hands does not qualify one to be a concert pianist.³⁴ Interpreters earn their certification by passing a series of rigorous written and oral exams administered by the State of California³⁵ or by the Administrative Office of the Courts.³⁶ From 1978 to 1991, the Federal Court Interpreter Exam for Spanish (written component of the test) was taken by 9,750 presumably bilingual candidates.³⁷ Only 2,015 passed this written component, and of these 2,015 who went on to take the oral portion, only 388 passed and became federal court interpreters.³⁸ If it were only a matter of being bilingual, there would have been 9,750 new federal court interpreters, not a mere 388 new certified federal court interpreters in the United States for that time period.

To pass rigorous interpreting exams, most interpreters attend one-to-two-year certificate or master's degree programs in translation and interpretation in the United States or around the world.³⁹ A number of these interpreters are already lin-

23. FUNDAMENTALS OF COURT INTERPRETATION, *supra* note 6, at 16 (Duenas quotes Jon A. Leeth, a federal court administrator: "Most people believe that if you are bilingual you can interpret. That's about as true as saying that if you have two hands you can automatically be a concert pianist.").

24. *United States v. Sanchez*, 1994 U.S. Dist. LEXIS 16725 (E.D. Pa. Nov.16, 1994).

25. *Id.* at *6.

26. Hansen, *supra* note 1, at 38.

27. *Montoya v. Texas*, 811 S.W.2d 671, 672 (Tex. Ct. App. 1991)

28. *Id.*

29. *Id.*

30. California has enacted a Judicial Administration Standard Rule of Court, Rule 18, which provides guidelines for judges to follow when determining the need for a court interpreter. CAL. R. CT., APP., DIV. I § 18 (Deering 2001). See FUNDAMENTALS OF COURT INTERPRETATION, *supra* note 6, at 595.

31. Dery, *supra* note 7, at 843.

32. Pawlosky, *supra* note 8, at 466.

33. David L. Lewis, Book Review, 9 CRIM. JUST. 48 (1994) (reviewing

SUSAN BERT-SELIGSON, THE BILINGUAL COURTROOM: COURT INTERPRETERS IN THE JUDICIAL PROCESS (1990)).

34. FUNDAMENTALS OF COURT INTERPRETATION, *supra* note 6, at 16 (quote by Jon A. Leeth); see note 22 *supra*.

35. Roxana Cardenas, *Lost in the Translation: Courtroom Interpreters All Too Easily Are Made Scapegoats*, L.A. DAILY J., March 24, 1995.

36. Because the Administrative Office of the Courts (AOC) is directly responsible for the implementation of the Act, the AOC director delegates the task of constructing the federal court interpreter examination. SUSAN BERT-SELIGSON, THE BILINGUAL COURTROOM: COURT INTERPRETERS IN THE JUDICIAL PROCESS 36 (1990).

37. FUNDAMENTALS OF COURT INTERPRETATION, *supra* note 6, at 62.

38. *Id.*

39. Examples of such training programs are the UCLA Extension Program in Court Interpretation or the California State University, Los Angeles, Certification Program, which offers an array of classes on different modes of interpretation. Other interpreters attended European schools where they were trained to interpret for international organizations, such as the United Nations. See Cardenas, *supra* note 35.

guists, former Spanish literature professors, or former attorneys from other countries. In these programs, they learn to transfer all of the meaning heard from the source language into a target language, not editing, summarizing, adding meaning, or omitting, all in a matter of split seconds.⁴⁰ A bilingual person is not born with these capabilities. It takes an inordinate amount of skill and practice.

2. Myth #2: An Interpreter Is a Translator

An interpreter is not automatically a translator. Translations are written, as opposed to interpretations, which are oral.⁴¹ Therefore, the individuals we see in court should be addressed as interpreters, never as translators.⁴² The court interpreter may also be a court translator, but the performance of this job as a translator will take place in an office setting, perhaps at home, in front of the computer. The translator produces written documents in English or foreign languages, such as a translation into English that was originally a taped conversation that took place in Spanish.

