

Court Review

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EDITOR'S NOTE

In this issue, we present articles, essays, and other contributions by an impressive group of authors on a wide range of subjects of interest to the judiciary.

The issue opens with an exchange of views regarding the ethical questions raised by the publication by Judge Richard Posner of a book examining the conduct that led to President Clinton's impeachment. Northwestern University law professor Steven Lubet, one of America's leading experts on judicial ethics, argues that Posner has violated judicial ethics rules forbidding comment on "pending or impending" cases. In response, Posner, one of America's most acclaimed judges, argues that no proceedings were "impending" when, after the impeachment trial had concluded, his book was published.

Next is an essay by Stephen Ceci and Maggie Bruck, authors of a critically acclaimed book on the problems presented with testimony by children. In the short space of an essay, they provide a vivid discussion of some of the problems and propose, by way of solution, that interviews of child witnesses should be recorded.

The next item fits none of our normal categories of contributions, consisting of the reprinting of two letters sent 28 years apart to the same judge regarding the sentencing of a man who had pled guilty to drug smuggling. Providing the wisdom that can only come through a long career, former Dean Paul Carrington of Duke Law School shares both his letters to the judge and his change of heart, 35 years after he first advocated sentencing guidelines, on their value in achieving justice.

Our book review in this issue, by law and business professor Frank Cross, reviews Terri Jennings Peretti's book, *In Defense of a Political Court*. Whether one ultimately agrees with her or not, Cross finds her positions and research worthy of careful review.

We have two articles. In the first, U.S. Magistrate Judge Andrew Wistrich explores the possibility of placing an overall page limit on the motions that can be filed by each party in any single lawsuit. Whether that—or another—solution ultimately seems best, it is hard to quarrel with his contention that a judge's available time to review motions, like his or her time in court, is a limited resource that sometimes can be overburdened. In the second, Patricia Zapf and Ronald Roesch, psychologists with more than 25 years of combined experience in the field of mental competency examinations, provide an overview for judges of the legal and psychological concepts involved.

Last, our Resource Page features excerpts of a new Eighth Circuit decision placing in doubt the constitutionality of court rules deeming unpublished court decisions non-precedential or non-citable. Because the opinion of Judge Richard Arnold truly adds a new dimension to a decades-old debate, we reprint it here.

—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 12. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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

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Photo credit: cover photo, Mary Watkins. The cover photo is of the Jackson County Courthouse in Kansas City, Missouri. Jackson County, Missouri has two courthouses: one in Kansas City and one in Independence. The Independence courthouse, which was dedicated by Harry S. Truman (then the presiding judge of the local court), was featured on the Winter 2000 *Court Review* cover.

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President's Column

Gerald T. Elliott

Change happens.

One strength of our legal system, and judicial institutions, consists in part in stability, consistency, and willingness to act on the authority of precedent. But even for judges and courts, *change* does happen; it is inevitable, and today it is accelerating.

It is not surprising to us as judges, but at times we must pause to recognize that the same stability that can be such a strength can also be a weakness of our legal system and judicial institutions when it prevents us from recognizing or responding to change.

A change in the "role of the judge" demonstrates, and is representative of, what we address. It is a change on which professional organizations are presently focusing time and attention. Fifty and more years ago, the role of the judge was simply to find the facts, determine the law, and decide the case, *i.e.*, a legal decision maker. Judges, and indeed the larger judicial institution, currently recognize that the responsibilities of judges have expanded well beyond this first role, the case-by-case decision maker.

First, judges today are expected to perform an administrative/management role. Bob Tobin of the National Center for State Courts has presented this change in his recent book, *Creating the Judicial Branch: The Unfinished Reform*. It is useful and informative, albeit a bit discomfiting at points. I recommend it to you. It was, and continues to be, necessary for judges and courts to manage and administer themselves. The alternative was, and still is, for others to set the rules and do the management, with the obvious resulting loss of independence necessary for an effective and impartial judiciary and court system.

Second, judges and courts today are being asked to solve not only legal conflicts but also social problems, and to address the need for social services. This role was demonstrated recently in the June 2000 *New York State Bar Association Journal* in the article, "New York's Problem-Solving Courts Provide Meaningful Alternatives to Traditional Remedies." The article is a good exposition of the "problem solving" role of courts and judges in New York and the concepts are applicable to all of us as judges and in our courts. But, apart from New York, all judges and courts have had their own experience with the problem-solving role. We all do this regularly in juvenile courts as well as in domestic relations. Custody cases always involve determining and carrying out the best interest of children. A central feature of drug courts is to provide and moni-

tor the service of drug treatment. In our criminal courts and criminal cases, we not only convict and incarcerate, but also provide training and other services during incarceration and post-incarceration designed to break the cycle and reduce recidivism.

Third, judges and courts are increasingly being held accountable for public assets, resources, and finances. Though arguably an aspect of administration and management, performance-based budgeting for the use of public funds and financial management are discrete areas that are ultimately the role and responsibility of the judge.

Fourth, judges and courts are being asked to adjudicate with an awareness of and sensitivity to the effect the process may have on the parties involved, that is, to be aware of and adjudicate with the therapeutic/anti-therapeutic consequences. *Court Review* explored this in depth in its last issue, Spring 2000.

Last, judges and courts are being urged to adopt a self-monitoring and self-evaluation role to ensure the performance of their court addresses appropriate aspirational goals and objectives, such as those articulated by the Trial Court

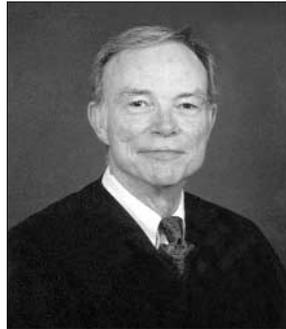
Performance Standards.

Some may observe more, some less, and others simply different changes in the role of judges. Few, if any, however, have expressed the notion that the role of the judge is not changing from that of solely an adjudicator.

Whether, and the extent to which, this changing role impacts individual judges will be determined by local statutes, rules, and legal cultures, but it is likely that judges with any administrative or similar responsibilities will be confronted and involved with changes like this sooner or later, if they haven't already.

Responding to these changes, the American Judges Association is expanding its educational programs to include attention to the administrative and management aspects of judging. Those expanded programs may include breakout discussion groups at our meetings focused on administrative aspects; separate presentations; or longer programs, all depending, of course, on the needs and interests of the judges.

Judges will benefit from more opportunity to focus on the growing and changing administrative aspects of judging. It is the intention of the American Judges Association to respond to that need as a part of its service to the membership and judiciary as an institution.



On Judge Posner and the Perils of Commenting on Pending or Impending Proceedings

Steven Lubet

The ordinary strictures of judging obviously do not apply to Richard Posner, at least when it comes to productivity. In addition to his administrative duties as chief judge of the Seventh Circuit Court of Appeals, he is no doubt the most efficient and prolific opinion writer currently on the federal bench—indeed, perhaps in history. By one count, he has written over 1,500 opinions since becoming a judge in 1981, an astonishing average of one and a half opinions per week (with no time for vacations).

Equally, if not more, impressively, Judge Posner also manages to publish an important book just about every year, on fascinating topics ranging from *Aging and Old Age* (1995) to *Sex and Reason* (1992). He also teaches as a senior lecturer at the University of Chicago, and he somehow found time to serve as the mediator in the Microsoft antitrust trial.

Posner's most recent book, *An Affair of State: The Investigation, Impeachment, and Trial of President Clinton* (Harvard University Press), drew the usual acclaim. The *New York Times* called it one of the ten best books of 1999, and it was a finalist for the *Los Angeles Times* Book Award. *An Affair of State* has also created a controversy, however, suggesting that Posner had gone beyond another of the usual limitations on judges—this one ethical rather than temporal.

In *An Affair of State*, Judge Posner dissects the Clinton impeachment investigation and trial in great detail, offering his repeated opinions that President Clinton committed “varied felonious obstructions of justice” and that he clearly “perjured himself in the Paula Jones deposition.” Opening the book almost at random, one would find comments such as this:

Even if, as I do not for a moment believe, none of President Clinton's lies under oath amounted to perjury in the strict technical sense, they were false and misleading statements designed to derail legal proceedings, and so they were additional acts of obstruction of justice—as well as additional overt acts of a conspiracy to obstruct justice involving Clinton, Lewinsky, Currie, and possibly Jordan and others as well, such as Blumenthal. An imaginative prosecutor could no doubt add counts of wire fraud, criminal contempt, the making of false statements to the government, and aiding and abetting a crime.

The ethical question, as first pointed out by Ronald Dworkin in the *New York Review of Books*, is whether Posner's commentary violates Canon 3A(6) of the Code of Judicial Conduct for United States Judges, which prohibits public comments on “pending or impending” cases.

Posner defended himself, in the pages of both *New York Review of Books* and the *New York Times*, by observing that the impeachment process itself had been concluded, and was therefore no longer pending, well before his book was published. Concerning the problem of impending proceedings, as in the possibility of a future criminal prosecution, he declared that “impending” means imminent, and that almost “no issue of policy has a smaller probability of someday becoming a legal case than that President Clinton will someday be prosecuted for the offenses of which the Senate acquitted him.”

It turns out, however, that Judge

Posner is wrong on both counts. *An Affair of State* violates each provision of Canon 3A(6) by commenting on both pending and impending proceedings.

Consider first the question of a future prosecution of Clinton (or others). While the Code of Judicial Conduct does not define “impending,” it obviously means something more than cases that are currently on trial or in court. In our treatise, *Judicial Conduct and Ethics*, my coauthors and I define an impending proceeding as “one that can be identified . . . as a dispute between recognizable parties over identifiable facts and circumstances,” whether or not it has already been filed in court. The Independent Counsel's continuing criminal investigation of President Clinton and his associates certainly seems to fit that description.

The potential prosecution of President Clinton for perjury or obstruction of justice was discussed throughout the impeachment debate and after. Judge Posner's current assertion that it is “almost certainly not going to happen” might gladden hearts in the White House, but it would come as surprising news to the Office of Independent Counsel. In fact, it has been widely reported that Robert Ray, Kenneth Starr's successor, is still “actively investigating whether to indict President Clinton after he leaves office.” True, Mr. Ray might yet decide not to charge Clinton, but the test for “impendingness,” so to speak, has to be evaluated as of the time of the judge's comments, not in retrospect after all of the litigation decisions have been made.

One reason for restraining judicial speech about impending prosecutions is that the outspoken opinion of a respected federal judge might influence the

prosecutor's decision about whether or not to proceed. True, everyone in the country recognizes that Bill Clinton lied in the Jones deposition, but those lies would not be criminal unless they met the legal test of "materiality." A prosecutor pondering an indictment would have to worry about whether he could satisfy that requirement beyond a reasonable doubt, which remains an open question. It should hardly need saying that a sitting federal judge should not be in the business of advising prosecutors, even indirectly, about such matters.

Judge Posner, however, devoted several pages in *An Affair of State* (and several more paragraphs in a subsequent reply to Dworkin) to an explanation of precisely how the necessary case for materiality could be made: "All that must be shown is that the lie had the potential to impede the interrogator's investigation," he explains, followed by a precise description of the way that Clinton's falsehoods could be said to have done just that. Indeed, not only is it certain that Clinton's "lies were material" says Posner, but, "[i]n addition, a lie that intentionally derails or delays a legal proceeding, sending the other participants on a wild-goose chase, is a form of obstruction of justice even if it is not material to any issue in the case." Thus, his comments directly addressed one of the most important issues still outstanding—and still under active consideration—in the Clinton scandal. That is precisely the situation that the Code of Judicial Conduct was intended to prevent.

Moreover, a proceeding to revoke President Clinton's law license was actually pending at the very time that *An Affair of State* was published, having been referred to the Arkansas Committee on Professional Conduct by Judge Susan Webber Wright in April of 1999. Since publication, the Committee has announced that it would indeed seek the disbarment of Mr. Clinton and has filed a formal complaint alleging that his conduct in the Jones case was "prejudicial to the administration of justice." The next step is a hearing before a trial judge in Little Rock, whose ruling will be reviewed by the Arkansas Supreme Court. Posner's book has already been invoked in the public debate. In urging

disbarment of the president, the *Providence Journal Bulletin* relied upon a seemingly tailor-made quote from *An Affair of State*: "Clinton engaged in a pattern of criminal behavior and obsessive public lying, the tendency of which was to disparage, undermine and even subvert the judicial system of the United States."

Finally, it is instructive to consider Posner's own words on the subject of public commentary. In *An Affair of State* he calls Abner Mikva "irresponsible" for publicly attacking the integrity of Kenneth Starr, since Mikva was then "mantled with the prestige of a former chief judge of a federal court of appeals." What should we make, then, of the conduct of the sitting chief judge of the Seventh Circuit?

It is tempting to lobby for a "Posner exception" to the no-comment rule. He is, after all, one of our leading public intellectuals and he does, after all, enrich the national discourse by writing invariably interesting books on imaginatively diverse subjects. If any judge should have leeway to pursue his thoughts in print, it is certainly Richard Posner.

Nonetheless, even great minds are not immune to errors of judgment. The conclusion seems inescapable that *An Affair of State* impermissibly comments on both pending and impending proceedings. For that reason, Ronald Dworkin condemned the book as injudicious and ethically questionable.

Technically, Posner could face reprimand by the Seventh Circuit Judicial Council, but it is unlikely that things will ever go that far. The sides have long been drawn on the Clinton scandal, and *An Affair of State*, though detailed, deliberate, and exhaustive, plows no new ground. Posner's explicit purpose in writing was to limn the impeachment process, not to urge prosecution of the president. In that light, this contretemps is a doubtful candidate for any sort of disciplinary action. But that does not mean it should be quickly forgotten.

In defending himself, Posner claimed to speak on behalf of the judiciary, asserting that acceptance of Dworkin's criticism would discourage other judges from writing about public affairs. One hopes that Judge Posner's colleagues would disagree with that interpretation

of the Code of Judicial Conduct—and be willing to tell him so, even if only in private. There is a sharp distinction between public affairs and impending cases, which most judges are more than willing to accept. In other situations, it might be dangerous indeed for a sitting federal judge to proclaim the guilt of an as yet unindicted person. Richard Posner's formidable intellect notwithstanding, *An Affair of State* sets a poor example for the necessary neutrality of the federal judiciary.



Steven Lubet, a professor of law at Northwestern University, is coauthor of the book, *Judicial Conduct and Ethics*, now in its third edition.

The Ethics of Judicial Commentary:

A Reply to Lubet

Richard A. Posner

I am grateful to the editor for inviting me to comment on Professor Lubet's article. This is the second piece in which he has asserted that my book *An Affair of State: The Investigation, Impeachment, and Trial of President Clinton* (1999) violates Canon 3A(6) of the Code of Judicial Conduct for United States Judges.¹ The canon prohibits federal judges from commenting publicly (with an immaterial exception) on "pending or impending" cases. Lubet charges that my book, in violation of the canon, comments on (1) the prosecution of President Clinton for perjury, should he be prosecuted, and (2) the proceeding to disbar him in Arkansas.

Let me take the second charge first. The book does not comment on disbarment proceedings. Lubet argues that, even so, the book's discussion of the President's misconduct is a public comment on facts that might warrant disbarment. But that is not commentary on a "pending or impending" case—or if it is, judges will have to stop commenting publicly on any matter that might give rise to a lawsuit, which in this litigious society of ours means any matter.

The first charge is more serious, since the book does discuss the possibility that the President committed perjury and other obstructions of justice. The question then becomes whether a prosecution for these crimes is "impending." Lubet claims to have answered this question in his treatise on judicial ethics by defining an impending proceeding as "one that can be identified...as a dispute between recognizable parties over identifiable facts and circumstances," whether or not a case has been

filed. I am disturbed by the ellipses; the omitted words, "in some palpable manner," qualify the claim. I am merely puzzled why in his piece in the *National Law Journal* Lubet cited the first edition of his book, rather than the current one, but the relevant language is unchanged.² But I am astonished at his failure to reveal the context of the quoted language. His treatise does not discuss judicial comment on impending cases. The quoted language is from a discussion of what judicial nominees can properly be required to testify about at a confirmation hearing. For obvious reasons, the term "impending" cases should be very broadly construed in that context, to prevent the nominee from having to take a position on the entire range of cases that may come before him as a judge. Protecting a judge from being harassed by his senatorial inquisitors in this fashion and forced to decide in advance as it were all the "hot" cases that he is likely to encounter as a judge is different from preventing a judge from commenting on public issues that, as in the case of a prosecution of President Clinton, could not come before the judge's own court. Prohibiting judicial free speech raises a First Amendment issue; protecting him from being forced to speak does not. Lubet does not mention the First Amendment.

But all this to one side, Lubet's definition does not embrace the discussion of the President's conduct in *An Affair of State*. There was not, when the book was published (which was after the President's acquittal by the Senate), a recognizable legal dispute³ between recognizable parties. There was merely an ongoing investi-

gation by the Independent Counsel, which might or might not lead someday to an actual case.

Lubet construes his definition more broadly, to encompass any case that might be brought. But this ignores the dimension of imminence. "Impending" does not mean "possible sometime in the future." It means (at least that is its primary meaning) "about to happen" or "imminent."⁴ A prosecution of President Clinton, while conceivable as a theoretical matter, is not imminent and in fact will almost certainly never happen, despite some rumblings in the press. It thus is not an impending case.

Alluding to the remote possibility that Clinton might some day be prosecuted, *An Affair of State* says that should this happen his guilt or innocence would be decided on the basis of the evidence presented at his trial, not the evidence compiled by the Independent Counsel and discussed in my book, and therefore "nothing in the book should be taken to prejudice any future criminal or civil proceeding arising out of the matters discussed in it."⁵ I hope this will reassure anyone who thinks that my book will influence a court in the unlikely event that the President is someday prosecuted for conduct arising out of the Lewinsky affair.



