

Court Review

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THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

Volume 36, Issue 4

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EDITOR'S NOTE

With this issue, we bring to a close another year of our publication. Thus, in addition to noting what's in this issue, I want to provide an overview of what we've been doing to maintain and to improve the quality of *Court Review*.

First, though, the issue at hand. We have three essays that we think you'll find of interest. Psychologist Isaiah Zimmerman discusses the isolation that can come from judging and ways to deal with it. Professor Stephen Ceci, one of the leading experts on the interactions between children and the courts, argues that children should not be deemed capable of waiving their right to an attorney. And Pennsylvania appellate jurist Stephen McEwen, Jr. provides an overview of that court's move to televised oral arguments in selected cases.

We also have three articles: Professor Charles Whitebread, in separate articles, reviews criminal and civil decisions rendered in the past Term of the United States Supreme Court; in the third article, a group of authors reviews the problems encountered in maintaining court security and proposes a comprehensive plan to work toward further improvements. Last, we include a review of a new book about wrongful convictions overturned through DNA evidence and what these cases mean for our criminal justice system.

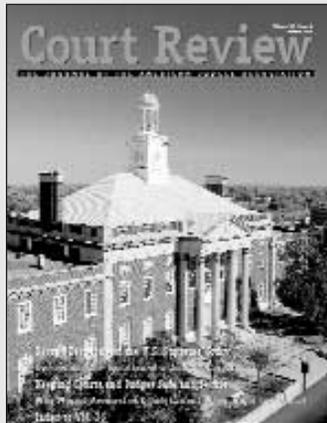
Now, a thought or two about *Court Review* in general. Our goal is to provide practical, useful information to working judges in a professionally appropriate but easy-to-read format. To do this, we need to make contacts with potential authors, to identify topics that need coverage and to stay alert to new resources and developments that judges would want to know about.

Recently, I attended the biennial conference of the American Psychology-Law Society, a division of the American Psychological Association, to spread the word about *Court Review* as a place to share useful information with judges. In the past year, we have had several submittals from prominent psychologists and hope to obtain more. Similarly, we have contacted a number of law professors, several of whom have committed to write for us.

We have not been as successful, thus far, in getting judges to write and to solicit articles, essays, and book reviews. We invite your help in making this journal one that you and your fellow judges will find greatly beneficial in your work. Feel free to contact me to discuss an idea that you might like to write about. If you would be interested in writing a review of a new book, let me know—as we hear of new books, we can check with you to see whether you'd like to review one we're interested in. As you hear exceptional speakers at judicial education programs, let them know that you would really like to see an article from them in *Court Review*. Our guidelines for authors are in almost every issue.

With your help, we can continue to improve *Court Review* and to achieve our goal of providing useful information for working judges in every issue.

— SL



Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 6. *Court Review* reserves the right to edit, condense or reject material submitted for publication.

Court Review is indexed in the Current Law Index, the Legal Resource Index, and LegalTrac.

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

Advertising: *Court Review* accepts advertising for products and services of interest to judges. For information, contact Charles F. Campbell, managing editor, at (757) 259-1841.

Photo credits: cover photo, Mary Watkins. The cover photo is of the Jackson County Courthouse in Independence, Missouri. Then-Presiding Judge Harry S. Truman spoke on the front steps of this courthouse when it was dedicated, after extensive remodeling, in September 1933.

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President's Column

Gerald T. Elliott

Judicial independence can be carried too far. When independence results in isolation from the public, it is carried too far. Isolation tends to reduce public information about and involvement with the courts; public understanding and confidence suffer as a result.

Judges and courts are created and empowered by the public. Our independence is likewise authorized by the public. Judicial independence is essential, but will be extended only so long as it is perceived to be justified; it is not a birthright.

One source of public confidence is information about and involvement with judges and courts. It follows that one way to contribute to judicial independence is to promote public information and involvement.

Public confidence is expressed in well-known ways: the adequacy of the funding, impeachment demands, election results, term limits, media commentary, and public displays.

As judges, we appreciate fully what needs to happen—the public needs to be better informed and more involved. That is always the response: if the public only understood . . .

On the other hand, what courts and judges institutionally have yet to appreciate and act on is that it is judges and courts that must do the informing. Neither the public nor the media nor the executive branch nor the legislative branch will do so: who else will?

The practical predicament is that a judge's job is to judge, to manage the docket and try the cases. We are expected to devote full time and attention to those tasks. Furthermore, judicial ethics and due process require judges to avoid both improperly influencing the public and improper influence from the public. These factors combine to discourage very much judicial education or involvement of the public, and this precedent in which judges and courts are grounded makes it difficult for them to see the need, let alone act on it.

Recognizing these limitations, the American Judges Association assists all judges by evaluating new information, knowledge and techniques and disseminating it to judges and courts in practical ways they can put it to use.

The last issue of *Court Review* is a good example. It reported

in detail on the National Conference on Public Trust and Confidence held in May 1999. A review of that issue very effectively and efficiently brings all judges current on a topic that is of central importance to all of us.

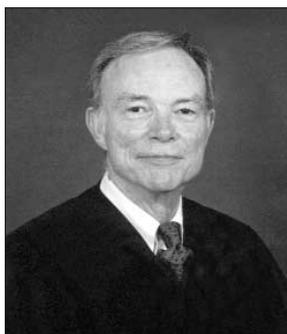
In May of this year, AJA will join the National Consortium of Task Forces and Commissions on Racial and Ethnic bias in the Courts in sponsoring its a national conference to develop an action plan to confront the issues of diversity and ethnic equality in the courts. We hope to take the plan as it is developed and work with the existing judicial education organizations to bring that program to judges for their use.

Recently, the Office of National Drug Control Policy has agreed with our Judicial Leadership for Substance Abuse Reduction Initiative to support a national symposium to develop a program dealing with the abuse of alcohol and other drugs. This program will explain the most recent developments and successful techniques that are available, not only for drug courts, but also for criminal, domestic relations, domestic violence, juvenile, and traffic courts.

The Trial Court Performance Standards are another useful tool for courts and judges in meeting the issues we all face in public service. The Association is currently assisting in the development of a strategic action plan that will provide a very simple, straightforward way that courts and judges can immediately implement the standards and begin to use them as appropriate.

Finally, the Conference of Chief Justices and Conference of State Court Administrators are developing a "best practices" program that also involves our Association. This program will collect the best practices used by a variety of courts and make them available for modification and use by others.

The goal of these efforts is to provide courts and judges with proven tools and established methods to incorporate them without taking time from their otherwise busy dockets. The concept, of course, is that by their use judges and courts will be able to provide the public the service, information, and involvement that generates trust and confidence—and results in judicial independence.



Isolation in the Judicial Career

Isaiah M. Zimmerman

"Before becoming a judge, I had no idea or warning, of how isolating it would be." "Except with very close, old friends, you cannot relax socially." "Judging is the most isolating and lonely of callings."¹ "The isolation is gradual. Most of your friends are lawyers, and you can't carry on with them as before." "When you become a judge, you lose your first name!" "It was the isolation that I was not prepared for." "After all of these years on the bench, the isolation is my major disappointment." "The Chief Judge warned me: 'You're entering a monastery when you join this circuit.'" "I live and work in a space capsule—alone with stacks of paper" "Your circle of friends certainly becomes much smaller." "Once you get on the appellate bench, you become anonymous."

These are the voices of state and federal judges. They are culled from twenty years of notes taken from my work with the judiciary as a consultant or as a psychotherapist. They are spontaneous, and not in response to any leading question regarding isolation.

JOINT EFFECT OF CODE AND CASELOAD

What is going on here? Why did approximately 70% of the judges interviewed come up with this observation on their own? When asked, most cited the combined effect of a crushing workload plus the restrictions imposed by the Code of Judicial Conduct. Indeed, the average judge, in my experience, brings work home on many evenings and weekends and lives with a constant tension of being behind in his caseload. Time for friends and family, recreation, and cultural pursuits is severely limited, and is constantly weighed against the demands of the court.

Some innovate. A federal trial judge

told me, "On occasional weekends, my wife and kids come to my chambers. They play. I work. We get pizza or Chinese delivered, and time passes better than being separated." Another couple, both of whom are state trial judges, report, "We work late in the courthouse every week day. But on the weekends, we see no one. We sleep or stay in bed most of the weekend, and absolutely bring no legal work home. As a result, we hardly see any friends and have almost given up on social life, but we've tried to preserve our intimate life. This way we're also usually caught up with our work."

As to the effect of the Code, judges report that it is more the "appearance" requirement that poses the biggest burden. They have to be vigilant and maintain an appropriate distance and demeanor at social and bar gatherings. Jokes and offhand remarks can backfire, especially in smaller communities. The immediate family is also drawn into the ambiguous image and behavior restrictions. A rural area judge writes, "We have no privacy. If my wife or I fail to say hello to a local, it will result in a slight. If I'm seen talking alone to someone longer than a couple of minutes, word will get around that I must somehow be close to that person. So, we've learned to be alert and careful when we step outside our home."

Most judges believe it is necessary to appear confident and unperturbed in public. Thus, an overworked trial judge explains, "You develop the skill of moving a docket of 200 cases without giving the impression of hurrying anyone! But burnout is a widespread fact here that we don't discuss. Often, I am bored and exhausted; but I can't talk to anyone about it. I have to keep up the act of being on top of my game."

Chief justices and presiding judges often exhort their colleagues to become more involved in their communities in permissible ways. But some colleagues object. A federal judge expressed it to me this way: "I would like to contribute more. But, with the little time I have left, I feel it first should go to my family, and then to my own time: to read, stay fit, and listen to some music." Another judge added, "You gradually lose your original group of friends, and you have no time or energy to make new ones. Discretionary time goes down to zero. With all the ethical restrictions that are obviously necessary, who has time to go out and break new ground?"

THE ISOLATION PROCESS

Judicial isolation is essentially a part of a wide-ranging and deep acculturation process. Early in the judicial career, former lawyer colleagues immediately begin to show deference to the new judge by referring to him or her only by title. Despite protestation by the new judge when outside the court, this usually sticks and the judge accepts it.

The higher status conferred on the former lawyer casts wide social ripples. It is experienced by the judge and his immediate family with excitement and pride. Despite the ritual requirement to appear modest and even unworthy, the net effect is one of a heady rise in esteem and social worth. The subculture of the courthouse reinforces the new identity through the powerful symbolism of the robing ceremony and constant deferential behavior. This even includes the architecture of the building and courtroom with its raised bench and solemnity.

Despite the understanding that it is the office and role that are being honored, the man or woman occupying it is

Footnotes

1. Linda Stewart Dalianis, "Judges Writing Journals: A Personal Perspective," *JUDGES' J.*, Spring 1999, at 13.

soon merged with the charismatic image. Slowly, former colleagues continue to pull away from the judge and act with more formality toward him or her. Friends, relatives and neighbors also acknowledge the rise in status and continually display heightened respect and deferential behavior. In other societies, this process is more pronounced. In our less formal American culture, judges still are usually placed at the apex of any survey of the degree of respect accorded various professionals. Inside himself, the judge may not accept the imposed image, but he is still likely to be swept along by the external niceties.

At a later stage, many judges find themselves adopting a duality in their sense of self. They play out "The Honorable" role at work, but shed it at home and with close friends. The power of the stereotype and the high qualities attributed to its bearer can impel even close friends to buy into it, at least to some extent.

Under the combined effect of having little time for personal life and being continually treated like a demigod, it should not surprise anyone that the phenomenon humorously referred to as "robe-itis" can emerge. The caricature conveys the image of a pompous martinet who never sheds his robe or exaggerated role, especially at home. The more serious and lifelike version is a judge who has become so absorbed by his professional role that he or she has lost much of his private persona and can no longer relate as a peer to most people. This is the end product of years of living and working in the absence of frank criticism and corrective feedback.

A further casualty of this isolating process is the weakening of honest and robust dialogue. At the appellate level it can sometimes be seen when oral argument is eschewed. Judge Coffin² cites the "dilution of collegiality" under conditions of an overburdened and expanded judiciary where judges are "polite strangers" to each other and dialogue is shallow. Over a span of years, a judge usually surrenders a continuing

close relationship with his classmates. Despite meetings and work on bar projects, the required degree of trust and emotional access seldom develops. Some of the judges quoted at the top of this essay were referring precisely to this invisible wall.

The subject of judicial isolation is so vexing also because one meets a great deal of denial on the part of many judges. They may claim in a public forum that they have many friends and are puzzled by all of this talk of isolation. On closer examination, I have usually found that this is true for some extroverted judges, but not for the majority, who tend to be largely introverted and overwhelmed by work.

Another unintended casualty of the Code and the long-range effect of interpersonal isolation is a withdrawal from intellectual and community involvement. The judge expends all his fine capabilities in court, but seldom outside. Sometimes ambition and reappointment or election is folded into a posture described by a federal judge: "You use extreme caution, not to say something you'll later regret, or something that may be held against you if you're under consideration for an appellate appointment. These cautionary attitudes certainly dictate that you're not likely to write or say much outside of your carefully crafted opinions."

I did ask a few judges if they could think of colleagues who used to be rich and exciting as thinkers and who have gradually withdrawn into smooth and social banality. The response described colleagues who exchange jokes and talk about sports in the judges' dining room, and do not respond to occasional efforts at serious conversation.

ROLE OF PERSONALITY TRAITS

In my clinical experience, a substantial majority of judges' personality profiles are a composite (in varying degrees) of introversion, intellectuality, high idealism, and a strong work ethic. Given these personality traits, it is my opinion that, under the twin hammers of

social isolation and chronic overwork, it is not surprising that so many judges adapt to their very difficult situation with the reaction patterns discussed above. Essentially, they fail to aggressively fight isolation and its associated negative consequences.

Let us now look at the other group, the roughly 30% of judges who appear not to suffer appreciably from isolation. Their profiles display a combination of extroversion, more emotionality nuanced intellectuality, idealistic tendencies tempered by pragmatism, and a strong work ethic also, but coupled with oppositional traits. These "more extroverted" brethren are equally competent judges, but they seem to experience less stress. They also appear not to feel so confined by the Code of Judicial Conduct. They strive for more public appearances, engage in more debates, and publish more widely.

A few examples of their venturesomeness may help paint a composite portrait: a couple of these judges appear occasionally on talk radio; one is a volunteer paramedic; some teach a variety of non-legal courses in colleges and prisons; several write fiction and act in small theater; others have written on important societal issues. Almost all of them report that when they sense isolation beginning to envelop them, they respond by a variety of vigorous outreach efforts. They reconnect with old friends, seek new social contacts outside the legal profession, and engage in various communal and cultural activities

TRANSMUTING ISOLATION

Isolation is not going to be removed from the judicial career. The strictures of the Code are the bulwark of judicial independence. Both heavy workloads and isolation will remain major elements of the judicial career. Indeed, under the pressures of a high-profile trial, a judge can find great strength not only in his friends and family, but also in his years of monastic isolation. One state judge expressed it thus: "You have to accept isolation. Ultimately, it will serve you

2. Frank M. Coffin, *ON APPEAL: COURTS, LAWYERING AND JUDGING* 216-17 (1994).

well when your independence is seriously threatened. You must cultivate your distance in order to make the hardest decisions of your life when your own life and that of your family is under threat because of a decision you've handed down."