3. Myth #3: A Perfect Translation Is a Literal Translation

There is no such thing as a perfect translation because interpretation is a mixture of art and science.⁴³ Interpretations are performed by humans and humans are not machines. Humans get fatigued and respond to distracting stimuli. Because there are no definite rules or vocabulary, two interpreters may give different renditions of the same passage and both may be correct. In an afternoon of testimony, an interpreter might process an average of 10,000 words.⁴⁴ If one of these words should escape her, it would still represent an accuracy rate of 99.9%.⁴⁵ In other words, even the best interpreter will make an occasional mistake and still be considered an excellent interpreter.

A number of statutes and rules of court require that the

interpreter provide a “verbatim⁴⁶ record” of the proceedings while interpreting witness testimony.⁴⁷

Because “verbatim records” are an impossibility, the court interpreter mediates between two extremes of conveying meaning and a conveying a verbatim record.⁴⁸ She does this while manipulating registers of language from the most formal legalese used during motions to the most informal jargon, such as slang.⁴⁹ The interpreter performs all these cognitive functions while interpreting for all courtroom parties speaking at rates of 200 words or more per minute.⁵⁰

There is no such thing as a perfect translation because interpretation is a mixture of art and science.

C. THE ROLE OF THE COURT INTERPRETER: EXPERT WITNESS OR COURT OFFICER?

The court interpreter is a language mediator who, through interpretation, allows the defendant to be linguistically and cognitively present in a legal setting.⁵¹ Accordingly, the proper role of the interpreter is to place the non-English speaker, as closely as is linguistically possible, in the same situation as an English speaker in a legal setting.⁵²

The interpreter is perhaps the only “officer of the court” who renders “expert services,” here by rendering regular court interpretation services.⁵³ Federal Rule of Evidence 604⁵⁴ subjects interpreters to expert qualification rules. An expert witness interpreter may testify as to translations she or others have done, or render opinions on questionable interpretations that other colleagues have made. A court interpreter must easily adapt to the dual role occasionally required of her, whether it is expert witness or interpreter/court officer. Despite the dual role, the interpreter is only compensated as an interpreter and never as an expert witness.⁵⁵

40. FUNDAMENTALS OF COURT INTERPRETATION, *supra* note 6, at 155.

41. *See* Cardenas, *supra* note 35.

42. This is a common misconception further exacerbated by the television industry’s use on the screen of “voice of the translator” when interviews/meetings are televised between two heads of state of different countries. The screen should read “voice of the interpreter” because the interpreter is working orally.

43. *See* Cardenas, *supra* note 35.

44. *Id.*

45. *Id.*

46. In the court interpreting field, “verbatim” translation means a “word-for-word” or “literal” translation. This is a misnomer because verbatim translations are rare. Imagine having to interpret “latch-key child” or “PTA” meetings at school. These concepts probably do not exist in other countries and must be explained by the interpreter in a short phrase. The same problem arises with legal concepts that have no direct translation such as “Mirandizing” someone, “six-packs” of photo lineups, or the “three strikes” laws. Again, the interpreter must concisely explain the meaning of the legal concept to the Spanish speaker.

47. FUNDAMENTALS OF COURT INTERPRETATION, *supra* note 6, at 17.

48. *Id.*

49. *Id.* at 19.

50. *Id.*

51. *Id.* at 155.

52. *Id.*

53. Officers of the court are employees or staff who work in the courtroom and are often administered oaths to comport themselves in a dignified manner in all interactions with judges, counsel, other court officers, defendants, and witnesses. FUNDAMENTALS OF COURT INTERPRETATION, *supra* note 6, at 160.

54. Rule 604 of the Federal Rules of Evidence provides: “An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.”

55. The pay rate of the interpreter does not increase because she is testifying as an “expert witness.” In fact, the county may even refuse to pay the interpreter her daily compensation. The county’s justification for nonpayment is that an interpreter-witness does not perform interpreting services while testifying as an expert; this despite the fact that an interpreter may unwillingly become a witness as a result of her regular job as a court interpreter.