Richard A. Posner is a judge on the U.S. Court of Appeals for the Seventh Circuit and a senior lecturer at the University of Chicago Law School.

Footnotes

1. The first, entitled "Ethics Clash of Two Giants," appeared in the April 3, 2000, issue of the *National Law Journal*.
2. See JEFFREY M. SHAMAN, STEVEN LUBET & JAMES J. ALFINI, JUDICIAL CONDUCT AND ETHICS § 12.05, p. 424 (3d ed. 2000).
3. I take it that by "dispute between recognizable parties" he means legal dispute, rather than just disagreement; otherwise a judicial nominee could refuse to testify about any controversial matter, such as the perennial controversy over originalist and purposive

interpretations of the Constitution.

4. That is the definition in *Webster's Third International Dictionary*. The *Oxford English Dictionary* defines "impending" as "about to fall or happen; 'hanging over one's head'; imminent; near at hand." When I wrote *An Affair of State*, the prosecution of President Clinton was not near at hand; it still isn't. The *American Heritage Dictionary* gives as one meaning of "impending" "to menace," but the first definition it gives is "to be about to take place."
5. RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 7 n. 13 (1999).

When Is an Investigation Merely an Investigation?

A Response to Posner

Steven Lubet

The basic problem with *An Affair of State* is epitomized by Judge Posner's statement that "[t]here was merely an ongoing investigation by the Independent Counsel, which might or might not lead someday to an actual case." Posner apparently believes that it is acceptable for a sitting federal judge to comment publicly on the guilt of individuals who are, in his own words, subject to an "ongoing investigation." I disagree. There is simply no good reason for a judge to declare people guilty of felonies while they are still under active investigation.

According to Posner's reply, *An Affair of State* only discussed "the possibility that the President committed perjury and other obstructions of justice." But the book went much further than that. Posner asserted time and again that Clinton (and "possibly" others, including Betty Curry, Vernon Jordan, and Sidney Blumenthal) committed various felonies, providing a virtual roadmap for prosecution. None of this is remedied by Posner's empty disclaimer that his book should not be taken to "prejudge any future criminal or civil proceeding," since the book is, in fact, all about judgment. "Clinton's violations of federal criminal law . . . were felonious, numerous, and nontechnical," Posner says. And indeed, he makes an extremely

compelling case—which is precisely why the chief judge of the Seventh Circuit should have abstained from comment until the conclusion of the investigation.

The main point, which Posner declines to acknowledge,¹ is that a book like *An Affair of State* may influence the "ongoing investigation," or appear to, thus compromising the neutrality of the federal judiciary. Posner is one of the most prominent and important judges in the United States; any diligent prosecutor would have to take some account of his insistence that Clinton's lies were material, and therefore indictable as perjury.

Turning to events in Arkansas, Posner says that his book did not comment on the disbarment proceedings. In fact, however, he did observe that Clinton engaged in conduct that "would ordinarily result in disbarment." He also declared repeatedly that Clinton committed obstruction of justice, which is exactly the gist of the disciplinary charge ("conduct prejudicial to the administration of justice") in the Arkansas proceeding. Posner's position seems to be that a judge may pronounce a defendant factually culpable, so long as he does not mention the forum in which the matter is pending. On that theory, a federal judge could have proclaimed Clinton

guilty (or innocent) of perjury at the very height of the Senate trial, so long as there was no explicit reference to impeachment. Perhaps I am naive, but I think it is essential that judges refrain from holding forth on the facts of a case while the matter is in progress.

The prestige of the federal judiciary should not be employed on one side or the other in pending litigation, but Posner's words have already been invoked at least once in support of disbarment. Surely that was not his intention, but it was certainly predictable.

Posner says that "limiting judicial free speech raises a First Amendment issue," although he does not elaborate. In his reply to Dworkin, however, Posner stated that the "no-public-comment rule is a good one," so he evidently agrees that the First Amendment allows some meaningful restrictions on judges' speech.

In order to accept Posner's rationale, one has to characterize the continuing work of the Independent Counsel as "merely" an investigation. One would also have to agree that my essay, in effect, called upon judges to refrain from "commenting publicly on any matter that might give rise to a lawsuit." I trust that most readers will find both positions untenable.² Ultimately, the question is pragmatic. Should federal judges

1. Posner's complaints about a reference to my treatise are insubstantial: (1) The elision that disturbed Posner is trivial. The omitted phrase—"in some palpable manner"—obviously changes nothing, since there has been no more palpable controversy in recent legal history. (2) I cited the 1990 edition in my *National Law Journal* article in order to show that the definition was proposed long in advance of the controversy over Posner's book. (3) The treatise discusses judicial commentary on impending cases in the context of confirmation proceedings because that was the only context in which the question had previously been raised. Until the publication of *An Affair of State*, no one imagined that a sitting judge would write a book about the legal issues in ongoing criminal investigation. The definition in the treatise, however, was clearly based on Canon 3A(6) of the Code of Judicial Conduct and was

not limited to confirmation hearings.

2. Posner's equation of "impending" proceeding with "imminent" filing is unworkable as well, especially with regard to matters under investigation, since it requires an unerring prediction of the prosecutor's undisclosed intentions. Neither is his first-definition-in-the-dictionary principle a viable maxim of statutory construction. For example, "legal action" is the sixth definition of "proceeding" in my dictionary, though it is obviously the meaning intended by the Canon 3A(6). WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY at 1434 (2nd ed. 1983). Moreover, the first definition of "imminent" itself is "hanging over," with "about to happen" as the second. *Id.* at 909. Of course, other dictionaries vary the order—which is precisely why definitional sequence is a poor guide for legal analysis.

be immediate participants in hotly disputed public controversies, including those under active review by prosecutors? Or are the values of the judiciary better served by observing a reasonable period of restraint?

In conclusion, my criticism of *An Affair of State* is not that it was written by a sitting judge, but rather that it was published too soon. Under federal law, the Office of Independent Counsel must eventually announce the conclusion of every investigation, accompanied by a written report. Thus, there was bound to be a definite end, one way or another, to the Clinton investigation (as well as to the Arkansas disciplinary proceeding). Nothing would have been lost if Judge Posner had waited for that to happen before publicly pronouncing judgment on these issues and events.³

I have great respect for Richard Posner as a scholar and jurist, but in this instance he is just plain wrong.

3. While this essay was going to press, it was revealed that the Office of Independent Counsel had convened a new grand jury, which, according to the *New York Times*, would "consider whether Mr. Clinton should be charged with perjury or obstruction of justice after he leaves office." Thus, there is now in fact a pending proceeding in the Clinton matter—which was obviously impending during the publication of *An Affair of State*. Perhaps Judge Posner still denies that this turn of events was a foreseeable possibility. Readers will draw their own conclusions.

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Why Judges Must Insist on Electronically Preserved Recordings of Child Interviews

Stephen J. Ceci and Maggie Bruck

Over the past two decades, there have been important procedural changes to accommodate children's growing involvement in the legal system. One of the most significant changes in the courtroom has involved the expanded admissibility of children's hearsay statements. As a result, mental health, medical, and law enforcement professionals, as well as parents, frequently testify about children's prior statements. Sometimes, their testimony is aided by diaries or by notes taken during or after interviews. Frequently, however, it is the case that hearsay witnesses rely solely on memory.

Although it is assumed that the hearsay testimony can be an accurate account of children's prior statements, there are times when such testimony can be highly inaccurate, as illustrated by the following case involving alleged sexual abuse of preschool children by their teacher.¹ The state's appointed expert witness provided the prosecution with written reports of her pretrial evaluations of the child witnesses. One of those written reports included the following passage: "He informed me that she (the defendant) drank the pee-pee. That's how she got crazy." Compare this expert's report to the transcript of the actual audiotaped interview with this child:

Expert Witness: Did she drink the pee-pee?

Boy: Please, that sounds just crazy. I don't remember about that. Really don't.

Was this an idiosyncratic error made by an expert who consciously misrepresented the content of her interview? The scientific literature suggests otherwise. Her error was not deliberately motivated, but reflected the limitations of our memory system. We do not remember events in detail, nor do we remember conversations on a word-for-word basis. When we try to reconstruct past experiences at a later time, not only do we fail to report some information, but our current beliefs and motivations guide our reconstructions. As a result, although much of what is recalled is accurate, significant errors can also inadvertently occur. Memories of conversations of interviews are a special instance of this phenomenon.

Recently, we and our colleagues have provided scientific support for these conclusions based on our research into adult-child interviews. We asked adults to interview children about a recently experienced event (about which the researchers had

full knowledge but about which the interviewers were ignorant). These interviews were electronically recorded in order to obtain an accurate record of the exact statements made by the interviewer and by the child. Later, the interviewers were asked to recall the content of their interviews. The following consistent results have been reported in various laboratories:

Three days after interviewing their four-year-old children about a special event, mothers recalled only 35% of the details of the actual conversation.

Two weeks after interviewing four different children about special visitors to their school, mental health trainees made significant substantive errors: 40% claimed that the child had participated in a special event, when an examination of the transcripts revealed that the child had never made this report.

Ten minutes after interviewing children about a previously experienced event, highly trained and experienced interviewers did not recall a significant number of statements made by the children and they frequently reported statements that the children never made.

Thus, when asked to recall prior interviews with young children, interviewers of varying levels of expertise frequently omitted important details and also included details that were never stated by the child.

The situation regarding the accuracy with which an interviewer can recall the gist of what a child told them is worse than the above data indicate. This is because it is not sufficient for witnesses to recall only the essence or gist of what a young child told them (e.g., "According to my notes, he told me she made him drink urine.") Even if such a statement was made by the child, judges need to consider the full interrogative context in which such a statement emerged. For example, was the statement a spontaneous disclosure to an initial, open-ended question, "Tell me everything that happened at school"? Or, was it prompted, the result of monosyllabic acquiescence to a series of suggestive questions? Was the statement a product of initial denials by the child that were eventually abandoned after repeated interviews or repeated leading questions? To make these assessments and to determine whether strategies recognized as capable of affecting the reliability and accuracy of children's reports were applied by interviewers, the trier of

Footnotes

1. *State v. Michaels*, 625 A.2d 489, 524 (N.J. Super. Ct. App. Div. 1993), *aff'd*, 642 A.2d 1372, 1385 (N.J. 1994).

fact must examine a record that contains the exact wording and order of each question asked and each response supplied during each interview. This record should also contain the number of times questions are repeated and the tone of questioning.

When providing hearsay evidence, how easily can adults recall these important elements of interviews? The following example demonstrates the fallibility of reporting by one police detective whose written report provided details of his interview with a young boy who accused his parents and other adults of sexual abuse.² “On other occasions, Britt said that a man would put his privates in his butt and that at the same time, a woman would make him put his mouth on her privates.” The transcript of the audiotape of this same interview shows that although the detective accurately reported the gist of the interview, his hearsay testimony misrepresented the manner in which the statements were extracted from the child:

Adult: Okay, when you were tied up Britt, on the floor, and a man was sticking his penis into your butt, was a lady doing something to you at the same time?

Child: No

Adult: Would that ever happen?

Child: Yes

Adult: What would the lady be doing?

Child: I can't remember.

Adult: Would she be doing anything with your mouth?

Child: (pause) Yes.

In most of the studies conducted by our colleagues and ourselves, the interviewers were also asked to recall the exact words used and how the information was disclosed by the children. The results suggest that this detective's failure to report the manner in which the child's statements were obtained is common across interviewers, and that it reflects the rapid loss from memory of the exact words used, and the sequences of interactions between speakers. For example, mothers could not remember who said what (e.g., they could not remember whether they had suggested that an activity had occurred or if the child had spontaneously mentioned the activity). They could not remember the types of questions they had asked their children (e.g., they could not remember whether they had used an open-ended question or a series of leading questions to obtain a piece of information). The mental health trainees made similar types and numbers of errors when asked to recall their interviews with preschool children.

In addition, these trainees mixed up which children said what. That is, they often attributed the actual report of Child A to Child B. And the highly experienced interviewers who were questioned 10 minutes after an interview with a young child recalled that they had not asked leading questions or questions requiring any one-word answers. In fact, however, the transcripts of their audiotaped interviews showed that they mainly used leading and specific questions.

In summary, serious errors occur in recall of conversations and interviews with children. These errors are made by interviewers with various levels of training and also with various levels of familiarity with the child. The errors include the omission of details (forgetting) and the commission of details (inserting facts that were not stated), as well as misreporting the degree to which the child's answers were spontaneous or the result of suggestive techniques. In addition, interviewers often cannot recall the source of their hearsay statements; they cannot remember whether the child originally made the statement, whether the interviewer originally made the statement, and in some cases, whether another child made that statement. The last error is most likely to occur when investigators interview a number of children during the same investigation.

Our demonstrations of interviewer fallibility probably underestimate memory errors in courtrooms. First, unlike interviewers in these experimental studies who were asked to recollect a recent interview, experts and other witnesses often must reconstruct an interview that occurred months or even years previously. Memory fades with the passage of time, and therefore courtroom interviewers can be expected to do even more poorly than the interviewers in our experiments, who were tested only minutes to days after completing their interviews. Second, many experts have interviewed, evaluated, or treated hundreds of children. Our results suggest that their reports may at times reflect confusion among cases (a situation that is reported by many school principals and by pediatricians).

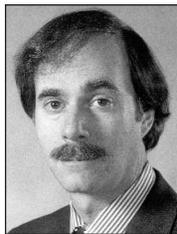
What are potential remedies to ensure the accuracy of hearsay testimony? One suggestion is to encourage each interviewer to keep notes or diaries that can be used to aid future testimony. However, notes and diaries are subject to a number of distortions that can include omission of important details, inclusion of inaccurate details, and, most importantly, the absence of a verbatim record of each utterance produced in the interview. Usually notes only contain pieces of information that the investigator thinks are important at the moment. In fact, no interviewer can write down every word during an interview. They cannot and do not write down every question asked, especially ones that failed to produce a response, or produced an undesired response. If the investigator has a bias that the child was a victim, participant, or observer of a crime, this could color his or her interpretation of what the child said or did; and it is this interpretation that appears in the notes/diary rather than a factual account of what transpired.

The results of the scientific studies reported above support these conclusions. First, explicitly warning interviewers to remember all details and words of an upcoming interview with a child does not influence the accuracy of their subsequent reports of the interview. Second, errors are made even when interviewers are encouraged to make careful notes. In the most naturalistic of the current studies, audiotaped transcripts of investigatory interviews with sexually abused children were

2. *California v. Scott Kniffen and Brenda Kniffen*, Cal. Ct. App., 5th Dist., No. F004423 (1995).

compared to handwritten notes that interviewers took during the interview. The notes were inaccurate: there were omissions of important details, and there were frequent misreports that the child's statements were spontaneous when, in fact, they were produced by repeated questions.

The most significant message to be drawn from this work is that interviewers should be mandated to electronically preserve *all* (and especially the very first) of their interviews with children. If courts are interested in historical accuracy, there is simply no substitute for a tape that can be played to verify the accuracy of the witness's recall and the details of the discussion that took place between the interviewer and child. Although there may be times when it is not feasible to electronically record interviews (specifically when parents question their children at home or in the car), it is nevertheless important for jurors and judges to know how to interpret hearsay testimony and to consider the potential for different types of errors, even though the testimony may be compelling and be offered in good faith. Finally, it might be argued that electronic records should be mandated for interviews of adults as well as children. At present, however, there is only sufficient scientific evidence and legal cause to support the recommendation in the case of children—who often cannot and do not provide courtroom testimony to support or rebut the hearsay testimony provided by their adult interviewers.



Stephen J. Ceci holds a lifetime endowed chair in child development at Cornell University. He is the author of over 300 articles, books, and chapters on children's development. Maggie Bruck is a professor of child psychiatry at Johns Hopkins University Medical School and the author of over a hundred articles and books on various aspects of children's memory and language development. Ceci and Bruck specialize in the study of factors that cause children to misreport events to interrogators, and interrogators to misremember what children told them. They also study the hazards of interviewing preschoolers and the limits of expert-witness knowledge. They are the authors of the best-selling book, Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony, which won the 1999 William James Award by the American Psychological Association for best book.



Court Review Author Submission Guidelines

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Two Letters to Judge Eaton

Paul D. Carrington

The two letters set forth below are quite factual; they were sent and received very much as they appear here. I have modified them only insofar as necessary to conceal the identity of the protagonist, who is entitled to have the events described remain a private matter. I publish them as a comment on current federal law limiting the discretion of judges in imposing sentences on offenders. With many others, I favored sentencing guidelines and was among the first to advocate them in 1965. Reflecting on decades of experience with them, I recant. The old system of absolute discretion in sentencing by the trial judge is better than what we have. What follows is a piece of evidence supporting that view.

A gracious response to the second letter was received from the elderly Judge Eaton, who expressed the hope that his descendants might ever read about his decision in Ike's case. I share his hope.

Paul D. Carrington
University of Michigan Law School
Ann Arbor, Michigan 48104
September 16, 1971

Hon. Joseph Eaton
United States District Court
Southern District of Florida
Miami FL

Dear Judge Eaton:

I write in regard to Isaac Rosen who will come before you for sentencing next week.

I have known Isaac since 1956. At that time, his father Myron (Mike) was in the Army, as was I. We were both stationed at the Aberdeen Proving Ground. We both lived with our families in a building erected to house married soldiers. "Ike" was four when our second child was born there in 1957. Partly because his father was a Captain and I was a Private First Class, we were not close at that time.

But when my wife and I moved to Ann Arbor in 1965, we were pleased to discover the Rosens as neighbors. Ike sometimes played wiffle ball or touch football with our children.

