

# Court Review

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THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

## T A B L E O F C O N T E N T S

### ESSAYS

- 4** Chief Justice John Marshall:  
Soldier of the Revolution

*Stephen J. McEwen, Jr.*

- 6** Coming to a Court Near You:  
An Unlicensed Immigrant Driver

*Mary A. Celeste*

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### ARTICLES

- 10** Courting Justice with the Heart:  
Emotional Intelligence in the Courtroom

*Nancy Perry Lubiani and Patricia H. Murrell*

- 18** Robes and Rehabilitation:  
How Judges Can Help Offenders "Make Good"

*David B. Wexler*

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### DEPARTMENTS

- 2** Editor's Note
- 3** President's Column
- 31** Letters
- 32** The Resource Page

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## EDITOR'S NOTE

**R**eactions to the lead article in this issue may vary greatly. Some will find its conclusions surprising, while others will simply find new labels for concepts they already understand. Nancy Perry Lubiani and Patricia H. Murrell apply the concepts of emotional intelligence to judges, including suggestive evidence that judges who are rated best in bar association surveys are the ones who score highest in emotional intelligence. Another article follows up on our Spring 2000 special issue on therapeutic jurisprudence: David Wexler returns with some specific thoughts on how judges can promote offender rehabilitation.

We continue our examination of ethical rules governing judicial speech about pending or impending cases, which began in our Summer 2000 and Winter 2001 issues. In this issue we reprint the portions of the appellate opinion in *U.S. v. Microsoft* dealing with the trial judge's comments to reporters. In a future issue, Professor William G. Ross, whose article on judicial speech was cited by the *Microsoft* court, will provide overall guidance for judges on dealing with both the ethical rules and the media.

The issue includes two essays. Denver judge Mary A. Celeste discusses the problem of unlicensed, illegal immigrant drivers. Pennsylvania appellate judge Stephen J. McEwen, a past contributor to our pages, returns with some thoughts about the war record of Chief Justice John Marshall.

I want to close with a few comments about the work-in-progress that is *Court Review*. This is the 13th issue that we've put out since I became the editor. It has been a great learning experience for me, and I hope that you've found the issues of interest as well. I have received some helpful suggestions recently from some of our Canadian members, and we certainly appreciate suggestions about what would be of interest to you. The Canadian members rightly note that articles focused purely on facets of the United States legal system are only of limited interest to them. It's a difficult problem—even though we've had nice growth in our Canadian membership, it still represents less than 4% of total membership in the American Judges Association.

We have attempted to meet the interests of our Canadian readers, along with the rest of our readers, in a variety of ways. We have increased coverage of psychology and law topics, which cut across national boundaries and affect judges at all levels. We have also increased coverage of judicial ethics, having included something on judicial ethics in three of the past four issues. We welcome your input about topics you would like to see addressed here or authors you'd like us to invite to write something for the judicial audience. If you have thoughts about those subjects or other comments on *Court Review*, please contact me at [sleben@ix.netcom.com](mailto:sleben@ix.netcom.com). I hope to hear from you—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 31. *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](mailto:sleben@ix.netcom.com). Comments and suggestions for the publication, not intended for publication, also are welcome.

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# President's Column

Chris Williams

This is a very exciting time for the American Judges Association.

I recently attended the annual meeting of the Conference of State Court Administrators (COSCA) and the Conference of Chief Justices (CCJ) in Seattle, Washington. At that meeting there was a great concern and desire on the part of all the national associations connected to the National Center for State Courts to work more closely with each other on projects that would be of joint concern to all associations.

To further this objective, COSCA's Policy and Liaison Committee appointed Dr. Hugh Collins of Louisiana as liaison to the AJA. It is my hope that we continue this connection with other associations and that we continue our liaison, through our president and president-elect, not only to CCJ and COSCA, but also to the State Justice Institute, the National Association of State Judicial Educators (NASJE), the National Association for Court Management (NACM), the National Conference of Court Public Information Officers, the National College of Probate Judges, the National Conference of Metropolitan Courts, the National Court Reporters Association, the National Association of Drug Court Professionals, and the National College of Juvenile and Family Court Judges. A closer relationship with these associations would be of great benefit to us.

We are now in the process, after approval by the Board of Governors, of strengthening these relationships by having joint meetings with other associations. It is my honor to announce to you that we are planning a joint meeting between AJA, NACM, and NASJE at the year 2004 AJA Midyear Meeting in Savannah, Georgia. We anticipate that NASJE will be putting on an educational program for AJA and NACM at this conference. We will be looking for some education programs involving issues of the courts and judicial-branch education through NASJE.

The National Center for State Courts is very excited about this joint session, with the hope that in the future AJA and NACM will evolve into closely interacting groups, along with NASJE, much as the relationship between CCJ and COSCA has developed over the years. I am very supportive of this proposi-

tion and hope that our association will follow and attempt to strengthen our involvement with other members of the national judicial community.

I believe our mission in these liaisons should be to provide more of a national forum to assist state court judges in the development of a more just, effective, and efficient system of justice. We can do that by identifying issues and developing policy standards relating to the administration of the judicial system and relating to the future education of judges through the mainstream of core curriculum and not through the basis of information that is beneficial for us to get reelected. We need to get back to the core subjects, like evidence, civil procedure, criminal procedure, and procedure of courts.

It is my hope that in this network of exchange of information from different associations, we will transfer ideas and methods of improving state courts. This will take a lot of cooperation, consultation, and exchange of information among our organizations to assist us in perfecting judicial branch education and to improve judicial understanding concerning the court system. I hope that we will be

more involved in implementation of national issues in the future by our association with other judicial groups.

Good relationships with these groups must be maintained in order for us to be inclusive and more dynamic in the national scene. This will be a great opportunity for us to improve our judicial education and at the same time to expand our national presence. In addition, I hope that in our expansion of our association we are able to encourage membership with both Canadian and Mexican judges. I will be attending a meeting with the provincial trial judges in Canada in September. From that meeting, I hope that we are able to secure more membership in the association and to encourage more Canadian judges to be involved in AJA.

I'm excited about our future. I hope that you will work hard with me in trying to improve and expand our national appearance and image as the only independent association of judges at all levels. I have enjoyed being your president and I will continue to work after my term to ensure that AJA stays in the forefront in the national scene.



# Chief Justice John Marshall: Soldier of the Revolution

Stephen J. McEwen, Jr.

**H**ope for the future is an intrinsic part of the reflection that has accompanied the beginning of a new century. Quite surely, our hope for the future relies upon a trust that Providence will provide individuals of strength and character and integrity and wisdom to lead us in this new century and new millennium, just as such individuals were present to found and then shape our United States of America. As a result, thoughts at this time inescapably move to that time and to those individuals—and, for me, to a particular man, John Marshall.

George Washington will forever be remembered as the father of our country. Thomas Jefferson will live through the ages as the designer and author of our Declaration of Independence. More than a few colonial patriots could be nominated to complete a trinity of our founders, but surely the unanimous choice of those who have embraced the profession of the law must be John Marshall, the patriot so aptly designated by acclaimed author Jean Edward Smith as “the definer of a nation.”

Every American school child since 1776 has learned of the historic role played by the Liberty Bell in the founding of our country. Every school child since 1835 has been told that the crack in the Liberty Bell appeared as that historic symbol of freedom tolled the death of Chief Justice John Marshall—and, thereby, the adjournment of his 35-year term as the fourth Chief Justice of the United States, a tenure of historical proportion in itself, for it spanned the terms of five presidents: Thomas Jefferson, James Madison, James Monroe, John Quincy Adams, and Andrew Jackson.

John Marshall was an individual of many gifts, versatility, character, and accomplishment. A superb advocate, he served his country as an American Commissioner in Paris, Congressman, Secretary of War, and Secretary of State. Thus, the life of John Marshall goes

beyond epochal, while the legend of Chief Justice John Marshall is ageless. All of which has obscured *John Marshall the Soldier*.

By the time that a full decade of British oppression had escalated to the April 1775 battles at Lexington and Concord, and had inspired the bold, stirring declamation of Patrick Henry to “Give me liberty, or give me death,” John Marshall was already second in command of training and drilling a militia company of Virginia’s Fauquier County. Marshall had learned the rudiments of military drill from his father, Thomas Marshall, who was himself a versatile and powerful man, and the partner of George Washington in the surveys of Virginia and Kentucky.

That military training in the spring of 1775 would serve John Marshall in the next few months and over the next several years as he became a combat soldier in such fierce battles of the Revolutionary War as:

## **THE BATTLE AT GREAT BRIDGE, 1775:**

John Marshall first engaged in combat against the British grenadiers at Great Bridge, in the summer of 1775, as a first lieutenant in the Fauquier Rifles of the Culpeper Minutemen battalion. The Culpeper Minutemen badly defeated the British, after several days of a battle later described as a second Bunker Hill. When the smoke had cleared and the wounded were under care, the Americans, upon the initiative of Lieutenant John Marshall, buried the British grenadiers, with full military honors, so as to salute the dignity of brave men who had died in battle in the service of their country.

\* \* \*

## **NEW JERSEY/NEW YORK, 1777:**

Lieutenant John Marshall and his Fauquier unit of sharpshooters joined Washington’s Army in April 1777; they were dispatched through New York into the Hudson Valley, their mission to reflect the presence of a well-armed, mobile force and thereby serve as a feint to the

main British force, which was stationed in New York.

\* \* \*

## **BATTLE OF IRON HILL, COOCH’S BRIDGE, DELAWARE, 1777:**

The New York British command had targeted Philadelphia, the capital and largest city of the fledging Republic, and opted for the strategy of sailing south from New York to the Chesapeake and then marching northward to Philadelphia. Washington selected the area, along the Pennsylvania/Delaware border, as the battleground, and, with the counsel of the Marquis de Lafayette, dispatched a light infantry force of 600 marksmen to harass the British advance. Marshall was one of six lieutenants assigned to this corps, which so valiantly carried out its mission of swift movement and sudden strikes at the British perimeter that the enemy commander reported that half the Americans “had shot themselves out of ammunition and carried on the fight with sword and bayonet.” It was at this Battle of Iron Hill, a prelude skirmish of the Battle at Brandywine, that the Stars and Stripes was first flown in battle, the Congress having adopted it as the American flag on June 14, 1777, just days prior to the battle. How fitting that John Marshall, a great nationalist Chief Justice, enjoys the distinction of participating in the first battle in which our Stars and Stripes were unfurled.

\* \* \*

## **BATTLE OF THE BRANDYWINE RIVER, SEPTEMBER 11, 1777:**

When the British commenced to cross the Brandywine River in the dawn light of September 11, 1777, Marshall’s unit was assigned to delay and harass them at Kennett. The British and Hessian troops eventually swept the main American force from the field, except for one flare-up—the light infantry of Marshall’s unit, composing an ambush rear guard, held the grenadiers at bay until finally obliged to retreat under cover of darkness. The Continental Army of Washington was

defeated at the Battle of Brandywine, but the bravery of portions of the patriot force, including the Virginia regiments, enabled defeat without devastation.

\* \* \*

#### **GERMANTOWN, OCTOBER 1777:**

Washington, in an effort to dislodge the British from Philadelphia, attacked the main British camp on the outskirts of Philadelphia in Germantown. The most fierce skirmish of that battle occurred in the fields around the huge stone house of Tory Pennsylvania Chief Justice Benjamin Chew, a battle in which 53 Americans were killed and John Marshall suffered wounds.

\* \* \*

#### **VALLEY FORGE, WINTER 1777-1778:**

The capture of Philadelphia by the British forced Washington to move his winter quarters to Valley Forge where the absence of food and clothing and shoes, and the presence of small pox, typhus, dysentery, and scurvy, caused 3,000 American patriots to perish. John Marshall realized that, as a commander, he was obliged to set an example for his troops, and a splendid example he was, for he has been described as a man "idolized by his soldiers and brother officers, whose gloomy hours were enlivened by his inexhaustible fund of anecdotes." Some attribute his endurance to his excellence as a runner; he also was known as the only man in the Continental Army who could high jump over six feet.

\* \* \*

#### **MONMOUTH COUNTY, NEW JERSEY, SPRING 1778:**

The Virginia militiamen were sent to New Jersey to impede the British march to New York, and while a bloody battle, which Lafayette described as Washington's finest

hour, was fought in Monmouth County, New Jersey, Marshall and his men were not directly engaged because they were assigned to the flanks so as to prevent a British retreat to the west. It was during this battle that Marshall was promoted to the rank of captain.

\* \* \*

#### **STONY BROOK POINT, NEW YORK, SPRING 1779:**

The fortification sites afforded by the Hudson River had given great advantage to the British, but in the spring of 1779, Marshall and his regiment captured a most important Hudson River fortification, that of Stony Brook Point. Thereafter, Marshall's men served in the force of Light-Horse Harry Lee, which seized the British fortification of Paulus Hook, a short distance from the Continental Army camp at West Point.

\* \* \*

When the winter of 1779 arrived, Marshall was dispatched to Virginia to thwart a suspected British plan to invade the Carolinas. The invasion never came. Marshall remained in Virginia until his commission expired in February 1781; thus, the 1779 New Jersey battles were his final combat engagements. Some would assert, of course, that five years of war was quite enough.

Marshall never psychologically mustered out of the military. He relished the title of general that he subsequently earned in the Virginia militia; he peppered his conversation with military metaphors; and he unfailingly, while on the Supreme Court, went out of his way to assist former soldiers with whom he had fought, always quick to write lengthy letters in longhand to the Secretary of War attesting to the pension claims of veterans of the Virginia line.

The five years that he had spent at war and in bloody combat as a light infantry officer certainly toughened John Marshall, and while he was too modest to talk about his accomplishments, he so considered America as his country and Congress as his government that, in his words, "they constituted a part of my being."

The classic movie, *Saving Private Ryan*, recently stirred the American soul. As I viewed the film, I sensed that the suffering and horror and death experienced by the soldiers of the two armies, the Continental Army of George Washington and the GIs of General Dwight Eisenhower, were equally horrible and dreadful—just as the valor and bravery and courage exhibited by those GIs was a clear and certain reflection of the valor and bravery and courage displayed by Captain John Marshall and the light infantry minutemen of Fauquier County.



Judge Stephen J. McEwen, Jr., is President Judge of the Pennsylvania Superior Court, the intermediate appellate court in Pennsylvania. He has served on that court since 1981 and as its presiding judge from 1996 through 2001. A graduate of St. Joseph's College (A.B.), the University of Pennsylvania Law School (LL.B.), and the University of Virginia Law School Graduate Program for Judges (LL.M.), Judge McEwen was a trial lawyer, professor of trial advocacy at Villanova University Law School, twice elected District Attorney of Delaware County, and General Counsel for the Pennsylvania District Attorneys Association.