The infamous O.J. Simpson trial . . . provides an illustration of how the lack of a rule . . . can lead to the use of unfair tactics by attorneys.

D. FLIPSIDE: ETHNOCENTRISM OR A FUNCTION OF SOUND DECISIONS?

Some would argue that ethnocentrism⁵⁶ is not the reason why there is a dearth of statutes and rules to aid the court in interpreter-related situations—they are simply unnecessary because judges are already making sound decisions pertaining to interpreter matters. As delineated in the first part of

this article, it is unlikely that noninterpreters in certain situations can make sound decisions. Even a bilingual judge in a city like Los Angeles is limited in his capacity to draft interpreter rules of court, hence the majority representation of California interpreters on judicial rule-drafting panels.⁵⁷

Some states are taking their first steps to wipe out ethnocentrism by recognizing that attitudes of cultural ignorance exist.⁵⁸ Once a state recognizes there is a problem in its courts, it can prioritize its budget accordingly. California is one such state that has been forced to examine its history, as described in the following section.

II. EQUAL ACCESS TO THE COURTS FOR SPANISH SPEAKERS HAS NOT BEEN ACHIEVED IN CALIFORNIA

In Los Angeles County, there are 645 certified court interpreters.⁵⁹ Of this total, 375 are Spanish court interpreters.⁶⁰ Los Angeles County provides interpreters for 91 different languages and has access to 168 languages via telephone interpretation.⁶¹ The overwhelming number of Spanish court interpreters, as compared to non-Spanish interpreters, is to be expected in a city that is at 46.5% Hispanic.⁶² When one factors into the equation that an interpreter may handle multiple cases in one day, the Spanish caseload may easily exceed that of any other foreign language.⁶³

The California Rules of Court are more likely to directly impact the specific conduct and treatment of interpreters than a general statute. Statutes on interpreters tend to be very broad, whereas rules of court are more specific. If state or federal statutes are not on point, a court interpreter, such as myself, will seek guidance from rules of court or the interpreter code of ethics. In fact, an interpreter may participate in drafting a rule of court by being appointed to the Court Interpreters Advisory Panel that makes rule recommendations to the California Judicial Council.⁶⁴ As will be shown below, current court rules are far from perfect.

A. THE O.J. TRIAL: A CASE IN POINT

The infamous O.J. Simpson trial, of which the author has some knowledge,⁶⁵ provides an illustration of how the lack of a

56. To the author, a lack of cultural-linguistic expertise may arise out of a lack of multicultural experiences, as is the case with a monolingual person in the United States who has never traveled abroad or spoken another language by choice. The author refers to a person fitting this profile as “ethnocentric.”

57. The statute authorizing the Judicial Council Court Interpreters Advisory Panel provides: “The panel shall include a majority of court interpreters and may include judges and court administrators, members of the bar, and others interested in interpreter services in the courts.” CAL. GOV’T CODE § 68565 (Deering 2001).

58. For example, in 1997, Wisconsin State Supreme Court Justice Janine Geske and state bar association members established a commission on racial and ethnic bias in the courts. The commission’s area of study will include sentencing patterns and court interpretation. See News, MILWAUKEE J. & SENTINEL, June 22, 1997. See also Ellen McCarthy, *Annual Report; Keeping California Courts Fair and Accessible*, 1998 CAL. JUD. COUNCIL, ADMIN. OFFICE OF THE CTS. VOL. III, at 18, 24, 41 (discusses strides made by the Racial and Ethnic Bias in the Courts Advisory Committee).

59. Telephone interviews with Gregory Drapac, Los Angeles County Assistant Court Manager, Interpreter Services (Oct. 13, 1998, and April 17, 2000).