In 1967, Ike was expelled from Ann Arbor Pioneer High School because he wore his hair in violation of the school's grooming rules. As a friend, I appeared before the Ann Arbor School Board to argue that the grooming rules were too severe. It happened that on the day of the school board meeting, a colleague took me into his bank while he cashed a check. The Presidents of the United States were pictured on the wall. I observed that only four of them would be permitted to attend Pioneer High School. I called that situation to the attention of the school board, and they rescinded the grooming rules.

Despite my success as his lawyer, Ike refused to return to school. He was an irrationally angry young man. Ann Arbor is the sort of town in which very smart children sometimes grow up too fast. Ike at fourteen was a strenuous anti-war activist and deeply embittered by what he perceived to be the bovine indifference of the community to the brutalities occurring in Vietnam. He could not stand it that his parents continued to go to work, keep house, visit with friends, and indeed go on living while there was Vietnam on the tube every night.

Not long after the school board rescinded the grooming rules, Ike moved out of his parents' house. I encountered him on the street a little later and saluted him; he gave me a hostile glare but did not otherwise acknowledge me. We then heard that he was living in a garret or a garage somewhere around town. Time passed, and his parents received word that he had moved to upper Michigan. A year passed. Somehow, he sent word to his father, Mike, that he was living in Amsterdam. Another year passed. It was rumored that he was now in Morocco. His grandmother went to Morocco to look for him in the dens and brothels of Marrakech, but she did not find him.

Then last spring, Mike called me to say that he had heard from Ike. "Great," I said. "But," he said, "he is in the custody of the United States Marshal. He has been busted for smuggling. He wants me to send him a lot of money so he can try to bribe a federal officer or judge to let him out. Should I do that?" Of course I derailed the absurd guardhouse idiocy, and found him a lawyer, an alumnus of this law school, and on his advice, Ike has pleaded guilty.

Meanwhile, however, he was allowed to return to Ann Arbor. Mike made him come see me. He was still as hostile as he had been that day on the street, but was at least submissive enough to ask my advice. I told him I had none, really, but that I did know an old judge Lincoln in state court in Wayne County who had told me that he had sentenced 25,000 children in his years on the bench, and that his iron rule was never to send one to training school if he had a job or if he was making progress in school. "Maybe, Ike," I said, "you might get a lighter sentence if you found work."

I do not know that my words made an impression, but he did find a job supervising newsboys for the Ann Arbor News. This was only part-time work, so he enrolled in the high school completion program at Washtenaw Community College. That did not fill his time, so he took a night shift job working in a tool and die shop. The daughter of the owner of the shop took a shine to him, and she is now his steady company when he is not working or studying. He now smiles. He smiles a lot.

It seems to me there is a good chance that Ike is now able to take care of himself and will do so. I don't know if you subscribe to Judge Lincoln's iron rule, but this might be a very good time to apply it.

I hope these thoughts are useful. Best wishes.

Sincerely yours,

/s/ Paul D. Carrington

Paul D. Carrington
Duke University School of Law
Durham, North Carolina 27708-0362
September 16, 1999

Hon. Joseph Eaton
United States District Court
Southern District of Florida
Miami FL

Dear Judge Eaton:

This is my second letter to you. The first was written twenty-eight years ago today.

Perhaps you recall my first letter. I enclose a copy to refresh your recollection. You of course did not answer it. But, as his father reported the sentencing hearing to me, you asked Ike if it was true that he had trouble with authority. He grunted an affirmative answer. You acknowledged that you, too, sometimes had trouble with authority. You then stated that the pre-sentencing report told you that you ought give him at least five years of hard time. You then stated that his sentence was indeed five years. However, you said, "Just to show that I too can defy authority, I hereby suspend the whole sentence. If you get caught speeding in the next five years, you will begin with five years in the federal penitentiary and then they can worry about the speeding ticket on top of that. Go make a life for yourself, Mr. Rosen, and then you can forget the last four years."

You may not know that Ike a few weeks later married the girl friend mentioned in my previous letter. She was an undergraduate at Michigan. Ike finished his high school course, and enrolled at Eastern Michigan University in nearby Ypsilanti. After a year of all As, he transferred to the University of Michigan where he compiled a spectacular undergraduate record. He went on to do graduate work at the University of Chicago. His record there earned him a faculty appointment at Berkeley. He is now a professor of cell biology at that distinguished university. He and his wife have two children who prosper in school.

I salute your wisdom. I am informed that if Ike had come up for sentencing in 1999 that the judge would have had no authority to suspend the sentence, and that he would have spent as much as twenty years in the federal penitentiary. What a tragic waste!

Best wishes.

Sincerely yours,

/s/ Paul D. Carrington



Paul D. Carrington is a law professor and former dean at the Duke University School of Law.



The Politics of Judges

Frank B. Cross

Terri Jennings Peretti, *IN DEFENSE OF A POLITICAL COURT*. Princeton University Press, 1999. 371 pp. \$27.50.

Many judges won't like this book, but it might profit them to read it. Terri Jennings Peretti argues (1) that judge make decisions based on their politics and not on some neutral principles of law; (2) that judges are not particularly independent of the influence of legislatures and hence must tailor their decisions to congressional politics; and (3) that this situation is a very good thing. As most consider the first two premises false and virtually everyone considers them pernicious, the argument is obviously an intriguing one. And I will suggest that it contains a substantial residuum of truth. *In Defense of a Political Court* focuses on federal judges, but its arguments surely apply as well to state courts, though elected state judges already must see themselves as part of the political process.

Ms. Peretti begins by reviewing the concept of traditional neutral legal principles, the cynical claims of critical legal studies, and the majoritarian case for provisional review of Supreme Court decisions by representative bodies. While she embraces none of the theories, some of her sympathies lie with the "Crits." She proceeds with her argument that judges are fundamentally political animals, in every sense of that word.

Peretti's arguments synthesize some very well established strains of political science research. The prominent democratic theorist, Robert Dahl, argued decades ago that the courts were not truly independent but would defer to the majoritarian will on all salient issues.¹ More recently, those studying the court propounded something they called the "attitudinal model," which maintained that judges decided cases according to their ideological or political objectives, rather than neutral principles.² More recently, political scientists have combined the models and argued that judges make political decisions within the constraints imposed by the legislative and executive branches.³

The political scientists support their claims with a formidable body of research. Most law professors are unfamiliar with their data, but there are literally scores of studies demonstrat-

ing that a federal judge's decisions can be predicted by knowing the party of his or her appointing president. Peretti reviews this research, noting that politics is central to the selection of federal judges and that their decisions on the bench likewise correspond with politics (in the ideological sense, not the party loyalty sense). She views the Court as a representative body, in a sense. Judges are selected indirectly (much like the U.S. Senate used to be) and have relatively slow turnover, at least on the Supreme Court. Hence, the Court's makeup and its decisions respond to political trends but more slowly than do the other branches.

The political science research, including that emphasized by Ms. Peretti, does not reflect a full understanding of the judicial role and is exaggerated in its claims.⁴ Social scientists focus their empirical vote studies on the most controversial issues (such as civil liberties) at the Supreme Court level, and may fail to account for the fact that decisions categorized as political may actually be legal, in reflection of a legal philosophy about constitutional interpretation. A broader perspective with greater understanding of the law would show that judges are not so pervasively political as is often claimed.⁵

The exaggerated claims of the political science research do not warrant its summary dismissal, however. There is simply too much evidence that cannot be dismissed. If judges were deciding cases apolitically, the outcome would not fit the pattern of the research results. For example, a study of my own found that circuit court judges are more likely to grant *Chevron* deference to agency decisions that fit their ideology than those that do not.⁶ In major cases with a significant policy component, judges are pretty clearly influenced by ideology, more than they are driven by neutral legal principles.

Peretti's second point is that judges are constrained, rather than independent. She considers the tools that Congress may use to constrain the courts, from impeachment to jurisdictional control, to control of judicial salaries, budget, and staff. Moreover, judicial decisions often require the affirmative action of other branches for their implementation, and compliance is uncertain. Peretti's policy-motivated judges clearly have to consider the response from other branches if they are

Footnotes

1. Robert A. Dahl, *Decision-making in a Democracy: The Supreme Court as National Policy-maker*, 6 J. PUB. LAW 279 (1957).
2. A classic exposition of this theory is found in JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993).
3. A good example of this research is Gregory C. Sisk, Michael Heise, & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73

N.Y.U. L. REV. 1377 (1998).

4. I have reviewed and critiqued this research in Frank B. Cross, *Political Science and the New Legal Realism*, 92 Nw. U. L. REV. 285-308 (1997).
5. For example, a study of district court judges' rulings on the constitutionality of the sentencing guidelines, an issue without a clear ideological divide, found that other factors better predicted case outcomes. See Sisk, Heise & Morriss, *supra* note 3.
6. Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine*, 107 YALE L.J. 2155 (1998).

to see their policies advanced. This reflects the current strain of institutional research in political science.⁷

Judges may take offense at these suggestions. Most judges probably feel little fear of impeachment and are undeterred by the remote threat that Congress may limit basic federal jurisdiction. In recent years, though, the federal courts have increasingly gone to Congress with their hat in hand. Judges have pleaded for more resources in staff, courthouses, etc. Increasingly, the chief justice has gone to the legislature and begged that federal jurisdiction be limited, as his judges feel overburdened with their caseload. There are clear anecdotal examples of where the courts have compromised in reaction to political pressure. As in the case of the political decision-making theory, the vast bulk of judicial decisions are of little interest to the legislature and therefore unconstrained. Yet the legislature may seek to pressure the judiciary on controversial issues, which may be among the most important ones before the courts.

After concluding that judges are ideological, Peretti does not criticize them, as Robert Bork has. After declaring that judges are relatively dependent on and responsive to the legislature, Peretti does not seek to stiffen their respective spines. Instead, she argues that the constrained ideological court is ideal. She notes that the so-called accountable branches are far from being perfectly majoritarian. The courts provide another institution that can interact with the legislature and the executive, adding to the dialogue of governing. While courts won't "go to the mat" to fight the legislature, they do put up some resistance to policies with which they disagree and might even mobilize citizens in support of their position. She urges that "the Court possesses the capacity for serving as a particularly profitable redundancy in the policymaking process, by invoking interests and values overlooked in other branches and by being sensitive to unintended or harmful policy consequences in individual cases." Peretti supports her position by noting that most Americans, according to research, believe that the judiciary is ideological and is relatively happy with that fact.

The key conclusion, aptly if incompletely made by Peretti, is that courts are government institutions that exercise political power, much like the legislative and executive branches. She describes judges as "politicians who share in the difficult but noble task of political leadership, in generating consensual solutions to the often vexing and contentious issues of the day." This must be true, at least in part. A certain politics is intrinsic in the nature of judging—even the most impartial judge deciding the most mundane of cases is exercising political power. The classical, formalist judge is still exercising governmental power. The common law, once seen as distinct from politics, has become central to politics, as tort law commands considerable attention from legislatures.

Of course, a great deal of litigation has little or no ideological component and of relatively little concern to the legislative or executive branches of government. A flaw in much of the

political science research on courts is its tendency to dwell on the most controversial cases that come before the United States Supreme Court, at the expense of the representative bulk of litigation and other courts, which probably have more societal significance. Perretti's book shares this flaw, but the flaw does not doom its value. The unrepresentative, politically charged cases are an extremely significant portion of what courts do, even if they are not common.

The traditional view of judging both exalts and demeans the judiciary by rendering judges nonhuman. Some approaches treat judges as if they were saints, others treat judges as ciphers or machines producing mathematically formalistic results. These traditional perspectives, sometimes held up as an ideal, are not realizable. Even if judges strive for this ideal, they will come up short. While I see some merit in striving for the classical ideal, Perretti dissents. She finds the ideal a naïve one that will produce inferior results. Her argument is an interesting one, well supported, and deserving of a hearing.



Frank B. Cross is the Herbert Kelleher Professor of Business Law in the McCombs School of Business and also a professor in the law school at the University of Texas at Austin. His research and teaching interests include the environmental regulation of business and the economics of law and litigation. Cross is a graduate of Harvard Law School.

7. For a good review and study of decision-making at the Supreme Court and institutional influences see LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998).

Using an Overall Page Limit to Improve Motion Practice

Andrew J. Wistrich

There is a limit to everything.¹

People think of courts primarily as places where trials are held. That perception is no longer accurate.² Most cases are civil cases,³ and only a handful of civil cases reach trial.⁴ According to most estimates, approximately two-thirds are settled, and about one-quarter are decided on the basis of a motion.⁵ Only 2.1% are tried.⁶

What these statistics show, among other things, is that motions matter. Of the roughly 30% of cases that are decided rather than settled, the decision is about ten times more likely to be based on a motion than on a trial. In addition, since most cases settle before a trial or a dispositive motion, even non-dispositive motions can be important.⁷ Therefore, although the ongoing efforts to improve the efficiency and quality of trials are

worthwhile, efforts to improve motion practice deserve at least as much attention because motions are so much more common.⁸ For those who are interested in improving the efficiency and quality of adjudication as a whole, measures that would strengthen motion practice merit consideration.

Perhaps the best way to begin thinking about how motion practice might be improved is to explain what motions are. The term "motion" has been defined as "[a] written or oral application requesting a court to make a specified ruling or order."⁹ Defined this broadly, motions are an unavoidable feature of our justice system as it is presently configured.¹⁰ The question, then, is not whether motions can be eliminated, but how they can be kept within appropriate bounds.

Footnotes

1. American proverb, *quoted in* WOLFGANG MEIDER, STEWART A. KINGSBURY & KELSIE B. HARDER, *A DICTIONARY OF AMERICAN PROVERBS* 377 (Oxford University Press, 1992).
2. That perception used to be more nearly correct. See Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 636 (concluding that in 1938, 63 percent of the adjudicated terminations of federal civil cases were trials, while in 1990 the figure was only 11 percent).
3. See BRIAN J. OSTROM & NEAL B. KAUDER, *EXAMINING THE WORK OF STATE COURTS, 1995: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 95* (1996) (reporting that civil cases comprised 70 percent of the cases filed in state courts of general jurisdiction during 1995); ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1999 ANNUAL REPORT OF THE DIRECTOR 16* (1999) [hereafter U.S. COURTS 1999 REPORT] (indicating that 85 percent of the cases pending in federal district courts on September 30, 1999 were civil cases).
4. Trials are surprisingly rare. For example, in the United States District Court for the Central District of California, the largest federal trial court in the nation, there were only 91 civil jury trials and 64 civil nonjury trials during the twelve-month period ending September 30, 1999. See U. S. COURTS 1999 REPORT, *supra* note 3, at 367 tbl. T-1. Similarly, during 1994, there were only 292 state court civil jury trials in Los Angeles, 178 in Manhattan, and 57 in San Francisco. See ERIK MOLLER, *TRENDS IN CIVIL JURY VERDICTS SINCE 1985 7-11* (Rand Institute for Civil Justice, 1996).
5. See Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1100 n.17 (1996) (reporting that in one database of state and federal cases, 69 percent were settled, 7 percent were tried, and 24 percent were terminated by some other form of adjudication (such as a motion)); Robert I. Weil, *This Judge for Hire*, CAL. LAW., August 1992, at 41, 42 (estimating that of every 100 cases filed, 67 are settled, 30 are decided by motion, and only 3 are tried); Herbert M. Kritzer, *Adjudication to Settlement*, 70 JUDICATURE 161, 162-164 (1986) (estimating that 22 percent of cases are resolved by trial, motion, or arbitration).
6. This figure is derived from statistics regarding the federal district courts for the year ending September 30, 1999. During that year there were a total of 272,526 civil cases terminated, and there were a total of 5,724 jury trials and bench trials on the ultimate issue. See U. S. COURTS 1999 REPORT, *supra* note 3, at 130 tbl. C & 365 tbl. T-1. These numbers do not include preliminary proceedings during which testimony was taken. The percentage of civil cases tried in state courts is only slightly higher. See OSTROM & KAUDER, *supra* note 3, at 22 (reporting that 3.3 percent of the civil cases terminated in state courts during 1995 were resolved by a trial). The exact percentage of civil cases tried in any particular court, of course, varies depending on the types of cases that predominate in the court's caseload, the attitudes of the judges and the bar toward settlement, and other factors.
7. See WILLIAM W. SCHWARZER, A. WALLACE TASHIMA & JAMES M. WAGSTAFFE, *CALIFORNIA PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL* § 12:1 ("Because most cases settle before trial, pre-trial motions often play a major role in litigation.").
8. The statistics cited include only dispositive motions. When non-dispositive motions, which are far more common, are included, the gap between the number of motions and the number of trials becomes much wider.
9. BLACK'S LAW DICTIONARY 1031 (7th ed., 1999); see Fed. R. Civ. P. 7(b)(1) (defining a "motion" as "[a]n application to the court for an order. . ."); but see Fed. R. Civ. P. 77(c) (providing that certain "motions" "which do not require allowance or order of the court are grantable of course by the clerk. . .").
10. See William E. Steckler, *Motions Prior to Trial*, 29 FR.D. 299, 302 (1962) ("Justice does require an adequate opportunity to present motions to the court with supporting points and authorities,—an opportunity to oppose motions presented by an adverse party,—and a determination thereof by an informed court.").

The next step is to identify the objectives that motions can and cannot accomplish. Broadly speaking, motions have at least four purposes.¹¹

First, a motion may be used to resolve purely procedural issues, such as which court should handle a case, or the sequence or location in which depositions should be taken. Although these motions can be useful and occasionally are essential, they increase the transaction costs¹² of litigation without addressing the merits. Ideally, they should be kept to a minimum.