A judge does not have to undergo a personality change in order to reduce the effects of unavoidable isolation upon his quality of life and collegiality. It also is not necessary to test the borders of the Code of Judicial Conduct. As Judge Deanell Tacha of the United States Court of Appeals for the Tenth Circuit has written: "In fact, the laws, regulations, and codes governing the conduct of judges leave a wide range of civic, philanthropic, and educational activities open for participation by judges. Indeed, judges are far freer to interact with the other two branches of government than they realize."³

A prescription for transmuting isolation into a healthy life and judicial

career involves these elements:

(1) Aggressively holding on to old and childhood friends. We all need witnesses to our stages of life.

(2) Maintaining a close support circle of relatives and friends who are not competitive or envious, and with whom one can engage in robust and honest mutual appraisal and dialogue.

(3) Taking initiative to engage in activities totally removed from the legal and judicial world, and to form friendships with some of the people you will meet in this way.

(4) Learning the basics of stress management techniques so that you can work efficiently but not pay too high a price for it.

(5) Periodically serving as a mentor to a new judge, so that you can teach by example most of these points.

Judicial isolation is an inherent part of the role judges must play in society. It can seriously diminish a judge's intellectual and social abilities. By understand-

ing and actively employing the measures recommended, a judge can transmute isolation into a rewarding resource.



Isaiah M. Zimmerman is a clinical psychologist in private practice in Washington, D.C. He is on the faculty of the National Judicial College, the Washington School of Psychiatry, and the Medical School of George Washington University. Dr. Zimmerman received his B.A. in psychology and M.S.W. in clinical social work from the University of California at Berkeley; his Ph.D. in clinical psychology is from the Catholic University of America. He is a consultant and lecturer on judicial stress management, appellate collegial relations, and judicial productivity.

3. Deanell R. Tacha, "Renewing Our Civic Commitment: Lawyers and Judges as Painters of the 'Big Picture,'" 41 U. KAN. L. REV. 481, 488 (1993).

Court Review Author Submission Guidelines

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

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

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

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

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

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

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

Submission: Submissions may be made either by mail or e-mail. Please send them to *Court Review's* editor: Judge Steve Leben, 100 North Kansas Avenue, Olathe, Kansas 66061, e-mail address: sleben@ix.netcom.com, (913) 715-3822. Submissions will be acknowledged by mail; letters of acceptance or rejection will be sent following review.

Why Minors Accused of Serious Crimes Cannot Waive Counsel

Stephen J. Ceci

In Chicago recently, a 9-year-old boy was charged with murder after confessing under police interrogation to having been in a fight with his 5-year-old foster brother the day before his brother died. The boy's admission was made with no lawyer present, at 12:45 a.m., after he had been held in custody for nearly five hours. He supposedly waived his Miranda rights to remain silent, to refrain from making self-incriminating statements, and to have counsel present; he allegedly did this knowingly and without coercion.

In a controversial decision, a Cook County judge threw out the boy's confession. Elsewhere around the nation, there have been many similar cases. In Austin, Texas, 11-year-old LaCresha Murray made self-incriminating statements during a lengthy police interrogation at which neither parent nor counsel was present. Based on these statements, she was convicted of murdering a 2-year-old in her care and sentenced to 25 years. An appellate court judge overturned her conviction on appeal, though prosecutors were reported to be challenging this reversal in Texas Supreme Court.

From the perspective of psychological research, these judges were correct: Many innocent adults have succumbed to the pressures of lengthy interrogation, and it is unrealistic and inhumane to expect children to advocate for their best interests under such intense circumstances, despite the attempt by law enforcement to explain their Miranda rights.

Volumes of research demonstrate children's heightened suggestibility, willingness to comply to gain adult approval, and lack of understanding of the ramifications of their statements. For more than two decades, I have studied the factors that cause children to succumb to adult suggestions and pressures to comply. For the cognitively-unarmed child, an interrogation by experts is no contest—children can be made to say things

that are incriminating, even if they are false. Those familiar with the July 1998 murder of Ryan Harris in Chicago will recall that two boys, aged 7 and 8, confessed to murdering and molesting the 11-year-old girl after hitting her on the head with a rock while she was on her bicycle. The boys made their confessions without counsel present during a lengthy interrogation that was not taped. Later, a 27-year-old ex-con's semen was found on the dead girl's body and he was indicted for her murder. The two boys have been exonerated. Why did these children admit to things they didn't do?

Consider the techniques sometimes used by police to interrogate children. Interrogators are permitted to deceive, promise, and threaten to obtain a confession. While most adults may be sophisticated enough to demand their rights to counsel under such circumstances, children are not.

Can a child, for example, appreciate that the police may be lying when they claim that the decedent's eyes have been removed from his body and will be used as evidence against the child because they contain the image of the last person the decedent saw before being killed—the child himself? Or can a child be expected to appreciate the absurdity when an interrogator claims to have removed his fingerprints from the decedent's sweat pants? Can a child be expected to understand the significance of every statement made during hours of pressurized questioning? Can a child stand up to *relentless* assertions by powerful authority figures claiming they already have proof the child is guilty, and therefore the interrogation is not about denying but only about explaining whether they killed out of malice or out of anger, or by accident? Does a child understand the inherent trap when an interrogator tells him—as was vividly demonstrated on a recent ABC 20/20 episode involving the interrogation of

12-year-old Anthony Harris in New Philadelphia, Ohio—that he has a choice between one of two options, either to admit he killed out of anger or that he murdered as a result of careful planning? (If he admits to the former, the interrogator tells the child that he can do something to help, that he will allow the child to go home, and that he will write a letter to the judge urging leniency.) And, most significantly, does the child really believe that he has the right to refuse to answer a question until he consults with an attorney who will be appointed to represent him? Many children, particularly inner city ones, do not initially accept the interrogator's offer to have an attorney present because attorneys are associated with doing bad things. Can a child be expected, after an hour of interrogation, to suddenly recall the offer of counsel and demand to speak to an attorney before answering the next question? Most adults cannot do this!

Unsurprisingly, after it becomes clear that they admitted to murder, the faces of these children look like the proverbial cow in the corral who only now comprehends the slaughterhouse concept. To be sure, such pressurized tactics are effective in prompting confessions from the mouths of guilty children. The problem is that they can also coerce confessions from innocent children. Law enforcement professionals face a miserable dilemma in their efforts to protect society from truly dangerous children. Nevertheless, court-sanctioned interviewing techniques can sabotage the search for truth.

What does research tell us about children's thinking during interrogation? To those of us who study young children's intellectual development, one of its enigmas is their ability to reason like adults about emotionally neutral issues, while displaying immature thinking when confronted with emotionally charged situations.

Children actually *believe* interrogators who tell them that if they admit they murdered, they can go home. Most adults would immediately distrust such a statement. But a child desperate to go home often does not. When asked if he believed he would be allowed to go home if he signed a murder confession, 12-year-old Anthony Harris said, "Yes, I did." The fear and lacerating loneliness that comes with interrogation by a highly trained professional leads to both true *and* false confessions. Children are not the equals of their adult examiners: We must not delude ourselves that a child will never admit to something he did not do.

Can high-pressure tactics be justified because they may be the most effective way to get a reluctant child to admit a heinous crime? Perhaps, if the child indeed committed the crime. But what if the child did not? This approach is akin to burning down the barn to roast the pig. Transcripts of children interrogated without counsel show they often do not realize what they were being asked or what they were admitting to. Like mentally ill and feeble-minded adults, children represent a special class of defendants who absolutely require representation by counsel. It is unreasonable to expect children to withstand periods of confinement and pressurized questioning, after being told repeatedly that they are lying when they profess their innocence and that witnesses are ready to testify against them.

How can we guard against inappropriate interrogatory techniques? How can we ensure that children are dealt with in a developmentally appropriate manner?

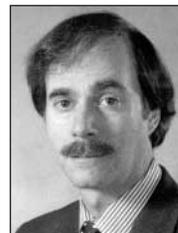
Key to such goals is the electronic preservation of the child's entire interrogation. Interviews are only rarely recorded; interviewers customarily testify on the basis of their memory, aided by notes. However, my research demonstrates that interviewers cannot accurately remember what children tell them. Interviewers often omit important exculpatory information, reverse the voice of who said what, and alter the gist of the child's statements.

Judges are often shocked when I show them what a child actually told an interviewer compared with what the interviewer claims the child said—even when the interviewer was warned to take careful notes because her or his memory would be tested. It is not enough for an interviewer to remember that the child disclosed guilt: Judges need to know the "atmospherics" of the interview, how long it lasted, how many times the child denied guilt before admitting it, and how many threats, bribes, or other inducements were employed to coax the child's disclosure.

No American should endorse the sentiment, "Anything worth fighting for is worth fighting dirty for." But isn't that what we are doing when we detain young children for hours, unanchored, loosed in a world of powerful adults promising, cajoling, threatening, insulting, and intermittently touting friendship? The stakes are too high to permit children to waive the right to counsel or to remain silent. Children as young as 11 can be sentenced to life in prison in some states. Across the country, 13-year-olds can be tried as adults. Children as young as 8 can be asked to waive their Miranda

rights. In some states, 16-year-olds can be sentenced to death.

All children accused of serious crimes must be represented by counsel. And all interviews—not merely the final one in which a child makes a guilty admission—must be electronically preserved. Only then can judges decide if a child's confession developed appropriately. Last year, we celebrated the 100th anniversary of the establishment of the first children's court in the United States. As we enter a second century of recognition that children need special protections, it is ironic that we are witnessing a chilling devolution of children's rights.



Stephen J. Ceci is the Helen L. Carr Professor of Developmental Psychology at Cornell University. He co-authored (with Maggie Bruck) the 1995 book, Jeopardy in the Court-

room: A Scientific Analysis of Children's Testimony, which won the prestigious William James Book Prize awarded by the American Psychological Association. Ceci's many honors include an NIH Research Career Scientist award and a Senior Fullbright-Hayes fellowship. He is the author of more than 300 articles, chapters, and books, mostly in the area of child intellectual development. Ceci serves on the editorial board of several scholarly journals.

American Judges Association - Annual Meeting and Educational Conference September 10-15, 2000 Kansas City, Missouri

This year's AJA annual meeting will be held September 10-15 in Kansas City. The meeting consists of an educational conference plus AJA business meetings, which include a general assembly for all AJA members and meetings of the AJA Executive Committee, Board of Governors, and other committees. For the budget-minded attendee, the educational programs all take place in a three-day period. A tentative schedule for the conference is found at page 25 of this issue. More information can be found by checking the AJA's general Web site (<http://aja.ncsc.dni.us>) or by checking the special AJA Conference 2000 Web site (<http://www.law.umkc.edu/aja>).

TV or Not TV:

The Telecast of Appellate Arguments in Pennsylvania

Stephen J. McEwen, Jr.

O YEZ! OYEZ! God preserve the Commonwealth ... and this Honorable Court—and, please God, save the judges from profile shots.

Last year, the Pennsylvania Superior Court, a statewide intermediate appellate court, began televising oral argument of its most significant cases—those chosen for en banc consideration. When the proposal to telecast argument sessions of this appellate court was initially suggested, the reaction of the bar mirrored, with but slight variation, the reaction of the bench. Judges wondered whether such telecasts would cause the lawyers to showboat a bit, while the lawyers mused whether the judges would proceed to posture and pose. During 1999, 14 hours of televised appellate arguments by more than 65 lawyers to the 15 en banc judges of the court did not provide even a glimpse of showboating by the lawyers—or by the judges.

Since the development of televised appellate arguments in Pennsylvania evolved rather naturally from the particular part played by the court in the justice system, it well serves to briefly describe the history and the role of the court.

The Superior Court of Pennsylvania was created in 1895 to assist the Supreme Court to handle a volume of appeals that was then, and has ever since been, ascending. When the occasional temporary efforts to reduce the inventory were not sufficiently productive, the legislature in 1980 expanded the Superior Court from seven to 15 judges. All appeals until that time had been heard by all seven judges of the Superior Court. Once the court was expanded to 15 Judges in 1980, the court undertook two essential changes in its operation.

First, all appeals to the Superior Court would be considered and decided by a three-judge panel. Second, the court would sit en banc in nine-judge panels to

hear arguments in those appeals that were determined by a majority of the 15 members of the court to be of exceptional importance.

Only a select number of cases receive en banc treatment. The court proceeded to en banc argument in only 26 cases in 1999, 7 as a result of the *sua sponte* determination of a majority of the Court and 19 by grant of a petition for en banc consideration filed by one of the parties to the appeal. Meanwhile, in recent years, the Superior Court has annually received 8,000 appeals, rendered 5,000 decisions, and heard argument in approximately one-half of that number, or 2,500 cases, while the parties in the other 2,500 appeals agreed to submit the appeal to the Court for decision upon the briefs.

At a December 1998 court conference, the judges decided that the live telecast of its en banc arguments on the Pennsylvania Cable Network (PCN) might well serve the cause of judicial independence by educating the public. The positive reaction of the judges was in large measure based upon their familiarity with the live telecast by PCN of the proceedings in the Pennsylvania Senate and the House since 1994, and upon the fact that PCN was not commercial television, or even a component of the Public Broadcasting System, but was what some have aptly described as Pennsylvania's C-Span.

PCN was very enthusiastic about the project and had no reservations about whether such telecasts were within the PCN mission; whether there would be sufficient viewer interest to justify the telecasts; or whether the telecasts were logistically feasible. PCN responded that because it seeks to inform the citizens of Pennsylvania about their state government, such telecasts would be quite purposeful. As a result, the PCN people took it from there. The need for court participation in the logistics was quite minimal.

The plan called for an en banc argument session in each of the three geographic districts of our statewide court. Spring saw the first televised en banc argument session held in the Capitol Courtroom in the State Capitol in Harrisburg, the building where PCN had been regularly televising the House and Senate proceedings. The summer en banc session took place in our Founders Courtroom Philadelphia on Flag Day, while the fall session was held in a Pittsburgh courtroom in September. By reason of an unusual number of en banc cases, a fourth session was held in Philadelphia in December.

It was a fortuitous coincidence that found the historic first telecast conducted on Law Day 1999. The en banc docket that day contained six cases: three appeals by convicted defendants, one of which implicated the state's "three strikes" legislation; a case in which a civil trial verdict had been reversed by the trial judge; a case requiring application of inheritance issues to the domestic relations support statute; and a case requiring interpretation of the environmental provisions of a three-decades old insurance policy.

PCN and the court shared the view that the understanding, and thereby the interest, of the viewers would be enhanced were a commentary to precede the actual presentation of the arguments. It was essential, however, that the argument session itself be conducted without any change in format and in the manner of 104 years of tradition. Thus, it was not possible to pause after each case to enable the commentators to provide a summary of the facts and issues in the case to follow. Rather, the commentary on all six appeals was telecast before the argument session itself began. That commentary also included a capsule of the role of the Superior Court in the justice system, as well as a few moments of biography of each of the nine judges who

would hear the cases.

The initial commentary team included the then-current president of the Pennsylvania Bar Association—in fact, the first woman president in the history of that association—Leslie Anne Miller; the judicial independence guru and prominent Philadelphia trial and appellate advocate Edward W. Madeira, Jr.; and G. Thomas Miller, the father of Leslie Miller, who had been a pillar of the Pennsylvania trial bar and its association for several decades, as well as a trial judge for several years. Thus, we had three commentators who could not only provide an astute summary of the appeals to be argued, but whose own identity provided pleasant chimes of both tradition and the times, namely, a daughter following her father into the profession of the law, and the Pennsylvania Bar Association selecting her to be its leader. For later sessions, each commentary team has consisted of two lawyers of prominence at the trial and appellate levels.