## **AMERICAN JUDGES ASSOCIATION Future Conferences**

### **2001 ANNUAL MEETING**

September 30-October 5

**Reno, Nevada** - Silver Legacy Resort  
(\$89.00 single or double)

### **2002 MIDYEAR MEETING**

April 18-20

**Biloxi, Mississippi**  
Beau Rivage Resort & Casino  
(\$119.00 single or double)

### **2002 ANNUAL MEETING**

September 8-13

**Mauai, Hawaii** - The Westin Maui  
(\$155.00 single or double –  
golf/mountain view;

\$169.00 single or double – ocean view)

### **2003 MIDYEAR MEETING**

**Billings, Montana**

(Dates and hotel to be determined)

### **2003 ANNUAL CONFERENCE**

**Montreal, Quebec**

(Dates and hotel to be determined)

# Coming to a Court Near You: An Unlicensed Immigrant Driver

Mary A. Celeste

There are currently as many as 13 million illegal immigrants in the United States;<sup>1</sup> 5 million are illegal Mexican immigrants, with 46,000 living in my home state of Colorado.<sup>2</sup> There is a push by the Mexican government at both the state and federal levels to change the legal status of those immigrants. President Vicente Fox of Mexico recently added the issue of permitting undocumented migrants to apply for a driver's license to his agenda for a meeting with governors from the United States.<sup>3</sup> On the federal level, President Bush is now weighing plans to grant legal residency to Mexican illegal immigrants in the United States, including a "guest worker" program.<sup>4</sup>

There are an abundant number of violations issued to illegal and legal immigrants for driving without a valid driver's license. At first blush, the problem seems to stem from the fact that Social Security cards are a precursor for a driver's license. Although legal immigrants are eligible for a Social Security card, it typically takes several years to obtain one because of the complex Immigration and Naturalization Service process required to get it.<sup>5</sup> Moreover, illegal immigrants may not be eligible for one at all. Some states have specifically excluded illegal immigrants from obtaining one.<sup>6</sup> Although the Social Security card requirement has never been

aimed at preventing illegal or legal immigrants from obtaining a driver's license, it became an end result. The problem began to present itself about six years ago when Congress decided that Social Security numbers should be used to track people whose child support payments were in arrears.<sup>7</sup> Perhaps the intention was for child support enforcement through the attachment of federal tax refunds.<sup>8</sup>

These types of convictions create extraordinary consequences for immigrants and the judicial system. For example, in order to purchase auto insurance in Colorado, one must supply the insurance company with a valid driver's license; therefore, many times a violation for having no valid license is accompanied with a violation for having no valid auto insurance. This scenario has both an economic impact and an incongruous legal result. For example, if an accident is involved and the immigrant driver is at fault, the victim may be left without insurance reimbursement. Further, within a short period of time, an immigrant may accumulate enough points to have a license suspended for excessive points.<sup>9</sup> This point accrual may continue until such time that the driving "privilege" is revoked even though there is no license to revoke. Nonetheless, the driving may continue and the immigrant

may pay higher and higher fines, ultimately facing potential incarceration. To ask why immigrants drive without a valid license and, in some cases, continue to drive even after several convictions, is begging the question. The primary reason people immigrate to the United States is to improve their economic condition. The way to accomplish that is through employment, and the automobile is almost a necessity for travel to and from that employment.

The driver's license issue for immigrants is not peculiar to Colorado. Recently, there has been political, social, and legal activity related to it in the states of Arizona, Georgia, Illinois, Minnesota, Tennessee, and Utah, each of which has taken differing positions. Illinois elected to enforce its existing driving laws. The Illinois Secretary of State ordered 80 suspected illegal immigrants to take a new driver's license exam. To do so, they had to show valid Social Security cards or other identification documents. Of the 25 who showed up, 15 people were arrested on document fraud charges. The remaining 55 were suspected of being illegal and the state canceled their licenses.<sup>10</sup> In Tennessee, the legislature passed a bill eliminating the need for a Social Security card as the only means of securing a state driver's license.<sup>11</sup> The expanded identifi-

## Footnotes

1. "FAIR Calls on Governor Sundquist to Veto Illegal Alien Driver's License Bill," *U.S. Newswire*, April 27, 2001.
2. Bruce Finley, "Mexican President Heads to U.S.," *DENVER POST*, July 11, 2001, at 1A.
3. *Id.*
4. Eric Schmitt, "Residency Sought for Illegals," *DENVER POST*, July 15, 2001. Chances of success for such a proposal are reportedly uncertain: "There is stiff opposition from anti-immigrant groups and influential Republicans in Congress." *Id.*
5. Monica Whitaker, "Driver's License Law Easing for Aliens; Legislators Put Motorists' Safety over Legal Status of Immigrants," *THE TENNESSEAN*, April 24, 2001.
6. See, e.g., Ga. Code Ann. § 40-5-1(15).
7. See Whitaker, *supra* note 5.

8. Child support enforcement is also sought at the state level with the use of Social Security information. In Colorado, for example, if a person is in arrears in child support, their privilege to drive may be revoked under Colo. Rev. Stat. section 42-2-138.
9. In Colorado, for example, three points are assessed for the first offense of driving without a valid license; six points are assessed for a second violation within two years. Colo. Rev. Stat. § 42-2-101. An additional four points are assessed for the no-insurance violation. *Id.* § 42-2-1409. Thus, it is very conceivable that a person convicted of those offenses could easily accumulate 12 points in one year or 18 points in two years, the levels at which licenses in place are suspended and obtaining one becomes impossible. See *id.* § 42-2-127.
10. James R. Edwards, "The Downside of Easy Driver's Licenses," *COMMERCIAL APPEAL* (Memphis, Tenn.), May 18, 2001.
11. 2001 Tenn. Pub. Acts 158, Sen. Bill 1266 (passed May 3, 2001).

cation options in Tennessee now include Immigration and Naturalization Service documents, resident alien cards, and military papers issued by a foreign country.<sup>12</sup> At a recent rally in Minnesota, illegal immigrants argued that the Minnesota Department of Public Safety should make it easier for them to obtain a driver's license.<sup>13</sup> In response to the rally, the head of the Department of Public Safety said that "state law enforcement agencies cannot institute policies that contradict federal law."<sup>14</sup> In Arizona, there have been two attempts to pass legislation that would eliminate the legal residency requirement for driver's license applicants,<sup>15</sup> while Utah has in fact already adopted this type of law.<sup>16</sup>

Some argue that permitting immigrants to obtain a driver's license is prompted by public safety concerns: a valid license would make the immigrants safer drivers; they would become familiar with driving regulations; and they could obtain the proper auto insurance.<sup>17</sup> Additionally it may circumvent the manufacturing of fraudulent documents. For example, the United States Immigration and Naturalization Service broke up a fake ID ring, finding 4,000 blank Social Security cards and other false documents, including green cards.<sup>18</sup> These measures may effect the elimination of false documents, which may in turn reduce the exploitation of immigrants. In contrast, others have argued that there is no correlation between a valid driver's license and safe driving,<sup>19</sup> that relaxed licensing rules would encourage and facilitate illegal immigration; and that it might make it easier to create false identities, thereby making the driver's license an inauthentic form of identification.<sup>20</sup>

This issue has also crept into case law.

Last year, an illegal immigrant who was charged with driving under the influence argued that the Georgia driving statute defining "resident" excluded illegal immigrants; therefore, he argued, he was not required to seek a valid license and was not subject to the driving laws.<sup>21</sup> The Georgia Court of Appeals rejected the argument, finding that "the intention of the General Assembly was not to exempt undocumented aliens from the requirement of obtaining a Georgia driver's license but to permit visitors, with no intention of becoming residents, to drive here without obtaining a Georgia license."<sup>22</sup> The court went on to say that "[t]o interpret the statutes otherwise would create an absurdity: Citizens and documented aliens would be required to obtain valid Georgia licenses after living in this state for 30 days, while undocumented aliens would be permitted to drive forever without a valid Georgia license."<sup>23</sup> In another case, illegal immigrants sought to have a class action certified against the Georgia State Department of Public Safety and its director, alleging that enforcement of state statutes prohibiting the issuance of driver's licenses to illegal immigrants was unconstitutional, based on equal protection and right-to-travel claims.<sup>24</sup> In June 2001, a federal court found that the illegal immigrants were not a suspect class requiring strict scrutiny and dismissed the complaint.<sup>25</sup> The court noted *Edwards v. California*,<sup>26</sup> the Supreme Court case establishing travel as a fundamental right, but held that, under *Edwards*, "the right to travel is derived from federal citizenship."<sup>27</sup> The court also noted that there were legitimate state interests furthered by the statute, including "not allowing its governmental machinery to be a facilitator for the concealment of illegal aliens" and limiting its services to citizens and legal residents.<sup>28</sup>

tor for the concealment of illegal aliens" and limiting its services to citizens and legal residents.<sup>28</sup>

To avoid a continued eruption of the issue, the motor vehicle or public safety departments in each state could adopt a policy similar to Illinois and "crack down" on illegal immigrants who drive without a valid license. But if the federal Immigration and Naturalization Service is not an effective deterrent to illegal immigration, would a state motor vehicle department serve as an effective deterrent to illegal driving?. Attorneys and the judiciary could urge state legislators to enact legislation similar to that recently enacted in Tennessee, expanding identification beyond Social Security cards; however, if the immigrant does not have a complying form of identification, as mandated by the statute, those immigrants remain in the same position. Each state could just let undocumented immigrants apply for driver's licenses, as they do in Utah. Judges could take under consideration the extraordinary circumstances of the immigrant defendant and simply render lenient sentences. There may be other creative state solutions as well.

State solutions, however, would only serve as a band-aid to a much broader underlying cause: the immigration law itself. Although it is somewhat beyond the scope of this essay, a cursory overview of this law seems important. With some exception, there are five requirements for naturalization: the English language requirement, the civics requirement, ideological qualifications, an oath renouncing allegiance to the country of origin, and a residency and good moral character requirement.<sup>29</sup> Denials of applications for citizenship began to soar during early 1999,<sup>30</sup> and one-third were attributable

12. Whitaker, *supra* note 5.

13. Charlie Weaver, "Why Not Grant Driver's Licenses to Illegal Aliens," STAR TRIBUNE (Minneapolis, Minn.), May 8, 2001.

14. *Id.*

15. Daniel Gonzales, "Change Sought for Arizona Drivers," ARIZ. REPUBLIC, February 11, 2001.

16. Finley, *supra* note 2.

17. See U.S. Newswire, *supra* note 1.

18. Edwards, *supra* note 10.

19. See U.S. Newswire, *supra* note 1.

20. Weaver, *supra* note 13.

21. *Diaz v. State*, 537 S.E.2d 784, 787 (Ga. 2000).

22. *Id.* at 788.

23. *Id.*

24. *John Doe No. 1 v. Georgia Dept. of Public Safety*, 2001 U.S. Dist. LEXIS 7385 (N.D. Ga. June 6, 2001).

25. *Id.* at \*6-\*19.

26. 314 U.S. 160 (1941).

27. 2001 U.S. Dist. LEXIS at \*12.

28. *Id.* at \*17.

29. See 8 U.S.C. §§ 1423, 1427, 1443, 1445, 1448; see generally Peter J. Spiro, "Questioning Barriers to Naturalization," 13 GEO. IMMIGRATION L.J. 479 (1999).

30. Patrick J. McDonnell, *INS Denial of Citizenship Climbs Sharply*, L.A. TIMES, June 14, 1999, at A1 (reporting a 251% increase in citizenship denials during the first six months of the 1998-99 fiscal year).

to a failure of the English language or civics test.<sup>31</sup>

Many scholarly reviews have been published, both pro and con, questioning the immigration laws.<sup>32</sup> Those advocating lowering or eliminating the requirements argue that the “requirements are ineffective and/or unnecessary to maintaining the integrity of the national community and its political foundations” and that “such ineffective or unnecessary barriers cannot be sustained where they compromise the rights of individuals.”<sup>33</sup> It has been said that these requirements are equivalent to being an “American moving to Japan, learning to speak the language as well as read and write kanji script, and reciting facts about the shogunate, the Maiji restoration, and Admiral Togo.”<sup>34</sup> Those who seek to reinforce or expand the requirements argue that those requirements prevent the fragmentation of the American polity.<sup>35</sup>

While it is difficult to speculate as to the number of illegal and legal immigrants who are operating motor vehicles across the country, it is fair to say that, due to their immigration status, many of those immigrants are operating a motor vehicle without a valid driver’s license. This issue presents cascading economic, social, political, and legal effects. Traffic

convictions for these offenses create both an economic impact and an incongruous legal result, at least in Colorado, and at most throughout the country. State public safety departments may enforce their laws on immigrants who drive without a valid license; state courts may continue to address the driver’s license issue in a piecemeal fashion; state legislatures may pass bills expanding identification requirements for a driver’s license; and the judiciary may render lenient sentences. These remedies, however, are only the tip of the iceberg.

As we view the underlying layers, we are left with a reflection of the existing immigration laws and their overarching impact on immigrants as well as the political and judicial system. While state legislators, courts, and agencies are positioned to address the driver’s license issue, they do not have any power with regard to the immigration laws themselves. Other writers have aptly summarized the basic situation: “As with all matters relating to immigration, the courts have exercised almost no oversight of naturalization policies.”<sup>36</sup> “Naturalization is a privilege, to be given or withheld on such conditions as Congress sees fit.”<sup>37</sup> “So long as federal policy classifies persons as illegal aliens they will be viewed as such by the state.”<sup>38</sup>

Thus, this seemingly negligible issue is ultimately in the hands of the federal government: hands that change with the tides of politics.



Judge Mary A. Celeste currently sits in the traffic division for the City and County of Denver. She is an honor graduate of San Diego State University and California Western School of

Law, where she was the editor-in-chief of the law journal and the recipient of several awards and scholarships. While practicing law, she was a member of the Colorado Bar Association Board of Governors, the Career Service Authority, the Personnel Board for the City and County of Denver, the Denver Bar Association’s Conciliation Panel, and the Board of Directors of the Colorado Women’s Bar Association, for which she was cochair of the 2000 convention. She has published several articles and is an adjunct professor of law at the University of Denver College of Law. Celeste has received the Paul Hunter Award for Human Rights and the American Association of University Women’s Trailblazer Award.

31. U.S. DEP’T OF JUSTICE, IMMIGRATION & NATURALIZATION SERV. & PRICE WATERHOUSE, LLP, A BLUEPRINT FOR THE NEW NATURALIZATION PROCESS: NATURALIZATION INTERVIEW OUTCOME SURVEY II at 8 (Aug. 21, 1998 draft). In 1997, naturalization applications numbered 1.6 million, a 600% increase over the 1990 level. *Id.* See also CONG. RES. SERV., NATURALIZATION TRENDS, ISSUES, AND LEGISLATION 2 (1998).

32. See Joseph Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POLITICS 251 (1987); JOHN J. MILLER, THE UNMAKING OF AMERICANS: HOW MULTICULTURALISM HAS UNDERMINED THE ASSIMILATION ETHIC 147-73 (1998); ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY (rev. ed. 1998).

33. Spiro, *supra* note 29, at 517.

34. Miller, *supra* note 32, at 150.

35. See, e.g., GEORGIE ANNE GEYER, AMERICANS NO MORE 137-89 (1996).

36. Spiro, *supra* note 29, at 481.

37. *Schneiderman v. United States*, 320 U.S. 118, 131 (1941) Cf. *Miller v. Albright*, 523 U.S. 420, 459 (1998)(Ginsburg, J., dissenting) and *id.* at 471 (Breyer, J., dissenting)(three justices in dissent found that equal protection clause would invalidate more restrictive citizenship admission standard for child of U.S. father and alien mother than for child of U.S. mother and alien father).

38. Weaver, *supra* note 13.



# Courting Justice with the Heart: Emotional Intelligence in the Courtroom

Nancy Perry Lubiani and Patricia H. Murrell

Recently, in a courtroom in Tennessee, a defendant was convicted of a DUI assault after a tragic accident that took the life of a young woman—at least life as she knew it before the accident. Evidence presented by the prosecution did not include a blood alcohol test, a Breathalyzer test, a field sobriety test, or any witnesses at the scene testifying that the defendant appeared to be under the influence of alcohol, although testimony from eyewitnesses did suggest that earlier in the evening the defendant did appear to be intoxicated. The lawyer for the prosecution simply brought the victim of the accident into the courtroom.