Second, a motion may be used to clarify, narrow, or eliminate issues, or to eliminate unnecessary parties. Examples include a motion to dismiss an especially weak claim or defense, or a motion to dismiss a party who was not involved in the underlying events. These motions can promote the efficiency by streamlining a case. They, too, however, increase the transaction costs of litigation. Therefore, they should be filed only when such issues cannot be adequately addressed by the common sense of counsel, the agreement of the parties, or the capitulation of counsel after prodding by the court during a status conference.

Third, a motion may be used to obtain judicial resolution of a question of law or fact in order to presage the likely outcome of a case. For example, a party might file a motion in limine to establish that a crucial piece of evidence, on which the opposing party hopes to rely at trial, will be inadmissible. Such motions may cause the predictions of the parties about how the case probably will be resolved to converge, thereby facilitating settlement.

Fourth, a motion may be used to resolve a case, or a substantial portion of a case, on the merits. The best example is a motion for summary judgment. Motions that possess a realistic chance of resolving all or most of a case should be encouraged, because most motions are cheaper than most trials.¹³ Bringing them early minimizes the transaction costs incurred by the parties and the court, and preserves resources for investment elsewhere.

Although motions are potentially useful tools, many are

unnecessary, most are expensive, and nearly all are too long. As an example, motions to dismiss claims or defenses are common, but many do little to advance a case, even if they are meritorious. Most pleading defects can easily be circumvented by amendment, and claims or defenses so weak that they never should have been pleaded usually are abandoned

eventually—at the pretrial conference, if not before. Parties ought not to be put to the burden of filing or opposing motions to get rid of such claims or defenses, and courts ought not to be put to the burden of considering and deciding them.

Similarly, although discovery motions occasionally are necessary or important, many are not. Most could be avoided if one side (or both sides) were more diligent, more courteous, more reasonable, or more assiduous in attempting to reach a practical solution by negotiation. Many are laden with tedious details about what one lawyer said to another lawyer that have little or nothing to do with the issues the court must resolve. Few involve anything other than an issue wholly collateral to the merits, namely, what information should be disclosed by the parties in advance of settlement or trial.

Motions designed to facilitate settlement by resolving a pivotal issue, on the other hand, can be highly efficient. Asymmetric information or divergent expectations about the likely outcome can hinder or delay settlement.¹⁴ The value of this use of motions may be more limited than generally recognized, however, because litigants and their counsel are vulnerable to “egocentric” or “self-serving” biases. These biases cause each side to overestimate its prospects for success and to underestimate the importance of negative information about its position.¹⁵ Therefore, such motions are worthwhile only if the

[M]otions to dismiss claims or defenses are common, but many do little to advance a case, even if they are meritorious.

11. Although the term “motion” includes written and oral applications or requests made before, during, and after trial, this article focuses on written pretrial motions. A comprehensive description of motions and their purposes lies beyond the scope of this article. For a more complete description of motions and their purposes, see 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 1190 (2d ed. 1990).

12. “Transaction costs” have been defined as “the costs of effecting a transfer of rights.” RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 13 (1972).

13. On the other hand, many trials are fairly short. See U. S. COURTS 1999 REPORT, *supra* note 3, at 368 tbl. T-2 (reporting that 60 percent of civil trials lasted 3 days or less); DALE ANNE SIPES, ON TRIAL: THE LENGTH OF CIVIL AND CRIMINAL TRIALS 9 tbl. 1 (1988) (reporting that in one study of 1,500 state court civil and criminal trials, the average length of the civil trials, which included both jury trials and bench trials, was just 13 hours and 30 minutes). This suggests that the widespread assumption that trials are far more costly than dispositive motions is frequently untrue.

14. See, e.g., Robert E. Thomas, *The Trial Selection Hypothesis Without the 50 Percent Rule: Some Experimental Evidence*, 24 J. LEGAL STUD. 209, 209 (1995) (“Economic theory posits that trials occur when plaintiffs expect to receive more from trial than defendants expect

to lose.”); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 423 (1973) (explaining that “a reduction in the variance between the parties’ estimates of the probability of prevailing and the true probability will [generally] increase the settlement rate”); John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279, 296 (1973) (observing that “a critical component in the motivation of . . . individuals to settle out of court is agreement on the probabilities of the court’s action”); see generally Joel Waldfogel, *Reconciling Asymmetric Information and Divergent Expectations Theories of Litigation*, 41 J. LAW & ECON. 451 (1998).

15. See, e.g., Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109, 119-120 (1997) (noting that “the parties—even with complete information—interpret the situation in different ways”); George Loewenstein, Samuel Issacharoff, Colin Camerer & Linda Babcock, *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 157-159 (1993) (presenting evidence that egocentric biases cause both plaintiffs and defendants to overestimate the strength of their positions, and concluding that “[t]his study reveals the shakiness of the assumption that the parties will integrate the information revealed through [discovery and motions] in an unbiased manner in order to settle.”).

For lawyers and judges, motion sickness has become an occupational hazard.

uncertainty is real rather than imagined, the issue is significant, and the losing party is willing to accept the negative signal sent by an adverse ruling. If the losing party will simply dismiss an adverse decision on a motion as unimportant, aberrant, or likely to

be reversed on appeal, the motion will do little to facilitate settlement.

Finally, despite their potential value, summary judgment motions pose significant problems. They are expensive for parties to prepare and time-consuming for judges to decide. Many require extensive consideration of the facts, as well as the interpretation and application of law. The papers supporting and opposing summary judgment motions frequently consume scores—or even hundreds—of pages. Although some summary judgment motions do end or meaningfully narrow a case, others are predestined to fail. Even some of the meritorious ones are not worth the effort invested in them, because the outcome was either a foregone conclusion or contributed little to restricting the scope of the case.

In addition, some summary judgment motions are filed to “educate the judge” about the merits or intricacies of the case, even if it is believed that they probably will be denied. This is an unfortunate practice. Judges need education about their cases, of course, but this is not the way to do it. A futile motion needlessly consumes judicial time and litigant resources. There are other, more efficient ways of achieving similar objectives, such as presenting necessary information in a status report, in a technology tutorial or instructional videotape, or by means of a court-appointed testifying expert or judicial advisor.

Motion practice, then, needs improvement. In its present

form, it is time-consuming for lawyers, expensive for clients, and burdensome for judges. For lawyers and judges, motion sickness has become an occupational hazard. What should be done?

Numerous proposals for reducing or improving motion practice have been made.¹⁶ In some courts, for example, counsel are required to meet and confer, and to attempt in good faith to resolve, discovery disputes or other contested issues before a motion may be filed.¹⁷ The purpose of these rules is to encourage the resolution or narrowing of motions on a consensual basis. Although not a panacea, such rules seem to reduce the number and narrow the scope of the motions that are filed.¹⁸ Similarly, rules allowing courts to impose sanctions for filing frivolous motions or oppositions are designed to keep to a minimum avoidable motions.¹⁹ Such rules, however, have enjoyed mixed success.²⁰

Faced with heavy caseloads and numerous lengthy motions, judges are adopting their own measures to control motion practice. Some forbid counsel from filing any motions without prior judicial approval. Others limit the number of motions that may be filed, such as by restricting each side to a single motion for summary judgment. Finally, some judges deny particular types of motions after only minimal scrutiny, acting on the theory that because so many motions of that type lack merit, scarce judicial resources are better deployed elsewhere.²¹

A better approach might be to establish a presumptive overall page limit restricting the aggregate length of the motions and oppositions to motions that could be filed in a case. Such a limit might be embodied in a local rule, or included in a case management order. The rule or order might provide that no party could file more than a specified number of pages of briefs or memoranda of points and authorities supporting or opposing motions during the pendency of a case, unless that number was enlarged by the court for good cause shown.²² The level of the limit would be set at less than the number of pages that

16. See, e.g., Morton Denlow, *Justice Should Emphasize People, Not Paper*, 83 JUDICATURE 50 (1999) (arguing, among other things, that our justice system should make fewer decisions based on papers and make more decisions made based on the direct participation of the affected people); Mathew A. Hodel, *Ending the Paper Fight*, CAL. LAW., March 1999, at 44, 45 (arguing that “[w]e should make it more difficult to file a motion.”).

17. See U.S.D.C. C.D. Cal. Local Rule 7.15 (discovery motions); U.S.D.C. C.D. Cal. Local Rule 7.4 (non-discovery motions).

18. See Steckler, *supra* note 10, at 310 (“One of the most effective techniques of controlling motions which tend to delay, is the prompt issuance of an order requiring counsel to confer among themselves on or before a certain date and to report to the court in writing the results of the conference.”). Not everyone agrees with that assessment. See Hodel, *supra*, note 16, at 45 (“Let’s also eliminate the nonsense ritual of meet-and-confer. I’ve never had a motion voided simply because of this process.”).

19. See, e.g., Fed. R. Civ. P. 11 (authorizing courts to impose sanctions on attorneys and parties responsible for presenting to the court motions or other papers that lack an adequate basis in law or fact).

20. See A. Mitchell Polinsky & Daniel L. Rubinfeld, *Sanctioning Frivolous Suits: An Economic Analysis*, 82 GEO. L. J. 397, 425

(1993) (concluding that there are more effective and less costly ways of deterring frivolous litigation); Daniel E. Lazaroff, *Rule 11 and Federal Antitrust Litigation*, 67 TULANE L. REV. 1033, 1118 (1993) (criticizing the abuse of discretion scope of review); Carl A. Tobias, *Reconsidering Rule 11*, 46 U. MIAMI L. REV. 855, 875-877 (1992) (criticizing the safe harbor provision).

21. See Steckler, *supra* note 10, at 307 (suggesting that overworked judges might deny motions for summary judgment “should there exist the slightest doubt of an issue of fact being present”).

22. Of course, such a limit could be expressed in terms other than pages. See Richard C. Reuben, *Courts Playing Against Type*, 82 A.B.A.J. 42 (August, 1996) (explaining that some courts are adapting to advances in word-processing technology by expressing limits on the length of briefs in words or characters rather than in pages); see also U.S.D.C. C.D. Cal Local Rule 3.4.1, 3.4.2 & 3.4.7 (presenting the type size, page size, and spacing of documents filed with the court). For simplicity, however, I shall continue to refer to it as a “page limit.”

counsel normally would spend, but not so much less as to prevent counsel from bringing or opposing motions that truly needed to be brought or opposed in a reasonable manner. The overall limit might be 30 pages per party in a simple case and 100 pages per party in a complex case.²³ Although usually the same overall page limit should apply to each party, disparate treatment might be warranted in some circumstances, such as where there are either multiple plaintiffs or multiple defendants who could achieve economies by coordinating their activities, such as by joining in one another's motions and oppositions. In cases such as these, imposing the limit on each side, rather than each party, might make more sense.²⁴

Of course, an overall page limit must be reasonably applied. The same limit should not be rigidly imposed in all cases.²⁵ Some cases require more motions—or lengthier motions—than others. Instead, there should be a presumptive limit that would be reasonable for the majority of cases, and the court should be given the discretion to increase—or even decrease—the presumptive page limit depending upon the needs of the case after discussion with counsel. As each case proceeded, further adjustments to the overall page limit might be appropriate for good cause, depending on the evolving circumstances.

The approach could be taken one step further. In addition to the losing party's pages, the winning party's pages also could be attributed to the losing party, so that the losing party would be “taxed twice” for failing to reach a pre-filing agreement regarding a motion: once for the pages it used in filing or opposing the motion, and once for the pages the winning party should not have been required to expend in filing or opposing the motion. The test, of course, should be one of reasonableness: was the losing party's failure to agree substantially justified? If it was, then the winning party's pages should not be

attributed to the losing party. But if the losing party's failure to agree was unreasonable, then the winning party's pages should be attributed to it as well. This added risk would provide both counsel with an additional incentive to reach agreement regarding potential motions. If the opposing counsel's briefing turned out to be extensive, the cost in lost pages of filing a dubious motion or opposition could be unexpectedly high.

An overall page limit would help to alleviate some of the flaws in motion practice. To begin with, it would force lawyers to prioritize. Rather than reflexively filing a questionable motion to transfer a case, or to dismiss one of the peripheral causes of the action alleged in the complaint, counsel might choose to conserve those pages for use in bringing a lengthy but potentially dispositive summary judgment motion later on. Similarly, rather than filing a pointless opposition to a meritorious discovery motion, counsel would have an extra incentive to stipulate to all or part of the relief requested. An overall page limit would encourage counsel to seriously attempt to resolve almost every potential motion during a pre-filing conference so that actually filing or opposing the motion would be unnecessary. If an avoidable motion were filed, both the moving party and the opposing party would be forced to expend unnecessarily pages that they might need later. Their desire to avoid regretting an improvident choice would provide them with an incentive to compromise.²⁶

An overall page limit also would encourage counsel to economize on the length of the motions—and the oppositions—they did elect to file. The result would be shorter papers that

Of course, an overall page limit must be reasonably applied.

23. One issue that would have to be addressed is whether the overall page limit should include supporting material, such as affidavits, declarations, or exhibits submitted with a motion or in an opposition to a motion. Existing page limits typically regulate only the length of briefs or memoranda of points and authorities, rather than the length of motions or oppositions in their entirety, and therefore do not restrict the quantity of evidence and other supporting material that may be submitted. There is some justification for applying the limit to all documents filed in support of or in opposition to a motion. Often it is the bulk of the supporting material that is the most wasteful, burdensome, and unnecessary aspect of a motion or opposition. In addition, counting the pages of affidavits, declarations, and exhibits against the limit would discourage attempts to evade the overall limit by shifting argument, discussion of legal authorities, or other matters typically included in a brief or memorandum of points and authorities into other documents in order to conserve pages.

On the other hand, as long as effective measures are taken to prevent such manipulation, pages of supporting material probably need not be counted against the overall page limit. Such documents are really meant to substantiate assertions made in a brief or a memorandum of points and authorities, and are not necessarily intended to be read by the court in their entirety. Moreover, the need for supporting material may vary in less predictable ways

than the need for argument. The best course would be to exclude pages of supporting material from the overall page limit, but to make it clear to counsel that shifting material such as legal argument from a brief or memorandum of points and authorities into other documents would not be tolerated, and might result in the court counting all of the pages of supporting material against the overall page limit.

24. See 28 U.S.C. § 1870 (allowing the court to consider several defendants or several plaintiffs as a single party for the purposes of determining the appropriate number of peremptory challenges to prospective jurors).

25. See generally *Amerel v. Connell*, 102 F.3d 1513, 1494 (9th Cir. 1996) (explaining that “[r]igid and inflexible hour limits on trials . . . are generally disfavored”); *General Signal Corp. v. MCI Telecommunications Corp.*, 66 F.3d 1500, 1509 (9th Cir. 1995) (same) (explaining that time limits on trial presentations should not sacrifice justice for the sake of efficiency), *cert. denied*, 516 U.S. 1146 (1996); *McKnight v. General Motors Corp.*, 908 F.2d 104, 114 (7th Cir. 1990) (same), *cert. denied*, 499 U.S. 919 (1991).

26. See generally *Chris Guthrie, Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 1, 65-73 (1999) (describing regret aversion theory, and how it affects litigation-related decisions).

The result would be shorter papers that would be cheaper to prepare and easier to digest.

would be cheaper to prepare and easier to digest.²⁷

The constraint of an overall page limit could have unanticipated collateral benefits. For example, it might result in innovations in motion practice, generating new techniques for presenting motions

concisely, persuasively, and comprehensibly. Perhaps counsel would apply the adage that “a picture is worth a thousand words,”²⁸ and explore methods for presenting portions of their arguments by means of pictures, charts, or graphs. Such measures could strengthen the impact of briefs or memoranda of points and authorities, and might even improve the quality of decisions based on motions.²⁹

Perhaps more important, an overall page limit might improve the quality of decision-making. Although the thrust of the proposal obviously is efficiency, there are reasons to suspect that it would improve the quality of decisions on motions as well. A judge who is tired from putting in full days at the courthouse, working on weekends, and who is conscious of the need to move on to the next motion, may be too exhausted or rushed to make the best possible ruling on a motion. Since judges benefiting from an overall page limit would have fewer pages of motions to review, they could give each motion a greater share of their attention. Similarly, because each particular motion would be shorter, a busy judge would be more likely to find the essential points, rather than

losing them in a sea of unimportant information.³⁰ For these reasons, then, an overall page limit would improve the quality of rulings on motions, even though that is not its principal objective.

Of course, an overall page limit might degrade the quality of decision making if it deprived courts of notice of controlling precedents or evidence of important facts because counsel presented too little information in their papers. This possibility seems remote. Counsel have powerful incentives to collect and present more information than is necessary.³¹ Seldom do lawyers present too little evidence or too few arguments. More commonly, the complaints are exactly the opposite: too much information presented, the wrong information presented, or the right information presented but obscured by other irrelevant or cumulative information.³²

One genuine risk posed by an overall page limit—a risk posed by any new procedural rule—is that it might encourage novel forms of strategic behavior, thereby canceling some of its benefits and further deflecting attention from where it ought to be, namely, the merits of the lawsuit.³³ For example, counsel might attempt to trick each other into expending pages unnecessarily by agreeing to the relief sought by a motion only after the motion was filed. Or they might plead unfounded claims or defenses even more often than they already do, hoping to lure opposing counsel into wasting pages to eliminate sham claims or defenses that the pleader never really intended to pursue. Of course, potential side effects such as these should be considered before an overall page limit is adopted. Provisions to avoid or counter such effects might need to be

27. See generally *Spaziano v. Singletary*, 36 F.3d 1028, 1031 n.2 (11th Cir. 1994) (“Effective writing is concise writing. Attorneys who cannot discipline themselves to write concisely are not effective advocates, and they do a disservice not only to the courts but also to their clients.”), *cert denied*, 513 U.S. 1115 (1995); see Daniel M. Freidman, *WINNING ON APPEAL: AN APPELLATE PRACTICE MANUAL* (1992) (“[M]ost briefs could be improved by tightening and sharpening. The shorter the brief, the more effective it will be.”).