60. *Id.*

61. The Los Angeles courts subscribe to Language Line Services (formerly AT&T Telephone Interpreting Services), whereby interpreting languages that may not be available in Los Angeles can be accessed by phone. If no interpreters for an obscure Mexican tribal language are found in Los Angeles, the courts may pay AT&T to locate an interpreter for that language who will interpret by phone from where she is living. *Id.*

What is unknown to the defendant and his defense attorney is

exactly what standard Language Line Services uses in selecting its interpreters and whether this standard is enforced. It is uncertain whether Language Line Services’ standards are as rigorous as that of certified court interpreters. Many certified interpreters work for Language Line Services in their leisure time, but other people work for Language Line Services precisely because they are not certified to work in the courts.

62. Los Angeles is a city of 3.7 million inhabitants, of which 46.5% were Hispanic in the 2000 Census. U.S. CENSUS BUREAU, THE HISPANIC POPULATION: CENSUS 2000 BRIEF (2001) (available at <http://www.census.gov/prod/2001pubs/c2kbr01-3.pdf>). In unincorporated East Los Angeles, the Hispanic population percentage was 96.8%, the highest concentration of Hispanics in any community in the United States with 100,000 or more in population. Hector Becerra & Fred Alvarez, *Census Reflects Large Gains for Latinos*, L.A. TIMES, May 10, 2001 (available at <http://www.latimes.com>).

63. According to Mr. Drapac, the courts do not keep track of the number of Spanish cases done by interpreters. A single interpreter may handle 1 to 20 cases a day. Because the interpreter is not required to keep count, there is no record of how much work is actually done. Drapac interview, *supra* note 59.

64. The panel is mainly composed of interpreters who have the necessary expertise to advise the judges and administrators while drafting rules. CAL. GOV’T CODE § 68565 (Deering 2001).

65. The author worked in the same building and belonged to the same pool of interpreters that provided services for the Simpson criminal trial. She regularly spoke with her colleague interpreters who worked directly on it. The result of these experiences led her to write the *Los Angeles Daily Journal* piece published on March 24, 1995. See Cardenas, *supra* note 35.

rule (due to a lack of interest) can lead to the use of unfair tactics by attorneys. The problem arose out of the defense team's insistence on a Salvadoran court interpreter as a replacement for the first interpreter, who was Mexican-born. This first interpreter had been assisting a Salvadoran-born defense witness, Rosa Lopez.⁶⁶ There was talk in the media of the imprecise interpretation by the Mexican-born interpreter, although no direct accusations were made.⁶⁷ The first interpreter was removed; her reputation, once impeccable, in question.⁶⁸

1. Confusion

The removal of the interpreter created mass confusion among court staff and the general public. What the public did not know, nor the defense team, was that interpreters rarely get assigned to court cases based on their race or country of origin.⁶⁹ Not only would it be impractical to do so, but the courts operate on the assumption that all California certified court interpreters are competent to interpret a broad use of Spanish that may be used in as many as 20 different countries that speak Spanish. This is because all interpreters basically take the same variation of a test⁷⁰ that may include a combination of Mexican, Salvadoran, Colombian, and/or other Latin American discourse and slang.⁷¹

It would be impossible for interpreters to become familiar with obscure colloquialisms from every Spanish-speaking region. Like an English speaker who cannot know every word in the English language, or may not know that a British person calls an elevator a "lift," the Spanish interpreter cannot know every word in both languages, nor every usage of a word in all 20 or more Latin American countries where Spanish is spoken, plus Spain.

The confusion was so great that court clerks started requesting nationality-matching interpreters for their cases. The county's interpreter assignment office, unable to fill such a tall

order, denied most nationality-matching interpreter requests. We interpreters reeducated the court staff on a daily basis by explaining why these interpreter requests were impossible to meet. As a result of this most unusual removal of an interpreter by the defense team, many interpreters, including myself, concluded that this was a ploy to win more time to prepare Rosa Lopez for testimony.⁷²

The removal of the interpreter created mass confusion among the court staff and the general public.