The 31-year-old wife, mother, and nurse was rolled before judge and jury in her wheelchair. As a result of the accident, she could no longer speak, stand, or sit up. She stayed in the courtroom one minute and fourteen seconds.<sup>1</sup> The jury deliberated 3 hours and 25 minutes before convicting the defendant. He was later sentenced to 12 years of a possible 25-year sentence.<sup>2</sup> The defense had argued, unsuccessfully, for a directed verdict, asking that the “sympathy factor” be removed from the courtroom. In this case, the lawyer clearly recognized and identified the primary emotion working on decision makers and the effect it would likely have on his case. Feelings are not always so easily identified and named, but whether or not we are cognizant of emotions, they impact almost every encounter and every decision we face.

Robert Levy, a psychiatrist and anthropologist, reported that in Tahiti “there is no concept or word for sadness in the culture. The signs—loss of appetite, sad expressions, inactivity—were present, but they ‘could not name the feeling.’ The symptoms were considered to be due to a sickness. This is a powerful demonstration of how cultural differences influence emotional experience.”<sup>3</sup>

American culture certainly has a word for sadness. In fact, we have several words, depression, dejection, sorrow, melancholy, despondency, and even a few colloquial phrases: “the blues,” “down in the dumps.” Sadness is probably one of the mildest emotions that judges see in their courtroom. On any given day they might also see anger, frustration, fear, impatience, apathy, boredom, awe, respect, intimidation, perhaps even some of the more welcome emotions, such as happiness, relief, or even joy, and that is just when the judge is on the bench. The list could go on and on. Other aspects of judicial work open up areas where emotions play a part as well. In fact, any activity that draws on a personal perspective or requires one to relate to others will draw on emotional experience.

Judges’ awareness of these emotions, both their own and other people’s, can influence how well they manage themselves, the people before them, and the judicial process. It may even contribute to what sets a judge apart in the eyes of his or her constituency as a well-qualified judge, what builds public trust and confidence and respect for him or her as a leader in the community. This awareness and regulation of emotion is foundational to a set of leadership qualities most recently defined as emotional intelligence.

## JUDGES AS LEADERS

Leadership characteristics are universally valued, whether in the boardroom, the courtroom, or the community at large. Often now, the judge is, in all of these positions, sometimes perceived to be the member of a team rather than a commanding presence from the bench issuing edicts. According to Judge Paul Lipscomb, presiding judge of the Marion County courts in Oregon, “Judges are taking a more active leadership role in the community, intervening to form coalitions and partnerships, mediating disputes, gathering allies and drawing people together.” In this scenario, collaboration is vital, community presence significant, and the ability to draw upon leadership qualities critical to a judge’s professional success.

Leadership development itself, starting out as what may have seemed to be the hot new topic for management training, has embedded itself firmly in our professional consciousness. So what exactly is leadership? And how does it present itself to us in a recognizable form?

The skills we value in leaders are related as much to who a person is as to what a person does. Leadership is a way of being as much as it is a way of doing. A person has acquired more than just a new set of skills, but has developed in ways that have transformed who they are, and this comes out in what they do, particularly how they relate to other people.

At the Leadership Institute in Judicial Education, housed at the University of Memphis and funded by the State Justice Institute, leadership is defined as “the capacity to discern and develop one’s resources, whether human or material. It further involves the ability to marshal those resources in realizing a vision, reaching a goal, or resolving a problem. It starts with who we are and then moves to what we do.” The idea of people as our most important resource has become almost a cliché, but we all know that relationships with others are critical to our success at work. How we handle those relationships, how we “marshal” the resources of the people we come into contact

## Footnotes

1. William C. Bayme, *Jury Sees Life Ruined in Crash/Disabled Nurse Appears as Testimony Ends*, COMMERCIAL APPEAL (Memphis, Tenn.), April 13, 2000 at A1.
2. William C. Bayme, *Ex-Policeman Convicted of DUI-Assault in Crash Disabling Nurse*, COMMERCIAL APPEAL (Memphis, Tenn.), April 14, 2000 at A1.
3. CHARLES DARWIN, *THE EXPRESSION OF THE EMOTIONS IN MAN AND ANIMALS* 392-93 (Paul Ekman ed. 3rd ed. 1998).

with can set apart a good leader from an excellent one.

In fact, some of the latest research in leadership indicates that the skills that set apart the good from the best are the result of a different kind of mental activity, a function of the affective, rather than the cognitive, the emotional rather than the reasoning capabilities. This research does not negate the necessity of reasoning capabilities but serves instead to elevate the connection that emotion has to the function of reasoning.

Grade points, technical skills, and intellectual abilities have long been considered traditional thresholds for success. What we are learning, however, is that the higher the position of a person in an organization, technical skills become relatively less important.<sup>4</sup> Better effectiveness is determined by a set of competencies; once again, what we are referring to as *emotional intelligence*.

So what is emotional intelligence, how does it apply to the court, and how do we determine our own competency and skill in this critical area of leadership?

### CONNECTING EMOTIONS WITH INTELLIGENCE

Cognition, or reasoning and judgment, is typically the kind of mental activity associated with the word *intelligence*. Howard Gardner, author of *Frames of Mind*, says that we must be careful to use the word intelligence as a means of labeling a phenomenon that may (but may well not) exist. To treat the concept of intelligence as a tangible, measurable quality is to give it more significance than it can hold. Ultimately, all intelligences (Gardner identifies seven in his book) must be viewed in the light of culture, how they provide us with opportunities to live well with and for the good of our society and ourselves. "The possession of an intelligence is best thought of as a potential," the difference between "knowing-that" and "knowing-how."<sup>5</sup>

John D. (Jack) Mayer, a researcher who, in partnership with Peter Salovey, provided the first formal definition and experimental measure of emotional intelligence, outlines the extremes of the different definitions of emotions. He explains that a biology-oriented researcher will define emotions as electrochemical reactions, while psychologists will define emotions as a conscious experience. He seems to suggest that emotions connect thought, feeling, and action: "Most people who study emotions are somewhere in between and they view emotions as a coordinated response system, so that an emotion occurs when there are certain biological, certain experiential, certain cognitive states which all occur simultaneously."<sup>6</sup> Mayer and Salovey define emotional intelligence as "the ability to perceive emotions, to access and generate emotions so as to assist thought, to understand emotions and emotional knowledge, and to reflectively regulate emotions so

as to promote emotional and intellectual growth . . . combining the idea that emotion makes thinking more intelligent and that one thinks intelligently about emotions."<sup>7</sup>

The Latin term for emotions, *motus anima*, means literally "the spirit that moves us," so we can say that emotion is the movement of our feelings.<sup>8</sup> Emotional intelligence, based on Salovey and Mayer's work, can be described as knowing we are moved by our feelings and understanding the impact on ourselves and others. Almost everyone hits a performance plateau eventually; the difference for the few that do not seems to be their emotional intelligence.

In their book, *Executive EQ: Emotional Intelligence in Leadership and Organizations*, Robert K. Cooper and Ayman Sawaf define emotional intelligence as "the ability to sense, understand, and effectively apply the power and acumen of emotions as a source of human energy, information, connection, and influence."<sup>9</sup> They argue that "reasoning has its power and value only in the context of emotion. No matter what the product, idea, service, or cause, we buy—or buy in—based on feelings; and then, if possible, we rationalize or justify our choices with numbers and facts. No one talks about the rationale of a passionate relationship or hobby, or brags about a reasonable marriage or logical vacation, or requires a statistical analysis of deeply felt human longings and dreams."<sup>10</sup>

Daniel Goleman, in his book *Working with Emotional Intelligence*, defines emotional intelligence as two distinct competencies: the personal competencies of self-awareness, self-regulation, and motivation, and the social competencies of empathy and social skills.<sup>11</sup> Some of Goleman's research has been highlighted in the *Harvard Business Review*. Analyzing leadership competency models from 188 companies in order to identify the distinguishing leadership characteristics in the organizations, performance proficiencies were collated into the categories of technical skill, IQ, or emotional intelligence. When these three factors were calculated in ratios as the components of excellent performance, emotional intelligence was twice as important as the others for jobs *at all levels*. Finally, by the time a person reached a senior leadership position, 90% of the difference in star performer versus average performer was due to a proficiency in emotional intelligence capabilities.<sup>12</sup>

**What we are learning . . . is that the higher the position of a person in an organization, technical skills become relatively less important.**

4. Daniel Goleman, *What Makes a Leader*, HARV. BUS. REV., Dec. 1998, at 94.  
5. HAROLD GARDNER, *FRAMES OF MIND* 68-69 (1985).  
6. EQ TODAY, Spring 1999, at 3.  
7. John D. Mayer & Peter Salovey, *What Is Emotional Intelligence?*, in EMOTIONAL DEVELOPMENT AND EMOTIONAL INTELLIGENCE: EDUCATIONAL IMPLICATIONS 3-31 (Peter Salovey & David J. Sluyter eds., 1997).

8. ROBERT COOPER & AYMAN SAWAF, *EXECUTIVE EQ: EMOTIONAL INTELLIGENCE IN LEADERSHIP AND ORGANIZATIONS* xiii (1998).  
9. *Id.*  
10. *Id.* at xxxi.  
11. DANIEL GOLEMAN, *WORKING WITH EMOTIONAL INTELLIGENCE* 24 (1998).  
12. Daniel Goleman, *What Makes a Leader*, HARV. BUS. REV., December 1998, at 94.

**Technical skills are a threshold to leadership positions; the qualities of emotional intelligence are what make a leader exceptional.**

## **EMOTIONAL INTELLIGENCE AND THE COURTS**

So, what the recent gurus of emotional intelligence tell us is that those who are skilled in connecting what they know and how they feel, and who can translate that connection into more productive behavior, will be more effective at work. But wait. The courtroom, we say, is different from the rest of the working world. A judge must be autonomous and independent in order to

receive and retain public trust and confidence. In no circumstance should a personal bias, emotional or otherwise, influence a decision or a ruling, or even the procedural management of the court. How, then, can understanding or implementing emotional intelligence skills be relevant to a judge? Goleman's theories about star performers holds its weight just as well in the court system.

Judges, lawyers, and other court professionals may take the courtroom for granted, while those who do not have daily interaction with the court may be a little in awe of the system. Someone looking down from on high, physically or figuratively, rendering a judgment on one's life, has the capacity to either set one at ease, to intimidate one, or to manipulate the situation in many different ways. If courts are to retain the respect and honor that they deserve—and that is necessary to maintain their position as moderators of society—then a mantle of judicial demeanor, temperament and fairness is important.

## **JUDICIAL PERFORMANCE EVALUATION**

All over the country, bar associations and other professional organizations in the legal community administer surveys and evaluations on the performance of judges. Usually the qualities fall into the broad general categories of legal knowledge, ability and/or experience, work ethic, integrity, fairness, and demeanor (sometimes called judicial temperament). These surveys are then published broadly among the judges' constituents in an effort to assist voters in deciding who are the best candidates and how to vote. The results of two such surveys will be analyzed here for the importance of qualities related to emotional intelligence. First, though, an analysis will be provided for a survey that polled voters in an effort to find out what they would like to know about judicial candidates, and how they use the information they do have in an election.

Founded in 1874, the 22,000-member Chicago Bar Association is the largest metropolitan bar association in the country. Their published purpose and objective is to establish and maintain the honor and dignity of the profession.<sup>13</sup> In

1998, the Chicago Bar contracted with an outside firm to administer a random survey of voters. One question asked was about which qualities were most important in selecting judges. Demeanor, described as fairness, lack of bias and behavior toward others in the courtroom, was extremely important among 65% to 70% of the surveyed voters. Legal experience was the second most important characteristic in selecting a judge: courtroom experience was extremely important to 55%, and time practicing law was extremely important to 41% of the respondents. A significant number of the voters polled (42% to 46%) ranked opinions on social issues, such as the death penalty, business and/or labor issues, abortion or gay rights, as extremely important. (Of course, these are the kinds of issues on which judges are prohibited from expressing their opinions, and these topics tend to be more likely to evoke passionate responses on either side. Consequently, how judges manage their own emotional responses as well as the responses of others—be it the prosecution, the defense, the jury, the media, or the public—is especially important.)

Political experience or party affiliation ranked fairly low as an issue extremely important to voters (20%), and grades in law school were at the bottom of the list at 18%. This survey indicates that for those characteristics considered extremely important to voters, there is a range of at least 15 points and up to 30 points verifying the importance of behavioral qualities. What we are calling emotional intelligence is more important than technical skills and experience, and just as important, if not more so, than a judges' record on decisions regarding social issues.<sup>14</sup>

Most voters in the survey responded that their primary source of information regarding judges was media coverage (28%). Regarding recommendations, 21% said they paid attention to newspaper endorsements and 20% relied on ratings by lawyers' associations, which are a common practice in many states.

One such organized effort is organized by the Chicago Council of Lawyers, which has a 200-member committee that spends thousands of volunteer hours evaluating judicial candidates. The Chicago Council collaborated in a joint process with the Alliance of Bar Associations and reported these findings on judicial candidates in a recent primary.<sup>15</sup> Their criteria can be divided into the two categories that Goleman used in his research: technical skills (legal knowledge, ability, and professional experience) and qualities of emotional intelligence (judicial temperament, diligence, sensitivity to diversity and bias, integrity, respect for the rule of law, political and institutional independence, character and professional conduct.) Of 88 judges evaluated, 23 were classified as *not recommended* based on lack of participation; the remaining 65 chose to participate in the process by submitting information in support of their candidacy.

A look at the narratives of the 65 participating judges in the

13. CHICAGO BAR ASS'N, THE JUDICIAL VOTERS SURVEY (Feb. 10, 2000).

14. All of the figures cited here are from the Chicago Bar's report of the survey data, *see supra* note 12.

15. CHICAGO COUNCIL OF LAWYERS, REPORT ON JUDICIAL CANDIDATES IN THE MARCH 21, 2000 PRIMARY (report initially posted on the

Chicago Council's website, but no longer available there). All of the data from the Chicago Council's discussed in this article came from their report on candidates in the March 21, 2000 primary election.

committee report supports Goleman's theory that technical skills are a threshold to leadership positions; the qualities of emotional intelligence are what make a leader exceptional. Those judges up for election who were considered *not qualified* were lacking technical skills twice as often (14 out of 24) as they lacked interpersonal skills (7 out of 24); in two cases, the narrative indicated a lack in both areas. If judges lacked sufficient legal ability or courtroom experience, they were automatically considered *not qualified*, and if they met the requirements for such technical skills but had not demonstrated qualities indicating emotional intelligence, then they were also considered *not qualified*.

A lack of emotional intelligence did not make up for lack in technical skills, although in at least one instance a judge's interpersonal competency and commitment overcame an apparent lack in the grasp of some legal issues. Of the 24 judges classified *qualified*, the narrative recommending all but 3 indicated proficiency in both technical skills, such as legal ability and experience in the courtroom, as well as skills demonstrating emotional intelligence, such as judicial temperament, demeanor, bias, etc. The two narratives that only mentioned legal abilities and experience were for judges who had supervisory experience, indicating some adeptness in interpersonal relationships. As stated previously, one judge's narrative indicated some problems grasping legal issues, but the overwhelmingly positive response to his work ethic, integrity, and service to the community allowed the review committee to consider him *qualified*.