Six appeals were presented at the second en banc session, held in Philadelphia. One criminal case concerned the conditions precedent to an appeal from the discretionary aspects of a sentence, and the other the sufficiency of a citizen's report for an investigatory stop by police. The civil cases included further scrutiny of the vexing issue of parental relocation in a child custody case, as well as the extent to which the issues of damages and of liability must be intertwined when a new trial is awarded. The other two civil cases required interpretation of insurance policies, one relating to underinsurance and the other to stacking.

The third en banc session, held in Pittsburgh, considered appeals in six civil cases and three criminal cases, while the fourth in Philadelphia considered five civil cases and three criminal cases.

PCN is considering a proposal to have the commentators for each session return for a post-argument commentary upon the decisions of the panel once all the decisions of that session are filed. That commentary would not be a separate program, but would only be shown as a segment of the session in the event that PCN reruns any session. The educational value of the tapes would be

thereby enhanced, since the en banc session, when used by students (high schools and colleges, not just law schools), would be composed of three parts: the pre-argument commentary, the session itself, and the post-decision commentary.

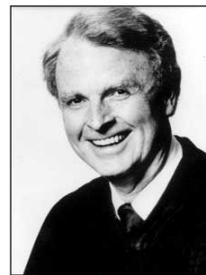
Our court has elected to restrict the live telecast of the presentation of argument to those cases that have been selected for en banc consideration, which total approximately 20 cases per year.

The other approximately 5,000 cases considered and decided by three-member panels of this Court are, advisedly, not telecast. First, it would not be logistically possible since many argument sessions are conducted simultaneously in Harrisburg, in Philadelphia, and in Pittsburgh. Moreover, the scheduling variables attendant those argument sessions, which in 1999 numbered 54, preclude accommodation of the precise, advanced scheduling intrinsic to television presentations. Most importantly, the live PCN telecast of Senate and House proceedings in the Capitol have been, and wisely remain, the primary, if not urgent, pursuit of PCN and its worthy goals of educating the citizenry upon the state government and informing the citizens of laws that are under consideration for enactment.

In any event, the judges of our court have concluded that the goal of educating the public upon the appellate segment of the judicial system would be more fully achieved if we were to restrict the telecast of Superior Court proceedings to en banc sessions. The court reserves its en banc scrutiny to the most troubling, vexing issues from which new law or changes in the law arise. Thus, less than one percent of the appeals receive en banc review. Frequently, those same troubling, vexing questions perturb the citizenry as well, and trigger such awareness, even controversy, that the public has a particularly keen interest in the subjects of the en banc arguments. The thought also occurs that the routine telecast of all Superior Court appeals would soon provide the same appeal for viewers as test patterns and static. One is, therefore, compelled to conclude that the telecast of Superior Court proceedings is wisely restricted only to en banc sessions.

While the judges of the court have opined that the telecast does not intrude upon or impair the dignity of the proceedings or distract the participants, their view is corroborated by the absence of even one public expression of objection to the broadcast of these appellate arguments. When one considers that our daily constituency is judges and lawyers, the lack of objection becomes singularly incredulous. Rather, all of the reaction has been positive, even enthusiastic.

Thus it is that the Pennsylvania Cable Network telecasts to the citizens of Pennsylvania the en banc argument sessions of the Superior Court of Pennsylvania—a practice that appears to provide meaningful education of the public about the role of the appellate judiciary in their justice system, without any negative effect upon the appellate proceedings.



*Judge Stephen J. McEwen, Jr. is the President Judge of the Pennsylvania Superior Court, the intermediate appellate court in Pennsylvania. He has served on that court since 1981 and has been its presiding judge since 1996. A graduate of St. Joseph's College (A.B.), the University of Pennsylvania Law School (LL.B.), and the University of Virginia Law School Graduate Program for Judges (LL.M.), Judge McEwen was a trial lawyer, professor of trial advocacy at Villanova University Law School, twice elected District Attorney of Delaware County, and General Counsel for the Pennsylvania District Attorneys Association. He has authored several articles and essays; in 1997, he published *Not Even Dicta*, a collection of judicial and personal lessons in the law.*



Actual Innocence:

The Justice System Confronts Wrongful Convictions

Steve Leben

Jim Dwyer, Peter Neufeld & Barry Scheck, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED*. Doubleday, 2000. 304 pp. \$24.95.

In some abstract, impersonal way, all of us are aware that mistakes are made in our justice system. It is, after all, a human institution, and human beings make mistakes.

Even as we read occasional stories about the release of an innocent person, the issues raised by that apparent mistake may remain abstract, without a sense of urgency attached to them. After all, this may have been an isolated error. Or the person may actually have been guilty, but not provably so.

If you read this book, the mistakes made in our criminal justice system will no longer be abstract ones.

Barry Scheck and Peter Neufeld are lawyers who started their careers in a legal aid office in the Bronx. Although they have long ago left legal aid for other, arguably greater pursuits—Scheck is a law professor and Neufeld is in private practice; they have teamed up to represent big-name clients like O.J. Simpson and to develop national reputations for their understanding of DNA evidence—they retain the zeal of idealistic young lawyers who have just started legal aid work and, as beginners, been given only a single client to represent.

The book tracks the work done by Scheck and Neufeld through the Innocence Project, a clinic they co-founded at the Cardozo Law School that uses volunteer law students and attorneys to review cases in which DNA testing might prove a convicted person's innocence. Their co-author, Jim Dwyer, is a reporter at *Newsday* who championed—prior to their release—the cases of some of those who had been wrongfully convicted.

The majority of the book consists of separate chapters detailing specific cases that illustrate typical ways in which the justice system may go awry and the innocent may be found guilty. The authors present overall data on 62 cases through August 1999 in which convictions were overturned based on DNA evidence. In 52 of 62 cases, there were mistaken eyewitnesses; in one case, there were five eyewitnesses, all of whom were wrong. The authors show how common techniques for police interrogations and lineups can suggestively lead witnesses to identify an innocent person. They also show how other factors—including false confessions, scientific fraud, junk science, poor defense counsel, and unethical prosecutors—have led to conviction of the innocent in specific cases in which DNA evidence has, after-the-fact, conclusively proved the defendant's innocence.

Two aspects of the book give a sense of urgency about reading it. First, it takes you vividly behind the scenes of real-life cases in which innocent men were convicted. We get to share not only the horror of the innocent who is sent to prison; we

also get to see, in context, how such a terrible mistake could have occurred. Second, it provides a number of suggestions for improving the system to avoid these results, including a helpful, six-page appendix detailing the authors' suggested reforms.

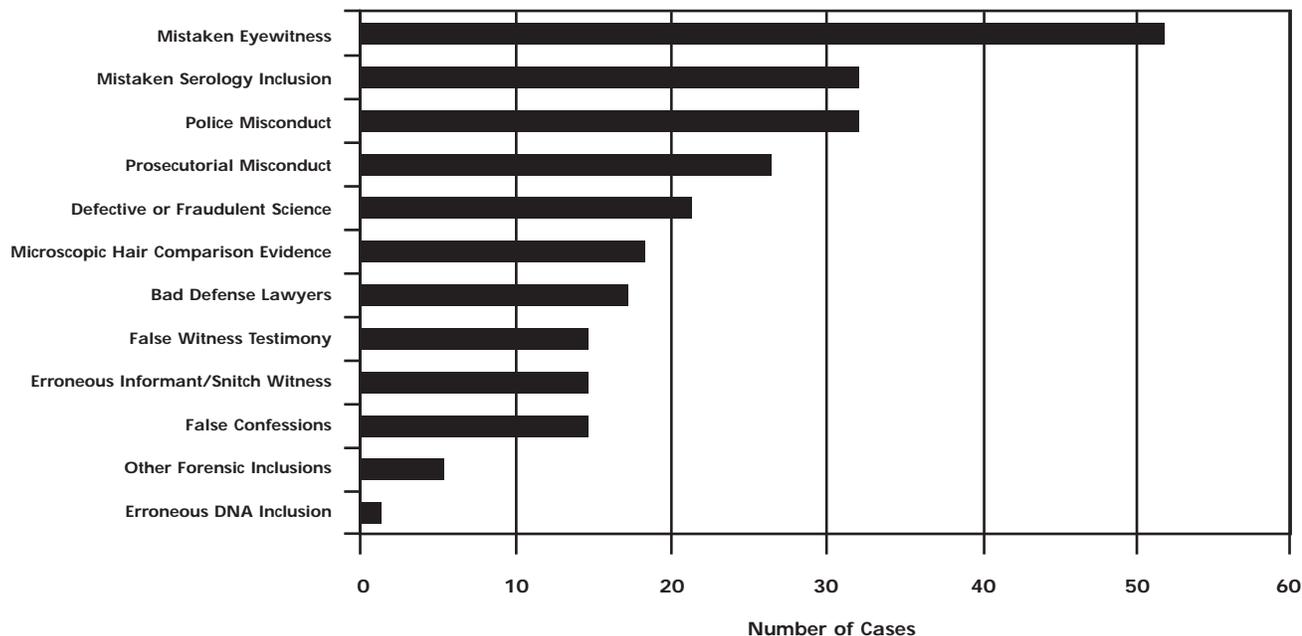
Perhaps the most intriguing proposal is the establishment of governmental Innocence Commissions at the federal and state levels. The authors appropriately note that government agencies investigate the causes of air crashes for the purpose of figuring out what went wrong so that future accidents can be prevented. Surely the specter of placing innocent people in prison for long terms—or even capital punishment—is worthy of a similar effort.

The book is not without flaws. The authors have no doubt good-naturedly poked fun at whichever of them—or the editor—who mistakenly referred to “Brett and Scarlett” as the leading characters from *Gone with the Wind*. More relevant is the sense that the authors have a consistent pro-defense slant and do not always give fair consideration to opposing views. It is interesting that they suggest that the immunity enjoyed by prosecutors should be ended so that they could be sued for intentional misconduct. They do not, however, suggest any civil remedies against incompetent defense counsel, even as they note that 27 percent of the wrongfully convicted in their study had “subpar or outright incompetent legal help.” When discussing the case of David Shephard, who had spent more than 11 years in prison for a rape he did not commit, the authors note that Shephard was unable to sue the prosecutor, the state, or the victim who had testified that he was the rapist. They ignore any possible claim against the defense counsel, who they have previously told us got so mad at Shephard when he refused to accept the plea bargain she had obtained (under which he would, no doubt, have served many years in prison) that she refused even to prepare him for his testimony in court.

There is also a sense that the authors generally accept whatever the wrongfully convicted man has to say about his dealings with attorneys, police and prosecutors as being accurate. Though they carefully attribute statements to the defendant, the stories are certainly told with an air of presumed truth to their statements. Yet there is certainly a chance that some of the police or prosecutorial misconduct was not as bad as reported if some of these recollections by the now-released defendants are exaggerated or wrong. Given the problems dutifully noted with eyewitness recollections, it would perhaps be appropriate to note more clearly that some of these recollections, potentially enhanced by years of wrongful imprisonment, may themselves lack accuracy as well.

Despite any limitations the book may have, it powerfully details problems in the system that anyone seriously concerned about justice must, at least, carefully consider. By

FACTORS LEADING TO WRONGFUL CONVICTIONS IN 62 U.S. CASES AS CATEGORIZED BY DWYER, NEUFELD & SCHECK



“Mistaken serology inclusion” refers to ABO and protein blood typing of semen, saliva, and blood stains. “Other forensic inclusions” refers to comparisons of fingerprints, fibers, and other physical evidence. Source: ACTUAL INNOCENCE, p. 263.

reviewing in detail cases in which it is beyond doubt that the wrong person was convicted, the book itself likely is better than any work product that could ever be produced by one of the authors’ suggested Innocence Commissions: the written work of a committee rarely approaches the scope, clarity, or depth of research reflected in this book. The proposal for an Innocence Commission—in each state and at the federal level—is still worth pursuing, however, because it is only through getting all of the relevant players to sit down at the same table and to collaborate about the potential solutions that real change in the system can be achieved.

Judges are among those who must give careful thought to whether the existence of these cases—and the apparent causes of these wrongful convictions—demand change from us. In many, if not most, of the cases examined, the appeals process

had included an appellate court’s finding that whatever errors had occurred were harmless because the evidence of guilt was overwhelming. In the cases examined in this book, the one thing we know for sure is that the errors in those cases were *not* harmless ones. We can’t know how many other cases are out there in which innocent men and women have been convicted—DNA evidence is not available to give definitive findings in most cases. The book makes a strong case, however, for careful thought about how a justice system of humans, with procedures already refined over the centuries, can be further improved.

Steve Leben, a general jurisdiction state trial judge in Kansas, is the editor of Court Review.

AMERICAN JUDGES ASSOCIATION 2000 MIDYEAR MEETING

MAY 4-6, 2000
SAN JUAN, PUERTO RICO

Educational Conference on Therapeutic Jurisprudence

For the second year in a row, the AJA Midyear Meeting will include an exciting educational conference devoted to an emerging issue of general interest to the judiciary. With financial support from the Fetzer Institute, the San Juan conference will feature four of the top experts worldwide in the emerging area of therapeutic jurisprudence—making this the most important conference ever held for judges on therapeutic jurisprudence.



David B. Wexler

Prof. of law and psychology;
co-author with Bruce Winick
of the book, *Law in a
Therapeutic Key: Developments
in Therapeutic Jurisprudence*



Bruce J. Winick

Prof. of law and
co-founder with David
Wexler of the therapeutic
jurisprudence field of
social inquiry



Peggy Hora

Superior Court Judge,
Alameda County,
California



William Schma

Circuit Judge,
Kalamazoo County,
Michigan

Therapeutic Jurisprudence

Therapeutic jurisprudence is a perspective that recognizes that rules of law, legal procedures, and the behavior of lawyers and judges often has an impact—positive or negative—on psychological well-being.

Therapeutic jurisprudence proposes only that we recognize and consider the potential therapeutic and antitherapeutic consequences of the law and legal processes; it does not propose that therapeutic concerns should “trump” other deeply held values. It does urge us to consider whether insights from psychology can be brought into the law or its administration in a way that will improve therapeutic consequences without offending traditional principles of justice.

Therapeutic jurisprudence has begun to influence day-to-day judging and lawyering in areas such as how courts might influence a criminal defendant's acceptance of responsibility; the role of apology in tort and other settings; the anti-therapeutic consequences of delay in personal injury case resolution; and the therapeutic implications of mediation, as examples.

[Adapted from David B. Wexler, “The Argument Culture and the Courts,” *Court Review*, Summer 1998, at 4.]

The Meeting Schedule

The AJA Midyear Meeting includes meetings of the AJA Executive Committee and Board of Governors, as well as some AJA committee meetings. All AJA members are welcome to attend any of these meetings. For those who may choose to attend only the educational conference on therapeutic jurisprudence, it will be held on Friday afternoon, May 5, 2000.

