Volume 38, Issue 4
Winter 2002

Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

TABLE OF CONTENTS

Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

Volume 38, Issue 4 Winter 2002

EDITOR'S NOTE

In the lead article in this issue, court consultant Roger Hanson examines the implications of the changing role of the judge. He rightly notes that judging today is not exactly what it was 30 years ago and asks how changes in the perceptions of the proper judicial role have affected the behavior of judges. For most of us, we tend to do our jobs on a daily basis without conscious thought about the various roles we play (*e.g.*, law applier, mediator, policy maker), let alone the expectations of others about our performance of each of those roles. Although Hanson draws no final conclusions in this article, I think you will enjoy joining him in giving some structured thought to these issues, including how they may impact your own work. If you see impacts in your own court, please consider sharing your views through a letter to the editor for publication in our next issue.

Perceptions also are the focus of our next article—this time how the perceptions of family court judges affect their decisions. Psychology professor Leighton Stamps found significant age-related differences in judges' attitudes about whether mothers or fathers should have custody of children. In most states, of course, statutes now prohibit use of the maternal-preference doctrine. Accordingly, this article also gives food for thought: how can we keep alert to our own biases so that we follow the law and not merely our biases?

Two other articles round out the issue. Arthur Garrison, a criminal justice planner with the Delaware Criminal Justice Council, reviews some of the problems involved in drug-treatment programs, including considerations that judges must keep in mind. Garrison's article is based on detailed research on a treatment program in Delaware. Pamela Richardson, a third-year law student at the Catholic University of America won the American Judges Association's 2001 writing competition with her article on *Illinois v. Wardlow*, the Supreme Court decision upholding the stopping of a pedestrian solely on the basis that he ran from police in a high-crime area. Each year, we print the winning entry in our writing competition, and Richardson's review of the *Wardlow* decision is a well-written review of a very interesting decision.

Last, we invite your attention to the annual index of the past four issues of *Court Review*. All of the articles listed are available on our website at http://aja.ncsc.dni.us/courtrv/review.html. —SL

Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States, Canada, and Mexico. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to 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 19 of this issue. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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

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

Advertising: *Court Review* accepts advertising for products and services of interest to judges. For information, contact Deloris Gager at (757) 259-1864.

Photo credit: Mary Watkins. The cover photo is of the Old State House in Boston, Massachusetts, the oldest surviving public building in Boston, built in 1713. Although it also housed the Massachusetts Assembly, the building's west end was home to the Massachusetts Supreme Judicial Court and the courts of Suffolk County for many years. The Declaration of Independence was read aloud to Bostonians from this balcony in 1776. More about the history of the building can be found at http://www.bostonhistory.org/old_state_hs_hist.html.

 Court Review is published quarterly by the American Judges Association (AJA). AJA members receive a subscription to *Court Review*. Non-member subscriptions are available for $35 per volume (four issues per volume). Subscriptions are terminable at the end of any volume upon notice given to the publisher. Prices are subject to change without notice. Second-class postage paid at Williamsburg, Virginia, and additional mailing offices. Address all correspondence about subscriptions, undeliverable copies, and change of address to Association Services, National Center for State Courts, P.O. Box 8798, Williamsburg, Virginia 23187-8798. Points of view or opinions expressed in *Court Review* are those of the authors and do not necessarily represent the positions of the National Center for State Courts or the American Judges Association. ISSN: 0011-0647.

President's Column

Bonnie Sudderth

We've often heard the remark, "A lawyer who represents himself has a fool for a client." And any judge who has had the misfortune of presiding over a matter in which an attorney is self-representing knows all too well the truth of this statement.

It's not so much that bad lawyers are the ones who make the (bad) choice to represent themselves, although I have long suspected a correlation. What I have observed is that even good lawyers lose their ability to perform well when they become distracted by their own self-interests. Lawyers who represent themselves in court quite often lose that degree of objectivity and dispassion necessary to make sound legal decisions.

Zeal and tunnel vision replace the cool detachment that law school instills. Just as a doctor should never self-diagnose, a lawyer, too, should not self-represent. This point was never driven home more for me than when, at the end of a lengthy jury trial of a boring commercial dispute involving a self-represented attorney, a juror asked me, "Does he beat his wife?" Not only had the attorney done a poor job in representing himself (he lost), but his over-passionate arguments and extreme positions left the jurors with the distinct impression that he was emotionally unstable, perhaps even dangerous.

If we all know that, generally speaking, even a law-trained attorney will do a poor job in representing himself in court, why do we persist in this notion that the justice system should do more to assist non-law-trained pro se litigants to represent themselves in court?