The greatest correlation with Goleman's theory comes when the evaluations of the judges ranked *well qualified* (13, or 20% of those rated) and *highly qualified* (4, or 3% of those rated) are reviewed. All judges in these categories did exhibit superior legal ability, considerable experience in the courtroom, and had excellent reputations for their interpersonal relationships and personal presentation. However, one more quality of emotional intelligence that seemed to set them over the top in qualification was their extra effort in promoting the judiciary outside of the courtroom, sometimes even outside of the legal community. This extra effort, or motivation, is a weighty component of emotional intelligence. Often, this effort plays out in generative acts, such as teaching, writing articles, and organizing efforts of community involvement. These judges were also cited for providing creative solutions, such as mediation, and for participating in professional associations or community activities. In addition, they had a broad range of experience, which might indicate a degree of risk taking.

Another survey, on a smaller scale, conducted by the Northern San Diego County Bar Association reflects interest in the same kinds of traits and characteristics regarding judges.<sup>16</sup> The rankings of *exceptionally well qualified*, *well qualified*, *qualified*, and *not qualified* were assigned by lawyers asked to rank judges on intellectual and legal knowledge, industriousness and diligence, temperament and demeanor, and fairness and lack of bias. There was a significant trend in how affective behaviors influenced the perceptions of whether or not a judge was qual-

ified for his job. Of the judges whose composite ratings were *qualified* or *well-qualified*, knowledge and experience were, at best, almost equal in importance to an understanding and a competence level of more affective behaviors. More significantly, of the votes that measured a judge to be on the extreme, either *exceptionally well qualified* or *not qualified* at all, proficiencies in emotional intelligence—or lack of the same—were the defining factor.

The message is that judges can perform adequately or even well in their work, but to be exceptional, to reach a level of excellence, they must have something besides a basic skill knowledge. They must demonstrate a way of relating to others that allows their performance to be noticed beyond the technical ability to carry out their day-to-day responsibilities. This is a double-edged sword: their lack of diligence, fairness, or judicial temperament may overshadow whatever skills and experience they possess. Technical abilities will not serve them well if they do not also know how to relate to other people, particularly in such an emotion-laden situation as the courtroom.

#### EQ MAP®

If we have established that competency in managing emotions, both our own and others, is important, then how do we determine if we are operating at our full potential, and, if not, how do we augment our performance in that area? We may or may not have been fortunate enough in our life experiences to have been taught these more developed and desirable ways of relating to ourselves and to other people; the good news about emotional intelligence is that it can be learned. Chances are we can look back over the experiences we have had, and with reflection, see where we have performed with wisdom and maturity, or see the challenges we face.

Once we have decided to evaluate ourselves, we may need a guide. Robert Cooper, along with Esther Orioli and others, has developed an instrument, EQ Map, to help us in that way. The EQ Map is challenging, and at the same time supportive, in helping us to evaluate personally and privately both our competencies and our areas of potential growth. EQ Map is more qualitative than quantitative; the scale of performance is a range of optimal, proficient, vulnerable, and caution, and the categories explored are current environment, awareness, competencies, values, and attitudes and outcomes. The EQ Map examines several categories of proficiency in emotional intelligence:

*Current Environment.* First, EQ Map has us take a look at our current environment, our life pressures, and our life satisfactions. Life pressures are the stresses and strains in every area of our life that

**Technical abilities will not serve [judges] well if they do not also know how to relate to other people, particularly in such an emotion-laden situation as the courtroom.**

16. These survey results are available at <http://www.sddt.com/law/survey/evalsupnorth.html>.

**Daniel Goleman has been emphatic in asserting that emotional intelligence can be learned, and further, that it can be increased across the life span.**

we experience as con-  
straining, difficult, or  
draining. Life satisfac-  
tions are those relation-  
ships or circumstances  
that we experience as  
pleasurable and fulfill-  
ing.

*Dimensions of Aware-  
ness.* Another category  
of review is awareness.  
Self-awareness is the  
degree to which we are  
able to notice our feel-  
ings, label them, and

connect to their source. Awareness of others is  
being able to sense what they may be feeling from  
their body language, their words, or other direct or  
indirect cues. Expression encompasses both self-  
awareness and awareness of others, and explores  
the ability to speak, using this new information in  
productive ways.

*Competencies for Growth and Development.* Our  
competencies in emotional intelligence explore fun-  
damental skills and behavior patterns we have  
developed over time to respond to the people,  
events, and circumstances of our life. They include  
our ability to act with purpose, or intention, our  
creativity, and an ability to be flexible or our  
resilience. Other competencies involve interper-  
sonal connections or those people with whom we  
can express caring and appreciation; vulnerabilities  
and hopes; and finally constructive discontent, or  
our ability to stay calm and emotionally grounded  
even in the face of disagreement or conflict.

*Values and Attitudes.* The personal principles that  
frame our lives and guide our actions are our system  
of values and beliefs. Our belief about how to inter-  
pret life events is our outlook: is the glass half-  
empty or half-full? Compassion, or empathy, is  
about valuing another person's feelings and point of  
view, and being forgiving of yourself and others.  
Intuition is the degree to which we trust and use  
hunches, our "gut feelings." The degree to which  
we believe and expect other people will be trust-  
worthy, or our inclination to trust until we have  
specific reason not to, is our trust radius. A calm  
conviction about who we are and our ability to get  
the things we want and need in life indicates a level  
of personal power. Finally, our level of self-integra-  
tion is the degree to which our intellectual, emo-  
tional, spiritual, and creative selves fit together to  
support our personal values.

*Outcomes.* Finally, the EQ Map measures the out-

come, or the impact, that emotional intelligence is  
having on our life, our general health, quality of life,  
and the quality and depth of our interpersonal con-  
nections with others.<sup>17</sup>

EQ Map is one instrument that can give us an indication of  
the strengths and challenges we have in the area of emotional  
intelligence; there are many others. These devices can be very  
helpful as they help us discern where we are and give us indi-  
cations of what to strive for in terms of improvement.

## **JUDICIAL BRANCH EDUCATION**

What can judicial branch education offer regarding EQ and  
court leadership? Daniel Goleman has been emphatic in assert-  
ing that emotional intelligence can be learned, and further, that  
it can be increased across the life span. That's the good news  
for providers of education in the court system. The perplexing  
question is, "How do we do it?"

David Kolb's experiential learning model offers a framework  
that can be useful in developing the kinds of affective out-  
comes that are identified with emotional intelligence. Kolb  
suggests that learning is a cyclical process involving concrete  
experience, reflective observation, abstract conceptualization,  
and active experimentation. The concrete experience and  
reflective observation modes seem especially useful as a way to  
recognize, acknowledge, and name feelings or emotions, and  
to question the appropriateness of those emotions. Three  
examples of judicial education programs will illustrate this  
process.

At the Leadership Institute in Judicial Education, partici-  
pants visit the National Civil Rights Museum that commemo-  
rates the 1968 sanitation workers' strike in Memphis and the  
life of Dr. Martin Luther King, Jr. The museum is designed to  
be participatory. There is the opportunity to sit on a  
Montgomery, Alabama, city bus and hear the driver demand  
that you move to the back of the bus. There is a lunch counter  
with stools on which one can perch and observe a film of the  
degradation and insults that African American customers  
received. Finally, there is the room in which Dr. King was stay-  
ing, the balcony on which he was shot, and the view of the  
boarding house window from which the fatal bullet was fired.  
Mahalia Jackson sings, "Take My Hand, Precious Lord."

The group will vary considerably in their experience of the  
civil rights movement, due to their ages and geographic ori-  
gins. Some will have participated; others will hardly know of  
its existence. Members of the group proceed through the  
museum at their own pace—sometimes in small groups, some-  
times individually, sometimes conversing quietly and solemnly  
at displays and, more often, reading or listening silently as  
haunting events are portrayed and memories are jogged. Most  
leave the museum to eat a meal with a colleague or friend,  
some gather in small groups for conversation, and many retreat  
to their rooms to contemplate the experience and its signifi-  
cance in their lives and in the court system.

The following morning presents a time to leave that privacy

17. ROBERT COOPER & Q-METRICS, EQ MAP® INTERPRETATION GUIDE  
(1997).

and reflect publicly in an attempt to arrive at some shared meaning about the events of the Civil Rights Movement, the implications of those events, the lessons we have learned, the state of race relations in our country, and the level of trust and confidence in our system of justice in the United States. The chairs are drawn in a tight circle with no tables to serve as barriers between participants. As people enter the room the mood is subdued—a contrast to the usual light banter.

The experiential learning model is used as a guide for the discussion. The leader requests simply that people talk about what stood out for them as they moved through the museum. One exhibit has meaning for one person; another exhibit strikes a chord for another. Participants rarely stop with the description of a display; they usually move on to share the feelings and emotions that are evoked by the event portrayed. The tone is respectful: this group has been together for four days, and they have engaged in many activities that demanded introspection and reflections on their lives. They have reached a level of comfort with each other that is remarkable given the fact that most of them knew no one outside their own state or organization's team when they arrived. Some struggle with words to name and describe their feelings, evidence of the lack of experience in doing this. The dialogue continues as other participants identify what was learned and bring the problem of racial inequities into the present. Finally, changes that need to be made in the way we deal with each other are encouraged in order to plan strategies and develop action plans for sensitizing the court system to issues of diversity in our society.

Another group learning experience that is very powerful in increasing emotional intelligence has been used in Maryland. A judge was given the task of teaching a course to other judges on the procedures for committing an individual to an elder care facility. First, she visited such a facility and discussed her upcoming program with the director. At his suggestion, she read a book, *The Notebook*, by Nicholas Sparks, a slender novel that deals with the aging process and the onset of Alzheimer's disease in a patient. She decided to invite all of her participants to read the book prior to the class, and to hold the class at the facility to give the judges a firsthand experience.

Both the reading of the book and the visit to the facility evoke emotions. Bringing those emotions into the discussion along with a presentation of the procedural guidelines and the legal issues involved provided a much richer learning experience than the simple presentation of cognitive content could have done. The potential for developing self-awareness, empathy, and the appropriate expression of emotions moved the experience from an informative learning opportunity toward a more transformative one.

The final example comes from a training session conducted by the Center for Effective Public Policy through a State Justice Institute-funded project to promote collaboration in the criminal justice system. On the afternoon of the second day of a conference for three drug court teams, the agenda indicated a plenary session entitled "Introduction to Experiential Learning Exercise." The teams were stunned by the appearance of a "guest lecturer" in the person of Benjamin Franklin! He was appropriately attired and presented the countenance and demeanor that one would expect from Franklin. Without intro-

duction, he began to talk about his role in the founding of our nation and the degree of collaboration that was required to write the constitution and other documents. He told of discussions and disagreements with John Adams, George Washington, and Thomas Jefferson, and how each one of them eventually had to give up something in order to achieve their goal of a new country.

At the conclusion of his talk, each team was given metro passes, a map of the national Mall in Washington, and disposable cameras. Their assignment was to keep the team together, negotiate the Metro system, choose what spots on the Mall they would visit that demonstrated collaborative efforts or heralded individuals who had been instrumental in those efforts, choose a place to eat dinner together, and return to the hotel.

The following morning a facilitator led the group in an exercise asking them to describe their experiences. Without prompting, many participants mentioned their emotional response to various parts of the exercise: intimidation by the newness of the Metro system, frustration in deciding what sites to visit—even where to eat! There was also recalling of emotions regarding places like the Lincoln Memorial, the Vietnam Memorial, the Supreme Court building, and the photography exhibits at a Smithsonian building. The group was amazingly open in naming and discussing their emotional reactions. Bringing the discussion back to the principles of collaboration that govern the operation of drug courts today, the group moved on to discuss ways the experience could influence their work.

While the examples discussed above all involved formal judicial education in a group, emotional intelligence can also be developed by a single individual in a self-directed and informal learning situation using the experiential learning model. Lucille was present in a small group of individuals working on a project that involved an institution's response to racial inequality. The multiracial group chose to open the meeting by having each person introduce himself or herself and by telling about his or her interest in this program. Lucille, in describing her experience, used the phrase, "those people" in reference to African-Americans who had first integrated her school. While there was no reaction from anyone in the group, Lucille was uncomfortable with her choice of words. A couple of days later, she mentioned it to two members of the group and expressed her humiliation and her disappointment with herself. This self-awareness and ability to reflect on her remark indicated a high level of emotional intelligence. Her willingness to share her feelings about herself with others as she tried to perceive how her words might have been received, and to get feedback from her colleagues, enabled her to project and plan what she would say and how she would present herself if a similar situation arose again. This process of reflection and

**Emotional intelligence can also be developed by a single individual in a self-directed and informal learning situation using the experiential learning model.**

introspection is essential if one is to increase competence in emotional intelligence and present oneself with authenticity and integrity.

Judicial branch education can provide a vehicle through which emotional literacy can be developed. It can give judges and other court personnel an opportunity to “name the feeling” in order to be more conscious of our affect and what drives our decisions and our behaviors. Connecting what we know and what we feel, we believe, will result in right action.

## CONCLUSION

Sartre said, “Hell is other people.” It would probably be best for judges to stay away from the bench on days when they agree with him! They can’t always do that, though, so learning how to identify that feeling and manage it productively is important. “The research suggests that a technically proficient executive or professional with a high EQ is someone who picks up—more readily, more deftly, and more quickly than others—the budding conflicts that need resolution, the team and organizational vulnerabilities that need addressing, the gaps to be leaped or filled, the hidden connections that spell opportunity, and the murky, mysterious interactions that seem most likely to prove golden—and profitable.”<sup>18</sup>

In our society, the court system is quickly becoming a formative institution, performing functions previously relegated to home, family, religious institutions, and schools. Even the healing community is making its way into the court system with the advent of drug courts and other forms of therapeutic jurisprudence. A judge’s leadership skills are critical in managing the changes in the system, the integrated relationships

that develop as well as the impact on their own work. Those most successful will lead with their head *and* their heart.

In Tahiti, there may not be a word for sadness. Nevertheless, the emotion is there with all the attendant signs and behaviors. What is missing is a language, a word that describes the feeling causing the behavior associated with sadness. This kind of literacy is important to develop here regarding emotional intelligence, an awareness and a language for communicating the connection between our cognitive brain and our affective brain, our mind and our heart, and the result that kind of learning can have on our work and our lives.



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18. COOPER & SAWAF, *supra* note 8, at xi.



# Robes and Rehabilitation: How Judges Can Help Offenders “Make Good”

David B. Wexler

Just over a year ago, *Court Review* devoted a special issue to the topic of therapeutic jurisprudence (often called, simply, TJ).<sup>1</sup> Judge William Schma, a leading judicial voice in therapeutic jurisprudence, introduced the issue in an essay titled “Judging for the New Millennium.”<sup>2</sup>

Judge Schma noted that “it is important for judges to practice TJ because—like it or not—the law does have therapeutic and anti-therapeutic consequences.”<sup>3</sup> In other words, judges are increasingly recognizing that the choice is indeed either to be part of the solution or, instead, to in essence be part of the problem—of “revolving door” justice and the like.