2. Abuse by O.J. Defense Team

As the saying goes, a little knowledge can hurt you. Along the same lines, thinking you know a little Spanish may hurt you, especially if you challenge a court interpreter's work. Bilingual or semi-bilingual attorneys will most often engage in such practices. How the judge reacts can vary widely between courts since there are no guidelines to follow in such a confrontation.⁷³

Without a court rule, the attorney is free to cast doubt on almost anything that sounds suspect, especially if his case is not going well. The O. J. Simpson defense attorneys did so, and the California Federation of Interpreters reacted to Judge Ito's acquiescence at a Judicial Council Advisory Panel Committee meeting held on September 23, 1995.⁷⁴

The California Federation of Interpreters urged the court to recognize that the "expert witness" status of court interpreters precludes an attorney, with no interpreter certification, from challenging the work of a California certified court interpreter. Only an interpreter-expert witness can state credible grounds for the impeachment of another interpreter-expert witness.⁷⁵ A mere layperson cannot.⁷⁶ The California Federation of

66. *Id.*

67. This first interpreter informed the author that she was not removed due to an imprecise interpretation. The interpreter office based the change of interpreter on the defense's unusual request for a Salvadoran interpreter.

68. If a proper rule of court standardizing a procedure by which an attorney can challenge an interpreter had existed, this interpreter would probably not have been removed merely for being Mexican-born.

69. If this were the case, there would be a shortage of Mexican interpreters for the large proportion of Mexican Spanish speakers in the courts. There would also be an overabundance of Peruvian or Chilean interpreters for the small number of same-nationality cases.

70. California Personnel Services (CPS) has administered the Spanish certification test for many years. This author studied variations of CPS tests in order to become certified. Each year, the tests had roughly the same difficulty level, with variations in words, transcript subjects, and test proctors. Today, the Judicial Council indirectly administers the test through the CPS and has entertained bids from different non-CPS testing entities. Interview with Judge Jaime A. Corral, member of the Court Interpreter Advisory Panel to the California Judicial Council (Sept. 19, 1998).

71. In effect, the interpreter becomes more familiar with different varieties of Spanish every day. As a result, many interpreters compile glossaries of new words, obscure expressions, regionalisms, and the like. This enables the interpreter to become more skilled every day.

72. See Cardenas, *supra* note 38.

73. A number of judges will require the attorney and the interpreter to go to sidebar to "duke it out." The interpreter usually wins based on her certification because the judge will refuse to hear the attorney's argument if the attorney is not a certified court interpreter. Another option for the court is to call another interpreter to get a second opinion.

74. Memorandum from Alex Abella, Vice-Chair of Greater Los Angeles Chapter of Court Interpreters Association (GLAC) Political Action Committee, to General Membership of GLAC (Sept. 23, 1995) (on file with the author). GLAC is now known as the California Federation of Interpreters. The Abella memorandum was a summary of his address to the panel urging action on interpreter impeachment and substitution.

75. *Id.*

76. Challenges to an expert witness's testimony are usually done by the opposing attorney's expert witness on the same subject—not by an attorney who is a layperson on the subject matter.

To this day, no rule of court establishes a procedure for an attorney to follow should he disagree with the Spanish interpretation.

Interpreter's presentation ended with a call to implement a procedure whereby interpreter substitution does not become a routine event, needlessly brought about by an attorney claiming to know the language better than the interpreter.⁷⁷

B. HOPE FOR AN INTERPRETATION CHALLENGE PROCEDURE?

To this day, no rule of court establishes a procedure for an attorney to follow should he disagree with the Spanish interpretation.⁷⁸ The California Federation of Interpreters will no doubt continue its lobbying efforts before the Judicial Council committees.