San Juan, Puerto Rico

There's lots to see and do in San Juan. Our official functions will include lunch on Friday before the educational conference, as well as dinner on Friday night at La Princesa restaurant, located in historic old San Juan. There's also an optional rain forest tour on Saturday, May 6. A limited number of rooms are reserved for attendees at the conference at the rate of \$125 (single or double) at the conference hotel, the Condado Plaza Hotel and Casino in San Juan, 1-787-721-1000 or 1-800-468-8588. Room reservations should be made directly with the hotel.

Conference Registration

Contact Shelley Rockwell at the National Center for State Courts, P. O. Box 8798, Williamsburg, Virginia 23187-8798, 1-757-259-1841, e-mail: srockwell@ncsc.dni.us to register for the conference. The cost of registration is \$125 for judges and \$75 for spouses or guests.

Recent Criminal Decisions of the United States Supreme Court: The 1998-1999 Term

Charles H. Whitebread

While the Supreme Court heard fewer cases than in previous sessions, there were many decisions that will nonetheless have an identifiable impact on constitutional criminal procedure.¹ During the 1998-1999 term, the Supreme Court ruled on approximately two dozen cases relevant to constitutional criminal procedure, many with regard to search and seizure and others dealing with a myriad of legal issues significantly affecting constitutional criminal procedure. Some rights of the criminal defendants were constricted, whereas others were reinforced and expanded. In particular, the Court constricted Fourth Amendment search and seizure rights in automobiles, but simultaneously protected individual privacy from media intrusion during home searches. The Court provided for a Fifth Amendment right to remain silent during sentencing and a Sixth Amendment protection from certain accomplice statements. The Court also considered the right to practice one's profession and the right to loiter. Finally, several federal habeas corpus issues were reviewed by the Court as well as the federal carjacking statute and the Comprehensive Drug Abuse Prevention and Control Act.

FOURTH AMENDMENT

The Supreme Court devoted a considerable amount of time to the Fourth Amendment right against unreasonable searches and seizures during the 1998-1999 term. In *Minnesota v. Carter*,² the Court constricted this Fourth Amendment right, holding that the defendants did not have a "legitimate expectation of privacy" while in the apartment of another individual for the sole purpose of packaging cocaine. Therefore, no Fourth Amendment claim could be raised. Chief Justice Rehnquist explained that the presence of the defendants in the apartment was more similar to that of a business transaction than that of an overnight stay by a guest. Therefore, because the defendants were present only in the apartment for a business transaction, they could not have had a legitimate expectation of privacy and could not invoke Fourth Amendment protection.

The Court acted to preserve individual privacy in *Wilson v. Layne*³ and *Hanlon v. Berger*.⁴ In both cases, the Court held that

it is a violation of the Fourth Amendment for police to bring a member of the media or other third party into a home during the execution of a warrant when the presence of the third party does not aid in the execution of the warrant. Chief Justice Rehnquist observed that while the presence of the media may at times serve legitimate law enforcement principles, if the media's presence is not directly related to the specific purpose of the intrusion, the Fourth Amendment bars the media's entry. The *Wilson* Court stated that "the importance of the right of residential privacy [is] at the core of the Fourth Amendment." The Court was not willing to sacrifice this Fourth Amendment right in favor of any First Amendment considerations supportive of the media.

The Court took several opportunities to address search and seizure in the context of automobiles. In *Florida v. White*,⁵ the Court held that police are not required to obtain a warrant before seizing an automobile from a public place when they have probable cause to believe that the automobile is forfeitable contraband. Justice Thomas noted that because an automobile is "movable contraband" that can be "spirited away," it is particularly important that police not be encumbered by a warrant requirement for fear that the vehicle may be moved before the warrant is obtained. The Court further explained that "Fourth Amendment jurisprudence has consistently accorded law enforcement officials greater latitude in exercising their duties in public places." Next, in *Maryland v. Dyson*,⁶ the Court held that a finding of probable cause that a vehicle contains contraband is sufficient to justify a warrantless search under the Fourth Amendment. In *Wyoming v. Houghton*,⁷ the Court further held that the Fourth Amendment is not violated when a police officer, acting on probable cause, searches a passenger's belongings in an automobile without a warrant. Justice Scalia, writing for the majority, relied on the Court's prior decision in *United States v. Ross*,⁸ where the Court, based on historical evidence, held that "if probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." Scalia reasoned that while *Ross* did not contemplate the presence of a passenger, the previous Court would have expressly mentioned such a limitation

Footnotes

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, 1998-1999 (Amer. Acad. of Jud. Educ. 1999).
2. 525 U.S. 83 (1998).
3. 526 U.S. 603 (1999).

4. 526 U.S. 808 (1999).
5. 526 U.S. 559 (1999).
6. 527 U.S. 465 (1999).
7. 526 U.S. 295 (1999).
8. 456 U.S. 798 (1982).

had it intended one. The Court did acknowledge some Fourth Amendment protection in automobile searches in *Knowles v. Iowa*,⁹ where the Court held that a full-blown search of an automobile subsequent to the issuance of a traffic citation is not permissible unless the search is necessary to disarm a suspect in order to take him into custody or needed to preserve evidence for trial.

FIFTH AMENDMENT

The Court considered the impact of prior guilty pleas during sentencing in *Mitchell v. United States*.¹⁰ In a 5-4 decision, the Court held that, in the federal system, defendants who enter a guilty plea do not waive their privilege against self-incrimination during the sentencing phase. During Mitchell's sentencing hearing, the trial court ruled that because of the defendant's guilty plea, she no longer maintained a right to remain silent and was obligated to discuss the details of the crimes. On review, the Supreme Court held that the privilege against self-incrimination remains in a sentencing hearing even after a criminal defendant has entered a guilty plea. Justice Kennedy explained that while the Fifth Amendment should not broadly allow a witness to "pick and choose what aspects of a particular subject to discuss," the amendment should not be interpreted too narrowly so that the individual relinquishes all rights upon pleading guilty. The majority further held that for the very same reasons the Court had prohibited negative inferences from silence during trial, negative inferences should not be drawn during sentencing when a defendant chooses to remain silent.

SIXTH AMENDMENT

In *Lilly v. Virginia*,¹¹ the Court considered the right of confrontation. While the justices disagreed as to the rationale behind their decision, a majority found that the admission of an accomplice's self-inculpatory statement that simultaneously inculpated the defendant violated the defendant's Sixth Amendment right to confrontation. A plurality of four justices based their decision on the notion that while the "against penal interest" exception to the hearsay rule is a "firmly rooted hearsay exception" in some instances, the use of a confession by an accomplice that incriminates the defendant is inherently unreliable.

EIGHTH AMENDMENT

In *Jones v. United States*,¹² the Court held that the Eighth Amendment does not require that a jury be instructed as to the consequence of its failure to reach a unanimous decision. Petitioner Louis Jones, Jr. was charged and convicted of kidnapping resulting in the death of the victim under 18 U.S.C. §1202(a)(2). During a separate sentencing hearing, the Government utilized its discretion under the Federal Death Penalty Act¹³ and sought the death penalty. The jury was not instructed as to the consequences of a deadlock, which, under

the statute, would preclude imposition of the death penalty. Nevertheless, the jury unanimously sentenced the defendant to death. On review, the Supreme Court concluded that the jury was not misled, reasoning that to instruct the jury about deadlock consequences "has no bearing on the jury's role in the sentencing process. Rather it speaks to what happens in the event that the jury is unable to fulfill its role."

DUE PROCESS

The Court also reviewed a variety of due process issues. In *City of West Covina v. Perkins*,¹⁴ the Court announced that under the Due Process Clause, an individual does not have a right to be notified of available state remedial procedures after the police seize property pursuant to a valid search warrant. Police officers from the City of West Covina had searched respondent Perkins' home pursuant to a valid search warrant and seized property, including a gun, ammunition, an address book, and more than \$2,000 in cash. The police officers left behind a form entitled, "Search Warrant: Notice of Service," in which the police officers listed each item that was removed from the premises and the phone numbers of the investigators involved in the investigation. The number of the warrant was not included because the warrant had been sealed. Perkins then contacted one of the detectives, who informed him that in order to have the property returned, a court order would need to be procured. Perkins then contacted the Municipal Court that issued the search warrant and was informed that the judge who issued the warrant was on vacation and that there was no record of property being held under Perkins' name. Writing for the Court, Justice Kennedy explained that the primary purpose for notice under the Due Process Clause is "to ensure that the opportunity for a hearing is meaningful." He explained that individualized notice that the property has been seized is necessary because an individual would have no other way of knowing that the property had been seized. But due process does not require notifying the individual of the available remedies when those remedies are "established by published, generally available state statutes and case law."

The Court also considered an individual's right to practice his or her profession in the context of criminal proceedings. In *Conn v. Gabbert*,¹⁵ the Court held that a prosecutor does not violate an attorney's Fourteenth Amendment right to practice his profession when the prosecutor causes the attorney to be searched at the same time that his client testifies before a grand jury. Respondent Paul Gabbert was an attorney for Traci Baker, a witness in the case of Lyle and Erik Menendez. Upon retrial of the brothers, petitioners David Conn and Carol Najera, both deputy district attorneys in Los Angeles, grew suspicious that Baker possessed a letter from Lyle Menendez instructing her to give false testimony at trial. Baker was subpoenaed to appear before a grand jury and to produce the letter. Police obtained a search warrant to search Baker's home for the letter. When

9. 525 U.S. 113 (1998).

10. 526 U.S. 314 (1999).

11. 527 U.S. 116 (1999).

12. 527 U.S. 373 (1999).

13. 18 U.S.C. § 3591 et seq.

14. 525 U.S. 234 (1999).

15. 526 U.S. 286 (1999).

police tried to execute the warrant, they were told that Baker had turned all her letters over to Gabbert. Police then obtained a warrant to search Gabbert. While searching Gabbert, whereupon the police actually found the letter, Baker was appearing before the grand jury. The Supreme Court determined that Gabbert's Fourteenth Amendment right to practice his calling was not violated by the search or by the questioning of his client before a grand jury without his presence. The Court observed that the "Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment, but a right which is nevertheless subject to reasonable government regulation." The Court further noted that this Fourteenth Amendment right applies to a "prohibition" on work, not the sort of "brief interruption" that occurred in this instance.

The Supreme Court also reviewed the constitutionality of a city ordinance that placed loitering restrictions on gang members in *City of Chicago v. Morales*.¹⁶ The Court held that a city ordinance that requires a police officer to order individuals reasonably believed to be criminal gang members to disperse because they are loitering, accompanied by criminal punishment for failure to comply with the dispersal order, is unconstitutionally vague in violation of the Due Process Clause. Justice Stevens, writing for a plurality composed of himself, Justice Souter and Justice Ginsburg, deemed the ordinance unconstitutional because it hinders the freedom to loiter. The plurality asserted that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." The plurality also objected to the ordinance because it criminalizes an activity that has no requisite scienter. The plurality explained that due to the ordinance's vagueness, the law is invalidated because there is not sufficient notice to enable an ordinary person to know that his or her conduct is prohibited and the ordinance encourages arbitrary and discriminatory behavior. The plurality further noted that there is a lack of clarity as to what constitutes compliance with the dispersal order. Additionally, the ordinance covers too many people and too many innocent activities. Justice O'Connor, joined by Justice Breyer, concurred in the Court's judgment and agreed that the ordinance is unconstitutionally vague because "it lacks sufficient minimal standards to guide law enforcement officers." For example, she noted, there is no definition of what constitutes an "apparent purpose." Justice O'Connor also said that there are reasonable alternatives that Chicago could use that more narrowly focus the discretion and the activity targeted by the statute. In a separate concurrence, Justice Breyer said, "The ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in every case." Justice Kennedy also concurred with the judgment because an unexplained dispersal order is inadequate notice.

FEDERAL HABEAS CORPUS

With respect to federal habeas corpus relief, the Court first considered the exhaustion of remedies requirement in *O'Sullivan v. Boerckel*.¹⁷ The Court held that a state prisoner petitioning for a federal writ of habeas corpus must exhaust all state remedies, including the assertion of claims to the state supreme court for discretionary review. Writing for the majority, Justice O'Connor emphasized the importance of allowing the state courts the first chance to resolve federal constitutional questions in order to reduce friction between state and federal courts. The Court noted that "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process."

In *Strickler v. Greene*,¹⁸ the Court considered a habeas petitioner's failure to raise a *Brady* claim of non-disclosure of exculpatory evidence prior to the habeas proceeding. The Court found that while petitioner was able to establish cause for failing to raise a *Brady* claim prior to federal habeas (because the prosecution withheld the exculpatory evidence), petitioner did not have a viable claim for relief because he failed to show a reasonable probability that the evidence would have changed the outcome of the jury's decision. The Court had previously decided in *Brady v. Maryland*¹⁹ that the state has a duty to disclose evidence favorable to the accused. The state violates *Brady* when three conditions are met: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued. The *Strickler* Court focused most of its analysis on the third prong of *Brady*, ultimately concluding that the suppression of the evidence was not prejudicial to the accused. Justice Stevens, citing *Kyles v. Whitley*,²⁰ noted that the standard of review "is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Based on this standard, the Court found that there was ample evidence in the record, notwithstanding the undisclosed exculpatory evidence, to warrant a finding of guilt.

STATUTORY INTERPRETATION

This term, the Supreme Court took time to interpret the parameters of several criminal statutes. In *Richardson v. United States*,²¹ the Court concluded that a jury that considers a violation under section 408 of the Comprehensive Drug Abuse Prevention and Control Act²² must unanimously agree as to the specific violations that they find make up a "continuing criminal enterprise." Justice Breyer, writing for majority, observed that to allow jurors to consider different offenses runs a risk of unfairness. Justice Breyer also noted that "this Court has indicated that the Constitution itself limits a State's power to define

16. 527 U.S. 41 (1999).

17. 526 U.S. 838 (1999).

18. 527 U.S. 263 (1999).

19. 373 U.S. 83 (1963).

20. 514 U.S. 419 (1995).

21. 526 U.S. 813 (1999).

22. 21 U.S.C. § 848.

crimes in ways that would permit juries to convict while disagreeing about means, at least where that definition risks serious unfairness and lacks support in history or tradition.”

The Court reviewed the federal carjacking statute²³ in two cases. The statute establishes that it shall be a federal offense for anyone to take an automobile “with the intent to cause death or serious bodily harm.” In *Holloway v. United States*,²⁴ the Court held that the intent requirement for carjacking is satisfied by proof that, at the moment that the defendant demanded or took control of the automobile, defendant conditionally intended to kill or cause serious bodily harm if necessary. The Court said it preferred a “commonsense” reading of the statute, explaining that Congress “intended to criminalize a broader scope of conduct than attempts to assault or kill in the course of automobile robberies.” The Court looked to the context of the intent requirement, thus finding that the intent requirement modified the “taking” of the automobile. Therefore, the mens rea requirement should only be examined at the precise moment the defendant demands or takes the vehicle. This reading of the statute abrogates the Ninth Circuit’s decision in *United States v. Randolph*.²⁵

In *Jones v. United States*,²⁶ the Court held that the provisions of the carjacking statute that imposed higher penalties when death or serious bodily injury occur are themselves additional elements of an offense and not mere sentencing guidelines. Under the statute, there are three subsections with different potential punishments: (1) unless serious bodily injury or death result, a person may not be imprisoned for more than 15 years under this statute; (2) if serious bodily injury results, a person may not be imprisoned for more than 25 years; and (3) if death results, a person may be imprisoned up to life.²⁷ Justice Souter explained that while at first glance the subsections do not appear to be separate offenses, further investigation shows that, in fact, subsections (2) and (3) are separate offenses. While both sections do contain steeper penalties, they also contain additional elements upon which those penalties hinge. The Court relied on a basic rule of statutory interpretation which provides that “where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.” If the statute were interpreted to mean that the subsections were merely sentencing guidelines and not additional elements, a constitutional concern would arise. That is, when the judge finds by a preponderance of evidence that great bodily harm has occurred, increasing the maximum sentence, the accused may have been denied the right to a jury trial on this issue.