Throughout the country, courts are being encouraged to do more to assist pro se litigants. From kiosks to how-to manuals, from case managers to preprinted pleadings and orders, courts across our country are bending over backwards, oftentimes at considerable taxpayer expense, to assist pro se litigants as they maneuver their way through the legal system. We continue to ask ourselves how we can do more to help pro se litigants represent themselves, yet there is virtually no dialogue on a more fundamental question—why should we?

The answer most often given is because all citizens have the absolute right to represent themselves in the court system. Certainly that is true. But, except in the context of very simple, noncomplex legal proceedings, this "right to self-representation" is euphemistic at best, an oxymoron at worst, because the "right to self-representation," in practical effect, is simply the right to commit legal malpractice.

In recognition of this basic "right to self-representation," the Constitution of the United States could have provided that all persons accused of crimes have the right to represent themselves. Instead, the Founding Fathers gave us the Sixth Amendment, which gives every person accused of a crime the right to have the assistance of counsel. Even 200 years ago, the Founding Fathers recognized that as between the concepts of right to self-representation and right to counsel, the latter is the one worthy of inclusion in our Bill of Rights.

The second most common answer is because they're going to do it anyway. In other words, the train has left the station, so we'd better quickly lay some tracks before it derails. Since pro se litigants are going to appear in our courts anyway, it is argued, it is in their best interest and ours alike to make the process go as smoothly as possible.

But this analysis begs a bigger question. Do we need to lay some tracks to prevent derailment? Or are we actually encouraging self-represented train travel by laying the tracks for them to use? By making the legal system more easily maneuverable for pro se litigants, are we encouraging more self-representation than would otherwise occur in the system?

Who among us would actually encourage an attorney to represent himself or herself in court? If we would not encourage a law-trained individual to self-represent, then why are we racking our brains trying to develop new and innovative ways of encouraging laypersons to undertake self-representation?

Instead of blindly accepting the premise that we need to ease the burden of self-represented individuals in our justice system, the court community needs to examine a more fundamental issue. We need to decide whether justice is best served by self-representation or legal representation. And if we choose the latter, the justice system needs to concentrate its efforts on providing legal assistance, not legal malpractice assistance.

Aside from isolated horror stories, including some about bad lawyers who slept through trials, most judges would agree that legal representation is the safest and surest route to justice. If that's the case, instead of figuring out how to make it easier to self-represent, why don't we spend some time discussing the more difficult issue of how to make attorneys accessible and affordable to all persons who seek justice?

A dialogue along those lines would go a long way toward improving our system of justice—not to mention making our jobs as judges a little easier. In my next column, I'll discuss some ideas and programs that are being instituted across our country in the attempt to provide quality and affordable legal representation to individuals in need.

Saving the State Justice Institute

José F. Dimas

Last fall, Congress seriously undermined efforts to strengthen and improve state court systems. The appropriations bill for FY 2002 funded the State Justice Institute (SJI) at $3 million and called for its demise by September 30, 2003.

SJI is the only federal institution dedicated to improving the state court systems. It does this primarily by funding national-scope court projects and the awarding of educational scholarships to court personnel. A national effort led by the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) is under way in the court community to reverse this decision and gain full funding for FY 2003.

While SJI has faced difficulties in funding before, this was the first time that its elimination has been legislated. The $3 million for SJI is just enough to cover the costs of phasing out the institution as of September 30.

BACKGROUND

SJI was established by federal law in 1984 and it is, in fact, the only vehicle for distributing federal funds dedicated exclusively to improving the quality of the nation's state courts. Since becoming operational in 1987, SJI has supported more than 1,000 projects with awards totaling more than $125 million. Courts in every state have received at least one SJI grant. Other grantees receiving awards include national court-support organizations, such as the National Center for State Courts; national court-education organizations, including the National Judicial College and American Academy of Judicial Education; national and state court membership organizations, such as the American Judges Association and the National Association for Court Management; universities; bar associations; other nonprofit groups; and individuals receiving judicial scholarships.

Annual funding for SJI—which was last authorized by Congress to receive an annual appropriation of $25 million, modest by federal standards—has ranged from $13.55 million in the mid-1990s to $6.85 million in 2001.

SJI is not a federal agency but rather a nonprofit corporation governed by a board of directors whose members are appointed by the President and confirmed by the U.S. Senate. By law, the board must include six state court judges, a state court administrator, and four public members. The judicial and state court administrator members must be selected from a list submitted to the President by the Conference of Chief Justices.