28. American proverb, *A DICTIONARY OF AMERICAN PROVERBS*, *supra* note 1, at 463.

29. See ROBERT LEFFERTS, *HOW TO PREPARE CHARTS AND GRAPHS* 1-2 (1982) (“Many report writers . . . fail to achieve the full impact of their purpose because of the absence of graphics to supplement and complement the words and numbers that comprise their reports. . . . Graphics not only attract attention but also present material in a clearer and more interesting manner.”).

30. See Arno H. Denecke, et al., *Notes on Appellate Brief Writing*, 51 OR. L. REV. 351, 361 (1972) (“[Those] on the other side of the bench are not super-human in . . . their capacity to understand or to accomplish. If you overload them with irrelevant matter, or bore them to tears with tedious and repetitious arguments, you can only reduce their receptivity to your real points. Anything you can do to make your brief shorter, lighter, and more readable, will improve your chances of getting your point across.”); *SCM Corp. v. Xerox Corp.*, 77 F.R.D. 10, 15 (D. Conn. 1977) (“[T]here are limits to the amount of factual material any trier, whether judge or jury, can realistically be expected to observe and assess. . . . [N]o matter how conscientiously they approach their task,

profusion of data threatens to impede their orderly and fair decision-making.”); *United States v. Reaves*, 636 F. Supp. 1575, 1580 (E.D. Ky. 1986) (arguing that reasonable time limits enhance the quality as well as the efficiency of adjudication because “[p]roperly streamlined, the case is more effective for the ascertainment of truth. . .”).

31. See Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 342, 384 (1994) (arguing that parties have incentives to present too much evidence during adjudication).

32. See *Coca Cola Bottling Co. v. Reeves*, 486 So.2d 374, 383-384 (Miss. 1986) (“A lawyer never uses one word when two or three will do just as well. . . . The legal mind finds magnetic attraction in redundancy and overkill.”); see also William W. Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 578 (1991) (stating that post-trial interviews of jurors “invariably disclose complaints about the lawyers’ prolixity and tendency to present too much evidence”); *Reaves*, 636 F. Supp. at 1578-1579 (“A court cannot rely on the attorneys to keep expenditures of time in trying a case within reasonable bounds. . . . Advocates tend to confuse quantity of evidence with probative quality.”).

33. See generally Samuel Issacharoff & George Loewenstein, *Unintended Consequences of Mandatory Disclosure*, 73 TEX. L. REV. 753, 785-786 (1995) (predicting that mandatory pre-discovery mutual disclosure rules will have unanticipated negative consequences, such as a tendency to discourage settlement).

incorporated into the rule or order imposing limit.³⁴

One predictable consequence of an overall page limit is that counsel might attempt to conserve pages by making motions orally instead of in writing. This possibility, however, is foreclosed by rules requiring that all motions, except those made during a hearing or trial, be made in writing.³⁵

Another potential problem with an overall page limit is that it might encourage counsel to file more motions or oppositions, or longer motions and oppositions, than they otherwise would have because they might feel that they should expend all of the pages fixed as the limit for the case. Perhaps this is a possibility,³⁶ but with so many other incentives in place—such as clients' concerns about cost, attorneys' concerns about malpractice liability, the characteristics of particular cases, and so on—it does not seem very likely. If it did occur, it would indicate that the level of the overall page limit was too high and might need to be refined. In any event, a court could make it clear to the bar what the overall page limit means.³⁷

An overall page limit also might cause difficulties in some circumstances. As an example, a lawyer might waste pages filing or opposing motions early in a case and then be left with too few to make a meritorious motion at a later stage of the case, when such a motion might not only benefit his or her client, but also might improve the efficiency of the trial. Judges would have to deal with such problems by employing the same flexible good judgment that they already must employ in dealing with the host of practical problems that may arise during the life of a case. I have no doubt that they would be equal to the task.

Of course, other types of limits on motions might be considered. A different approach would be to limit the number of motions that could be made. For example, each side could be limited to making no more than four motions or oppositions during the pendency of a case. This might make sense because the amount of judicial time consumed by motions may depend more on the number of motions filed than on the length of the papers filed supporting and opposing those motions.

This kind of limit, however, seems more problematic than

an overall page limit. It would tend to bar parties from filing entire motions or oppositions, rather than allowing the parties to make or oppose motions, but forcing them to present their arguments more concisely.

Moreover, some motions, such as motions in limine to determine what evidence may be presented at trial, serve salutary purposes by allowing courts to consider the issues in the calm of their chambers rather than the rough and tumble of the courtroom, to take the time to perform necessary legal research, to avoid consuming the jurors' time by delays during trial, and to reach better decisions. Although such motions often can be presented orally or in a page or two, and so probably would not be discouraged by an overall page limit, they would be discouraged or prevented by a limit on the number of motions that could be filed or made.

There is reason to suspect that any problems caused by an overall page limit would not be significant. As many readers probably already have noticed, the seemingly novel concept of an overall page limit is not really new. Instead, it is derived from, and consistent with, several existing rules. Like them, it is based on the insight that limits can be imposed on the investment of resources in a lawsuit in order to enhance efficiency without sacrificing fairness.

For example, it is no longer uncommon for judges to impose limits on the duration of trial presentations.³⁸ Some judges specify the amount of time that counsel can spend on opening statements, examination of particular witnesses, closing arguments, and so on. Others, perhaps more wisely, leave the priorities to be determined by counsel. This is similar to the kind of discipline imposed by an overall page limit, but the latter would apply to motions rather than to trials. The analogy is a close one, though. If we do not allow parties to waste

[L]imits can be imposed on the investment of resources in a lawsuit in order to enhance efficiency without sacrificing fairness.

34. As an example, if the parties stipulated to resolve a motion after it was filed but before it was considered by the court, the pages expended by the parties might not be counted against either of them. This, however, might allow richer parties, who could afford to spend resources on preparing pointless motions or oppositions, to take advantage of poorer parties, who could not tolerate such expense. Alternatively, the pages expended by the party who filed a motion might be taxed against the party who belatedly decided not to oppose it, on the theory that the latter should have capitulated during the pre-filing conference rather than forcing the moving party to invest resources in a motion that should not have been necessary. The latter approach, though more fair, might require that a separate motion be filed addressing only the issue of page shifting.

35. See Fed. R. Civ. P. 7(b)(1).

36. Cf. Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask For, the More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCH. 519 (1996) (noting that people make decisions by beginning with whatever value is suggested and adjusting, often inadequately, from there).

37. Cf. Malcolm M. Lucas, *quoted in* RUGGERO J. ALDISERT, *WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT* 196 (1992) ("Remember, you are writing a 'brief,' and if you do not need the page limit to set forth your arguments, stop.").

38. See, e.g., *Amarel*, 102 F3d at 1513 (affirming imposition of reasonable time limits by trial judge); *General Signal Corp.*, 66 F3d at 1507-1509 (same); *McKnight*, 908 F2d at 114 (declining to reverse imposition of unreasonable time limits, but only because the point had not been preserved for appeal); see generally Patrick E. Longan, *The Shot Clock Comes to Trial: Time Limits for Federal Civil Trials*, 35 ARIZ. L. REV. 663 (1993); Patrick E. Longan, *Civil Trial Reform and the Appearance of Fairness*, 79 MARQ. L. REV. 295, 326-327 (1995). Similarly, adoption of pretrial time limits has been advocated to reduce the investment in pretrial proceedings. See generally John Burrill MacArthur, *The Strange Case of American Civil Procedure and the Missing Uniform Discovery Time Limits*, 24 HOFSTRA L. REV. 865, 887, 978 (1996) (arguing that "[p]retrial time limits are a reform whose time has come," and suggesting that a presumptive nine-month limit be placed on the duration of discovery).

Like a judge's time on the bench, a judge's attention in chambers is a scarce and valuable resource.

their money and the judge's time during trial, why should we allow them to do so before trial? Like a judge's time on the bench, a judge's attention in chambers is a scarce and valuable resource. It, too, should be rationed.

An overall page limit on motions also is similar to, but better than, widely used document-by-document page limits. Most courts limit the length of briefs or memoranda of points and authorities.³⁹ Such limits, though helpful, may not be as sound as they seem. First, because they must cover all sorts of motions, from the simplest to the most complex, the page limits contained in such rules usually are set at so high a level that they seldom come into play. Thus, they are not very effective in reducing the length of most briefs, and they do little to constrain the aggregate length of all motions and oppositions.

Second, a document-by-document page limit encourages counsel to file motions serially rather than combining all grounds for relief into a single motion. Such disaggregation is inefficient for the judge because it forces him or her to return to the case again and again, repeatedly "re-inventing the wheel" and making piecemeal rulings, rather than handling everything related to the case at once.

Third, by restricting the number of pages that can be devoted to a particular motion, a judge is substituting his or her judgment for the judgment of counsel, just as the judge would be if he or she micromanaged counsel's allocation of trial time among specific tasks. No busy judge relishes receiving a lengthy motion, but if an attorney makes a strategic choice to spend all of his or her pages on one lengthy but potentially meritorious summary judgment motion, rather than on a series of short but dubious motions to dismiss aspects of the complaint, why should the judge second-guess that strategy? An overall page limit is better than a document-by-document page limit because it intrudes less on the prerogatives and expertise of counsel.⁴⁰

Attributing the winning party's pages to the losing party—a remedy that might be referred to as "page shifting"—is similar to the attorney fee shifting that courts already are authorized to employ in connection with discovery motions.⁴¹ Deciding

whether fees should be shifted usually takes little time, and the risk of fee shifting helps to encourage compromise. Page shifting would have the same effect. In addition, unlike fee shifting, page shifting would affect rich and poor litigants equally.

This aspect of the proposal also is based upon existing rules. For example, local rules imposing document-by-document page limits can be modified for good cause.⁴² Similarly, the Federal Rules of Civil Procedure place presumptive limits on the number of depositions that may be taken and the number of interrogatories that may be served.⁴³ A party may ask for permission to take or serve more, if necessary.⁴⁴ Of course, the parties ought not to be permitted to simply stipulate around the overall page limit without obtaining the permission of the court, as they are allowed to do with respect to limits on the number of depositions taken and the number of interrogatories served. This is because the number of pages of motions and oppositions filed affects the court as well as the parties.

The rules upon which I have drawn in formulating this proposal have worked well. Document-by-document page limits reduce the cost and burden of particular motions. Limits on depositions and interrogatories minimize the unnecessary expenditure of resources during discovery. Time limits on trial presentations encourage lawyers to try cases more efficiently, inexpensively, and comprehensibly. Fee shifting discourages unmeritorious motions and pointless oppositions to meritorious motions. Finally, lawyer discretion in the allocation of limited resources, rather than judicial micromanagement, allows lawyers to use their superior familiarity with a case and their professional judgment to allocate resources most effectively.

What is missing from this panoply of existing rules is a measure to reduce the overall investment of time and resources in motions to a more manageable level without sacrificing the quality of decisions. This gap would be filled by an overall page limit.

The proposal is essentially a refinement of the concept of managerial judging. A judge who is an active case manager can accomplish part of what an overall page limit would achieve by pressing the parties to consider the strengths and weaknesses of their claims and defenses, to abandon those that are not worth pursuing, and to help the parties identify which motions are worth filing and which motions are not. Effective case management, however, is a challenging and time-con-

39. See, e.g., U.S.D.C. C.D. Cal. Local Rule 3.10 (limiting briefs and memoranda of points and authorities to 25 pages).

40. See Howard Ross Cabot & Christopher S. Coleman, *Hey, California, Listen Up*, CAL. LAW., July 1999 at 23, 25 (observing that "[w]hereas detailed limits on individual portions of a trial force courts to micromanage trial proceedings, overall limits allow courts to control the length of trial while leaving attorneys free to arrange the elements of their presentation to advance the interests of their clients."); SCM Corp., 77 F.R.D. at 14 (same); Schwarzer, *supra* note 32, at 579 (same). This does not necessarily mean that document-by-document page limits should be abandoned, although an overall page limit might render them superfluous for all practical purposes. Rather, the point is that principal reliance should be placed on the judgment of counsel to regulate their

behavior as they might see fit in light of the circumstances of each particular case, circumstances with which they are likely to be more familiar than is the court.

41. See Fed. R. Civ. P. 37(a)(4); see also MICHAEL DE MONTAIGNE, *THE COMPLETE ESSAYS* 47-48 (trans. Donald M. Frame, Stanford University Press, 1976) (noting the ancient custom of "punishing, even with death those who obstinately defend a place which by the rules of war cannot be held.").

42. See U.S.D.C. C.D. Cal. Local Rule 3.10.

43. See Fed. R. Civ. P. 30(a)(2); Fed. R. Civ. P. 33(a).

44. See *Archer Daniels Midland Co. v. Aon Risk Services, Inc.*, 187 F.R.D. 578, 586-587 (D. Minn. 1999) (collecting cases regarding the evaluation of such requests).

suming process. Although some judges enjoy it and are good at it, others lack the time, the aptitude, or the inclination to engage in it. Moreover, even the most perceptive and active case managers are limited in their ability to appreciate the nuances of some cases as well as the lawyers can. Therefore, where judicial case management leaves off, an overall limit on motions can take over. An overall limit on motions is not a substitute for active judicial case management, but it can serve as a supplement to it.

Many courts probably would have the power to adopt an overall page limit by local rule, if they chose. Individual judges probably could include an overall page limit in their case management orders.⁴⁵ Courts, after all, possess the inherent power to regulate in a reasonable manner the conduct of proceedings before them.⁴⁶

There should not be any constitutional impediment to adoption of the proposal. It would not prevent litigants from filing a lawsuit, or from making or opposing motions seeking relief from the court during the pendency of a lawsuit, so it would not violate the right of access to the courts.⁴⁷ Similarly, as long as it was applied reasonably, it would not violate the right to due process of law.⁴⁸ An overall page limit would simply ration the time and energy of judges, a scarce and valuable resource. No litigant should be permitted to commandeer more than a reasonable share of that resource; otherwise, courts would be at the mercy of litigants who chose to occupy enormous quantities of court time, preventing courts from making high quality decisions in other cases, or from resolving other cases promptly.⁴⁹

Despite its advantages, I offer this proposal with ambivalence. I trust the professionalism of counsel, and I do not enjoy setting and enforcing arbitrary limits. Nor do I relish the

thought of asking counsel—or my courtroom deputy clerk—to keep track of the number of pages that have been expended on motions in a case. On the other hand, we have made a societal judgment to understaff the courts at every level.⁵⁰ Viewed against that background, reasonable limits on access to the courts—including motions—are unavoidable.

Whether an overall page limit on motions and oppositions would improve or worsen motion practice may be debatable. Because it is based upon principles that have proved successful in other contexts, however, there is a good chance that it would work. Perhaps it should be added to the list of case management tools from which judges may choose in attempting to manage their cases effectively.

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45. In some jurisdictions, amendment of existing rules or statutes might be required before the overall page limit on motions could be imposed.

46. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (recognizing “the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases”), quoting *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630-632 (1962).

47. See generally *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 515 (1972) (holding that although the right of access to the courts is an aspect of the constitutionally protected right to petition the government for redress of grievances under U.S. Const. Amend. I, it is nevertheless subject to reasonable limitations).

48. *Cf. Amerel*, 102 F3d at 154 (noting that a limitation on cross-examination denies due process only if it is “so severe as to constitute a denial” of any meaningful cross-examination), quoting *Harris v. United States*, 350 F2d 231, 236 (9th Cir. 1965).

49. As one court observed in the context of limits on the duration of trials:

Public resources are squandered if judicial proceedings are allowed to proliferate beyond reasonable bounds. The public’s right to a “just, speedy, and inexpensive determination of every action” is infringed, if a court allows a case, civil or criminal, to pre-empt more than its reasonable share of the court’s time.

Reaves, 636 F.Supp. at 1578, quoting Fed. R. Civ. P. 1; see also *SCM Corp.*, 77 F.R.D. at 14 (“The Court has obligations to other parties who have cases to be heard.”) quoting *United States v. United States Shoe Machinery Corp.*, 93 F.Supp. 190, 191 (D. Mass. 1950).

50. See Judith Resnick, *Trial as Error; Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 998 (2000) (explaining that rather than expanding the federal Article III judiciary to satisfy the demand for adjudication services, Congress and the Judiciary have allowed adjudicatory functions to be shifted to non-Article III judges or to administrative fora, and have encouraged alternative forms of dispute resolution, such as mediation or extra-judicial arbitration).

Mental Competency Evaluations: Guidelines for Judges and Attorneys

Patricia A. Zapf and Ronald Roesch

Competency to stand trial is a concept of jurisprudence allowing the postponement of criminal proceedings for those defendants who are considered unable to participate in their defense on account of mental or physical disorder. It has been estimated that between 25,000 and 39,000 competency evaluations are conducted in the United States annually.¹ That is, between 2% and 8% of all felony defendants are referred for competency evaluations.²

In this article, we will present an overview of competency laws, research, methods of assessment, and the content of reports to the courts conducted by clinicians, with the aim of providing a summary of relevant information about competency issues. The purpose of this article is to inform key participants in the legal system (prosecutors and defense attorneys, as well as judges) about the current state of the discipline of forensic psychology with respect to evaluations of competency.³

BACKGROUND & DEFINITION

Provisions allowing for a delay of trial because a defendant was incompetent to proceed have long been a part of legal due process. English common law allowed for the arraignment, trial, judgment, or execution of an alleged capital offender to be stayed if he or she "be(came) absolutely mad."⁴ Over time, statutes have been created that have further defined and extended the common-law practice.