In fact, in August 2000, the Conference of Chief Justices and the Conference of State Court Administrators, in a joint resolution, endorsed the notion of problem-solving courts and calendars that utilize the principles of therapeutic jurisprudence.<sup>4</sup> The resolution noted that well-functioning drug treatment courts<sup>5</sup> represent the best practice of these principles. Regarding therapeutic jurisprudence specifically, the resolution states:

There are principles and methods founded in therapeutic jurisprudence, including integration of treatment services with judicial case processing, ongoing judicial intervention, close monitoring of and immediate response to behavior, multi-disciplinary involvement, and collaboration with community

based and government organizations. These principles and methods are now being employed in these newly arising courts and calendars, and they advance the application of [other policy initiatives, such as] the trial court performance standards and the public trust and confidence initiative.<sup>6</sup>

Problem-solving courts—such as drug treatment courts, mental health courts,<sup>7</sup> and domestic violence courts<sup>8</sup>—may be the most obvious examples of “therapeutic jurisprudence in action,”<sup>9</sup> but it is crucial to recognize the potential application of therapeutic jurisprudence *generally*—in civil cases,<sup>10</sup> appellate cases,<sup>11</sup> family law cases,<sup>12</sup> and, of course, in criminal<sup>13</sup> and juvenile<sup>14</sup> cases. The importance of the therapeutic jurisprudence perspective beyond the specialized problem-solving court context was underscored by a “vision statement” recently agreed to by the District Court for Clark County, Washington.<sup>15</sup>

## CRIMINAL LAW CONTEXT

In the criminal law context, the challenge for therapeutic jurisprudence is multifaceted, and includes a concern not only for defendants, but also for others drawn into the process, such as victims<sup>16</sup> and jurors.<sup>17</sup> The remainder of this essay, however, will focus on defendants and on the opportunity for courts to contribute to offender rehabilitation and reform.

## Footnotes

1. COURT REVIEW, Spring 2000.
2. William Schma, *Judging for the New Millennium*, COURT REVIEW, Spring 2000 at 4.
3. *Id.*
4. CCJ Resolution 22 and COSCA Resolution 4, adopted August 3, 2000. The text of the resolution may be found at [www.problem-solvingcourts.com/resolutions.html](http://www.problem-solvingcourts.com/resolutions.html).
5. The leading article is Peggy Fulton Hora, William G. Schma, & John T.A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439 (1999). The article is available online under the heading “publications” in Judge Hora's website ([www.judgehora.com](http://www.judgehora.com)).
6. See note 4, *supra*.
7. LeRoy L. Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 24 SEATTLE U. L. REV. 373 (2000).
8. Randal B. Fritzler & Leonore M. J. Simon, *The Development of a Specialized Domestic Violence Court in Vancouver, Washington, Utilizing Innovative Judicial Paradigms*, 69 UMKC L. REV. 139 (2000).
9. Arthur J. Lurigio, et al, *Therapeutic Jurisprudence in Action: Specialized Courts for the Mentally Ill*, 84 JUDICATURE 184 (2001).
10. Steve Leben, *Thoughts on Some Potential Appellate and Trial Court Applications of Therapeutic Jurisprudence*, 24 SEATTLE U. L. REV. 467 (2000).
11. Shirley S. Abrahamson, *The Appeal of Therapeutic Jurisprudence*, 24 SEATTLE U. L. REV. 228 (2000); Gerald W. VandeWalle, *A Sea Change in the Appellate Process?*, 24 SEATTLE U. L. REV. 567 (2000); David B. Wexler, *Therapeutic Jurisprudence in the Appellate Arena*, 24 SEATTLE U. L. REV. 217 (2000).
12. Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 71 (1998).
13. David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, 35 Wm. & Mary L. Rev. 279 (1993), reprinted in LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 157 (David B. Wexler & Bruce J. Winick eds., 1996) (hereinafter cited as KEY).
14. David B. Wexler, *Just Some Juvenile Thinking About Delinquent Behavior: A Therapeutic Jurisprudence Approach to Relapse Prevention Planning and Youth Advisory Juries*, 69 UMKC L. REV. 93 (2000).
15. District Court of the State of Washington for Clark County, Division of District Court, approved May 18, 2001. Judge Randal B. Fritzler, a leading judicial voice in therapeutic jurisprudence, is a judge in that judicial district.
16. Richard P. Wiebe, *The Mental Health Implications of Crime Victims Rights*, in KEY, *supra* note 13, at 213.
17. Daniel W. Shuman et al, *The Health Effects of Jury Service*, in KEY, *supra* note 13, at 949.

Of course, judicial opportunity will be enhanced—but is by no means dependent upon—the presence of a group of lawyers practicing therapeutic jurisprudence.<sup>18</sup> Such a bar is indeed emerging.<sup>19</sup>

Dallas lawyer John McShane, for example, has a substantial criminal law practice that “focuses solely on rehabilitation and mitigation of punishment.”<sup>20</sup> McShane is in private practice, and he can pick and choose his clients. He chooses only those who agree to use the crisis occasioned by the criminal case as an opportunity to turn their lives around.

McShane seeks to defer disposition so as to allow the client an opportunity for rehabilitation. The hope, of course, is that the court will be impressed by, and take into account, such post-offense rehabilitation efforts and gains.<sup>21</sup>

A packet of mitigating information is assembled and eventually submitted to the prosecutor in an effort at plea bargaining, or, failing that, to the court at sentencing. The packet consists of items such as “AA Meeting Attendance Logs, urinalysis lab reports, reports of evaluating and treating mental health professionals, and letters of support from various people in the community, such as AA sponsor, employer, co-workers, clergy, family, and friends.”<sup>22</sup>

This may be illustrative of the role of an excellent TJ defense attorney, but what about the role of the judge? Apart from the important legal niceties such as the possibility of deferred sentencing<sup>23</sup> and the possibility of mitigating the sentence for acceptance of responsibility<sup>24</sup> and for post-offense rehabilitation, what guidance can therapeutic jurisprudence give to judges interested in furthering offender rehabilitation?

Some of the most exciting therapeutic jurisprudence work involves the crafting of creative proposals for importing promising behavioral science developments—such as important research on rehabilitation—into the legal system and into the day-to-day work of lawyers and judges. Such work also offers an excellent opportunity for partnership between academia and the judiciary.

In other work, which I will only briefly summarize here, I have explored how judges might use some basic principles to increase offender compliance with conditions of release.<sup>25</sup> Relatedly, I have explored how courts could encourage defendants to engage in relapse prevention planning.<sup>26</sup>

## COMPLIANCE

The compliance project was inspired by a book titled *Facilitating Treatment Adherence: A Practitioner's Guidebook*.<sup>27</sup> The book itself has nothing to do with law; it is addressed to

healthcare professionals and deals with improving patient adherence to medical advice. But many of its principles seem readily transferable to a legal setting.

Some of the principles are completely common sense, such as speaking in simple terms. Patients sometimes may not comply with medical advice because they never really quite get the message.

Other principles are somewhat less obvious. For instance, when patients sign “behavioral contracts”—agreeing to follow certain medical protocols, for example—they are apparently more likely to comply with medical advice than if such a contract is not entered into. If patients make some sort of public commitment to comply, to persons above and beyond the health care provider, their compliance is likely to increase. Relatedly, if family members are aware of a patient's promise, the patient is again more likely to adhere to the agreed-upon conditions.

Consider how these compliance principles might operate in a legal context. If a judge is considering a petition for the conditional release of an insanity-acquitted offender, or if, at a sentencing hearing, a judge is deciding whether to grant probation, the court could conceptualize the conditional release not simply as a judicial order but as a type of behavioral contract.

In addition, the hearing can serve as a forum in which an insanity acquittee or criminal defendant can make a public commitment to comply. Compliance should also be enhanced by the presence at the hearing of agreed-upon family members. There is much more to this, of course, and the interested reader can consult the more detailed work.<sup>28</sup> Let us now turn to the related material on relapse prevention planning principles.

## RELAPSE PREVENTION

As with the compliance project, my interest in importing relapse prevention planning into the legal arena was triggered by a particular book, this time James McGuire's anthology titled *What Works: Reducing Reoffending*.<sup>29</sup> The gist of McGuire's book is that certain rehabilitation techniques, known as the “cognitive behavioral” variety, seem particularly promising.

These programs are premised on the fact that offenders often act rather impulsively. Accordingly, the programs are

**The hearing can serve as a forum in which an insanity acquittee or criminal defendant can make a public commitment to comply.**

18. PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (Dennis P. Stolle, David B. Wexler, & Bruce J. Winick, eds., 2000) (hereinafter cited as PRACTICING TJ).

19. Susan Daicoff, *The Role of Therapeutic Jurisprudence Within the Comprehensive Law Movement*, in PRACTICING TJ at 465.

20. JOHN V. MCSHANE, THE HOW AND WHY OF THERAPEUTIC JURISPRUDENCE IN CRIMINAL DEFENSE WORK (2000).

21. *United States v. Flowers*, 983 F. Supp. 159 (E.D.N.Y. 1997). See generally Bruce J. Winick, *Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model*, in PRACTICING TJ, *supra* note 18, at 245.

22. MCSHANE, *supra* note 20, at 2.

23. See note 21 *supra*.

24. *U.S. v. Jeter*, 263 F3d 1032 (2001).

25. David B. Wexler, *Health Care Compliance Principles and the Insanity Acquittee Conditional Release Process*, 27 CRIM. L. BULL. 18 (1991).

26. David B. Wexler, *Relapse Prevention Planning Principles for Criminal Law Practice*, in PRACTICING TJ, *supra* note 18, at 237.

27. DONALD MEICHENBAUM & DENNIS C. TURK, FACILITATING TREATMENT ADHERENCE: A PRACTITIONER'S GUIDEBOOK (1987).

28. See note 25 *supra*.

29. WHAT WORKS: REDUCING REOFFENDING (James McGuire ed., 1995).

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geared to teaching offenders certain problem-solving skills: to understand the chain of events that often leads to criminality, to anticipate high-risk situations, and to learn to stop and think so as to avoid high-risk situations or to adequately cope with such situations should they arise.

Once offenders develop such an understanding, they may prepare relapse

prevention plans. For example, "I realize that I am at highest risk for criminal behavior when I party with Joe on Friday nights. I will therefore stay home and rent a video on Friday nights."

An interesting therapeutic jurisprudence inquiry is to explore how courts can encourage this "cognitive/behavioral" rehabilitative effort as part of the legal process itself. My suggestion—again, developed more fully elsewhere<sup>30</sup>—is for the court to place some real responsibility on the defendant (with the assistance of counsel and others) to think through his or her situation and vulnerabilities.

Thus, a judge about to consider a defendant for probation might say, "I'm going to consider you but I want you to come up with a type of preliminary plan that we will use as a basis of discussion. I want you to figure out why I should grant you probation and why I should feel comfortable that you're going to succeed. In order for me to feel comfortable, I need to know what you regard to be high-risk situations and how you're going to avoid them or cope with them without messing up. And, speaking of messing up, I want you to tell me what happened that led you to mess up last time, and why you think the situation is different this time around."

Under such an approach, a court would be promoting cognitive self-change as part and parcel of the sentencing process itself. The process might operate this way: "I realize I mess up on Friday nights, and from now on I will stay home on Fridays."

Note that this condition is not the product of judicial fiat. Instead, the defendant has thought through a serious high-risk situation and has in essence come up with his or her own condition of probation. The offender is thus likely to regard the condition as fair and, linking back to our earlier discussion, is probably more likely to comply with it than if it had simply been externally imposed by the court.

According to the "what works" research, cognitive self-

change programs seem promising, but, of course, they do not work for everyone. If an offender is committed to continued offending, for example, even substantial exposure to a program of problem-solving skills is simply not going to lead to desistance.

On the other hand, if an offender has a self-concept of being a basically good person who often finds himself in a jam, or in the wrong place at the wrong time, or mixing with the wrong crowd, such a person may well decide he wants to straighten out and take control of his life. For such a person, a cognitive skills development program may well help change his course.

## DESISTANCE

Who decides to change course, and how and why, seem to be questions locked away in what Shadd Maruna calls the "black box"<sup>31</sup> of the "what works" literature. Maruna's book, *Making Good: How Ex-Convicts Reform and Rebuild Their Lives*,<sup>32</sup> published in 2001 by the American Psychological Association, is, like *Facilitating Treatment Adherence*<sup>33</sup> and *What Works*,<sup>34</sup> a meaty work chock full of therapeutic jurisprudential implications. In the remainder of this essay, I would like to explore how Maruna's findings might be relevant to judges—how, with these insights, judges might help offenders "make good."

Briefly, in his "Liverpool Desistance Study," Maruna interviewed both "persistent" offenders and those who, after a steady diet of criminal behavior, eventually become "desisters." His objective was to use a "narrative" approach—consistent with the notion of "narrative therapy"<sup>35</sup>—to see how the two offender types described and made sense of their lives.

Maruna's principal contribution, of course, relates to the "desisters." These ex-convicts need to develop a "coherent, prosocial identity,"<sup>36</sup> and need an explanation for "how their checkered past could have led to their new, reformed identities."<sup>37</sup> Presumably, these explanatory narratives are not merely a *result* of desistance behavior, but should also be understood as "factors that help to sustain desistance."<sup>38</sup>

Maruna notes that there is much drifting and zigzagging in and out of criminal activity.<sup>39</sup> Accordingly, desistance is best seen as a "maintenance process,"<sup>40</sup> rather than as a specific event.

Generally, a desister's narrative establishes that the narrator's "real self" is basically good; that the narrator became a victim of society who turned to crime and drugs to cope with a bleak environment; that the narrator then became trapped in a vicious cycle of repeated criminal activity and imprisonment; that someone in conventional society believed in and recognized the potential of the narrator, thereby allowing him or her to make good.<sup>41</sup>

But "reformation is not something that is visible or objective

30. See note 26 *supra*.

31. SHADD MARUNA, MAKING GOOD: HOW EX-INMATES REFORM AND REBUILD THEIR LIVES 111 (2001) (hereinafter cited as MAKING GOOD).

32. *Id.*

33. See note 27 *supra*.

34. See note 29 *supra*.

35. NARRATIVE THERAPY IN PRACTICE: THE ARCHAEOLOGY OF HOPE

(Gerald Monk, John Winslade, Kathy Crocket, and David Epstein eds., 1997).

36. MAKING GOOD, *supra* note 31, at 7.

37. *Id.* at 8.

38. *Id.* at 42 (emphasis supplied).

39. *Id.* at 44.

40. *Id.* at 26.

41. *Id.* at 87.

in the sense it can be 'proven.'<sup>42</sup> It is a construct that is interactional in nature: desisting persons must in some way accept conventional society and conventional society must in turn accept them.<sup>43</sup> Thus, their conversion "may remain suspect to significant others, and most importantly to themselves."<sup>44</sup>

Accordingly, the desisting interviewees in Maruna's study "seemed almost obsessed with establishing the authenticity of their reform."<sup>45</sup> During the interviews, many provided supporting documents—letters from college teachers and from parole officers, copies of offense records showing the date of last conviction. Others urged the investigator to speak with family members, girlfriends, or to the manager or receptionist of a drug treatment clinic.<sup>46</sup>

Not surprisingly, "while the testimony of any conventional other will do, the best certification of reform involves a public or official endorsement from media outlets, community leaders, and members of the social control establishment."<sup>47</sup> In his final chapter, Maruna undertakes an exercise that is essentially a therapeutic jurisprudential one: he speaks of instituting and institutionalizing redemption rituals. These include graduation ceremonies upon successful completion of correctional programs,<sup>48</sup> reentry courts "empowered not only to reimprison each felon but also to officially recognize their efforts toward reform,"<sup>49</sup> and "rebiographing" clean ex-offenders through officially recognized record expungement procedures.<sup>50</sup>

#### HOW COURTS CAN HELP

Two judicially related proposals mentioned by Maruna—graduation ceremonies and reentry courts—are matters of considerable current interest.