JURY INSTRUCTIONS

In *Neder v. United States*,²⁸ the Court found that a jury instruction that omits an element of an offense is nevertheless subject to a harmless-error analysis. Petitioner was indicted and tried for nine counts of mail fraud, nine counts of wire

fraud, twelve counts of bank fraud and two counts of filing a false income tax return. During the trial, the judge incorrectly instructed the jury that it need not consider materiality on the tax offenses and did not mention materiality as an element for the mail and wire fraud counts. Chief Justice Rehnquist, writing for a five-justice majority, noted that “an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” The Court unanimously agreed that materiality is an element of federal mail fraud under 18 U.S.C. §1341.

CONCLUSION

For the most part, the decisions of the 1998-1999 term, while important, made no radical upheavals to constitutional criminal procedure. Under the leadership of Chief Justice Rehnquist, the Court continued to expand law enforcement’s ability to search and seize an individual’s possessions and property. Concurrently, the Court did substantiate several small but nevertheless significant rights maintained by criminal defendants, including the right to remain silent, the right to loiter, and the right to confrontation.



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Professor Whitebread gratefully acknowledges the help of his research assistant, Whitney Jones.

23. 18 U.S.C. § 2119.

24. 526 U.S. 1 (1999).

25. 93 F.3d 656 (9th Cir. 1996).

26. 526 U.S. 227 (1999).

27. 18 U.S.C. § 2119.

28. 527 U.S. 1 (1999).

Recent Civil Decisions of the United States Supreme Court: The 1998-1999 Term

Charles H. Whitebread

During the 1998-1999 term, the Supreme Court reviewed a number of different civil issues.¹ Among the most notable constitutional issues addressed this term, the Court extended state sovereign immunity by determining that Congress does not have the authority to force states to be sued in state court in a variety of instances. The Court also addressed First Amendment freedom of speech issues in the context of casino advertising and initiative petition circulation. Of significant interest in California, the Court deemed the state's welfare practice of providing lower benefits to some new residents a violation of the Fourteenth Amendment. The Court also reviewed the interpretation and application of numerous federal and state statutes. In particular, the Court focused a considerable amount of time interpreting different aspects of the Americans with Disabilities Act, as well as Title VII and Title IX. The Court also considered the application of standards for the admission of expert testimony.

FIRST AMENDMENT

The Supreme Court considered two distinct First Amendment issues during the term. First, the Court addressed the right of casinos to advertise in *Greater New Orleans Broadcasting Association v. United States*.² Petitioners were an association of Louisiana broadcasters who would broadcast promotional advertising for private legal casinos if they were not subject to fines and imprisonment under 18 U.S.C. section 1304. The Court specifically held that the prohibition of broadcasting lottery information could not be applied to lawful private gambling casinos under the First Amendment. At the outset, Justice Stevens, writing for the majority, explained that in order to determine if a restriction on "commercial" speech is constitutional, the four-part test established in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*³ must be considered: (1) whether the expression concerns lawful activity and is not misleading; (2) whether the asserted governmental interest is substantial; (3) whether the regulation directly advances the governmental interest asserted; and (4) whether it is not more extensive than is necessary to serve that interest. The Court held that section 1304 does not satisfy these standards because, among other things, the restrictions have a limited impact on the government's goals since advertising is allowed for Native American gaming and state-run lotteries.

The Court also addressed the First Amendment in the context of initiative petitions in *Buckley v. American Constitutional Law Foundation*,⁴ where the Court overturned restrictions created in a Colorado statute on the initiative process that required petition circulators to be registered voters and wear badges identifying their names, and required the disclosure of names and addresses of paid circulators. The Court deemed the registered voter requirement unconstitutional because it limits the number of individuals who may circulate initiative petitions, in turn placing a significant burden on expression. With regard to the name badge requirement, the Court deemed the requirement unconstitutional because it subjected circulators to potential harassment, noting that "the injury to speech is heightened for the petition circulator because the badge requirement compels personal name identification at the precise moment when the circulator's interest in anonymity is greatest." Next, the Court found that the disclosure of payment requirement was unconstitutional because it provided the voters with no valuable information. Three restrictions were approved by the Court: that circulators be at least 18 years of age, that petitions may be circulated for a maximum of eight months, and that circulators must sign an affidavit attesting that they have read and understand the laws of petition circulation. Justice Ginsburg approved of these restrictions because it is important that states that maintain an initiative process "have considerable leeway to protect the integrity and reliability of the initiative process."

SEVENTH AMENDMENT

In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,⁵ the Court considered the Seventh Amendment right to a jury trial for claims under 42 U.S.C. section 1983. The Court held that an action under section 1983 is an "action at law" and, therefore, includes a right to a jury trial, even though section 1983 itself does not specifically confer the right. Justice Kennedy, writing for the Court, explained that while section 1983 did not exist when the Seventh Amendment was written, "the Seventh Amendment jury guarantee extends to statutory claims unknown to the common law, so long as the claims can be said to 'sound basically in tort.'" Additionally, such a suit seeks legal relief because just compensation is akin to ordinary legal monetary relief.

Footnotes

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, 1998-1999 (Amer. Acad. of Jud. Educ. 1999).

2. 527 U.S. 173 (1999).

3. 447 U.S. 557 (1980).

4. 525 U.S. 182 (1999).

5. 526 U.S. 687 (1999).

FOURTEENTH AMENDMENT

The Court also considered the constitutional right to travel. In *Saenz v. Roe*,⁶ the Court held in a 7-2 decision that a state statute imposing durational residency requirements in order to receive welfare violates the Fourteenth Amendment right to travel. This decision was made in response to California's welfare policy to provide new residents of the state with only the benefits that would have been received in their previous state of residence, even though such may be lower than what long-time California residents may receive. Justice Stevens, writing for the majority, explained that while the right to travel is not found in the text of the Constitution, the right is "firmly embedded in our jurisprudence." The Court determined that in order for the California statute to be deemed constitutional, the state must show: (1) why it is sound fiscal policy to discriminate against those who have been citizens for less than one year; and (2) why it is justified to treat members of the newly arrived class differently. Ultimately, the Court found that there is no legitimate justification for the disparity here. Justice Stevens noted that by simply reducing all California welfare recipients benefits by 72 cents per month, the state could achieve the same savings. Therefore, the Court concluded that "the State's legitimate interest in saving money provides no justification for its decision to discriminate among equally eligible citizens."

DUE PROCESS

The Court addressed due process rights to worker's compensation in *American Manufacturers Mutual Insurance Co. v. Sullivan*.⁷ The Court held that a worker's compensation regime that withholds payment for disputed treatment until an independent inquiry is conducted to determine whether the treatment is necessary or reasonable does not violate the Fourteenth Amendment because the insurer is not a state actor and the employee is not deprived of property.

STATE SOVEREIGN IMMUNITY

State sovereign immunity was significantly extended in *Alden v. Maine*,⁸ where the Court held in a 5-4 decision that Congress may not subject non-consenting states to private suits for damages in state courts. Justice Kennedy, writing for the majority, explained that "the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment." Instead, the majority found that "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today ... except as altered by the plan of the Convention or certain constitutional Amendments." The Court noted that the decision in this case does not completely eliminate judicial review of the actions of states because states may still consent to judicial review in their own courts and immunity does not bar suits against municipal and local government entities.

The Court further protected state sovereign immunity in federal court in companion cases *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*⁹ and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*.¹⁰ In both cases, the Court held that Congress must possess power under the Fourteenth Amendment Due Process Clause in order to abrogate state sovereign immunity in federal courts. In one case, College Savings filed suit in federal district court against the Florida Prepaid Postsecondary Education Expense Board, alleging that Florida Prepaid infringed upon College Savings' patent under the Patent Remedy Act. Upon review, the Court explained that in order for state sovereign immunity to be limited, two conditions must be satisfied: (1) Congress must expressly abrogate the immunity; and (2) Congress must possess constitutional power to do so. The Court noted that, according to *Seminole Tribe of Florida v. Florida*,¹¹ Congress does not have the power to abrogate immunity under Article I of the Constitution, but Congress does retain authority to abrogate immunity under Section 5 of the Fourteenth Amendment. The Court noted that in order "for Congress to invoke Section 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." Therefore, in order to abrogate immunity, it must be unremedied patent infringement that constitutes the Fourteenth Amendment violation. The Court observed that when Congress enacted the Patent Remedy Act, it did not suggest it was attempting to remedy a Fourteenth Amendment violation. Ultimately, the Court concluded, "The historical record and the scope of coverage therefore make it clear that the Patent Remedy Act cannot be sustained under § 5 of the Fourteenth Amendment."

In the second case, College Savings filed an action maintaining that Florida Prepaid violated section 43(a) of the Lanham Act,¹² which creates a private right of action against any person, including the state, who uses false descriptions to make false representations in commerce. Justice Scalia, writing for the same five-justice majority, found no property interest protected by the Due Process Clause of the Fourteenth Amendment. The Court noted that, "[u]nsurprisingly, petitioner points to no decision of the Court (or any other court, for that matter) recognizing a property right in freedom from competitor's false advertising about its own products." Therefore, the Court held that Congress does not have the authority in this instance to abrogate immunity.

FEDERAL SOVEREIGN IMMUNITY

The Court further protected federal sovereign immunity in *Department of the Army v. Blue Fox, Inc.*¹³ The Court held that a subcontractor may not enforce an equitable lien against the government based on the principles of sovereign immunity. The Supreme Court viewed Blue Fox's request for an equitable lien

6. 526 U.S. 489 (1999).

7. 526 U.S. 40 (1999).

8. 527 U.S. 706 (1999).

9. 527 U.S. 666 (1999).

10. 527 U.S. 627 (1999).

11. 517 U.S. 44 (1996).

12. 15 U.S.C. § 1125(a).

13. 525 U.S. 255 (1999).

as a request for “money damages.” Chief Justice Rehnquist, writing for a unanimous court, concluded that section 10(a) of the Administrative Procedure Act,¹⁴ which waives immunity in actions seeking relief “other than money damages,” does not negate the long-standing principle that sovereign immunity bars the enforcement of liens against the Government unless sovereign immunity is waived. The Court explained that the relief that would be afforded by the lien was a substitute for the suffered loss, not a specific remedy giving the claimant the exact thing to which he was entitled. Thus, it was equivalent to a request for money damages and, the Court concluded, the “respondent’s action to enforce an equitable lien falls outside § 702’s waiver of sovereign immunity.”

TITLE VII

The Court considered the award of damages under Title VII in two separate cases. In *West v. Gibson*,¹⁵ the Court declared that the Equal Employment Opportunity Commission (EEOC) has the power under Title VII to award compensatory damages against federal agencies that engage in employment discrimination. In this case, the respondent had filed a complaint claiming that the Department of Veterans Affairs discriminated against him by failing to promote him because of his gender. The EEOC found in favor of respondent and awarded him the promotion and backpay. Three months later, respondent filed a claim in district court to recover compensatory damages and to force the EEOC to comply with its prior decision. Justice Breyer, writing for the five-justice majority, reasoned that the language of section 717(b), “read literally,” creates sufficient authority for the EEOC to award compensatory damages. The term “including” clarifies that the enforcement powers are not limited to the options listed in the section. The Court further noted that “section 717’s general purpose is to remedy discrimination in federal employment.” With the addition of the Compensatory Damages Amendment, the Court concluded that compensatory damages are “appropriate” to enforce provisions of the Act. The Court noted that to find otherwise “would force into court matters that the EEOC might otherwise have resolved.” Thus delaying the resolution of the matter by the EEOC “would increase the burdens of both time and expense that accompany efforts to resolve hundreds, if not thousands, of such disputes each year.”

In *Kolstad v. American Dental Association*,¹⁶ the Court found that punitive damages may be imposed against a private employer for violating Title VII without a showing of “egregious discrimination” so long as the employer discriminates in the face of a perceived Title VII violation. Justice O’Connor concluded that “Congress plainly sought to impose two standards of liability—one for establishing a right to compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for punitive damages.” The Court explained that the terms “malice” and “reckless indifference” address the

employer’s knowledge that they may be violating federal law and engaging in discrimination. Therefore, the majority found that the appropriate standard to award punitive damages is that “the employer must at least discriminate in the face of a perceived risk that its actions will violate federal law.” Punitive damages based on vicarious liability will not be imposed when the employer makes a good faith effort to comply with Title VII.

TITLE IX

The Court addressed the subject of student-on-student harassment in *Davis v. Monroe County Board of Education*.¹⁷ Petitioner was the mother of a female minor who was the victim of sexual harassment by a fellow fifth grade student. Petitioner repeatedly reported the harassment to several school teachers and at least one incident was actually observed by a teacher. Nevertheless, the school failed to do anything to stop or punish the harasser and the victim suffered significant emotional problems. In a 5-4 decision, the Court held that the claim should not have been dismissed because student-on-student harassment is an acceptable basis for a Title IX claim. Justice O’Connor, writing for the Court, observed that because Title IX was enacted pursuant to Congress’s power under the Spending Clause, “private damages actions are available only where recipients of federal funding have adequate notice that they could be liable for the conduct at issue.” The school board cannot be held liable for the conduct of a student; rather, the board can only be held liable “for its own decision to remain idle in the face of known student-on-student harassment in its schools.”

DISABILITY

This term, the Supreme Court spent a considerable amount of time addressing claims under the Americans with Disabilities Act (ADA). The Court took several occasions to consider the appropriate method one must take in order to deem an individual disabled under the ADA. In both *Murphy v. United Parcel Service, Inc.*,¹⁸ and *Sutton v. United Air Lines, Inc.*,¹⁹ the Court held that corrective and mitigating measures should be taken into consideration in determining whether an individual is disabled under the ADA. Justice O’Connor, writing for the majority in both cases, asserted in *Sutton*: “Looking at the Act as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account” to determine whether a person is disabled. Justice O’Connor further explained that a person who is taking measures to correct a problem might not “have an impairment that substantially limits a major life activity.” Furthermore, the majority observed that if employers were expected not to take into account mitigating measures, as many as 160 million Americans would be deemed disabled, far beyond what Congress intended when it passed the ADA. This same principle was reinforced in *Albertsons, Inc. v. Kirkingburg*.²⁰ In

14. 5 U.S.C. § 702.

15. 527 U.S. 212 (1999).

16. 527 U.S. 526 (1999).

17. 526 U.S. 629 (1999).

18. 527 U.S. 516 (1999).

19. 527 U.S. 471 (1999).

20. 527 U.S. 555 (1999).