On the brighter side, a procedure was adopted in 1999 under which the interpreter may request a conference with the witness (and attorney calling the witness) prior to his testimony.⁷⁹ This is allowed to better acquaint the interpreter with the witness's usage of Spanish and any unusual vocabulary he may use during his testimony. The pre-testimony conference has the effect of raising accuracy levels of interpretation tremendously.⁸⁰

C. AN OVERBROAD "GOOD CAUSE" CLAUSE LEAVES THE QUALITY OF INTERPRETATION IN DOUBT.

Rule 984.2 (b)(2),⁸¹ known as the "good cause" clause, provides the courts with the option to use an uncertified interpreter, provided certain conditions showing "good cause" are met.⁸² It is the source of much dissension among judges and interpreters because it lends itself to abuse by the courts, thereby bypassing the assignment of certified court interpreters. The courts favor it because it is a tool of expediency, specifically preventing "burdensome delays."⁸³

For the Spanish speaker, the "good cause" clause signifies a step back in the struggle for equal access, hearkening back to the days of self-proclaimed interpreters such as relatives, court staff, and the like. This rule violates the purpose of the Court Interpreters Act and is a blow to the profession of certified court interpretation.⁸⁴ It brings the bilingual up to the level of a certified court interpreter once again. Even more disturbing, section (c)(1) of Rule 984.2 permits a nonqualified person to act as a Spanish interpreter for two consecutive six-month periods if the judge finds that there is "good cause."⁸⁵

The efforts of the Advisory Panel to tighten conditions attached to the invocation of the "good cause" clause culminated in 1997 when a representative of the Mexican-American Legal Defense and Education Fund (MALDEF) sat on the Advisory Panel for Court Interpretation. The representative communicated to the California Interpreters Association her efforts to eventually eliminate the "good cause" clause with regard to the Spanish language. This feat remains an unat-

77. Abella memorandum, *supra* note 74.

78. All that's provided for in the rules is a suggested instruction to counsel in cases in which interpreters are used that "any objection [be directed] to the court and not the interpreter" and that counsel should "[a]sk permission to approach the bench to discuss the problem." CAL. R. CT., APP., DIV. I § 18.1 (Deering 2001).

79. CAL. R. CT., APP., DIV. I § 18(e) (Deering 2001). Such a conference is to be allowed "if the interpreter needs clarification on any interpreting issues," including colloquialisms, slang, and technical terms. *Id.*

80. A golden rule in interpretation training is to assimilate as much information as possible prior to interpreting the subject matter at hand. For example, an interpreter will review ballistics terminology in English and Spanish prior to interpreting in a trial in which a ballistics expert is expected to testify. This ensures accuracy because an interpreter may not have ready knowledge of ballistics vocabulary. The same rule applies to the testimony of any witness who may use an expression unknown to the interpreter or street names that may be confusing. A pre-testimony conference affords the interpreter the chance to clarify any confusion or research a word prior to testimony. It allows the interpreter to interpret with the highest degree of accuracy.

81. CAL. R. CT., DIV. IV, R. 984.2(b)(2) (Deering 2001). Applicable to trials in criminal and juvenile delinquency proceedings, the rule allows a judge to appoint an interpreter who is not certified if the interpreter is "provisionally qualified" and the judge finds that "good cause exists to appoint the noncertified interpreter." Rule 984.2(b)(3) allows the appointment of a noncertified interpreter to handle "brief, routine matter[s]," even if not the interpreter is not "provisionally qualified," at the request of a defendant or

minor if necessary to "prevent burdensome delay or in other unusual circumstances." CAL. R. CT., DIV. IV, R. 984.2(b)(3) (Deering 2001).

82. *Id.* §984.2(b)(3) See (3) to interpret a brief routine matter (i) if the defendant has waived the appointment of a certified interpreter, (ii) finds that good cause exists . . . etc.

83. The author's experience is that it is entirely in the judge's discretion to decide what constitutes a "burdensome delay." A judge may invoke the "good cause" clause if he needs an interpreter, but no interpreter is available. This tends to occur with non-Spanish interpreters, who are fewer in number. If the judge does not wish to wait a full day or longer for a certified interpreter, he may invoke the "good cause" clause.