In drug treatment courts, for example, applause is common, and, in some courts, even judicial hugs are by no means a rare occurrence.<sup>51</sup> In Judge Judy Mitchell-Davis's Chicago courtroom, "upon successful completion of a drug court sentence, the offenders invite their friends and family to a graduation ceremony in the courthouse."<sup>52</sup> Some of the graduates make speeches, and all receive a "diploma" from the court.<sup>53</sup> In some such courts, "participants have asked that their arresting officer be present at their graduation."<sup>54</sup>

These lessons from drug treatment courts can be extended, of course, to other specialized treatment courts and to ordinary juvenile and criminal cases. Judicial praise, family and friend

attendance, and graduation ceremonies can all occur, for example, at the successful completion of—or early termination of—a period of probation imposed in a "routine" criminal case.

Such a ceremony would acknowledge a former offender's progress and, taking a page from Maruna, may, at the same time, itself contribute to the maintenance of desisting behavior. The strong suggestion that these ceremonies are themselves therapeutic, and are therefore not merely "ceremonial," might readily justify their widespread use. Relatedly, if they seem themselves to contribute to reduced recidivism, that crucially important societal benefit could easily justify their time-consuming nature.

Besides graduation ceremonies, Maruna endorses the notion of reentry courts "empowered not only to reimprison each felon but also to officially recognize their efforts toward reform."<sup>55</sup> The apparent success of drug treatment courts, based on a team approach and ongoing judge-defendant interaction, has led to proposals for importing the model to the prisoner reentry process.<sup>56</sup>

Reentry courts could tap many principles of therapeutic jurisprudence, and could serve a very important function. The problem, however, is that, at least in the United States, "in most jurisdictions, the authority for reentry issues is not within the judicial branch."<sup>57</sup>

Nonetheless, the function Maruna would like to see served—official recognition of efforts toward reform—can be performed by courts in at least some contexts. For example, unlike adult criminal courts, juvenile courts do typically retain a post-dispositional review authority, and such courts can in effect serve a major reentry function.<sup>58</sup>

The main lesson, of course, is that review hearings—for juveniles, for probationers, for conditionally released insanity acquittees—need not only be meaningful if one is to be "vio-

**Two judicially related proposals mentioned by Maruna—graduation ceremonies and reentry courts—are matters of considerable current interest.**

42. *Id.* at 158.

43. *Id.* at 155.

44. *Id.* at 158.

45. *Id.* at 156.

46. *Id.* at 157.

47. *Id.*

48. *Id.* at 162.

49. *Id.* at 164.

50. *Id.* at 164-65.

51. Adam W. Lasker, *Her Stock in Trade Is "Therapeutic Jurisprudence,"* CHICAGO DLY. L. BULL., June 13, 2001.

52. *Id.*

53. *Id.*

54. Deborah J. Chase & Peggy Fulton Hora, *The Implications of Therapeutic Jurisprudence for Judicial Satisfaction*, COURT REVIEW, Spring 2000 at 12.

55. MAKING GOOD, *supra* note 31, at 164.

56. OFFICE OF JUSTICE PROGRAMS, REENTRY COURTS: MANAGING THE TRANSITION FROM PRISON TO COMMUNITY (Sept. 1999).

57. *Id.* at 7. In Italy, judicial authority does exist, although that authority has typically been exercised in a very traditional, legalistic manner. American jurisprudence might profit from looking comparatively at legal structures that provide for ongoing judicial monitoring. Similarly, the Italian legal system, where the legal structure is in place, might profit from the American experience with therapeutic jurisprudence, specialized treatment courts, and the like. Such is the thrust of a recent article in an Italian criminology journal. S. Ciappi, D. Wexler, F. Agrait, & G.B. Traverso, *Therapeutic Jurisprudence. Alcune considerazioni su di una concezione postliberale del diritto e della pena*, 6 RASSEGNA ITALIANA DI CRIMINOLOGIA 1 (2001).

58. Wexler, *supra* note 14, at 97.

**The judge, of course, is the perfect prestigious person to confer public and official validation on . . . the offender's reform efforts.**

lated” and there is a real threat of revocation. Such hearings can and should also be meaningful—and not just routine and perfunctory—when all is going *well*. In many legal settings, courts have the discretion to set review hearings at intervals shorter than those mandated by law. Judges should consider taking such action even when they are not

especially worried about an offender's compliance, for such a hearing could indeed recognize and applaud an offender's efforts and itself contribute to the maintenance of desistance.

Recall that desistance is best thought of as a “maintenance process.”<sup>59</sup> And recall that desisters—especially at the early stages of desistance—desperately need outside validation to convince *themselves* of their conversion.

The judge, of course, is the perfect prestigious person to confer public and official validation on the offender and the offender's reform efforts. Ideally, at a deferred sentencing hearing or at an “all is going well” review hearing, the judge also can comment favorably upon the sorts of matters that Maruna found to be so important to desisting offenders: impressive meeting attendance logs, for example, and letters from or the occasional live testimony of members of conventional society: college teacher, probation or parole officer, mother, girlfriend, manager and receptionist at the drug clinic, and the like.

When all goes well, of course, it is relatively easy for the judge to constitute the respected member of conventional society willing to “believe in”<sup>60</sup> the defendant and to see the defendant's “real me”<sup>61</sup>—the diamond in the rough.<sup>62</sup> But all does not always go well. Review hearings will often be rather “mixed,” and sometimes they will require revocation. Sentencing hearings will not invariably lead to probationary dispositions. Often, judicial discretion regarding disposition will be severely circumscribed.

Even in these far from favorable situations, the court can play a highly important—albeit a more long-range—role in potential offender reform. Consider the “vision statement” of the District Court of Clark County, Washington.<sup>63</sup> That vision specifically embraces the use of principles of therapeutic jurisprudence to “make a positive change in the lives of people who come before the court.”<sup>64</sup>

Some of the vision statement's “guiding values” relate remarkably well to Maruna's findings regarding desister narratives. One guiding value, for example, is that “individuals are not condemned to a life of crime or despair by mental condition or substance abuse and that everyone can achieve a fulfilling and responsible life.”<sup>65</sup> Another is the belief that “every-

one, no matter whom, has something positive within their make up that can be built upon.”<sup>66</sup>

A judge committed to this vision will not regard these guiding values as mere fluff. Such a judge, for example, is unlikely to tell a woman that she is simply “no good as a mother.”<sup>67</sup> And, even when imposing a severe sentence, such a judge is not going to say, “You are a menace and a danger to society. Society should be protected from the likes of you.”<sup>68</sup>

Instead, especially in light of Maruna's findings, a judge committed to the vision statement should search for and comment on whatever favorable features might eventually be woven together by the offender to constitute the “real me” or the “diamond in the rough.” Sometimes, such a favorable feature might mitigate the sentence. If the judge takes the pains to emphasize it as a real quality—not simply as a mechanical mitigating factor—it may eventually constitute a meaningful component of the offender's self-identify. Such a judge might say something like this:

You and your friends were involved in some pretty serious business here, and I am going to impose a sentence that reflects just how serious it is. I want to add one thing, however. There's been some testimony here about how you showed some real concern for the victim. I'm going to take that into consideration in your case. You know, according to some of the letters that were submitted, it looks like that sensitive nature is something you displayed way back in grade school. Nowadays, it seems to peek out only now and then. But if I could peel away a few layers, I'll bet I could get a glimpse of a pretty caring person way down there. In any case, under the law in this state, I'm able to reduce your sentence by a year for what you did when that caring quality came peeking out last March.

Sometimes, a search for and discovery of a favorable feature or quality may not influence the disposition at all, but it may nonetheless plant a helpful seed, like this:

I don't really know what went wrong here. I do know you committed a robbery and someone was hurt. And I know that it is only right that I impose a sentence of such-and-such. What I don't understand is why this all happened. You are obviously very intelligent and were always a good student. Your former wife says that, until a few years ago, you were a very good, caring, and responsible father. You obviously have a real talent for woodworking, but it's been years since you spent time on a real woodworking project. Beneath all this, I see a good person who has gotten on the wrong path. I hope you'll think about this and change that path.

59. MAKING GOOD, *supra* note 31, at 26.

60. *Id.* at 87.

61. *Id.* at 88.

62. *Id.* at 95.

63. *See* note 15 *supra*.

64. *Id.*

65. *Id.*

66. *Id.*

67. *See* MAKING GOOD, *supra* note 31, at 88.

68. *See id.* at 158.

With your intelligence, personality, and talent, I think you can do it if you decide you really want to.

## CONCLUSION

Even if the sentence imposed is unaffected, following this process is likely to be worth the judicial effort. Maruna notes that both narrative development and desistance each constitute ongoing processes. In rewriting the narratives of their lives, desisting offenders often look to instances in their pasts when their “real” selves shone and when respected members of conventional society recognized their talents and good qualities.

Thus, even in instances where desistance seems not to have occurred, judges can use principles of therapeutic jurisprudence in the hope that their judicial behavior may constitute the building blocks of eventual reform and rehabilitation. This sort of judging may therefore have both short-term and long-term benefits. Ultimately, the benefits may be for offenders, and, in turn, for society as a whole.

And let’s not forget the benefits to the judges, whose sense of professional satisfaction may soar.<sup>69</sup> Who would not feel immense satisfaction receiving letters, as Chicago drug treatment court Judge Judy Mitchell-Davis (dubbed “Judge Judy” by defendants) often does, like this one?:

Judge Judy, I just want to thank you for being the loving and caring woman that you are. You’ve really helped make a positive change in my life. I believe I’m going to make it. It feels so amazing to control my own thoughts and feelings. I feel so good about myself for the first time.<sup>70</sup>



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69. See note 54 *supra*.

70. See note 51 *supra*



# The Resource Page: Focus on *U.S. v. Microsoft*

In the Winter 2001 Court Review, we reprinted excerpts of the appellate briefs in *U.S. v. Microsoft* concerning the trial judge's media interviews about the case. On June 28, 2001, the U.S. Court of Appeals for the D.C. Circuit unanimously concluded that the judge's conduct was improper. As we suggested in the preceding issue, while the *Microsoft* case may be unique, the incidence of judges having at least some contact with reporters is not. Thus, we believe the court's decision in the *Microsoft* case on this issue will be of widespread interest. The citations to the judge's media interviews, have been omitted; citations to those interviews can be found in the briefs excerpted in the Winter 2001 issue. In our next issue, William G. Ross, a law professor at the Cumberland School of Law at Samford University in Birmingham, Alabama, whose article on extrajudicial speech was cited by the *Microsoft* court, will provide some overall guidance for judges on dealing with both the ethical rules discussed here and the media.

**UNITED STATES OF AMERICA,  
Appellee v.  
MICROSOFT CORPORATION,  
Appellant.**

**No. 00-5212,  
Consolidated with 00-5213**

**United States Court of Appeals for the  
District of Columbia Circuit**

**Argued: February 27, 2001  
Decided: June 28, 2001  
Reported at: 253 F. 3d 34.**

Per Curiam: Microsoft Corporation appeals from judgments of the District Court finding the company in violation of §§ 1 and 2 of the Sherman Act and ordering various remedies. . . .

[253 F.3d at 107]

## **VI. JUDICIAL MISCONDUCT**

Canon 3A(6) of the Code of Conduct for United States Judges requires federal judges to "avoid public comment on the merits of [] pending or impending" cases.

Canon 2 tells judges to "avoid impropriety and the appearance of impropriety in all activities," on the bench and off. Canon 3A(4) forbids judges to initiate or consider ex parte communications on the merits of pending or impending proceedings. Section 455(a) of the Judicial Code requires judges to recuse themselves when their "impartiality might reasonably be questioned." 28 U.S.C. § 455(a).

All indications are that the District Judge violated each of these ethical precepts by talking about the case with reporters. The violations were deliberate, repeated, egregious, and flagrant. The only serious question is what consequences should follow. Microsoft urges us to disqualify the District Judge, vacate the judgment in its entirety and toss out the findings of fact, and remand for a new trial before a different District Judge. At the other extreme, plaintiffs ask us to do nothing. We agree with neither position.

### **A. The District Judge's Communications with the Press**

Immediately after the District Judge entered final judgment on June 7, 2000, accounts of interviews with him began appearing in the press. Some of the interviews were held after he entered final judgment. The District Judge also aired his views about the case to larger audiences, giving [253 F.3d at 108] speeches at a college and at an antitrust seminar.

From the published accounts, it is apparent that the Judge also had been giving secret interviews to select reporters before entering final judgment—in some instances long before. The earliest interviews we know of began in September 1999, shortly after the parties finished presenting evidence but two months before the court issued its Findings of Fact. Interviews with reporters from the *New York Times* and Ken Auletta, another reporter who later wrote a book on the *Microsoft* case, continued throughout late 1999 and the first half of 2000, during which time the Judge issued his Findings of Fact, Conclusions of Law, and Final Judgment. The Judge "embargoed" these interviews; that is, he insisted that the fact

and content of the interviews remain secret until he issued the Final Judgment.

Before we recount the statements attributed to the District Judge, we need to say a few words about the state of the record. All we have are the published accounts and what the reporters say the Judge said. Those accounts were not admitted in evidence. They may be hearsay.

We are of course concerned about granting a request to disqualify a federal judge when the material supporting it has not been admitted in evidence. Disqualification is never taken lightly. In the wrong hands, a disqualification motion is a procedural weapon to harass opponents and delay proceedings. If supported only by rumor, speculation, or innuendo, it is also a means to tarnish the reputation of a federal judge.

But the circumstances of this case are most unusual. By placing an embargo on the interviews, the District Judge ensured that the full extent of his actions would not be revealed until this case was on appeal. Plaintiffs, in defending the judgment, do not dispute the statements attributed to him in the press; they do not request an evidentiary hearing; and they do not argue that Microsoft should have filed a motion in the District Court before raising the matter on appeal. At oral argument, plaintiffs all but conceded that the Judge violated ethical restrictions by discussing the case in public: "On behalf of the governments, I have no brief to defend the District Judge's decision to discuss this case publicly while it was pending on appeal, and I have no brief to defend the judge's decision to discuss the case with reporters while the trial was proceeding, even given the embargo on any reporting concerning those conversations until after the trial." 02/27/01 Ct. Appeals Tr. at 326.

We must consider too that the federal disqualification provisions reflect a strong federal policy to preserve the actual and apparent impartiality of the federal judiciary. Judicial misconduct may implicate that policy regardless of the means by which it is disclosed to the public. [253 F.3d at 109] Also, in our analysis of the

arguments presented by the parties, the specifics of particular conversations are less important than their cumulative effect.

For these reasons we have decided to adjudicate Microsoft's disqualification request notwithstanding the state of the record. The same reasons also warrant a departure from our usual practice of declining to address issues raised for the first time on appeal . . . . We will assume the truth of the press accounts and not send the case back for an evidentiary hearing on this subject. We reach no judgment on whether the details of the interviews were accurately recounted.