Albertsons, a unanimous Court went further to find that under the ADA, employers may base employment qualifications for truck drivers on Department of Transportation (DOT) standards, but are not required to accept the DOT's experimental waivers. The Court found that "the regulatory record made it plain that the waiver regulation did not rest on any final, factual conclusion that the waiver scheme would be conducive to public safety in the manner of the general acuity standards and did not purport to modify the substantive content of the general acuity regulation in any way."

In *Wright v. Universal Maritime Service Corporation*,²¹ the Court unanimously found that a general arbitration clause in a collective bargaining agreement does not require longshoremen to use arbitration to resolve violations of the Americans with Disabilities Act. The Court reasoned that while an arbitrator is in a better position to interpret the collective bargaining agreement, this claim deals with the interpretation of the ADA and not the agreement. Therefore, it would be mistaken to presume that the arbitrator is in a better position to resolve the issue. The Court further found that if framers of an agreement want to require that claims under the ADA be arbitrated, the provision in the agreement must be "particularly clear." In previous cases regarding the arbitration of discrimination claims under the National Labor Relations Act, the Court had found that if arbitration is required, it must be "clear and unmistakable" in the agreement.²² The Court concluded that the same standard should be applied to ADA claims.

The Court also considered the confinement of mentally disabled individuals under the ADA. In *Olmstead v. L.C.*,²³ the Court held that a state may take into account the availability of resources in determining whether mentally disabled patients living in state-run institutions are entitled to immediate community placement after doctors approve of the community placement. This decision was in response to a suit filed by two mentally disabled patients housed in a Georgia healthcare facility who had not been released to a community-based program despite the fact that their doctors had approved the release. Writing for the majority, Justice Ginsburg first explained that "unjustifiable institutional isolation" of disabled persons constitutes discrimination. Nevertheless, the Court concluded that states must be afforded some leeway because if states are not allowed to consider available resources in determining placement, limited resources might force states to close institutions in order to comply with a finding that those who have been approved for community-based treatment must be immediately placed. Justice Ginsburg noted that "the ADA is not reasonably ready to impel States to phase out institutions, placing patients in need of close care at risk."

The Court also unanimously found in *Cleveland v. Policy Management Systems Corp.*,²⁴ that a claim of disability discrimination in the workplace is not automatically invalid if the individual also applies for Social Security Disability Insurance

claiming total disability. The applicant should be afforded an opportunity to explain why she has claimed total disability in one instance and the ability to work in the other instance.

The Court also reviewed the Individuals with Disabilities Education Act (IDEA) in *Cedar Rapids Community School District v. Garret F.*,²⁵ where the Court held that continuous nursing service is a "related service" under the IDEA and school districts must, therefore, bear the financial burden of providing such services to students who require them in order to attend school.

EVIDENCE

The Court considered the application of the reliability standards to expert testimony from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,²⁶ in federal court. In *Kumho Tire Co. v. Carmichael*,²⁷ the Court held that the general principles of *Daubert* apply to all expert testimony regardless of whether it is "scientific." Justice Breyer, writing for the Court, found that the trial court may consider the various factors set forth in *Daubert* when determining the reliability of expert testimony and that the trial court should be afforded "latitude in deciding how to test an expert's reliability." A trial court may consider all, some, or none of the *Daubert* factors in its analysis.

CONCLUSION

Ultimately, the Supreme Court did not announce any dramatic decisions radically altering the current trends in modern jurisprudence. For the most part, the Court followed the standards set forth in decisions from previous terms whenever possible. Nevertheless, the Court's decisions, particularly with regard to sovereign immunity, were quite significant. The Court's focus on the ADA will most likely assist employers and employees in the interpretation of the parameters of the statute and the Court's approach to the admission of expert testimony has further extended the discretion of trial courts.



Charles H. Whitebread is the George T. and Harriet E. Pflieger Professor of Law at the University of Southern California Law School. His oral presentations at the annual educational conference of the American Judges Association exploring recent Supreme Court decisions have been well received for many years. Professor Whitebread gratefully acknowledges the help of his research assistant, Whitney Jones.

21. 525 U.S. 70 (1998).

22. *E.g.*, *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

23. 527 U.S. 581 (1999).

24. 526 U.S. 795 (1999).

25. 526 U.S. 66 (1999).

26. 509 U.S. 579 (1993).

27. 526 U.S. 137 (1999).

2000 Annual Educational Conference

American Judges Association/American Judges Foundation

September 10-15, 2000 Kansas City, Missouri

Tentative Schedule of Events

Sunday, September 10, 2000

9:00 a.m. - Noon

Budget Committee and Executive Committee meetings

12:15 p.m.

Kansas City Royals game vs. Texas Rangers (optional)

6:00 - 7:00 p.m.

New Attendees Reception

7:00 - 8:00 p.m.

Opening Reception

Monday, September 11, 2000

9:00 - 10:15 a.m.

Opening Remarks and Keynote Address: Roger Warren, president, National Center for State Courts - "Public Trust and Confidence in the Courts"

10:30 - 11:15 a.m.

Chief Justice Gerald Vandewalle, North Dakota Supreme Court - "Report on the 'Best Practices' Project"

11:15 a.m. - Noon

Address: William S. Sessions, former director of the FBI and former federal judge

Noon - 1:45 p.m.

Annual Awards Luncheon
Speaker: Chief Justice William Ray Price, Missouri Supreme Court

1:45 - 3:15 p.m.

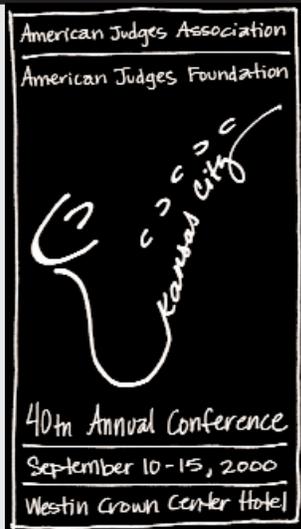
Pamela Casey, National Center for State Courts, and Judge Steve Leben, Johnson County, Kansas - "Trial Court Performance Standards"

3:30 - 5:00 p.m.

David Rottman, National Center for State Courts, and Alan Tomkins, director, University of Nebraska Public Policy Center - "What the Public Thinks of Us - Polls and Surveys on the Courts"

6:00 - 10:00 p.m.

Barbecue and music at Steamboat Arabia Museum



Tuesday, September 12, 2000

7:30 - 9:00 a.m.

American Judges Foundation Trustees meeting

9:00 - 10:45 a.m.

Judge Brian McKenzie, Oakland County, Michigan - "Judicial Outreach"

11:00 a.m. - Noon

Judge Glen Norton, Ralls County, Missouri - "Judicial Ethics Update"

Noon - 1:30 p.m.

American Judges Foundation Luncheon Speaker: Dean Burnele Powell

1:30 - 2:30 p.m.

Judge Jeffrey Rozinek, Miami, Florida; Judge Pedro Hernandez, Billings, Montana; Judge James Faison, Camden, New Jersey - "Diversity and Ethnic Equality in the Courts"

2:30 - 3:30 p.m.

David Rottman, National Center for State Courts - "Community-Focused Courts"

3:45 - 4:45 p.m.

Judge Libby Hines, Ann Arbor, Michigan - "Domestic Violence Update"

6:00 - 10:00 p.m.

Cocktail Reception, Nelson-Atkins Museum of Art; Tour of the Country Club Plaza

Wednesday, September 13, 2000

8:00 a.m. - 2:00 p.m.

Vendor Show

8:00 - 10:00 a.m.

AJA committee meetings

10:00 a.m. - Noon

AJA House of Delegates meeting

2:00 - 4:00 p.m.

Professor Charles Whitebread - "Recent Decisions of the U.S. Supreme Court"

7:30 - 10:00 p.m.

Tour of the 18th and Vine District, including the Negro Leagues Baseball Museum and the American Jazz Museum

Thursday, September 14, 2000

8:00 - 10:00 a.m.

AJA General Assembly meeting

10:00 a.m. - Noon

Meeting of new AJA Board of Governors

7:00 - 8:00 p.m.

Champagne Reception

8:00 - 11:00 p.m.

Installation Banquet and Dancing

Friday, September 15, 2000

8:00 - 10:00 a.m.

Meeting of new AJA Executive Committee

For registration materials, contact Shelley Rockwell at the National Center for State Courts, (757) 259-1841. Also watch for updates on the AJA Web site (<http://aja.ncsc.dni.us>) and on the special AJA Conference 2000 Web site (<http://www.law.umkc.edu/aja>).

Safe and Secure: Protecting Judicial Officials*

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Judges and others who work in our nation's courts—prosecutors, defenders, bailiffs, and sheriffs, among others—have become targets of a range of hostile acts. These acts include inappropriate communications, direct threats, inappropriate approaches, and physical assaults.

While much violence is personal and concrete, the direct result of a grievance, some violence is a largely impersonal and symbolic attack against public institutions or officials. These acts are attempts to make a general statement, using a public setting such as the court as a platform. Thus, a threat or attack against a judicial official, or against a courthouse, can also serve as a symbolic attack against the justice system as a whole. Symbolic attacks on the judicial system heighten the stakes and the challenges that must be addressed in a pluralistic democracy, for it is largely through the judiciary that individuals with conflicting interests can seek remedies and thereby defuse escalation before it reaches the level of outright violence.

Court security resources are limited at virtually every judicial level and in each judicial jurisdiction. Only in rare instances can a judicial official be provided with protection twenty-four hours a day, seven days a week. It becomes essential, therefore, to develop tools to assess threats and to distinguish between those threats that are real and those that are not. Although investigative, assessment, and management protocols have recently been designed for use in the federal judicial system, no such protocol is available for the protection of state and local judicial officials.

Effective protection of any public or judicial official has two key components. The first consists of a range of physical measures that may be employed to deter an attack. Armored limousines, metal detectors, and armed law enforcement officers are some examples. Such physical measures are often widely employed but inherently limited. Less visible but equally important are efforts to identify persons and groups who may have the intent and capacity to attack before they come within lethal range of the target. The process of identifying those who may pose threats comprises a sequence of activities involving investigation, assessment, and management. In order to be effective, such a program must be built upon an operationally relevant knowledge base of actual attacks and near attacks, and instances where persons have communicated threats or other

expressions of inappropriate interest. Such a knowledge base does not exist for judges and other court officials.

This article reviews recent efforts to respond to violence directed against federal, state, and local judicial officials, as well as against the judiciary itself, and proposes that a program of research be undertaken to aid in the development of protocols of threat investigation, assessment, and management. Two sources of evidence underscore the seriousness of the problem and the need for such a research program: (1) individual case histories and personal experience (recounted by judicial officials and leaders of their professional associations); and (2) quantitative information (such as the rates at which judicial officials experience threats and attacks and the degree to which these vary by geographical location and judicial jurisdiction).

The following individual acts of violence against the judiciary nationwide provide cause for concern:

- California Superior Court Judge Harold J. Haley was brutally murdered by two prisoners, James McClain and William Christmas, during an attempted escape from the Marin County Courthouse in San Rafael, California, on August 7, 1970. This single incident became the impetus for the establishment of the court-security division within the U.S. Marshals Service.
- In 1988, a man shot at a federal judge outside the judge's home in Pelham, New York. After pursuing the judge inside his house, the man shot the judge and later shot himself.
- In Plantation Key, Florida, during the course of his trial, a drunk-driving defendant pulled a gun, aimed it at the judge, and shot the courtroom bailiff who tried to intervene.
- A Maryland circuit court judge was injured in a pipe-bomb explosion in December 1990.
- In Grand Forks, North Dakota, a man appearing in court for failing to pay child support shot and seriously wounded the judge. On that same day, in Clayton, Missouri, another man shot and killed his estranged wife and wounded her attorneys while waiting for his divorce hearing to begin.
- Since 1979, three federal judges have been assassinated in or around their homes because of their involvement in court cases.
- On October 19, 1999, Judge Linda K. M. Ludgate of the

Footnotes

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for her statistical programming and critical review of earlier drafts; and Lynn Jenkins of the National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention, for her critical review of the article, for pointing to measurement and sampling deficiencies in the area of workplace violence and how to begin remedying them, and for directing us to key research citations.

Court of Common Pleas of Berks County, Pennsylvania, was attacked by a defendant during a status hearing. The defendant incapacitated two sheriff's deputies prior to beating the judge unconscious. The judge suffered a broken arm, nose, and facial bone before police and probation officers could intervene.

These incidents are only a small part of a more substantial story whose full dimensions are not fully understood. The problem of judicial security, like all occupational security, has only begun to emerge over the last two decades as an issue warranting rigorous scientific examination. The limited information available regarding judicial security derives from only a few federal, state, and local sources.

SHOULD WE SOUND THE ALARM? WHAT DO THE NUMBERS SAY?

The U.S. Marshals Service has collected information about inappropriate communications, threats, and attacks involving federal judicial officials from October 1, 1980 to September 30, 1993. During this period, 3,096 reports were recorded by the U.S. Marshals Service. Just under 8% of the reports involved inappropriate communications (242 incidents) that appeared to be linked to later, more serious actions. Of the 3,096 reports, 4% (118) involved incidents in which court officials were attacked or involved attacks against others, and another 4% (124) involved incidents in which other court officials were in danger of being harmed by persons who threatened or attempted to take inappropriate action.¹

The U.S. Marshals Service performed analyses expressly for this article for the two most recent reporting years, 1997 and 1998. Each year, there were approximately 1,700 judges sitting on the federal bench and there were approximately 700 separate inappropriate communications reported. Overall, 334 judges in 1997 and 345 judges in 1998 received these communications. In both 1997 and 1998, fully one in five federal judges received an inappropriate communication that raised concern about the potential for an inappropriate approach or attack. It is difficult to imagine that this level of concern did not have a disruptive impact on judicial functioning.

The National Institute for Occupational Safety and Health at the Centers for Disease Control and Prevention collects information annually on fatal workplace violence, which it compiles in the National Traumatic Occupational Fatalities Surveillance System.² Between 1980 and 1992, there were 9,937 workplace homicides, an average annual rate of 0.70 homicides per 100,000 workers. Five law enforcement and justice administration occupational groups were among the 18 highest workplace homicide rates between 1983-1989: sheriffs and court bailiffs; police and detectives—public service; security guards; supervisors—police and detectives; and correctional institution officers. Among these groups, sheriffs and court bailiffs had the

highest rate (10.9 per 100,000 workers). This is more than fifteen times the national average.³ Moreover, among the 18 occupational groups with the highest workplace homicide rates, the rate for sheriffs and court bailiffs was surpassed only by taxicab drivers and chauffeurs (15.1 per 100,000 workers).

At the 1999 mid-annual meeting of the Pennsylvania Conference of State Trial Judges, a discussion of court security and safety took place. Virtually all of those in attendance indicated by a show of hands that they had been threatened within the last year.⁴ That show of hands raised sufficient concern for the Court Administrator of Pennsylvania to mount a "survey of judicial safety" covering 1,112 of the state's judges, which included all judges in the state who come in direct contact with defendants and litigants. The survey focused on the types of threats—inappropriate (odd, ominous, troubling) communications, explicit threats, inappropriate approaches (e.g., followed, face-to-face confrontation or attempts), and physical assaults inside and outside the courthouse—sustained within the previous year as the result of discharging "judicial responsibilities." Related questions were asked about law-enforcement notification, the extent of physical injuries that were sustained, and the extent to which such incidents led to a change in the way in which judges conducted judicial business.