The modern standard in U.S. law was established in *Dusky v. United States*.⁵ Although the exact wording varies, all states use a variant of the *Dusky* standard to define competency.⁶ In *Dusky*, the United States Supreme Court ruled that a minimum level of rational understanding of the proceedings and ability to help one's attorney was required:

[I]t is not enough for the district judge to find that "the defendant [is] oriented to time and place and [has] some recollection of events," but that the "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."⁷

Although the concept of competency to stand trial has been long established in law, its definition, as exemplified by the ambiguities of *Dusky*, has never been explicit. What is meant by "sufficient present ability"? How does one determine whether a defendant "has a rational as well as factual understanding"? To be sure, some courts⁸ and legislatures⁹ have provided general direction to evaluators in the form of articulated *Dusky* standards,¹⁰ but the typical forensic evaluation is left largely unguided except by a common principle, in most published cases, that evaluators cannot reach a finding of incompetency independent of the facts of the case at hand.

This article was adapted from Ronald Roesch, Patricia A. Zapf, Stephen L. Golding & Jennifer L. Skeem, *Defining and Assessing Competency to Stand Trial*, in *HANDBOOK OF FORENSIC PSYCHOLOGY* 327 (Irving B. Weiner & Allen K. Hess, eds., 2d ed. 1999)

Footnotes

1. Steven K. Hoge, et al., *The MacArthur Adjudicative Competence Study: Development and Validation of a Research Instrument*, 21 *LAW & HUM. BEHAV.* 141 (1997); Henry J. Steadman & E. Hartstone, *Defendants Incompetent to Stand Trial*, in *MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE* 39 (John Monahan & Henry J. Steadman eds., 1983).
2. Richard J. Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 *BEHAV. SCI. & L.* 291 (1992); STEPHEN L. GOLDING, *INTERDISCIPLINARY FITNESS INTERVIEW-REVISED: A TRAINING MANUAL* (1992); Steven K. Hoge, et al., *Attorney-client Decision-making in Criminal Cases: Client Competence and Participation as Perceived by Their Attorneys*, 10 *BEHAV. SCI. & L.* 385 (1992).
3. This article focuses on competency issues within the United States. For a review of competency issues with respect to Canadian laws and practice, the reader is referred to Patricia A. Zapf & Ronald Roesch, *Assessing Fitness to Stand Trial: A Comparison of Institution-based Evaluations and a Brief Screening Interview*, 16 *CAN. J. COMMUNITY MENTAL HEALTH* 53 (1997); and Patricia A. Zapf & Ronald Roesch, *A Comparison of Canadian and*

American Standards for Competence to Stand Trial, *INTL. J. L. & PSYCH.* (in press).

4. Hale, 1973, cited in P. R. Silten & R. Tullis, *Mental Competency in Criminal Proceedings*, 28 *HASTINGS L.J.* 1053, 1053 (1977).
5. 362 U.S. 402 (1960).
6. R. J. Favole, *Mental Disability in the American Criminal Process: A Four Issue Survey*, in *MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE* 247 (John Monahan & Henry J. Steadman eds., 1983).
7. 362 U.S. at 402 (quoting from brief of U.S. Solicitor General).
8. See, e.g., *Wieter v. Settle*, 193 F. Supp. 318 (W.D. Mo. 1961).
9. See, e.g., Utah Code Ann. § 77-15-1 *et seq.* (2000).
10. Standards of competence have been one area of inquiry; the conceptualization of competence is another. Some researchers and scholars have provided reconceptualizations of competence to stand trial. Bruce J. Winick has persuasively argued that, in some circumstances, it might be in the best interests of the defendant to proceed with a trial, even if he or she is incompetent. See Bruce J. Winick, *Restructuring Competency to Stand Trial*, 32 *UCLA L. REV.* 921 (1985); and Bruce J. Winick, *Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie*, 85 *J. CRIM. L. & CRIMINOLOGY* 571 (1995). Winick postulated that this could take the form of a provisional trial in which the support of the defense attorney would serve to ensure protection of the defendant. This would allow the defendant to proceed with his or her case while maintaining decorum

OVERVIEW OF LEGAL PROCEDURES

The issue of competency may be raised at any point in the adjudication process.¹¹ If a court determines that a bona fide doubt exists as to a defendant's competency, it must consider this issue formally,¹² and usually after a forensic evaluation, which can take place in a jail, an outpatient facility, or in an institutional setting.

One legal issue that may concern evaluators of competency to stand trial is whether information obtained in a competency evaluation can be used against a defendant during the guilt phase of a trial or at sentencing. While some concerns have been raised about possible self-incrimination,¹³ all jurisdictions in the United States provide, either statutorily or through case law, that information obtained in a competency evaluation cannot be introduced on the issue of guilt unless the defendant places his or her mental state into evidence at either trial or sentencing hearings.¹⁴

Once a competency evaluation has been completed and the written report submitted,¹⁵ the court may schedule a hearing. If, however, both the defense and the prosecution accept the findings and recommendations in the report, a hearing does not have to take place. It is likely that in the majority of the states, a formal hearing is not held for most cases. If a hearing is held, the evaluators may be asked to testify, but most hearings are quite brief and usually only the written report of an evaluator is used. In fact, the majority of hearings last only a few minutes and are held simply to confirm the findings of evaluators.¹⁶ The ultimate decision about competency rests with the court, which is not bound by the evaluators' recommendations.¹⁷ In most cases, however, the court accepts the recommendations of the evaluators.¹⁸

At this point defendants found competent proceed with their

case. For defendants found incompetent, either their trials are postponed until competency is regained or the charges are dismissed, usually without prejudice. The disposition of incompetent defendants is perhaps the most problematic area of the competency procedures. Until the case of *Jackson v. Indiana*,¹⁹ virtually all states allowed the automatic and indefinite commitment of incompetent defendants. In *Jackson*, the U.S. Supreme Court held that defendants committed solely on the basis of incompetency "cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future."²⁰ The Supreme Court did not specify how long a period of time would be reasonable nor did it indicate how progress toward the goal of regaining competency could be assessed.

The *Jackson* decision led to revisions in state statutes to provide for alternatives to commitment as well as limits on the length of commitment.²¹ The length of confinement varies from state to state, with some states having specific time limits (e.g., 18 months) while other states base length of treatment on a proportion of the length of sentence that would have been given had the defendant been convicted.

Once defendants are found incompetent, they may have only limited rights to refuse treatment.²² Medication is the most common form of treatment, although some jurisdictions have established treatment programs designed to increase understanding of the legal process,²³ or that confront problems that

Although the exact wording varies, all states use a variant of the *Dusky* standard to define competency.

in the courtroom and without violating the defendant's constitutional rights. As well, Richard J. Bonnie has provided a reformulation of competence to stand trial. Bonnie proposed a distinction between two types of competencies—competence to assist counsel and decisional competence. He argued that defendants found incompetent to assist counsel would be barred from proceeding until they were restored to competence. See Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. MIAMI L. REV. 539 (1993). Defendants found decisionally incompetent, on the other hand, may be able to proceed in certain cases where his or her lawyer is able to present a defense. Although these reformulations are consistent with psychological perspectives on competence, they have not yet been adopted by the courts. Until the courts have accepted these ideas they will not significantly impact psychological practice.

11. Stephen L. Golding & Ronald Roesch, *Competency for Adjudication: An International Analysis*, in LAW AND MENTAL HEALTH: INTERNATIONAL PERSPECTIVES 73 (David N. Weisstub ed., Vol. 4, 1988).
12. *Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966).
13. See, e.g., W. T. Pizzi, *Competency to Stand Trial in Federal Courts: Conceptual and Constitutional Problems*, 45 U. CHI. L. REV. 20 (1977).
14. *Estelle v. Smith*, 451 U.S. 454 (1981); GOLDING & ROESCH, *supra* note 11.
15. See, for a discussion of the content of these reports, Gary B. Melton, John Petrila, Norman G. Poythress & Christopher

Slobogin, *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* (1987); Russell C. Petrella & Norman G. Poythress, *The Quality of Forensic Evaluations: An Interdisciplinary Study*, 51 J. CONSULTING & CLINICAL PSYCH. 76 (1983); Jennifer L. Skeem, Stephen L. Golding, Nancy B. Cohn & Gerald Berge, *The Logic and Reliability of Evaluations of Competence to Stand Trial*, 22 LAW & HUMAN BEHAV. 519 (1998).

16. HENRY J. STEADMAN, *BEATING A RAP?: DEFENDANTS FOUND INCOMPETENT TO STAND TRIAL* (1979).
17. See, e.g., *State v. Heger*, 326 N.W.2d 855 (N.D. 1982).
18. Stephen D. Hart & Robert D. Hare, *Predicting Fitness for Trial: The Relative Power of Demographic, Criminal and Clinical Variables*, 5 FORENSIC REP. 53 (1992); Steadman, *supra* note 16.
19. 406 U.S. 715 (1972).
20. 406 U.S. at 738.
21. RONALD ROESCH & STEPHEN L. GOLDING, *COMPETENCY TO STAND TRIAL* (1980).
22. See generally, Bruce J. Winick, *Incompetency to Stand Trial: Developments in the Law*, in MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE 3 (John Monahan & Henry J. Steadman eds., 1983).
23. L. Pendleton, *Treatment of Persons Found Incompetent to Stand Trial*, 137 AM. J. PSYCH. 1098 (1980); Christopher D. Webster, F. A. S. Jenson, L. Stermac, K. Gardner & D. Slomen, *Psychoeducational Programmes for Forensic Psychiatric Patients*, 26 CANADIAN PSYCH. 50 (1985).

Jennifer Skeem and her colleagues demonstrated that examiner agreement on specific psycholegal deficits (as opposed to general competency) averaged only 25%

hinder a defendant's ability to participate in the defense.²⁴ Laws regarding competence vary from state to state, although most jurisdictions follow procedures similar to those described above.

RESEARCH FINDINGS

Though there has been some confusion over the definition of competency per se, there nevertheless appears to be generally good

agreement between evaluators about whether a defendant is competent or not. The few studies of reliability that have been completed report that pairs of evaluators agree in 80% or more of the cases.²⁵ When evaluators are highly trained and use semi-structured competence assessment instruments, even higher rates of agreement have been reported.²⁶

When base rates of findings of competency are considered, however, these high levels of agreement are less impressive and they do not suggest that evaluators are necessarily in agreement about the criteria for a determination of competency. A psychologist, without even directly assessing a group of defendants, could achieve high levels of agreement with an examining clinician, simply by calling all defendants competent (base-rate decision). Since in most jurisdictions, approximately 80% of all referred defendants are competent, the psychologist and the examiner would have modest agreement, even with making no decisions at all. Most disturbingly, Jennifer Skeem and her colleagues demonstrated that examiner agreement on specific psycholegal deficits (as opposed to overall competency) averaged only 25% across a series of competency domains.²⁷ It is the more difficult decisions, involving cases where competency is truly a serious question, that are of concern. How reliable are decisions about these cases? To date, no study has accumulated enough of these cases to answer this question.

High levels of reliability do not, of course, ensure that valid decisions are being made. Two evaluators could agree that the presence of psychosis automatically leads to a finding of incompetency. As long as the evaluators are in agreement about their

criteria for determining psychosis, the reliability of their final judgments about competency will be high. It is quite possible that the criteria used by too many evaluators inappropriately rely on traditional mental status issues without considering the functional aspects of a particular defendant's case.

As we have indicated, the courts usually accept mental health judgments about competency. Does this mean that the judgments are valid? Not necessarily, since courts often accept the evaluator's definition of competency and his or her conclusions without review, leading to very high levels of examiner-judge agreement.²⁸

We have argued that the only ultimate way of assessing the validity of decisions about incompetency is to allow defendants who are believed to be incompetent to proceed with a trial anyway.²⁹ This could be a provisional trial (on the Illinois model), in which assessment of a defendant's performance could continue. If a defendant was unable to participate, then the trial could be stopped. If a verdict had already been reached and the defendant was convicted, the verdict could be set aside.

We suspect that in a significant percentage of trials, alleged incompetent defendants would be able to participate. In addition to the obvious advantages to defendants, the use of a provisional trial could provide valuable information about what should be expected of a defendant in certain judicial proceedings (e.g., the ability to testify, identify witnesses, describe events, evaluate the testimony of other witnesses, etc.). Short of a provisional trial, it may be possible to address the validity issue by having independent experts evaluate the information provided by evaluators and other collateral information sources. In the next section, we will review various methods for assessing competency.

CURRENT STATE OF ASSESSMENT

A major change that has occurred within the past few decades has been the development of a number of instruments specifically designed for assessing competence. This work was pioneered by A. Louis McGarry and his colleagues.³⁰ Their work was the starting point for a more sophisticated and systematic approach to the assessment of competency. In 1986, Thomas Grisso coined the term "forensic assessment instrument" (FAI) to refer to instruments that provide frameworks for conducting forensic assessments.³¹

FAIs are typically semistructured elicitation procedures and

24. D. L. Davis, *Treatment Planning for the Patient Who Is Incompetent to Stand Trial*, 36 HOSPITAL & COMMUNITY PSYCH. 268 (1985); A. M. Siegel & A. Elwork, *Treating Incompetence to Stand Trial*, 14 LAW & HUM. BEHAV. 57 (1990).
25. Norman G. Poythress & H. V. Stock, *Competency to Stand Trial: A Historical Review and Some New Data*, 8 PSYCH. & LAW 131 (1980); Roesch & Golding, *supra* note 21; Skeem, et al., *supra* note 15.
26. Stephen L. Golding, Ronald Roesch & Jan Schreiber, *Assessment and Conceptualization of Competency to Stand Trial: Preliminary Data on the Interdisciplinary Fitness Interview*, 8 LAW & HUM. BEHAV. 321 (1984); Robert A. Nicholson, & Karen E. Kugler, *Competent and Incompetent Criminal Defendants: A Quantitative Review of Comparative Research*, 109 PSYCH. BULL. 355 (1991).
27. See Skeem, et al. *supra* note 15. Competency domains might include ability to understand the nature of the proceedings, a fac-

tual understanding of the proceedings, and rational understanding of the proceedings and are set out in each state's competency statutes.
28. Hart & Hare, *supra* note 18; Skeem, et al., *supra* note 15.
29. See ROESCH & GOLDING, *supra* note 21.
30. Paul D. Lipsitt, D. Lelos & A. Louis McGarry, *Competency for Trial: A Screening Instrument*, 128 AMER. J. PSYCH. 105 (1971); A. Louis McGarry, *Competency for Trial and Due Process via the State Hospital*, 122 AM. J. PSYCH. 623 (1965); A. LOUIS MCGARRY, & W. J. CURRAN, *COMPETENCY TO STAND TRIAL AND MENTAL ILLNESS* (1973).
31. THOMAS GRISSO, *EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS* (1986).

lack the characteristics of many traditional psychological tests. However, they serve to make forensic assessments more systematic. These instruments help evaluators to collect important and relevant information and to follow the decision-making process that is required under the law. Since the time that the term was coined, a number of assessment instruments have been developed that are designed to work in this way, and it appears that the use of FAIs has been slowly increasing.³² This trend is encouraging in that empirical data suggest that trained examiners using FAIs achieve the highest levels of inter-examiner and examiner-adjudication agreement.³³ Next, we will briefly describe a few of these recently developed instruments.

The MacArthur Competence Assessment Tool—Criminal Adjudication. This measure, known as the MacCAT-CA,³⁴ was developed as part of the MacArthur Network on Mental Health and the Law. It was developed from a number of research instruments³⁵ and assesses three main abilities: understanding, reasoning, and appreciation.

The MacCAT-CA consists of 22 items and takes approximately 30 minutes to administer. The basis of the items is a short story about two men who get into a fight and one is subsequently charged with a criminal offense. The first eight items assess the individual's understanding of the legal system. Most of these items consist of two parts. The defendant's ability to understand is first assessed and, if it is unsatisfactory or appears to be questionable, the information is then disclosed to the defendant and his or her understanding is again assessed. This allows the evaluator to determine whether or not the individual is able to learn disclosed information. The next eight items assess the individual's reasoning skills by asking which of two disclosed facts would be most relevant to the case. Finally, the last six items assess the individual's appreciation of his or her own circumstances. National norms for the MacCAT-CA have been developed and published.³⁶

Other Specialized Assessment Instruments. In recent years, there has been a move toward the development of competence

assessment instruments for specialized populations of defendants. We will not go into detail about these specialized instruments here but the reader should be aware that they exist. Carol Everington has developed an instrument designed to assess competence with mentally retarded defendants called the Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR).³⁷ Recent research on the CAST-MR has indicated that this instrument shows good reliability and validity.³⁸ Other researchers have focused their efforts on another special population—juvenile defendants,³⁹ finding that younger defendants are more likely to be found incompetent.

While an assessment of the mental status of a defendant is important, it is not sufficient as a method of evaluating competency.

THE FUNCTIONAL EVALUATION APPROACH

Although there are numerous ways in which to conduct competency evaluations, we believe that the most reasonable approach to the assessment of competency is based on a functional evaluation of a defendant's ability matched to the contextualized demands of the case.⁴⁰ While an assessment of the mental status of a defendant is important, it is not sufficient as a method of evaluating competency. Rather, the mental status information must be related to the specific demands of the legal case, as has been suggested by legal decisions such as the ones involving amnesia. As in the case of psychosis, a defendant with amnesia is not per se incompetent to stand trial, as has been held in a number of cases.⁴¹ In *State v. Davis*,⁴² the defendant had memory problems due to brain damage. Nevertheless, the Missouri Supreme Court held that amnesia by itself was not a sufficient reason to bar the trial of an otherwise competent defen-

32. Randy Borum & Thomas Grisso, *Psychological Test Use in Criminal Forensic Evaluations*, 26 PROF. PSYCH.: RES. & PRAC. 465 (1995).