The published accounts indicate that the District Judge discussed numerous topics relating to the case. Among them was his distaste for the defense of technological integration—one of the central issues in the lawsuit. In September 1999, two months before his Findings of Fact and six months before his Conclusions of Law, and in remarks that were kept secret until after the Final Judgment, the Judge told reporters from the *New York Times* that he questioned Microsoft's integration of a web browser into Windows. Stating that he was "not a fan of integration," he drew an analogy to a 35-millimeter camera with an integrated light meter that in his view should also be offered separately: "You like the convenience of having a light meter built in, integrated, so all you have to do is press a button to get a reading. But do you think camera makers should also serve photographers who want to use a separate light meter, so they can hold it up, move it around?" In other remarks, the Judge commented on the integration at the heart of the case: "It was quite clear to me that the motive of Microsoft in bundling the Internet browser was not one of consumer convenience. The evidence that this was done for the consumer was not credible . . . . The evidence was so compelling that there was an ulterior motive." As for tying law in general, he criticized this court's ruling in the consent decree case, saying it "was wrongheaded on several counts" and would exempt the software industry from the antitrust laws.

Reports of the interviews have the District Judge describing Microsoft's conduct, with particular emphasis on what he regarded as the company's prevarication, hubris, and impenitence. In some of his secret meetings with reporters, the Judge

offered his contemporaneous impressions of testimony. He permitted at least one reporter to see an entry concerning Bill Gates in his "oversized green notebook." He also provided numerous after-the-fact credibility assessments. He told reporters that Bill Gates' "testimony is inherently without credibility" and "if you can't believe this guy, who else can you believe?" As for the company's other witnesses, the Judge is reported as saying that there [253 F3d at 110] "were times when I became impatient with Microsoft witnesses who were giving speeches." "They were telling me things I just flatly could not credit." In an interview given the day he entered the break-up order, he summed things up: "Falsus in uno, falsus in omnibus": "Untrue in one thing, untrue in everything." "I don't subscribe to that as absolutely true. But it does lead one to suspicion. It's a universal human experience. If someone lies to you once, how much else can you credit as the truth?"

According to reporter Auletta, the District Judge told him in private that, "I thought they [Microsoft and its executives] didn't think they were regarded as adult members of the community. I thought they would learn." The Judge told a college audience that "Bill Gates is an ingenious engineer, but I don't think he is that adept at business ethics. He has not yet come to realise things he did (when Microsoft was smaller) he should not have done when he became a monopoly." Characterizing Gates' and his company's "crime" as hubris, the Judge stated that "if I were able to propose a remedy of my devising, I'd require Mr. Gates to write a book report" on Napoleon Bonaparte, "because I think [Gates] has a Napoleonic concept of himself and his company, an arrogance that derives from power and unalloyed success, with no leavening hard experience, no reverses." The Judge apparently became, in Auletta's words, "increasingly troubled by what he learned about Bill Gates and couldn't get out of his mind the group picture he had seen of Bill Gates and Paul Allen and their shaggy-haired first employees at Microsoft." The reporter wrote that the Judge said he saw in the picture "a smart-mouthed young kid who has extraordinary ability and needs a little discipline. I've often said to colleagues that Gates would be better off if he had finished Harvard."

The District Judge likened Microsoft's

writing of incriminating documents to drug traffickers who "never figure out that they shouldn't be saying certain things on the phone." He invoked the drug trafficker analogy again to denounce Microsoft's protestations of innocence, this time with a reference to the notorious Newton Street Crew that terrorized parts of Washington, D.C. Reporter Auletta wrote in *The New Yorker* that the Judge

went as far as to compare the company's declaration of innocence to the protestations of gangland killers. He was referring to five gang members in a racketeering, drug-dealing, and murder trial that he had presided over four years earlier. In that case, the three victims had had their heads bound with duct tape before they were riddled with bullets from semi-automatic weapons. "On the day of the sentencing, the gang members maintained that they had done nothing wrong, saying that the whole case was a conspiracy by the white power structure to destroy them," Jackson recalled. "I am now under no illusions that miscreants will realize that other parts of society will view them that way."

[253 F3d at 111] The District Judge also secretly divulged to reporters his views on the remedy for Microsoft's antitrust violations. On the question whether Microsoft was entitled to any process at the remedy stage, the Judge told reporters in May 2000 that he was "not aware of any case authority that says I have to give them any due process at all. The case is over. They lost." Another reporter has the Judge asking "were the Japanese allowed to propose terms of their surrender?" The District Judge also told reporters the month before he issued his break-up order that "[a]ssuming, as I think they are, [] the Justice Department and the states are genuinely concerned about the public interest," "I know they have carefully studied all the possible options. This isn't a bunch of amateurs. They have consulted with some of the best minds in America over a long period of time." "I am not in a position to duplicate that and re-engineer their work. There's no way I can equip myself to do a better job

than they have done.”

In February 2000, four months before his final order splitting the company in two, the District Judge reportedly told *New York Times* reporters that he was “not at all comfortable with restructuring the company” because he was unsure whether he was “competent to do that.” A few months later, he had a change of heart. He told the same reporters that “with what looks like Microsoft intransigence, a breakup is inevitable.” The Judge recited a “North Carolina mule trainer” story to explain his change in thinking from “if it ain’t broken, don’t try to fix it” and “I just don’t think that [restructuring the company] is something I want to try to do on my own” to ordering Microsoft broken in two:

He had a trained mule who could do all kinds of wonderful tricks. One day somebody asked him: “How do you do it? How do you train the mule to do all these amazing things?” “Well,” he answered, “I’ll show you.” He took a 2-by-4 and whopped him upside the head. The mule was reeling and fell to his knees, and the trainer said: “You just have to get his attention.”

The Judge added: “I hope I’ve got Microsoft’s attention.”

### **B. Violations of the Code of Conduct for United States Judges**

The Code of Conduct for United States Judges was adopted by the Judicial Conference of the United States in 1973. It prescribes ethical norms for federal judges as a means to preserve the actual and apparent integrity of the federal judiciary. Every federal judge receives a copy of the Code, the Commentary to the Code, the Advisory Opinions of the Judicial Conference’s Committee on Codes of Conduct, and digests of the Committee’s informal, unpublished opinions. See II GUIDE TO JUDICIARY POLICIES AND PROCEDURES (1973). The material is periodically updated. Judges who have questions about whether their conduct would be consistent with the [253 F.3d at 112] Code may write to the Codes of Conduct Committee for a written, confidential opinion. See Introduction, CODE OF CONDUCT. The Committee traditionally responds promptly. A judge may also seek

informal advice from the Committee’s circuit representative.

While some of the Code’s Canons frequently generate questions about their application, others are straightforward and easily understood. Canon 3A(6) is an example of the latter. In forbidding federal judges to comment publicly “on the merits of a pending or impending action,” Canon 3A(6) applies to cases pending before any court, state or federal, trial or appellate. See JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS § 10.34, at 353 (3d ed. 2000). As “impending” indicates, the prohibition begins even before a case enters the court system, when there is reason to believe a case may be filed. Cf. E. WAYNE THODE, REPORTER’S NOTES TO CODE OF JUDICIAL CONDUCT 54 (1973). An action remains “pending” until “completion of the appellate process.” CODE OF CONDUCT Canon 3A(6) cmt.; Comm. on Codes of Conduct, Adv. Op. No. 55 (1998).

The Microsoft case was “pending” during every one of the District Judge’s meetings with reporters; the case is “pending” now; and even after our decision issues, it will remain pending for some time. The District Judge breached his ethical duty under Canon 3A(6) each time he spoke to a reporter about the merits of the case. Although the reporters interviewed him in private, his comments were public. Court was not in session and his discussion of the case took place outside the presence of the parties. He provided his views not to court personnel assisting him in the case, but to members of the public. And these were not just any members of the public. Because he was talking to reporters, the Judge knew his comments would eventually receive widespread dissemination.

It is clear that the District Judge was not discussing purely procedural matters, which are a permissible subject of public comment under one of the Canon’s three narrowly drawn exceptions. He disclosed his views on the factual and legal matters at the heart of the case. His opinions about the credibility of witnesses, the validity of legal theories, the culpability of the defendant, the choice of remedy, and so forth all dealt with the merits of the action. It is no excuse that the Judge may have intended to “educate” the public about the case or to rebut “public misperceptions” purportedly caused by the par-

ties. If those were his intentions, he could have addressed the factual and legal issues as he saw them—and thought the public should see them—in his Findings of Fact, Conclusions of Law, Final Judgment, or in a written opinion. Or he could have held his tongue until all appeals were concluded.

Far from mitigating his conduct, the District Judge’s insistence on secrecy—his embargo—made matters worse. Concealment of the interviews suggests knowledge of their impropriety. Concealment also prevented the parties from nipping his improprieties in the bud. Without any knowledge of the interviews, neither the plaintiffs nor the defendant had a chance to object or to seek the Judge’s removal before he issued his Final Judgment.

Other federal judges have been disqualified for making limited public comments about cases pending before them. See *In re Boston’s Children First*, 244 F.3d 164 (1st Cir. 2001); *In re IBM Corp.*, 45 F.3d 641 (2d Cir. 1995); *United States v. Cooley*, 1 F.3d 985 (10th Cir. 1993). Given the [253 F.3d at 113] extent of the Judge’s transgressions in this case, we have little doubt that if the parties had discovered his secret liaisons with the press, he would have been disqualified, voluntarily or by court order. Cf. *In re Barry*, 292 U.S. App. D.C. 39, 946 F.2d 913 (D.C. Cir. 1991) (per curiam); 946 F.2d at 915 (Edwards, J., dissenting).

In addition to violating the rule prohibiting public comment, the District Judge’s reported conduct raises serious questions under Canon 3A(4). That Canon states that a “judge should accord to every person who is legally interested in a proceeding, or the person’s lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte communications on the merits, or procedures affecting the merits, of a pending or impending proceeding.” CODE OF CONDUCT Canon 3A(4).

What did the reporters convey to the District Judge during their secret sessions? By one account, the Judge spent a total of ten hours giving taped interviews to one reporter. We do not know whether he spent even more time in untaped conversations with the same reporter, nor do we know how much time he spent with others. But we think it safe to assume that these interviews were not monologues.

Interviews often become conversations. When reporters pose questions or make assertions, they may be furnishing information, information that may reflect their personal views of the case. The published accounts indicate this happened on at least one occasion. Ken Auletta reported, for example, that he told the Judge “that Microsoft employees professed shock that he thought they had violated the law and behaved unethically,” at which time the Judge became “agitated” by “Microsoft’s ‘obstinacy.’” It is clear that Auletta had views of the case. As he wrote in a *Washington Post* editorial, “anyone who sat in [the District Judge’s] courtroom during the trial had seen ample evidence of Microsoft’s sometimes thuggish tactics.”

The District Judge’s repeated violations of Canons 3A(6) and 3A(4) also violated Canon 2, which provides that “a judge should avoid impropriety and the appearance of impropriety in all activities.” CODE OF CONDUCT Canon 2; see also *In re Charge of Judicial Misconduct*, 47 F.3d 399, 400 (10th Cir. Jud. Council 1995) (“The allegations of extra-judicial comments cause the Council substantial concern under both Canon 3A(6) and Canon 2 of the Judicial Code of Conduct.”). Canon 2A requires federal judges to “respect and comply with the law” and to “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” CODE OF CONDUCT Canon 2A. The Code of Conduct is the law with respect to the ethical obligations of federal judges, and it is clear the District Judge violated it on multiple occasions in this case. The rampant disregard for the judiciary’s ethical obligations that the public witnessed in this case undoubtedly jeopardizes “public confidence in the integrity” of the District Court proceedings.

Another point needs to be stressed. Rulings in this case have potentially huge financial consequences for one of the nation’s largest publicly-traded companies and its investors. The District Judge’s secret interviews during the trial provided a select few with inside information about the case, information that enabled them and anyone they shared it with to anticipate rulings before the Judge announced them to the world. Although he “embargoed” his comments, the Judge had no way of policing the reporters. For all he knew there may have been trading on the

basis [253 F.3d at 114] of the information he secretly conveyed. The public cannot be expected to maintain confidence in the integrity and impartiality of the federal judiciary in the face of such conduct.

### C. Appearance of Partiality

The Code of Conduct contains no enforcement mechanism. See THODE, REPORTER’S NOTES TO CODE OF JUDICIAL CONDUCT 43. The Canons, including the one that requires a judge to disqualify himself in certain circumstances, see CODE OF CONDUCT Canon 3C, are self-enforcing. There are, however, remedies extrinsic to the Code. One is an internal disciplinary proceeding, begun with the filing of a complaint with the clerk of the court of appeals pursuant to 28 U.S.C. § 372(c). Another is disqualification of the offending judge under either 28 U.S.C. § 144, which requires the filing of an affidavit while the case is in the District Court, or 28 U.S.C. § 455, which does not. Microsoft urges the District Judge’s disqualification under § 455(a): a judge “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). The standard for disqualification under § 455(a) is an objective one. The question is whether a reasonable and informed observer would question the judge’s impartiality. See *In re Barry*, 946 F.2d at 914; see also *In re Aguinda*, 241 F.3d 194, 201 (2d Cir. 2001); RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION § 24.2.1 (1996).

“The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible.” *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988). As such, violations of the Code of Conduct may give rise to a violation of § 455(a) if doubt is cast on the integrity of the judicial process. It has been argued that any “public comment by a judge concerning the facts, applicable law, or merits of a case that is *sub judice* in his court or any comment concerning the parties or their attorneys would raise grave doubts about the judge’s objectivity and his willingness to reserve judgment until the close of the proceeding.” William G. Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, 2 GEO. J. LEGAL ETHICS 598 (1989). Some courts of appeals have taken a hard line on public comments, finding violations of

§ 455(a) for judicial commentary on pending cases that seems mild in comparison to what we are confronting in this case. See *Boston’s Children First*, 244 F.3d 164 (granting writ of mandamus ordering district judge to recuse herself under § 455(a) because of public comments on class certification and standing in a pending case); *In re IBM Corp.*, 45 F.3d 641 (granting writ of mandamus ordering district judge to recuse himself based in part on the appearance of partiality caused by his giving newspaper interviews); *Cooley*, 1 F.3d 985 (vacating convictions and disqualifying district judge for appearance of partiality because he appeared on television program *Nightline* and stated that abortion protestors in a case before him were breaking the law and that his injunction would be obeyed).

While § 455(a) is concerned with actual and apparent impropriety, the statute requires disqualification only when a judge’s “impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). Although this court has condemned public judicial comments on pending cases, we have not gone so far as to hold that every violation of Canon 3A(6) or every impropriety under the Code of Conduct inevitably destroys the appearance of impartiality and thus violates § 455(a). See *In re Barry*, 946 F.2d at 914; see also *Boston’s Children First*, 244 F.3d at 168; *United States v. [253 F.3d at 115] Fortier*, 242 F.3d 1224, 1229 (10th Cir. 2001).

In this case, however, we believe the line has been crossed. The public comments were not only improper, but also would lead a reasonable, informed observer to question the District Judge’s impartiality. Public confidence in the integrity and impartiality of the judiciary is seriously jeopardized when judges secretly share their thoughts about the merits of pending cases with the press. Judges who covet publicity, or convey the appearance that they do, lead any objective observer to wonder whether their judgments are being influenced by the prospect of favorable coverage in the media. Discreet and limited public comments may not compromise a judge’s apparent impartiality, but we have little doubt that the District Judge’s conduct had that effect. Appearance may be all there is, but that is enough to invoke the Canons and § 455(a).

Judge Learned Hand spoke of “this

America of ours where the passion for publicity is a disease, and where swarms of foolish, tawdry moths dash with rapture into its consuming fire . . .” LEARNED HAND, *THE SPIRIT OF LIBERTY* 132-33 (2d ed. 1953). Judges are obligated to resist this passion. Indulging it compromises what Edmund Burke justly regarded as the “cold neutrality of an impartial judge.” Cold or not, federal judges must maintain the appearance of impartiality. What was true two centuries ago is true today: “Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges.” CODE OF CONDUCT Canon 1 cmt. Public confidence in judicial impartiality cannot survive if judges, in disregard of their ethical obligations, pander to the press.