As would be expected, judges of limited jurisdiction courts (district justices, Philadelphia Municipal Court judges, Philadelphia Traffic Court judges, and judges of the Pittsburgh Magistrates Court) experienced more incidents than judges of general jurisdiction, and judges on active assignment had more problems than senior judges. The detailed results are shown in Table 1, which shows, for each type of judge, how many reported receiving an "inappropriate communication," a "threatening communication," an "inappropriate approach," a "physical assault," or "any threatening action" (i.e., any one or more of the types already listed). Notably, more than half (52%) of responding judges had experienced one or more incidents of various types.

While not surprising, it is important to look at the differences in incident rates based upon the jurisdiction of the judge. Most judges of limited jurisdiction serve in a location other than the county courthouse and generally have less protection than judges of general jurisdiction. Additionally, active judges experienced higher rates of the surveyed incidents than senior judges. Senior judges are typically judges age 70 and over who work on an as needed basis. Because senior judges generally do not work as often as active judges, they are exposed to fewer

"Most judges of limited jurisdiction serve in a location other than the county courthouse and generally have less protection"

1. FREDERICK S. CALHOUN, HUNTERS AND HOWLERS 51 (U.S. Marshals Service, 1998).

2. Current Intelligence Bulletin 57, *Violence in the Workplace, Risk Factors and Prevention Strategies* (National Institute for Occupational Safety and Health, June 1996).

3. National Institute for Occupational Safety and Health, June 1995, Table 9.

4. Personal communication with Nancy Sobolevitch, Administrative Office of the Pennsylvania Courts.

**Table 1 : Pennsylvania Judicial Safety Survey
Type of Judicial Jurisdiction by Type of Threatening Action**

Type of Judge	Number of Judges Responding	Inappropriate Communication	Threatening Communication	Any Inappropriate Approaches	Physical Assaults	Threatening Action
All Responding Judges	1,029	440 -- 42.8%	238 -- 23.1%	268 -- 26.0%	12 -- 1.2%	533 -- 51.8%
Judges of the Courts of General Jurisdiction	355	154 -- 43.4%	80 -- 22.5%	64 -- 18.0%	2 -- 0.6%	184 -- 51.8%
Senior Judges of the Courts of General Jurisdiction	75	12 -- 16.0%	5 -- 6.7%	6 -- 8.0%	0 -- 0.0%	15 -- 20.0%
Judges of Limited Jurisdiction Courts	530	267 -- 50.4%	147 -- 27.7%	187 -- 35.3%	9 -- 1.7%	320 -- 60.4%
Senior Judges of Limited Jurisdiction Courts	69	7 -- 10.1%	6 -- 8.7%	11 -- 15.9%	1 -- 1.4%	14 -- 20.3%
All Judges of the Courts of General Jurisdiction	430	166 -- 38.6%	85 -- 19.8%	70 -- 16.3%	2 -- 0.5%	199 -- 46.3%
All Judges of Limited Jurisdiction Courts	599	274 -- 45.7%	153 -- 25.5%	198 -- 33.1%	10 -- 1.7%	334 -- 55.8%
All Active Judges	885	421 -- 47.6%	227 -- 25.6%	251 -- 28.4%	11 -- 1.2%	504 -- 56.9%
All Senior Judges	144	19 -- 13.2%	11 -- 7.6%	17 -- 11.8%	1 -- 0.7%	29 -- 20.1%

opportunities to be endangered due to their professional responsibilities.

Table 2 details the number of judges reporting threatening actions by locale (i.e., whether they were inside or outside the courthouse) and whether the judge reported the threatening actions to law enforcement. Of those judges receiving inappropriate communications, 85% reported at least one incident that had taken place inside the courthouse, while 27% reported at least one incident that had occurred outside the courthouse. Law enforcement was notified of inappropriate communications by 44% of the judges. Between 72% and 100% of the judges said that a threatening communication, an inappropriate approach, or a physical assault had occurred inside the courthouse; between 17% and 44% of the judges indicated that these same types of actions had occurred outside the courthouse. Law enforcement was notified by between 44% to 100% of the judges about these incidents, with the highest percentages for physical assaults. As these percentages show, the largest num-

ber of threatening actions occurred inside the courthouse. With the exception of the physical assaults, which are the most serious threatening actions, a substantial number of each type of threatening action was not reported to law enforcement.

Judicial functioning was affected because of these incidents. As a result of threats, inappropriate approaches, or assaults against themselves, 25% of the judges "somewhat" altered the way they conducted judicial business, and another 5% altered their conduct "a great deal." As a result of acts against one of their associates, 21% "somewhat" altered their business, and another 4% altered their conduct "a great deal." Overall, more than one in three judges (35%) changed their judicial conduct "somewhat" or "a great deal" because either they or one of their associates had experienced one of these incidents.

Unfortunately, it is extremely difficult to frame meaningful comparisons of these levels, or of the overall consequences of non-lethal violence, to other occupational groups because so

Table 2 : Inside or Outside the Courthouse: Number of Judges Experiencing One or More Incidents and the Number of Judges Reporting Incidents to Law Enforcement

	Inappropriate Communication		Threatening Communication		Inappropriate Approaches		Physical Assault	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Number of Respondents Reporting Incidents	440		238		268		12	
Occurred Inside Courthouse	375	85.2%	175	73.5%	193	72.0%	12	100.0%
Occurred Outside Courthouse	117	26.6%	67	28.2%	119	44.4%	2	16.7%
Law Enforcement Notified	193	43.9%	144	60.5%	119	44.4%	12	100.0%

Note: Each respondent may report multiple incidents; thus, percentages sum to more than 100 as several judges reported incidents in both locales.

little research has been done in this area. Only a few studies could be located that are broadly comparable to the Pennsylvania survey of trial judges.

A national school survey reported that 13% of the elementary and secondary school teachers surveyed in the public schools and 4% of those surveyed in the private schools had been threatened with injury by a student in the previous twelve months.⁵ In addition, 4% of those elementary and secondary school teachers surveyed in the public schools and 2% of those surveyed in the private schools were physically attacked by a student. The percentage of threatened teachers is far below the threat figures for Pennsylvania judges. However, the percentages of teachers who were physically attacked by students were comparable to that of Pennsylvania judges.

Only one other study could be compared to the results of the Pennsylvania safety survey, and then only broadly because the violence categories were not equivalent. The National Crime Victimization Surveys, conducted annually by the U.S. Department of Justice, collect information about violence in the workplace. In this context, violence is defined as rape and other sexual assaults, aggravated and simple assaults, and robbery. The data is collected for several occupational groups: retail sales; law enforcement; teaching; medical; mental health; and transportation.⁶ As shown in Table 3, the rate of physical attacks on Pennsylvania judges (1.2%) is almost identical to the overall rate for the occupational groups surveyed nationally (1.5%). There is some possibility that the national data is artificially higher, since the national data included robberies and the Pennsylvania survey did not, but the incidence of robberies (only 4% of workplace violence incidents reported in the national survey) was relatively modest and should not have greatly affected the comparison.

As can be seen in Table 3, the Pennsylvania judges rate of physical attacks would be fairly close to the medical and teaching categories but lower than the other categories. However, if one were also to include judicial security officials (sheriffs and bailiffs), we suspect that the rates for all judicial staff, including judges, would fall among those occupational categories with the very highest risk of physical assault. The workplace homicide information discussed earlier point in exactly that direction: sheriffs and bailiffs suffered an exceptionally high workplace fatality rate, second only to taxicab drivers and chauffeurs. These results, together with the ones cited earlier regarding the very high rates nationally of judicial workplace homicide, paint a very disturbing picture of a problem that needs much closer, sustained attention.

As the Pennsylvania survey of judicial safety confirms, for each officially recorded incident, many others are not reported. A serious challenge faced by researchers is that virtually nothing scientifically rigorous is known about almost any aspect of violence targeted at state and local court officials, both those that are recorded and those that are not. No subject—whether suspects and perpetrators; targets (judges, prosecutors, defend-

Table 3 : Percentages of Non-Fatal Attacks by Occupation Group (National Crime Victimization Survey, 1992-1996)

Occupation	Rate of Non-Fatal Attacks
Law Enforcement	
Police	30.6%
Corrections Officer	11.7%
Private Security	21.8%
Other	6.2%
Transportation	
Taxi Driver	18.4%
Bus Driver	4.5%
Other	1.0%
Retail Sales	
Bar	9.1%
Gas Station	7.9%
Convenience/Liquor Store	6.8%
Other	1.8%
Mental Health	
Professional	8.0%
Custodial	6.3%
Other	6.4%
Teaching	
Junior High	5.7%
Special Education	4.1%
High School	2.9%
Elementary	1.6%
Technical/Industrial	0.4%
Preschool	0.4%
College/University	0.3%
Other	1.0%
Medical	
Nurses	2.5%
Technician	2.1%
Physicians	1.6%
Other	1.1%
Other/Unspecified	0.8%

ers, sheriffs, bailiffs, and others); or the settings in which they cross one another—has been rigorously studied.

More is known about violence directed at federal judicial officials, but that work has only recently begun. Additional data are necessary regarding threatened, attempted, and actual

5. KAUFMAN, ET AL., INDICATORS OF SCHOOL CRIME AND SAFETY, 1998 (U.S. Department of Education and U.S. Department of Justice, Oct. 1998).

6. GREG WARCHOL, WORKPLACE VIOLENCE, 1992-96 (Bureau of Justice Statistics Special Report, July 1998, available in full text at: <http://www.ojp.usdoj.gov/bjs/pubalp2.htm#W>).

"A fair and impartial judiciary needs a safe and secure environment within which justice can be pursued without intimidation."

attacks—their types and numbers; whether and how often inappropriate communications preceded them; the specific behaviors that pose a threat; the personal and social backgrounds of perpetrators and targets; and the relationship between the perpetrators and targets. Finally, little is known about what has been done to

respond to the perpetrators or the effectiveness of these responses.

Some knowledge is available now, based on research by the U.S. Secret Service and the U.S. Marshals Service, that leads to the conclusion that threats, inappropriate approaches, and attacks against public officials (federal executive-branch protected officials and federal judges) occur for a variety of reasons and a range of motives.⁷ Importantly, many of these hostile and violent acts exhibit components of behavioral orderliness, rationality, coherence, deliberateness, duration, and, consequently, predictability. This means that these acts are often amenable to effective, strategic interventions.

The requirement that courts be free and open complicates security planning, making it more difficult to deliver protection. Court managers and security officers struggle to provide security without jeopardizing the administration of justice. The identification, through research, of appropriate security practices, procedures, programs, and policies can help alleviate this problem.

As mentioned previously, the U.S. Secret Service and the U.S. Marshals Service have begun to research and to design protective solutions for public officials covered by their agency mandates. Unfortunately, their work does not focus on state and local judicial officials.

We expect that research collected about state and local judiciaries also will benefit federal security practices, as cases from these jurisdictions increasingly find their way into the federal court system. The U.S. Marshals Service has observed the increasing transmission of inappropriate communications across federal, state and local jurisdictions. A pilot project called Protecting Justice, with the acronym PROJUST, has been undertaken. As part of the PROJUST project, nine local jurisdictions have been reporting inappropriate threats against local judicial officials to the U.S. Marshals Service. Through this program, the Marshals Service found that 10% of the persons who had inappropriately communicated with state and local officials had also inappropriately communicated with federal judicial officials.

RESEARCH NEEDED

A group of leading law-enforcement agencies, professional associations, and research institutions, represented by the authors of this paper, have proposed a multi-phased project to collect and analyze information and to develop threat assessment protocols, procedures, and policies applicable to state and local courts. The collaborative project seeks to achieve the following goals: the development of a data-reporting system and the collection of data and its analysis; the design of a threat assessment instrument and guidebook; and the development of educational and instructional materials, along with the provision of technical assistance.

A fair and impartial judiciary needs a safe and secure environment within which justice can be pursued without intimidation. Judges and jurors need to be free from fear; other court officials and employees need to feel safe in and out of their workplace; and witnesses, litigants, and visitors all need to feel safe while in and around the courthouse.

Threats to the safety of judges, judicial personnel, and other participants in our judicial system have prompted the implementation of enhanced security measures inside our nation's courthouses. These measures have focused mainly on the courts' physical environment and have been designed to "harden targets," to detect and confiscate weapons, and, thereby, to deter or interfere with the occurrence of violence. Target-hardening measures have included entrance screening through the use of metal detectors and x-rays; the use of separate prisoner, public, and staff circulation systems within the building; and the installation of duress alarms and video surveillance. These and other security measures that focus on instruments of violence have become commonplace in our county and state courts. What has not been adequately addressed, however, is how to assess and respond to inappropriate communications and threats against judicial officials and to dangers posed outside the courthouse.

Local sheriffs, who are most often responsible for court security, are not well equipped to handle inappropriate communications and threats against judges or other judicial staff, especially those that occur outside the courthouse. Sheriffs do not presently have the capacity to distinguish between a threat made and a threat posed: a person may make a threat but it may not constitute an actual threat. Yet, precisely such guidance is needed and frequently requested.⁸ In those places where court security does exist, it is typically directed toward the physical security of the courthouse and is often limited only to those hours that court is in session. Moreover, in many county courthouses, security procedures are only in operation during trials. At other times, the courthouse is not secured at all.

Sufficient resources are not available to provide judges and other judicial officials with round-the-clock protection.

7. BRYAN VOSSEKUIL AND ROBERT A. FEIN. PREVENTING ASSASSINATION: REPORTS FROM THE SECRET SERVICE EXCEPTIONAL CASE STUDY PROJECT (U.S. Secret Service, April 1998, unpublished manuscript); Robert A. Fein and Bryan Vossekuil, *Assassination in the United States: An Operational Study of Recent Assassins, Attackers, and Near-Lethal Approachers*, J. FORENSIC SCI. 321 (March 1999); FREDERICK S.

CALHOUN, HUNTERS AND HOWLERS: THREATS AND VIOLENCE AGAINST FEDERAL JUDICIAL OFFICIALS IN THE UNITED STATES, 1789-1993 (U.S. Marshals Service, Feb. 1998).

8. Personal communication with Edward Keyton, Director of Training, National Sheriffs' Association, April 1999.

Consequently, it is essential that procedures be designed to assess the likelihood that individual threats will be carried out. Without such procedures, there is no rational way of maximizing the effectiveness of limited resources.

Research is needed to address these needs by reaching the following goals:

- identifying characteristics associated with different types of inappropriate communications and direct threats that might indicate whether an assault may follow;
- developing a threat assessment instrument that can be utilized by state and local court security officers; and
- preparing a guidebook on how to manage and counteract threats.

In order to accomplish these goals, it will be necessary to collect data nationwide on threats, inappropriate communications, and attacks against state and local judges and judicial officials. The data will need to be analyzed to identify those factors that most influence a particular assailant's decision to attack and the circumstances surrounding that decision. State and local court security officials, law-enforcement agencies, judges, and court administrators will need to be surveyed to document the perceived extent and nature of threats and attacks, and appropriate responses.

PHASE ONE

The project will sample a representative cross-section of county/city judicial sites within states in order to collect nationally representative information on individual incidents of inappropriate communications, direct threats, inappropriate approaches, and attacks. Judicial and law-enforcement officials in each of the sampled jurisdictions will be asked to submit reports on each incident. One by-product of the project would be the creation of a consensus about national standards for reporting incidents directed towards judges and judicial officials (i.e., which incidents and which data elements must be reported).