84. If the good cause clause exists to allow nonqualified people to interpret, what is the point of seeking training to become qualified? Certified interpreters must pass tests and comply with continuing education requirements, much like attorneys. If they do not do so, they are dropped from the Judicial Council list of certified interpreters. Per Rule §984.2(c)(1), six-month Spanish interpreters neither take tests nor comply with continuing education. The incentive to become a certified interpreter is undermined if a nonprofessional can be deemed an interpreter for a one-year period (two consecutive six-month periods are allowed) without having to take a test or comply with continuing education requirements.

85. Rule 984.2(c)(1) provides that in counties with more than 80,000 people, "a noncertified interpreter of Spanish may be allowed to interpret for no more than any two 6-month periods." CAL. R. CT., DIV. IV, R. 984.2(c)(1) (Deering 2001).

Opinion Writing and Footnotes

I applaud the attention given opinion writing in the Summer 2001 issue of *Court Review*. Most decisions I make in a busy Indiana juvenile court as a magistrate are made immediately and without a detailed opinion. However, in the custody and visitation realm, there are occasions when a deliberative and detailed analysis is needed.

In those cases I submit detailed findings of fact and conclusions of law, not because of a need to define the case for higher review or because I have been asked to, but because the issues involved and the decisions made critically affect relationships between parents and children. Such cases to me merit an explanation to the litigants of what and why the decision has been made.

Having had the opportunity to study with F. Reed Dickerson in the late 1960's at Indiana University—he was cited by Joseph Kimble as "the father of legal drafting" in the United States—and the benefit of participating in a presentation by Bryan A. Garner to the Indiana judiciary several years ago, I acknowledge a need to control a personal tendency to be wordy. Though the objective is not always attained, I do make an effort to cut back. Helpful in the process is the advantage given by modern word processing, i.e., an ability to instantaneously see and revise while thoughts are fresh.

Though I recall some disdain by Professor Garner for the use of footnotes in trial court opinions, I continue to use them to include specific statutes, common-law principles (invariably in the family law realm I find something useful from Blackstone's Commentaries), etc., that may be known to the lawyers involved but not always to the litigants, who truly are "concerned about the underlying reasons" why a particular decision which affects the most basic of relationships has been made.

Thanks for an interesting and useful primer.

Harold E. Brueseke, Magistrate
St. Joseph Probate Court
South Bend, Indiana

tained objective today because the MALDEF representative's term expired before a drafted rule was introduced. MALDEF nonetheless paved the way to "good cause" clause reform. Undoubtedly, community representation on the panel by groups such as MALDEF is one of the most effective ways Spanish speakers wield power with respect to the courts.

In 1999 the Advisory Panel mandated a limit of two consecutive six-month periods (within the "good cause" clause) that a person may be deemed a court interpreter.⁸⁶ The MALDEF representative posited while on the panel that there was no need for the "good cause" clause to be implemented with respect to Spanish interpreters. With a list of more than 300 certified Spanish interpreters in Los Angeles County alone, a court cannot claim that there is "good cause" to deem anyone else a Spanish interpreter. The "good cause" clause should be used as a last resort, not as a mere tool of expediency.

Until the California Rules of Court reflect a true understanding of the importance of the court interpreter to California's court system, the Spanish speaker will remain on the fringes of attaining fair and equal treatment as compared with his English-speaking counterpart. A better result is possible only if California's judges and judicial administrators recognize that different cultures and languages are represented in many of our multicultural courtrooms on a daily basis. As a result, the interpreter is a necessary part of the daily functions of the court. The appropriate recognition and use of the certified court interpreter's skills is the key to justice for the Spanish speaker in the California court system.



Roxana Cardenas has been a certified court interpreter in California state courts since 1989 and in the federal courts since 1996. She holds a Master of Arts degree in Spanish Translation/Interpretation from the Monterey Institute of International Studies. Her years of experience derive from having worked in as many as 40 different courts in Los Angeles

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86. Corral, interview, *supra* note 70

COURT REVIEW

AUTHOR SUBMISSIONS WELCOME

Court Review invites the submission of original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to working judges. 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 articles, essays, or book reviews for *Court Review* are set forth in detail on page 25 of the Summer 2001 issue. For more information, contact *Court Review's* editor, Judge Steve Leben, at (913) 715-3822 or by e-mail: sleben@ix.netcom.com.