We recognize that it would be extraordinary to disqualify a judge for bias or appearance of partiality when his remarks arguably reflected what he learned, or what he thought he learned, during the proceedings. See *Liteky v. United States*, 510 U.S. 540, 554-55 (1994); *United States v. Barry*, 961 F.2d 260, 263 (D.C. Cir. 1992). But this “extrajudicial source” rule has no bearing on the case before us. The problem here is not just what the District Judge said, but to whom he said it and when. His crude characterizations of Microsoft, his frequent denigrations of Bill Gates, his mule trainer analogy as a reason for his remedy—all of these remarks and others might not have given rise to a violation of the Canons or of § 455(a) had he uttered them from the bench. See *Liteky*, 510 U.S. at 555-56; CODE OF CONDUCT Canon 3A(6) (exception to prohibition on public comments for “statements made in the course of the judge’s official duties”). But then Microsoft would have had an opportunity to object, perhaps even to persuade, and the Judge would have made a record for review on appeal. It is an altogether different matter when the statements are made outside the courtroom, in private meetings unknown to the parties, in anticipation that ultimately the Judge’s remarks would be reported. Rather than manifesting neutrality and impartiality, the reports of the interviews with the District Judge convey the impression of a judge posturing for posterity, trying to please the reporters with colorful analogies and observations bound to wind up

in the stories they write. Members of the public may reasonably question whether the District Judge’s desire for press coverage influenced his judgments, indeed whether a publicity-seeking judge might consciously or subconsciously seek the publicity-maximizing outcome. We believe, therefore, that the District Judge’s interviews with reporters created an appearance that he was not acting impartially, [253 F.3d at 116] as the Code of Conduct and § 455(a) require.

#### **D. Remedies for Judicial Misconduct and Appearance of Partiality**

##### **1. DISQUALIFICATION**

Disqualification is mandatory for conduct that calls a judge’s impartiality into question. See 28 U.S.C. § 455(a); *In re School Asbestos Litig.*, 977 F.2d 764, 783 (3d Cir. 1992). Section 455 does not prescribe the scope of disqualification. Rather, Congress “delegated to the judiciary the task of fashioning the remedies that will best serve the purpose” of the disqualification statute. *Liljeberg*, 486 U.S. at 862.

At a minimum, § 455(a) requires prospective disqualification of the offending judge, that is, disqualification from the judge’s hearing any further proceedings in the case. See *United States v. Microsoft Corp.*, 56 F.3d 1448, 1463-65 (D.C. Cir. 1995)(per curiam)(“Microsoft I”). Microsoft urges retroactive disqualification of the District Judge, which would entail disqualification antedated to an earlier part of the proceedings and vacatur of all subsequent acts. Cf. *In re School Asbestos Litig.*, 977 F.2d at 786 (discussing remedy options).

“There need not be a draconian remedy for every violation of § 455(a).” *Liljeberg*, 486 U.S. at 862. *Liljeberg* held that a district judge could be disqualified under § 455(a) after entering final judgment in a case, even though the judge was not (but should have been) aware of the grounds for disqualification before final judgment. The Court identified three factors relevant to the question whether vacatur is appropriate: “in determining whether a judgment should be vacated for a violation of § 455(a), it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining

the public’s confidence in the judicial process.” *Id.* at 864. Although the Court was discussing § 455(a) in a slightly different context (the judgment there had become final after appeal and the movant sought to have it vacated under Rule 60(b)), we believe the test it propounded applies as well to cases such as this in which the full extent of the disqualifying circumstances came to light only while the appeal was pending. See *In re School Asbestos Litig.*, 977 F.2d at 785.

Our application of *Liljeberg* leads us to conclude that the appropriate remedy for the violations of § 455(a) is disqualification of the District Judge retroactive only to the date he entered the order breaking up Microsoft. We therefore will vacate that order in its entirety and remand this case to a different District Judge, but will not set aside the existing Findings of Fact or Conclusions of Law (except insofar as specific findings are clearly erroneous or legal conclusions are incorrect).

This partially retroactive disqualification minimizes the risk of injustice to the parties and the damage to public confidence in the judicial process. Although the violations of the Code of Conduct and § 455(a) were serious, full retroactive disqualification is unnecessary. It would unduly penalize plaintiffs, who were innocent and unaware of the misconduct, and would have only slight marginal deterrent effect.

Most important, full retroactive disqualification is unnecessary to protect Microsoft’s right to an impartial adjudication. The District Judge’s conduct destroyed the appearance of impartiality. Microsoft neither alleged nor demonstrated that it rose to the level of actual bias or prejudice. There is no reason to presume that everything the District Judge did is suspect. [253 F.3d at 117] See *In re Allied-Signal Inc.*, 891 F.2d 974, 975-76 (1st Cir. 1989); cf. *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1301-02 (D.C. Cir. 1988). Although Microsoft challenged very few of the findings as clearly erroneous, we have carefully reviewed the entire record and discern no basis to suppose that actual bias infected his factual findings.

The most serious judicial misconduct occurred near or during the remedial stage. It is therefore commensurate that our remedy focus on that stage of the case. The District Judge’s impatience with

what he viewed as intransigence on the part of the company; his refusal to allow an evidentiary hearing; his analogizing Microsoft to Japan at the end of World War II; his story about the mule—all of these out-of-court remarks and others, plus the Judge's evident efforts to please the press, would give a reasonable, informed observer cause to question his impartiality in ordering the company split in two.

To repeat, we disqualify the District Judge retroactive only to the imposition of the remedy, and thus vacate the remedy order for the reasons given in Section V and because of the appearance of partiality created by the District Judge's misconduct.

## 2. REVIEW OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

Given the limited scope of our disqualification of the District Judge, we have let stand for review his Findings of Fact and Conclusions of Law. The severity of the District Judge's misconduct and the appearance of partiality it created have led us to consider whether we can and should subject his factfindings to greater scrutiny. For a number of reasons we have rejected any such approach.

The Federal Rules require that district court findings of fact not be set aside unless they are clearly erroneous. See FED R. CIV. P. 52(a). Ordinarily, there is no basis for doubting that the District Court's factual findings are entitled to the substantial deference the clearly erroneous standard entails. But of course this is no ordinary case. Deference to a district court's factfindings presumes impartiality on the lower court's part. When impartiality is called into question, how much deference is due?

The question implies that there is some middle ground, but we believe there is none. As the rules are written, district court factfindings receive either full deference under the clearly erroneous standard or they must be vacated. There is no *de novo* appellate review of factfindings and no intermediate level between *de novo* and clear error, not even for findings the court of appeals may consider sub-par. See *Amadeo v. Zant*, 486 U.S. 214, 228 (1988) ("The District Court's lack of precision, however, is no excuse for the Court of Appeals to ignore the dictates of Rule

52(a) and engage in impermissible appellate factfinding."); *Anderson v. City of Bessemer City*, 470 U.S. 564, 571-75 (1985) (criticizing district court practice of adopting a party's proposed factfindings but overturning court of appeals' application of "close scrutiny" to such findings).

Rule 52(a) mandates clearly erroneous review of all district court factfindings: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." FED. R. CIV. P. 52(a). The rule "does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of [253 F3d at 118] appeals to accept a district court's findings unless clearly erroneous." *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982); see also *Anderson*, 470 U.S. at 574-75; *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 855-58 (1982). The Supreme Court has emphasized on multiple occasions that "in applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969); *Anderson*, 470 U.S. at 573 (quoting *Zenith*).

The mandatory nature of Rule 52(a) does not compel us to accept factfindings that result from the District Court's misapplication of governing law or that otherwise do not permit meaningful appellate review. See *Pullman-Standard*, 456 U.S. at 292; *Inwood Labs.*, 456 U.S. at 855 n.15. Nor must we accept findings that are utterly deficient in other ways. In such a case, we vacate and remand for further factfinding. See 9 MOORE'S FEDERAL PRACTICE § 52.12[1] (Matthew Bender 3d ed. 2000); 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2577, at 514-22 (2d ed. 1995); cf. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986); *Pullman-Standard*, 456 U.S. at 291-92.

When there is fair room for argument that the District Court's factfindings should be vacated in toto, the court of appeals should be especially careful in determining that the findings are worthy

of the deference Rule 52(a) prescribes. See, e.g., *Thermo Electron Corp. v. Schiavone Constr. Co.*, 915 F.2d 770, 773 (1st Cir. 1990); cf. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984). Thus, although Microsoft alleged only appearance of bias, not actual bias, we have reviewed the record with painstaking care and have discerned no evidence of actual bias. See *S. Pac. Communications Co. v. AT & T*, 740 F.2d 980, 984 (D.C. Cir. 1984); *Cooley*, 1 F.3d at 996 (disqualifying district judge for appearance of partiality but noting that "the record of the proceedings below . . . discloses no bias").

In light of this conclusion, the District Judge's factual findings both warrant deference under the clear error standard of review and, though exceedingly sparing in citations to the record, permit meaningful appellate review. In reaching these conclusions, we have not ignored the District Judge's reported intention to craft his factfindings and Conclusions of Law to minimize the breadth of our review. The Judge reportedly told Ken Auletta that "what I want to do is confront the Court of Appeals with an established factual record which is a *fait accompli*." He explained: "part of the inspiration for doing that is that I take mild offense at their reversal of my preliminary injunction in the consent-decree case, where they went ahead and made up about ninety percent of the facts on their own." *Id.* Whether the District Judge takes offense, mild or severe, is beside the point. Appellate decisions command compliance, not agreement. We do not view the District Judge's remarks as anything other than his expression of disagreement with this court's decision, and his desire to provide extensive factual findings in this case, which he did.

## VII. CONCLUSION

The judgment of the District Court is affirmed in part, reversed in part, and [253 F3d at 119] remanded in part. We vacate in full the Final Judgment embodying the remedial order, and remand the case to the District Court for reassignment to a different trial judge for further proceedings consistent with this opinion.

### More on Impending Proceedings

In his reply to my commentary on Free Speech for Judges (Winter 2001), Professor Steven Lubet misquotes my proposal.

Making my proposal appear more restrictive on judicial speech than it is in fact, Professor Lubet says: "Professor Freedman's own proposal sweeps much more broadly, as it would apply to all 'issues' in a 'contested case,' and not merely to identifiable, impending proceedings."

Actually, my proposed rule would apply only if there is a reasonable possibility that the same "issue [discussed by the judge] will be contested" in a case that will come before the judge. Thus, to take Professor Lubet's illustration, it is possible that perjury cases will come before Judge Posner, but it is exceedingly unlikely that the same issue of materiality presented in President Clinton's case will be contested in a case before Judge Posner.

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## Court Review Author Submission Guidelines

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

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

**Articles:** Articles should be submitted in double-spaced text with footnotes, preferably in WordPerfect format (although Word format can also be accepted). The suggested article length for *Court Review* is between 18 and 36 pages of double-spaced text (including the footnotes). Footnotes should conform to the 17th edition of *The Bluebook: A Uniform System of Citation*. Articles should be of a quality consistent with better state bar association law journals and/or other law reviews.

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

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

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

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# The Resource Page



## NEW BOOKS

STEVEN LUBET, *NOTHING BUT THE TRUTH: WHY TRIAL LAWYERS DON'T, CAN'T, AND SHOULDN'T HAVE TO TELL THE WHOLE TRUTH*. New York Univ. Press, 2001. (\$38). 198 pp.

We have to admit that we started out rooting for this book even before we knew what it was about. After all, Steven Lubet is both a member of *Court Review's* editorial board and a frequent contributor. Then we learned that the book was a essentially a defense of the way trials are conducted in the American legal system, the very place many of us spend most of our working lives. After getting the book and reading it, we're pretty sure most judges would both enjoy it and find its comments intriguing.

To be sure, Lubet's hero is the trial lawyer, not the trial judge. But he has written a book that is so clearly grounded in the realities of the trial process that anyone who has spent time there will find many moments of recognition.

Many judges, no doubt, have from time to time been tempted to think—as do many in the public at large—that trials are as far from a search for truth as one could get. (These thoughts are most apt to come on a day in which inept lawyers have taken positions on both sides of the courtroom.) Lubet contends, however, that the purposive storytelling engaged in by good lawyers is the key to the success of the adversary system. In a brief introduction, he explains the importance of having a case theory and theme; he also contends that the “story frame” may be the most important element. For example, he notes that the prosecutors in the O.J. Simpson case used a domestic violence story frame, hoping that jurors would view events in that context, while the defense used a police prejudice story frame, advanc-

ing the theory that officers must have contrived or mishandled the evidence against Simpson.

Lubet then explores what he calls the messy process of getting to the truth at trial by focusing on several cases, both real and fictional. He includes John Brown and Wyatt Earp, as well as Liberty Valance and Atticus Finch. In each of the seven chapters, he develops his theme against both the record of these actual or fictional trials and the contexts in which they arose.

As Lubet notes, and most of us who have endured long trials would agree, “More facts produce less clarity.” Thus, a good trial lawyer does a service to the search for truth by organizing the narratives, including facts that fit and omitting those that do not, so that the trier of fact can form conclusions about what happened. If, on a bad day, you find yourself having doubts about “the system,” this is the book to pick up and read.



## WEBSITE UPDATES

### Public Trust & Confidence Update

<http://www.ncsc.dni.us/PTC.HTM>

In May 1999, the National Conference on Public Trust and Confidence in the Justice System brought together over 500 representatives of the bench, bar, and public to address the state of public confidence in the courts. The fall 1999 issue of *Court Review* included all the major presentations given during the conference and an overview of the emerging national action plan to improve public trust.

During the conference, United States Supreme Court Justice Sandra Day O'Connor told attendees that “the measure of this conference will be what happens when you return home, what you do about the conclusions and ideas discussed here.” Based on a recent survey of public trust and confidence activities, many states continue to work diligently to improve court performance and enhance

public trust. The 1999 conference identified 15 issues that contribute to low trust and confidence. At least a few states are working on each issue. A majority are focusing on issues related to judicial isolation, lack of public understanding, and poor customer relations with the public. Several states also are concentrating on the conference's top-priority issues of unequal treatment in—and the high cost of access to—the justice system. For more information on each state's efforts and on the national action plan to improve public trust and confidence, visit the online forum on public trust and confidence in the justice system at the website address listed above.

### U.S. v. Microsoft Update

<http://www.microsoft.com/presspass/legalnews.asp>

[http://www.usdoj.gov/atr/cases/ms\\_index.htm](http://www.usdoj.gov/atr/cases/ms_index.htm)

In our Winter 2001 issue, we reprinted portions of the appellate briefs in the *Microsoft* antitrust case. The U.S. Court of Appeals for the District of Columbia has now agreed with Microsoft's argument that the trial judge's extensive contacts with the media were improper (see the Focus section noted below). As this issue went to press, Microsoft had filed a petition for a writ of certiorari in the United States Supreme Court based solely on the trial court misconduct issue. The websites listed above contain most of the court pleadings filed in the case both by Microsoft and by the United States Department of Justice.

## FOCUS ON THE MICROSOFT CASE

In the Resource Page Focus section last issue, we presented the briefs on appeal in the *Microsoft* antitrust case dealing with the trial judges' conduct. We didn't know at that time whether the appellate court would find this issue of importance in deciding the appeal. It did, and we have reprinted the appellate court's views in this issue, beginning at page 25.