33. Golding, Roesch & Schreiber, *supra* note 26; Nicholson & Kugler, *supra* note 26; Skeem, et al., *supra* note 15.

34. STEVEN K. HOGE, RICHARD J. BONNIE, NORMAN G. POYTHRESS & JOHN MONAHAN, *THE MACARTHUR COMPETENCE ASSESSMENT TOOL - CRIMINAL ADJUDICATION (MACCAT-CA)* (1999).

35. For a complete discussion of its development, see Hoge, et al., *supra* note 1.

36. See HOGE, ET AL., *supra* note 34.

37. Carol T. Everington, *The Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR): A Validation Study*, 17 CRIM. J. & BEHAV. 147 (1990).

38. Carol Everington & C. Dunn, *A Second Validation Study of the Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR)*, 22 CRIM. J. & BEHAV. 44 (1995).

39. Deborah K. Cooper, *Juvenile Competency to Stand Trial: The Effects of Age and Presentation of Factual Information in the Attainment of Competency in Juveniles*, 56 (10-B) DISSERTATION ABSTRACTS INTERNATIONAL 5761 (1995); V. L. Cowden & G. R. McKee,

Competency to Stand Trial in Juvenile Delinquency Proceedings—Cognitive Maturity and the Attorney-Client Relationship, 33 U. LOUISVILLE J. FAM. L. 629 (1995).

40. A recent Supreme Court decision (*Godinez v. Moran*, 509 U.S. 389 (1993), discussed later) has been interpreted by some as being in opposition to a functional evaluation approach and, therefore, indicative of tension between the application of good social science principles and the views of the U.S. Supreme Court. The ruling in *Godinez* indicated that the *standard* for all types of competence was to be the same (i.e., that set out in *Dusky*) to meet the constitutional minimum. In *Godinez*, the Court noted that “while States are free to adopt competency standards that are more elaborate than the *Dusky* formulation, the Due Process Clause does not impose these additional requirements.” *Id.* at 402. Therefore, it appears that the functional evaluation approach may still be used in those states that have adopted more elaborate standards of competence while still satisfying the minimum *Dusky* standard.

41. See, e.g., *Wilson v. United States*, 391 F.2d. 460 (D.C. Cir. 1968); *Ritchie v. Indiana*, 468 N. E. 2d. 1369 (Ind. 1984).

42. 653 S. W. 2d. 167 (Mo. 1983).

[C]ompetence should be considered within the context in which it is to be used: the abilities required by the defendant in his or her specific case should be taken into account

dant. In *State v. Austed*,⁴³ the Montana Supreme Court held that the bulk of the evidence against the defendant was physical and not affected by amnesia. Finally, in a Maryland decision,⁴⁴ the court held that, because of the potential for fraud, amnesia does not justify a finding of incompetence. The court also stated that everyone has amnesia to some degree since the passage of time erodes memory. These decisions are of interest because they support the view that evaluators cannot reach a finding of incompeten-

here will be whether the government's case is such as to negate all reasonable hypotheses of innocence. If there is any substantial possibility that the accused could, but for his amnesia, establish an alibi or other defense, it should be presumed that he would have been able to do so.

- Any other facts and circumstances that would indicate whether or not the defendant had a fair trial.⁴⁶

One could substitute any symptom for amnesia in the above quote. If this were done, the evaluation of competency would certainly be one based on a determination of the manner in which a defendant's incapacity may have an effect on the legal proceedings. In fact, some states, such as Florida⁴⁷ and Utah,⁴⁸ already specify that the evaluators must relate a defendant's mental condition to clearly defined legal factors, such as the defendant's appreciation of the charges, the range and nature of possible penalties, and capacity to disclose to the defense attorney pertinent facts surrounding the alleged offense.⁴⁹ Utah's statute goes the furthest in this direction, specifying the most comprehensive range of psycholegal abilities to be addressed by evaluators (including the negative effects of medication as well as decisional competencies) and also requiring judges to identify specifically which psycholegal abilities are impaired when a defendant is found incompetent.

cy independent of the facts of the legal case—an issue we will return to later. Similarly, a defendant may be psychotic and still be found competent to stand trial if the symptoms do not impair the defendant's functional ability to consult with his or her attorney and otherwise rationally participate in the legal process.

Some cases are more complex than others and may, as a result, require different types of psycholegal abilities. Thus, it may be that the same defendant is competent for one type of legal proceeding but not for others. In certain cases, a defendant may be required to testify. In this instance, a defendant who is likely to withdraw in a catatonic-like state may be incompetent. But the same defendant may be able to proceed if the attorney intends to plea bargain (the way in which the vast majority of all criminal cases are handled).

The functional approach is illustrated in the famous amnesia case of *Wilson v. United States*.⁴⁵ In that decision, the U.S. Court of Appeals for the District of Columbia held that six factors should be considered in determining whether a defendant's amnesia impaired the ability to stand trial:

- The extent to which the amnesia affected the defendant's ability to consult with and assist his lawyer.
- The extent to which the amnesia affected the defendant's ability to testify in his own behalf.
- The extent to which the evidence in suit could be extrinsically reconstructed in view of the defendant's amnesia. Such evidence would include evidence relating to the crime itself as well as any reasonable possible alibi.
- The extent to which the government assisted the defendant and his counsel in that reconstruction.
- The strength of the prosecution's case. Most important

The most important aspect of assessing competence, therefore, is an assessment of the specific psycholegal abilities required of a particular defendant. That is, competence should be considered within the context in which it is to be used: the abilities required by the defendant in his or her specific case should be taken into account when assessing competence. This contextual perspective was summarized by Stephen Golding and Ronald Roesch⁵⁰ as follows:

Mere presence of severe disturbance (a psychopathological criterion) is only a threshold issue—it must be further demonstrated that such severe disturbance in *this* defendant, facing *these* charges, *in light of existing* evidence, anticipating the substantial effort of a *particular* attorney with a *relationship of known characteristics*, results in the defendant being unable to rationally assist the attorney or to comprehend the nature of the proceedings and their likely outcome.⁵¹

The importance of a contextual determination of specific psycholegal abilities has been repeatedly demonstrated by empirical findings that competency assessments in one area of functioning are rarely homogeneous with assessments in other areas of functioning.⁵² For example, assessments of compe-

43. 641 P. 2d. 1373 (Mont. 1982).

44. *Morrow v. Maryland*, 443 A. 2d. 108 (Md. 1982).

45. 391 F. 2d. 460.

46. *Id.* at 463-64.

47. Fl. R. Crim. Pro. § 3.21 (a)(1); see Bruce Winick, *supra* note 22, at 38.

48. Utah Code Ann. § 77-15-1 *et seq.* (2000).

49. Winick, *supra* note 22, at 38.

50. Golding & Roesch, *supra* note 11.

51. *Id.* at 79 (emphasis in original).

52. Bonnie, *supra* note 2; Bonnie, *supra* note 10; Thomas Grisso, Paul Appelbaum, Edward Mulvey & K. Fletcher, *The MacArthur Treatment Competence Study II: Measures of Abilities Related to Competence to Consent to Treatment*, 19 LAW & HUM. BEHAV. 127 (1995); Skeem, et al., *supra* note 15; Karen E. Whittemore, James R. P. Ogloff & Ronald Roesch, *An Investigation of Competency to Participate in Legal Proceedings in Canada*, 42 CANADIAN J. PSYCH. 1 (1997); Patricia A. Zapf, *An Investigation of the Construct of Competence in a Criminal and Civil Context: A Comparison of the FIT, the MacCAT-CA, and the MacCAT*, DISSERTATION ABSTRACTS INTERNATIONAL (1998).

tency to stand trial may not necessarily correspond with assessments of competency to plead guilty. Likewise, assessments of competency to waive *Miranda* may not correspond with assessments of competency to stand trial or competency to plead guilty.

A more recent Supreme Court decision, however, has confused this issue by finding that the standard by which competency to be judged is not context-specific. In *Godinez v. Moran*,⁵³ the United States Supreme Court held that the *standard* for the various types of competency (*i.e.*, competency to plead guilty, to waive counsel, to stand trial) should be considered the same. Justice Thomas wrote for the majority:

The standard adopted by the Ninth Circuit is whether a defendant who seeks to plead guilty or waive counsel has the capacity for “reasoned choice” among the alternatives available to him. How this standard is different from (much less higher than) the *Dusky* standard—whether the defendant has a “rational understanding” of the proceedings—is not readily apparent to us. . . . While the decision to plead guilty is undeniably a profound one, it is no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial. . . . Nor do we think that a defendant who waives his right to the assistance of counsel must be more competent than the defendant who does not, since there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights.⁵⁴

In his dissent, Justice Blackmun argued that the “majority’s analysis [was] contrary to both common sense and long-standing case law.”⁵⁵ He reasoned that competency could be considered in a vacuum, separate from its specific legal context. Justice Blackmun argued that “[c]ompetency for one purpose does not necessarily translate to competency for another purpose”⁵⁶ and noted that prior Supreme Court cases had “required competency evaluations to be specifically tailored to the context and purpose of a proceeding.”⁵⁷ What was egregiously missing from the majority’s opinion in *Godinez*, however, was the fact that Moran’s competency to waive counsel or plead guilty to death penalty murder charges was never assessed by the forensic examiners, regardless of which standard (rational choice or rational understanding) was employed.

The *Godinez* holding has been subsequently criticized by legal scholars⁵⁸ and courts alike. In a concurring opinion, one federal appellate judge wrote that the case under review “presents us with a window through which to view the real-world effects of the Supreme Court’s decision in *Godinez v. Moran*,

and it is not a pretty sight.”⁵⁹ The problem is not whether or not the *standards* for various psycholegal competencies are higher, different, or the same, but rather, more fundamentally, whether or not the defendant has been examined with respect to these issues in the first place.

The *Godinez* holding has been subsequently criticized by legal scholars and courts alike.

REPORTS

In this final section, we will outline the information that should be contained in reports that are submitted to the court with respect to the issue of competence. One of the first pieces of information that should be contained in the report is the defendant’s identifying information. This usually includes the defendant’s demographics, the circumstances of the referral, the defendant’s criminal charges, and some statement about the current stage of proceedings. Another piece of information that should be included relatively early in the report is some statement about the procedures that were used for the competency evaluation. This should include the dates and places that the defendant was interviewed, any psychological tests or forensic assessment instruments that were administered to the defendant, other data gathered, collateral information or interviews used, documents reviewed, and the techniques used during the evaluation. A section on the defendant’s relevant history, usually including psychiatric/medical history, education, employment, and social history, is necessary to give the defendant’s background and to note any important aspects of the defendant’s background that may impact upon his or her case in some way.

There are two areas that *must* be addressed in a competency report: the defendant’s current clinical presentation (including the defendant’s presentation and possibly his or her motivation, test results, reports of others, and diagnosis) and some statement about the defendant’s ability to proceed to trial (or the next stage in the proceedings). These two areas are the focal point of the evaluation.

Since we advocate for a functional assessment of a defendant’s competencies, we believe that it is necessary that the evaluator ask questions that are pertinent to the individual defendant’s case. A good competency report will set out each of the specific criteria that are required within the jurisdiction and will offer an opinion as to whether the defendant meets each of the specific criteria. These statements should be supported with the evaluator’s behavioral observations of the defendant or through illustrative dialogue between the defendant and the evaluator. In addition to these two areas that must be addressed, a useful report will also contain a section

53. 509 U.S. 389 (1993).

54. *Id.* at 397-99.

55. *Id.* at 409.

56. *Id.* at 413.

57. *Id.* at 2694.

58. Michael L. Perlin, “Dignity Was the First to Leave”: *Godinez v. Moran*, Colin Ferguson, and the Trial of Mentally Disabled Criminal Defendants, 14 BEHAV. SCI. & L. 61, 81 (1996).

59. Government of the Virgin Islands v. Charles, 72 F3d 401, 411 (3rd Cir. 1995) (Lewis, J., concurring).

[A] functional evaluation of competence is consistent with psychological theory and research.

Competence is not a global construct, but rather is context-specific.

where the evaluator will present his or her opinion regarding the defendant's competency to proceed. Although evaluators are prohibited from speaking to the ultimate legal issue of competency, they are expected to arrive at some conclusion about a defendant's competency. A good report should include the evaluator's final opinion as to whether or not a defendant meets the required criteria to proceed. As we indicated earlier, in the majority of cases, the court

accepts the recommendation of the evaluator.⁶⁰

A poorly prepared report is one that does not include the basic information described above. Those components of a report that are considered to be essential include names, relevant dates, charges, data sources, notification to defendant of the purpose of the evaluation, limits on confidentiality, psychiatric history, current mental status, current use of psychotropic medication, and information specific to each forensic question being assessed.⁶¹ With respect to the use of forensic assessment instruments or formal psychological testing, Randy Borum and Thomas Grisso found, in a survey of assessment practices, that one-third of respondents reported using forensic assessment instruments regularly, whereas most respondents reported using general psychological instruments (such as the Wechsler Adult Intelligence Scale) in forensic assessments.⁶² In light of the advances in the area of forensic assessment and the development of specialized forensic assessment instruments, the practice of routinely using only general psychological instruments, in lieu of forensic assessment instruments, appears to be inadequate.

A poorly prepared report will include opinions that have no basis. If the author of a report states opinions without also including the bases for the opinion, one should be skeptical. It is good psychological practice to back up any stated opinion with observations, descriptions, and justifications for why that opinion was reached. It is also good practice to detail behavioral observations and descriptions that lend support for an opinion as well as any other observations that may be in opposition to the opinion reached. That is, any inconsistencies that were noted throughout the evaluation as well as any alternative hypotheses that may be reached will also be documented in a good report.

The Florida Rules of Criminal Procedure⁶³ provide a useful report checklist by requiring that each of the following elements must be contained in a written report submitted by an expert:

- the specific matters referred for evaluation,

- the evaluative procedures, techniques and tests used in the examination and the purpose or purposes for each,
- the expert's clinical observations, findings and opinions on each issue referred for evaluation by the court, indicating specifically those issues, if any, on which the expert could not give an opinion, and
- the sources of information used by the expert and the factual basis for the expert's clinical findings and opinions.

In some jurisdictions, if the evaluator concludes that the defendant could be considered incompetent to proceed, some statement about the restorability of the defendant is required to be included in the report. In addition, some jurisdictions require evaluators to include an opinion regarding whether the defendant would meet criteria for commitment. Finally, some jurisdictions require the evaluator to include other recommendations, such as the possibility of counseling for the defendant, treatment for the defendant while incarcerated, or other special observation precautions.

SUMMARY AND CONCLUSIONS

To conclude, we leave the reader with a summary of the five main points discussed in this article. First, the *Dusky* standard sets the foundation for every state's competency-to-stand-trial standard. In addition, as per the decision in *Godinez*, the *Dusky* standard also sets the foundation for every state's standards for other types of criminal competencies (e.g., competency to waive Miranda rights, competency to plead guilty, competency to confess). Each state is free to elaborate standards for different types of competencies; however, the *Dusky* standard is the minimum constitutional requirement.

Second, there is no true way to assess the validity of competency determinations short of a provisional trial. The only way to truly determine that an individual is not able to participate in his or her own defense is to allow that individual to proceed. As we have described, some states have these provisions but they are not utilized.

Third, a functional evaluation of competence is consistent with psychological theory and research. Competence is not a global construct, but rather is context-specific. It is possible for an individual to be competent with respect to one area of functioning but incompetent with respect to another. A good forensic evaluation will assess a specific individual's competence with respect to a particular set of abilities, in light of the specific characteristics of the individual and the circumstances of the individual's case.

Fourth, there have been a number of forensic assessment instruments developed to assist evaluators in the assessment of competency. In general, reliability increases with the use of these instruments.

Fifth, a good forensic report must include information about the defendant's current clinical presentation as well as information about the specific forensic question being assessed

60. Hart & Hare, *supra* note 18.

61. Randy Borum & Thomas Grisso, *Establishing Standards for Criminal Forensic Reports: An Empirical Analysis*, 24 BULL. AMER.

ACAD. PSYCH. & L. 297 (1996).

62. Borum & Grisso, *supra* note 32.

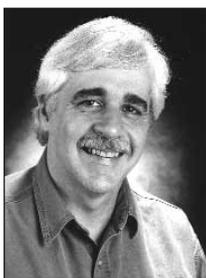
63. Fl. R. Crim. Pro. § 3.211 (a).

(i.e., competency to proceed). In addition, a good forensic report should include descriptions and observations that serve as the basis for the opinions or conclusions stated in the report.

The purpose of this article was to present an overview of competency laws, research, methods of assessment, and the content of competency reports submitted to the courts by expert evaluators. We believe that by informing legal professionals of the current state of the discipline with respect to competency evaluations we will begin to bridge the gap that often exists between psychology and the legal profession. There exists a body of research and literature that examines issues that are at the heart of both psychology and the law; however, often this literature is only accessed by one set of professionals or another. We hope that publishing articles such as this, in sources that are easily accessed by legal professionals, and in a format familiar to legal professionals, will facilitate a better understanding of psychology as it pertains to the legal system.



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Ronald Roesch is a professor of psychology at Simon Fraser University in Burnaby, British Columbia, Canada. From 1988 to 1996, he was the editor of Law and Human Behavior, one of the leading journals in law and psychology; he presently edits a series of books sponsored by the American Psychology-Law Society (APLS), a division of the American Psychological Association. Roesch was president of the APLS in 1993-94. He has studied and written about issues involving the assessment of competency to stand trial for more than two decades.