The Resource Page



NEW BOOKS

GREG ROBINSON, *BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS*. Harvard Univ. Press, 2001 (\$27.95). 310 pp.

Canadian history professor Greg Robinson has pieced together from hundreds of sources the events and considerations that led to President Franklin D. Roosevelt's 1942 order for the internment of Japanese-Americans. Although the timing was a complete coincidence, its publication after the events of September 11 provides an opportunity to move back in time to a similar situation to see how events and policies unfolded.

As Judge Procter Hug noted in his speech at the American Judges Association annual educational conference in Reno in October (*see* pages 5-6 of this issue), the internment of Japanese-Americans has been soundly criticized in later years, both in scholarly discussions and in court opinions. What Professor Robinson adds to the discussion is a straightforward presentation, in Watergate terms, of what President Roosevelt knew and when he knew it. Robinson concludes that Roosevelt failed to recognize and transcend the prejudice that infused the movement to intern Japanese-Americans and that he "bears a special measure of guilt" for never projecting any real sympathy or consideration for these people.



ARTICLES ON JUDICIAL ETHICS

David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 *Geo. J. Legal Ethics* 509 (2001).

University of Minnesota law professor David McGowan has provided an

interesting commentary on interrelationships between judicial writing, the role of the judge in our legal system, and judicial ethics. He proposes—and discusses potential objections to—four rules:

1. Judges should speak candidly and speak first to the parties and their dispute.
2. Judges should write their own published opinions. They should not have law clerks or anyone else do the writing for them.
3. A published opinion should discuss the resolution of an actual dispute and try to use the dispute to develop the law in a way useful to society and in particular to those whose situation is similar to that of the parties. Opinions that do not should not be published.
4. An opinion should not be published to make a point of general political content, nor should an otherwise appropriate opinion make such a point.

Of at least equal interest, Professor McGowan applies these rules to a fascinating exchange from the published opinions of the Ninth Circuit in a death penalty case in which various internal court memoranda and procedures became an issue both before that court and before the United States Supreme Court. Any judge who regularly writes opinions will find this article of interest.

Steven Lubet, *Bullying from the Bench*, 2 *Green Bag 2D* 11 (2001).

[Available on the web at www.greenbag.org.]

Even if you've neither heard of United States District Judge Samuel B. Kent, who sits in Galveston, Texas, nor read one of his opinions chastising incompetent attorneys, you should read Professor Lubet's pithy chastisement of Judge Kent. Many of our readers probably have seen e-mails exchanged among judges quoting from some of

Kent's opinions, such as one accusing the attorneys of having "obviously entered into a secret pact—complete with hats, handshakes, and cryptic words—to draft their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed."

Professor Lubet finds Judge Kent to be an exemplar of a more general problem of abuse of power by judges. Lubet argues that opinions of this type exploit the inherent inequality of power between judges and lawyers; that they further reduce civility in the courts; and that they unnecessarily lead clients to question whether justice was the aim of the proceeding. In addition, he notes that the zealous advocacy upon which the legal system depends may be tempered by a desire to reduce the risk of public humiliation from a judge who regularly engages in such conduct.

Steven Lubet, *Stupid Judge Tricks*, 41 *S. Tex. L. Rev.* 1301 (2000).

All judges need an occasional review of the applicable ethics rules. Reading this article by Professor Lubet won't cover all of the rules, but it is an interesting reminder of situations that have led to significant sanctions against judges. The article arose from Lubet's practice of keeping a folder next to his desk labeled, "Stupid Judge Tricks." He has regularly put case reports and newspaper stories into it for use in updating the treatise on judicial ethics he coauthored. First, he defines "stupid judge tricks" as those violations "that cause you to scratch your head in wonderment and exclaim, 'What could that judge have possibly been thinking?'" Then, he covers a variety of examples and tries to draw conclusions about the causes of such behavior, as well as how it can be prevented.