Drawing upon the approaches developed by the U.S. Secret Service and the U.S. Marshals Service, the data will be examined to:

- identify typical threat, inappropriate approach, and assault scenarios;
- consider ways to monitor and adjust to them;
- determine how to gauge their chances of occurring; and
- formulate recommendations about how to control them.

In order to achieve its overall goals, we envision phase one of the project would contain seven elements: (1) a survey of state and local courts and law enforcement agencies; (2) design of a law enforcement data collection instrument; (3) identification of localities for law enforcement data collection; (4) creation and maintenance of a permanent national investigative database; (5) creation and maintenance of a permanent national research database; (6) data analyses; and (7) establishment of international connections.

Objective 1: Surveying State and Local Courts and Law Enforcement Agencies

The project will first design, field test, and administer surveys for gathering information from courts and law enforce-

ment agencies on practices, procedures, programs, and policies regarding judicial safety and security. This information includes: (1) perceptions of patterns and trends in judicial safety; (2) relevant security studies that might have been conducted by state and local judiciaries and law enforcement agencies; (3) plans to launch such studies; (4) factors thought to be related to judicial threats, approaches, and attacks; and (5) factors thought to be related to their prevention and intervention.

The surveyed courts will correspond to the same jurisdictions from which law enforcement data will be collected about specific judicial incidents. The equivalence in the two samples will produce overlapping information from courts and law enforcement agencies regarding their overall perceptions of judicial safety and security.

Objective 2: Designing the Law Enforcement Data Collection Instrument

The project will collect records from law enforcement agencies about threats, approaches, and attacks against state and local judiciaries. Local court administrators will be requested to collect this information from their corresponding law enforcement agencies and forward it to the state court administrator who, in turn, will be asked to forward it to the U.S. Marshals Service. Arrangements for collecting information will be made on a state-by-state basis depending upon each state's capacity to collect and forward information.

Drawing upon the data collection and threat-management protocols of the U.S. Marshals Service, the U.S. Secret Service, and the experience of state and local court security personnel, a data collection instrument will be designed to gather key information on each incident. The data collection instrument will be field tested on cases involving judges and other judicial officials collected by the U.S. Marshals Service as part of the PROJUST pilot program now being conducted in nine state and local agencies. Based upon their experience, we anticipate being able to capture the following types of information:

- the personal and social characteristics and histories of the assailants and target;
- the type and jurisdiction of the court;
- the type of judicial proceeding;
- whether the incident was premeditated or deliberate at the time it occurred;
- the origin of the assailants idea to threaten or attack;
- the progression from the idea-to-act to taking action;
- the assailant's motives;
- how/why the target was selected;
- whether the attack was planned over time;

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"The national research database will be analyzed to describe patterns and trends in threats, inappropriate approaches, and attacks"

- the types and number of communications the subject made prior to the attack;
- whether there were factors in the assailant's life that influenced the decision to threaten or attack;
- the technology used to threaten or attack; and
- the types and number of prior threats and attacks against other judicial officials.

One procedure for improving the quality and usefulness of the data involves compiling all documents relating to several judicial security incidents and subjecting them to intensive analysis by a multidisciplinary team of the researchers and local authorities familiar with the incidents. This will assist us in understanding which informational elements, perhaps including ones that are not routinely documented now, might be useful if collected in the future.

Objective 3: Identifying Localities for Law Enforcement Data Collection

The sample will be designed to gather a sufficiently large number of incidents to ensure that sufficient jurisdictions (e.g., state/local, urban/rural) and court proceedings (e.g., criminal, civil) of each type are included to permit the reliable tracking of national, regional, and local patterns and trends. First, all state courts that have complete centralized reporting of judicial data will be asked to participate in the project.⁹ Second, each state not able to participate in this way, because of decentralized reporting of judicial data, will have its judicial jurisdictions sampled. The population categories adopted by the Federal Bureau of Investigation's Uniform Crime Reporting System will be used to sample individual jurisdictions. At least 800 locations will be sampled, covering a population of roughly 80 million. This design will encompass more than one-third of the population of those agencies reporting to the Justice Department's Uniform Crime Reports.¹⁰

Objective 4: Creating and Maintaining the Permanent National Investigative Database

All agencies that have agreed to participate in the project's data-collection activity will be asked to provide detailed information on individual incidents. Participating agencies will be asked to report in an automated format whenever possible. It is anticipated that state and local courts and law enforcement agencies (e.g., state police, county sheriffs, or court security agencies) will do the reporting on a quarterly basis to the U.S. Marshals Service in order to insure currency of the information.

This information will be entered into a national database of individual incidents that can be used for individual case intelligence and investigation across jurisdictions.

We expect that state court administrators will be the primary means for involving the local courts in the study. This is the most efficient way to proceed because required administrative reporting structures and procedures already exist that can be adapted for this project. The leadership of the Conference of State Court Administrators has already agreed to bring this issue to the full membership. Memorandums of understanding regarding reporting requirements and responsibilities will be established between the specific state administrative offices and the U.S. Marshals Service as necessary.

Objective 5: Creating and Maintaining the Permanent National Research Database

An aggregate research database of judicial threats and attacks will be established at, and maintained by, the National Center for State Courts. This database will be identical to the one maintained by the U.S. Marshals Service, except that individual case identifiers will be deleted. The database will be updated at least quarterly.

In view of the fact that the national research database will initially be composed of a sample rather than complete enumeration of jurisdictions, we conceive of it initially as:

- (1) a surveillance tool that will assist in tracking national, regional, and local patterns and trends in judicial threats, approaches, and attacks;
- (2) a technical assistance tool for jurisdictions that desire help in planning their security needs; and
- (3) a tool for designing standard strategies for investigating, assessing, and managing threats to judicial officials.

Once it matures into a complete enumeration of incidents, the national research database would comprise a census of incidents against judicial officials and the judiciary.

Objective 6: Data Analyses

The national research database will be analyzed to describe patterns and trends in threats, inappropriate approaches, and attacks within and across geographical units as well as within and across judicial levels within these units. The analyses will be designed to (1) develop a threat assessment instrument for law enforcement; (2) provide a national surveillance system of judicial incidents; (3) develop technical assistance modules for state and local groups; and (4) develop a guidebook on judicial threat investigation, assessment, and management.

Objective 7: Establishing International Connections

Threats and attacks against judicial systems worldwide have mirrored threats and attacks against the American judiciary.¹¹ We anticipate that our work will help judicial systems in other

9. The court survey will be designed to identify those states that already collect information of threats and attacks against judges and court officials in a centralized way. States that already collect information in this way, such as Connecticut, will be included in full in the sample. We have also been promised the full coopera-

tion of the courts in Delaware, New Jersey, New Mexico, and Pennsylvania in trying to implement full statewide coverage.

10. UNIFORM CRIME REPORTS, TABLE 12 (U.S. Dept. of Justice, 1996).

11. Calhoun, *supra* note 4, at 39-41.

countries to better protect themselves through collaborative research, information sharing, training, and technical assistance. In turn, we expect to learn from their experiences. We propose to engage with international partners, first in a limited way, and then expanding our contacts as the project unfolds.

Initially we will work with colleagues in Israel, who will design parallel court and law enforcement surveys, and law enforcement data collection instruments and procedures. A spate of bombings and bomb threats against the Israeli judicial system has catapulted the issue of judicial security to the fore in Israel. We will form a partnership with colleagues at the Minerva Center for Youth Studies at the University of Haifa to conduct the first cross-national work of its type in this area. This international relationship will stimulate comparative analyses that can assist in gauging the generality of our findings.

Due to its evolving expertise and prominence in judicial threat investigation, assessment, and management, the U.S. Marshals Service provides training in and delivers technical assistance on judicial security to several nations. At the present time, they are engaged with Russia, Venezuela, Italy, Finland, and Estonia, among others. The findings and products of this project can assist judicial systems beyond our nation's borders to better protect their court officials and, in turn, their capacity to discharge their judicial obligations in a fair and impartial way free from intimidation.

PHASE TWO

Once these seven objectives have been accomplished, a threat assessment instrument will be developed that can be used by state and local law enforcement and court security officials to assess individual threats. Then a guidebook will be designed, summarizing practices, procedures, programs, and policies to eliminate or reduce threats, approaches, and attacks. Both the instrument and the guidebook will be jointly developed by the research investigators at the National Center for State Courts and the University of Pennsylvania, with the consultation and assistance of the agencies working on this project.

ANTICIPATED CONTRIBUTIONS TO JUDICIAL POLICY AND PRACTICE

We expect to produce first-generation information about threats, approaches, and attacks against state and local judicial officials, as well as first-generation responses based upon case intelligence. As a result, anticipated contributions fall into two areas.

1. Policy and Planning:

- *Improved Strategic Decision-Making:* Development of information systems to improve the overall management and administration of judicial security and protection;
- *Results-Based Planning and Assessment:* Development and design of information systems and indicators to quantify measures of successful security initiatives; and
- *Greater Cooperation and Information Sharing:* Encouragement and creation of mechanisms for the transmission and sharing of information across federal, state, and local jurisdictions.

2. Applications and Operations:

- *Designing Better Response Strategies:* Development of comprehensive and coherent programs, procedures, and protocols focusing on the distinctive aspects of assailants, targets, and settings to bolster the safety of federal, state, and local judicial staff;
- *Improved Data Utilization:* Development of an increased capacity by federal, state, and local law enforcement agencies to access, share, and use law-enforcement data for individual case investigations;
- *More Focused Training:* Creation of the foundation for improved research-based training and instruction of federal, state, and local law enforcement agents and judicial staff; and
- *Database Infrastructure Improvements:* Design of a process and structure to create, maintain, and update databases that can be used for individual case investigations and for aggregate research analyses during and after the project.

"Safety and security are an indisputable predicate of an open and fair judicial system"

CONCLUSION

The goals of the proposed research project—"Safe and Secure: Protecting Judicial Officials"—are ambitious. Their attainment depends, as is often the case, upon the availability of funding to carry out the work outlined here. But the project's ambitions and costs are matched by the stakes involved. The safety and security of judicial staff must be of the highest priority at the federal, state, and local levels. Safety and security are an indisputable predicate of an open and fair judicial system, which, in turn, is a predicate of vigorous and undisturbed judicial functioning. There is no better way to realize one of the founding principles of our nation: to establish justice and to insure domestic tranquility.

Neil Alan Weiner is a senior research associate with the Center for the Study of Youth Policy at the University of Pennsylvania.

Donald J. Harris is director of policy research and statistics for the Administrative Office of Pennsylvania Courts.

Frederick S. Calhoun is the threat management advisor for the United States Marshals Service.

Victor E. Flango is vice president for research at the National Center for State Courts.

Donald Hardenberg is president of Court Works, a consulting firm for court management and planning located in Williamsburg, Virginia.

Charlotte Kirschner is a research analyst for the Administrative Office of Pennsylvania Courts.

Thomas O'Reilly is the administrator of the New Jersey Attorney General's office and a past president of the National Criminal Justice Association.

Robert Sobolevitch is a senior research associate at the Center for the Study of Youth Policy at the University of Pennsylvania.

Bryan Vossekuil is executive director of the National Threat Assessment Center of the United States Secret Service.

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- SEE TENTATIVE SCHEDULE ON PAGE 25 •
- For registration materials, contact Shelley Rockwell at the National Center for State Courts, (757) 259-1841. Also watch for updates on the AJA Web site (<http://aja.ncsc.dni.us>) and on the special AJA Conference 2000 Web site (<http://www.law.umkc.edu/aja>).

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NEW BOOKS

THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN. Linda Przybyszewski. Univ. of North Carolina Press, 1999 (cloth: \$49.99; paper: \$19.95). 286 pp.

University of Cincinnati history professor Linda Przybyszewski has crafted a winning review of the legal career and views of the first Justice John Marshall Harlan (1883-1911), whose grandson and namesake also served on the Court. The first Justice Harlan served on the Court from 1877-1911; the second from 1955-1971. The elder Harlan is best known for his dissenting opinion in *Plessy v. Ferguson*, in which he condemned racial segregation, declaring: "Our Constitution is color-blind." Professor Przybyszewski reviews Harlan's work in *Plessy*, but also covers in detail the remainder of his judicial career. She uses transcripts of lectures on constitutional law given by Harlan in 1897-1898 as well as a compilation drawn up by Harlan himself of the opinions he wanted republished. If you enjoy constitutional history and judicial biography, you'll enjoy this book.

FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS. Scott Douglas Gerber. New York Univ. Press, 1999 (\$30). 336 pp.

Having begun his service on the Supreme Court at age 43, Clarence Thomas will have the chance to influence American law for decades. In this book, Scott Douglas Gerber attempts a comprehensive review of the first several years of opinions by Justice Thomas as well as his public speeches and scholarly writings. Among Gerber's conclusions is that while Thomas usually votes with Chief Justice Rehnquist and Justice Scalia, his doctrinal views often dif-

fer from theirs in significant ways. A former law clerk to Justice Thomas, John C. Eastman, has taken issue with some of Gerber's interpretations, generally defending and supporting the views of Justice Thomas against attack. He concludes, however, that the book elevates the discussion of Justice Thomas' jurisprudence to a new level that is worthy of review by those interested in emerging trends of constitutional interpretation. (See John C. Eastman, *Taking Justice Thomas Seriously*, 2 GREEN BAG 2d 425 (Summer 1999)).

BRENNAN AND DEMOCRACY. Frank I. Michelman. Princeton Univ. Press, 1999 (\$24.95). 148 pp.

Frank Michelman is both a professor of law at Harvard University and a former law clerk, during the 1961-1962 Term, to Justice William J. Brennan, Jr. In this book, Michelman expands on two lectures he presented in 1996 and 1997. Michelman explores the tensions between a system of democratic self-government and the making of decisions in key areas, such as abortion and reproductive rights or affirmative action, by unelected judges. In doing so, he draws heavily on the writings of Justice Brennan, while making some extrapolations of his own of Brennan's views. For the views of some other scholars in response to Michelman's original lectures, see the May 1998 issue of the *California Law Review*.

CREATING THE THIRD BRANCH: THE UNFINISHED REFORM. Robert Tobin. National Center for State Courts, 1999 (\$27). 312 pp.

This new book by court management consultant Robert Tobin of the National Center for State Courts traces the court reform movement and looks critically both at what has been accomplished and how reform might best be pursued in the future.



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<http://abcnews.go.com/>
<http://www.foxnews.com/elections/index.sml>

At each of these sites, you can find comprehensive election coverage. The CNN "AllPolitics" site is co-sponsored by *Time* magazine, while the *Washington Post's* site also provides links to *Newsweek* coverage. None of these sites will breach journalistic ethics by providing exit poll results before the polls are closed, as some others listed below do, but their coverage is updated throughout the day and is very high in quality.

SUGGESTIONS FOR THE RESOURCE PAGE

Each issue of *Court Review* features The Resource Page, which seeks to help judges find solutions to problems they may be facing, alert them to new publications, and generally try to provide some practical information judges can use. Please let us know of resources you have found useful in your work as a judge so that we can tell others. Write to the editor, Judge Steve Leben, 100 N. Kansas Ave., Olathe, Kansas 66061, e-mail: sleben@ix.netcom.com.