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2002 Midyear Meeting

Biloxi, Mississippi
(Dates and hotel to be determined)

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The Resource Page: Focus on Unpublished Opinions

After a 1972 Federal Judicial Center report recommended that federal appellate courts could address their growing workload by publishing fewer of their decisions, the federal courts of appeal adopted publication plans that resulted in fewer published decisions. By 1980, seven of the federal circuits had also adopted rules providing that unpublished decisions could not be cited as precedent. Substantial debate has ensued thereafter as to the wisdom of rules prohibiting the citation of unpublished appellate court decisions in state and federal courts. In a recent decision, Judge Richard S. Arnold of the Eighth Circuit decided that such no-citation rules, at least in the federal courts, were unconstitutional. Because of the broad interest in this issue among judges, we reprint excerpts of Judge Arnold's decision. The footnotes and most of the textual citations have been omitted; other omissions are indicated with ellipses.

**FAYE ANASTASOFF, APPELLANT, V.
UNITED STATES OF AMERICA,
APPELLEE.**

No. 99-3917EM

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

**Submitted: May 8, 2000
Filed: August 22, 2000**

Before RICHARD S. ARNOLD and GERALD W. HEANEY, Circuit Judges, and PAUL A. MAGNUSON, Chief Judge, United States District Court for the District of Minnesota, sitting by designation.

RICHARD S. ARNOLD, Circuit Judge.

Faye Anastasoff seeks a refund of overpaid federal income tax. On April 13, 1996, Ms. Anastasoff mailed her refund claim to the Internal Revenue Service for taxes paid on April 15, 1993. The Service denied her claim under 26 U.S.C. § 6511(b), which limits refunds to taxes paid in the three years prior to the filing of a claim. Although her claim was mailed within this

period, it was received and filed on April 16, 1996, three years and one day after she overpaid her taxes, one day late. In many cases, "the Mailbox Rule," 26 U.S.C. § 7502, saves claims like Ms. Anastasoff's that would have been timely if received when mailed; they are deemed received when postmarked. But § 7502 applies only to claims that are untimely, and the parties agree that under 26 U.S.C. § 6511(a), which measures the timeliness of the refund claim itself, her claim was received on time. The issue then is whether § 7502 can be applied, for the purposes of § 6511(b)'s three-year refund limitation, to a claim that was timely under § 6511(a). The District Court held that § 7502 could not apply to any part of a timely claim, and granted judgment for the Service. On appeal, Ms. Anastasoff argues that § 7502 should apply whenever necessary to fulfill its remedial purpose, i.e., to save taxpayers from the vagaries of the postal system, even when only part of the claim is untimely. We affirm the judgment of the District Court.

I.

We rejected precisely the same legal argument in *Christie v. United States*, No. 91-2375MN (8th Cir. Mar. 20, 1992) (per curiam) (unpublished). . . .

Although it is our only case directly in point, Ms. Anastasoff contends that we are not bound by *Christie* because it is an unpublished decision and thus not a precedent under 8th Circuit Rule 28A(i). We disagree. We hold that the portion of Rule 28A(i) that declares that unpublished opinions are not precedent is unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the "judicial."

The Rule provides:

Unpublished opinions are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties

may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well. . . .

Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177-78, 2 L. Ed. 60 (1803). This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544, 115 L. Ed. 2d 481, 111 S. Ct. 2439 (1991); *Cohens v. Virginia*, 19 U.S. 264, 6 Wheat. 264, 399, 5 L. Ed. 257 (1821). These principles, which form the doctrine of precedent, were well established and well regarded at the time this nation was founded. The Framers of the Constitution considered these principles to derive from the nature of judicial power, and intended that they would limit the judicial power delegated to the courts by Article III of the Constitution. Accordingly, we conclude that 8th Circuit Rule 28A(i), insofar as it would allow us to avoid the precedential effect of our prior decisions, purports to expand the judicial power beyond the bounds of Article III, and is therefore unconstitutional. That rule does not, therefore, free us from our duty to follow this Court's decision in *Christie*.

II.

The doctrine of precedent was well-established by the time the Framers gathered in Philadelphia. To the jurists of the late eighteenth century (and thus by and large to the Framers), the doctrine seemed not just well established but an immemorial custom, the way judging had always been carried out, part of the course of the law. In addition, the Framers had inherited a very favorable view of precedent from the seventeenth century, especially through the writings and reports of Sir Edward Coke; the assertion of the authority of

precedent had been effective in past struggles of the English people against royal usurpations, and for the rule of law against the arbitrary power of government. In sum, the doctrine of precedent was not merely well established; it was the historic method of judicial decision-making, and well regarded as a bulwark of judicial independence in past struggles for liberty.

Modern legal scholars tend to justify the authority of precedents on equitable or prudential grounds. By contrast, on the eighteenth-century view (most influentially expounded by Blackstone), the judge's duty to follow precedent derives from the nature of the judicial power itself. As Blackstone defined it, each exercise of the "judicial power" requires judges "to determine the law" arising upon the facts of the case. "To determine the law" meant not only choosing the appropriate legal principle but also expounding and interpreting it, so that "the law in that case, being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule" In determining the law in one case, judges bind those in subsequent cases because, although the judicial power requires judges "to determine law" in each case, a judge is "sworn to determine, not according to his own judgements, but according to the known laws. [Judges are] not delegated to pronounce a new law, but to maintain and expound the old." The judicial power to determine law is a power only to determine what the law is, not to invent it. Because precedents are the "best and most authoritative" guide of what the law is, the judicial power is limited by them. The derivation of precedential authority from the law-declaring nature of the judicial power was also familiar to the Framers through the works of Sir Edward Coke and Sir Matthew Hale.

In addition to keeping the law stable, this doctrine is also essential, according to Blackstone, for the separation of legislative and judicial power. In his discussion of the separation of governmental powers, Blackstone identifies this limit on the "judicial power," i.e., that judges must observe established laws, as that which separates it from the "legislative" power and in which "consists one main preservative of public liberty." If judges had the legislative power to "depart from" estab-

lished legal principles, "the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions. . . ."

The Framers accepted this understanding of judicial power (sometimes referred to as the declaratory theory of adjudication) and the doctrine of precedent implicit in it. Hamilton, like Blackstone, recognized that a court "pronounces the law" arising upon the facts of each case. He explained the law-declaring concept of judicial power in the term, "jurisdiction": "This word is composed of JUS and DICTIO, juris dictio, or a speaking and pronouncing of the law," and concluded that the jurisdiction of appellate courts, as a law-declaring power, is not antagonistic to the fact-finding role of juries. Like Blackstone, he thought that "the courts must declare the sense of the law," and that this fact means courts must exercise "judgment" about what the law is rather than "will" about what it should be. Like Blackstone, he recognized that this limit on judicial decision-making is a crucial sign of the separation of the legislative and judicial power. Hamilton concludes that "to avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them. . . ."

The Framers thought that, under the Constitution, judicial decisions would become binding precedents in subsequent cases. Hamilton anticipated that the record of federal precedents "must unavoidably swell to a very considerable bulk . . ." But precedents were not to be recorded for their own sake. He expected judges to give them "long and laborious study" and to have a "competent knowledge of them." Likewise, Madison recognized "the obligation arising from judicial expositions of the law on succeeding judges." Madison expected that the accumulation of precedents would be beneficial: "among other difficulties, the exposition of the Constitution is frequently a copious source, and must continue so until its meaning on all great points shall have been settled by precedents." Although they drew different conclusions from the fact, the Anti-Federalists also assumed that federal judicial decisions would become

authorities in subsequent cases. Finally, early Americans demonstrated the authority which they assigned to judicial decisions by rapidly establishing a reliable system of American reporters in the years following the ratification of the Constitution.

We do not mean to suggest that the Framers expected or intended the publication (in the sense of being printed in a book) of all opinions. For the Framers, limited publication of judicial decisions was the rule, and they never drew that practice into question. Before the ratification of the Constitution, there was almost no private reporting and no official reporting at all in the American states. As we have seen, however, the Framers did not regard this absence of a reporting system as an impediment to the precedential authority of a judicial decision. Although they lamented the problems associated with the lack of a reporting system and worked to assure more systematic reporting, judges and lawyers of the day recognized the authority of unpublished decisions even when they were established only by memory or by a lawyer's unpublished memorandum.

To summarize, in the late eighteenth century, the doctrine of precedent was well-established in legal practice (despite the absence of a reporting system), regarded as an immemorial custom, and valued for its role in past struggles for liberty. The duty of courts to follow their prior decisions was understood to derive from the nature of the judicial power itself and to separate it from a dangerous union with the legislative power. The statements of the Framers indicate an understanding and acceptance of these principles. We conclude therefore that, as the Framers intended, the doctrine of precedent limits the "judicial power" delegated to the courts in Article III. No less an authority than Justice (Professor) Joseph Story is in accord. See his *Commentaries on the Constitution of the United States* §§ 377-78 (1833):

The case is not alone considered as decided and settled; but the principles of the decision are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence. Our ancestors brought it with them,

when they first emigrated to this country; and it is, and always has been considered, as the great security of our rights, our liberties, and our property. It is on this account, that our law is justly deemed certain, and founded in permanent principles, and not dependent upon the caprice or will of judges. A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.

This known course of proceeding, this settled habit of thinking, this conclusive effect of judicial adjudications, was in the full view of the framers of the constitution. It was required, and enforced in every state in the Union; and a departure from it would have been justly deemed an approach to tyranny and arbitrary power, to the exercise of mere discretion, and to the abandonment of all the just checks upon judicial authority.

III.

Before concluding, we wish to indicate what this case is not about. It is not about whether opinions should be published, whether that means printed in a book or available in some other accessible form to the public in general. Courts may decide, for one reason or another, that some of their cases are not important enough to take up pages in a printed report. Such decisions may be eminently practical and defensible, but in our view they have nothing to do with the authoritative effect of any court decision. The question presented here is not whether opinions ought to be published, but whether they ought to have precedential effect, whether published or not. We point out, in addition, that “unpublished” in this context has never meant “secret.” So far as we are aware, every opinion and every order of any court in this country, at least of any appellate court, is available to the public. You may have to walk into a clerk’s office and pay a per-page fee, but you can get the opinion if you want it. Indeed, most appellate courts now make their opinions, whether labeled

“published” or not, available to anyone on line. This is true of our Court.

Another point about the practicalities of the matter needs to be made. It is often said among judges that the volume of appeals is so high that it is simply unrealistic to ascribe precedential value to every decision. We do not have time to do a decent enough job, the argument runs, when put in plain language, to justify treating every opinion as a precedent. If this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only. The remedy, instead, is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price must still be paid. At bottom, rules like our Rule 28A(i) assert that courts have the following power: to choose for themselves, from among all the cases they decide, those that they will follow in the future, and those that they need not. Indeed, some forms of the non-publication rule even forbid citation. Those courts are saying to the bar: “We may have decided this question the opposite way yesterday, but this does not bind us today, and, what’s more, you cannot even tell us what we did yesterday.” As we have tried to explain in this opinion, such a statement exceeds the judicial power, which is based on reason, not fiat.

Finally, lest we be misunderstood, we stress that we are not here creating some rigid doctrine of eternal adherence to precedents. Cases can be overruled. Sometimes they should be. On our Court, this function can be performed by the en banc Court, but not by a single panel. If the reasoning of a case is exposed as faulty, or if other exigent circumstances justify it, precedents can be changed. When this occurs, however, there is a burden of justification. The precedent from which we are departing should be stated, and our reasons for rejecting it should be made convincingly clear. In this way, the law grows and changes, but it does so incrementally, in response to the dictates of reason, and not because judges have simply changed their minds.

IV.

For these reasons, we must reject Ms. Anastasoff’s argument that, under 8th Cir. R. 28A(i), we may ignore our prior decision in *Christie*. Federal courts, in adopting rules, are not free to extend the judicial power of the United States described in Article III of the Constitution. *Willy v. Coastal Corp.*, 503 U.S. 131, 135, 117 L. Ed. 2d 280, 112 S. Ct. 1076 (1992). The judicial power of the United States is limited by the doctrine of precedent. Rule 28A(i) allows courts to ignore this limit. If we mark an opinion as unpublished, Rule 28A(i) provides that is not precedent. Though prior decisions may be well-considered and directly on point, Rule 28A(i) allows us to depart from the law set out in such prior decisions without any reason to differentiate the cases. This discretion is completely inconsistent with the doctrine of precedent; even in constitutional cases, courts “have always required a departure from precedent to be supported by some ‘special justification.’” *United States v. International Business Machines Corp.*, 517 U.S. 843, 856 (1996), quoting *Payne v. Tennessee*, 501 U.S. 808, 842, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991) (Souter, J., concurring). Rule 28A(i) expands the judicial power beyond the limits set by Article III by allowing us complete discretion to determine which judicial decisions will bind us and which will not. Insofar as it limits the precedential effect of our prior decisions, the Rule is therefore unconstitutional.

Ms. Anastasoff’s interpretation of § 7502 was directly addressed and rejected in *Christie*. Eighth Cir. R. 28A(i) does not free us from our obligation to follow that decision. Accordingly, we affirm the judgment of the District Court.

HEANEY, Circuit Judge, concurring.

I agree fully with Judge Arnold’s opinion. He has done the public, the court, and the bar a great service by writing so fully and cogently on the precedential effect of unpublished opinions. I write separately only to state that in my view, this is a case which should be heard en banc in order to reconsider our holding in *Christie*, and thus resolve an important issue.



The Resource Page



NEW BOOKS

NEIL FEIGENSON, *LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS*. American Psychological Association, 2000 (\$49.95). 301 pp.

Quinnepac College law professor Neil Feigenson attempts to explain how juries actually go about making their decisions. Feigenson summarizes current research from social and cognitive psychology to show the background factors that may influence a juror's decision-making process. In addition to the background research, he offers varied case examples of civil juries doing their work. He argues that jurors use their common sense, along with the facts of the case and the law they are given, to arrive at what he calls "total justice." In his view, juries will attempt to consider all of the evidence they deem relevant, even if consideration of it is precluded by legal rules, to reach a decision that they view as correct as a whole, even if they may reach it by blurring some of the legal distinctions provided to them in their instructions.

M. LEE GOFF, *A FLY FOR THE PROSECUTION: HOW INSECT EVIDENCE HELPS SOLVE CRIMES*. Harvard Univ. Press, 2000 (\$22.95). 244 pp.

Book titles are supposed to be intriguing enough to catch one's attention and to get the reader to want to know more about a subject. This one worked for us. M. Lee Goff is a professor of entomology at the University of Hawaii at Manoa and a consultant to the Honolulu medical examiner. To him, each body at a crime scene is its own ecosystem, with a microenvironment inhabited by various flies, beetles, mites, spiders, and other creatures. Using actual cases on which he has consulted, Goff shows how the knowledge of these insects and their habits can allow a forensic entomologist to

provide key evidence about crimes. Merging murder stories and science, this one looks of interest, even if we may never have an entomology expert witness in our own courts.

THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, FOURTH EDITION. Houghton Mifflin, 2000 (\$60). 2050 pp.

For those contract and statutory interpretation cases that hinge on the meaning of a particular word, you want to have at least one, good dictionary on hand. The new fourth edition of the *American Heritage Dictionary* is a good choice either for your chambers or for your home. This new edition has 10,000 words and definitions that were not included in the last edition, published in 1992. In addition, this dictionary relies on a usage panel of 200 writers and scholars—including U.S. Supreme Court Justice Antonin Scalia from the judiciary—so that its entries provide both actual and proper usage guidance. New entries such as dot-com, e-commerce, and soccer mom keep this dictionary up-to-date with current usage.



WORTH NOTING

Juvenile Justice

Criminal Justice, the journal of the ABA's Criminal Justice Section, published a special issue on juvenile justice in its Spring 2000 issue. The issue included seven articles, including "What of the Future? Envisioning an Effective Juvenile Court" by Judge Arthur Burnett, Sr. Other articles examine the behind-the-scenes realities of juvenile detention facilities; whether a separate juvenile justice system is still feasible; the trend toward lowering the age at which juveniles may be treated as adults; and alternatives to punitive sentencing. Copies of the Spring 2000 issue can be obtained for \$10 plus \$2 for postage and handling from the ABA Service Center, 750 N. Lake Shore Drive, Chicago, IL 60611-4497.

Public Trust & Confidence

The National Action Plan on Public Trust and Confidence has gone "final." Prepared by a team as a follow-up to the May 1999 national conference, it provides a plan for building trust and confidence in the state courts. While the plan focuses primarily on what state and national organizations can do to promote public trust and confidence in the courts, it provides a useful overview of public trust and confidence issues, along with various steps that can be taken to improve trust and confidence in the courts. The national action plan can be found at <http://www.ncsc.dni.us/PTC/NAP/index.html>. *Court Review* published a special issue on public trust and confidence, based on the May 1999 national conference, in its Fall 1999 issue. The contents of that issue can be found at <http://aja.ncsc.dni.us/courtrv/review.html>.

Trial Court Performance Standards

Background resources on the Trial Court Performance Standards, including a detailed implementation manual with forms, are now available on the Web. The Trial Court Performance Standards can be an important resource for self-evaluation and self-improvement for any court or court system. They cover 22 performance standards in the areas of access to justice; expedition and timeliness; equality, fairness, and integrity; independence and accountability; and public trust and confidence. If something is an important mission of the courts, it's covered in these standards. Background materials on the standards are found at http://ncsc.dni.us/RESEARCH/tcps_web/. An introduction to the Trial Court Performance Standards can be found in Pam Casey's Winter 1998 article in *Court Review*. That article can be found at <http://aja.ncsc.dni.us/courtrv/review.html>.

FOCUS ON UNPUBLISHED OPINIONS

The Resource Page highlights a recent court decision of interest regarding the precedential effect of unpublished court opinions beginning at page 37.