WIDESPREAD SUPPORT

The proposed elimination of SJI has not been popular with the state court community. Besides CCJ and COSCA, other groups have also gone on record as opposing the elimination of SJI. They include the American Judges Association, the Conference of Court Public Information Officers, the Leadership Institute in Judicial Education, the National Association of State Judicial Educators, the National College of Probate Judges, the Association of Trial Lawyers, the Civil Justice Reform Group, the National Association for Court Management, the National Association of Women Judges, the National Conference of Appellate Court Clerks, and the American Bar Association.

Already, meetings have occurred with important members of the House and Senate Appropriations Committee on maintaining SJI. In March, South Carolina Chief Justice Jean Toal and Robert Miller (retired chief justice of South Dakota and chairman of SJI's board) met with Senate Appropriations–Commerce, Justice, State Subcommittee Chairman Ernest Hollings (D-S.C.) and made the case for keeping SJI. The Commerce, Justice, State Subcommittee is the Congress's primary funding body for SJI. This was followed by an April meeting between Chief Justice Harry Carrico of Virginia and House Appropriations–Commerce, Justice, State Subcommittee Chairman Frank Wolf (R-Va.). Other members of the full House and Senate Appropriations Committees also have been the primary targets of the "Save SJI" message. In addition to meeting with state court representatives, these members have been receiving faxes, letters, e-mails, and phone calls from the state court community.

In our constant communications with members of Congress and their staff, no one has contended that SJI has been doing a poor job or wasting taxpayer dollars. In fact, most objections center on the need for fiscal tightening throughout the federal government. SJI, perhaps due to its small size, seems to be a target for elimination.

As stated in the CCJ/COSCA resolution supporting SJI, the $13.5 million amount requested for FY 2003 is "a necessary first step" for this organization. The state court community intends to fight for that amount and gradually call for additional funds in the following years to the amount originally authorized by Congress. Only then can SJI truly fulfill its national mission and scope.

PROJECTS FUNDED

SJI has primarily addressed pressing national issues through its grants process. For example, SJI provided early seed money for improving the way state courts across the country deal with family violence cases, which began to fill court dockets. To address this growing problem, SJI convened the first-ever National Conference on Family Violence and the Courts. All 50 states sent teams of judges, criminal justice officials, social service/domestic violence workers, and others to develop strategies to respond to family violence. After the conference, SJI awarded grants to help 17 states put those plans into action. The result: in those 17 states, there was an unprecedented

degree of collaboration between agencies and organizations that usually know of each other, but rarely communicate with each other. All this benefited abused women and children in those states. Even more, the results of that teamwork are available to anyone who requests them from SJI or goes to the SJI website: www.statejustice.org.

One of the benefits of allocating funding through SJI is it only has the authority to work with all aspects of state court systems. Since family violence cases come to the state courts in criminal, civil, juvenile, and family courts, SJI is able to respond in a comprehensive matter. On the other hand, any federal agency attempting to respond would have to do it in a piecemeal fashion; for example, the Department of Health and Human Services could only fund projects related to child support cases.

SJI has also been helpful in helping address problems due to illegal drugs. As it did with family violence, SJI coordinated a national conference followed by a round of grants implementing many state plans. It has also supported the first national evaluation of drug courts. SJI also hosted regular meetings of federal funding agencies concerned with the criminal use of drugs such as the Bureau of Justice Assistance, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, and the Center for Substance Abuse Prevention and Treatment. The goal of these meetings was to coordinate efforts, avoid duplication, and maximize the impact of federal dollars.

Other projects funded by SJI that have had a national impact include examining the utility of court-based computer information kiosks and the delivery of conferences via CD-ROM.

KPMG REPORT

On March 31, 2002, the consulting firm of KPMG conducted a survey of SJI projects relating to drug abuse, family violence, and violence against women. The survey was designed to identify respondents' awareness of SJI projects and resources, the involvement of the respondents in SJI-supported actions, actions taken by respondents as a result of the involvement, and the benefit gained from such actions.

"It is clear from the results of the survey that SJI's impact has been felt in state court systems across the country," the KPMG report concluded. "This impact is not limited to the specific grant recipients, but instead the many grants that have had an impact on other court systems nationwide."

CONCLUSION

It is undeniable that SJI serves critical national and federal purposes. At a time when the public demands for an efficient and accountable use of taxpayer funds from every level of government, it is counterproductive for Congress to dismantle the only federally funded organization dedicated to helping the state courts more efficiently cope with their increased workload. In addition, what happens in state courts affects not only citizens' concepts of justice and confidence in the judicial system, but also the operation of federal courts. Congress must keep alive the only institution charged with improving the system where most Americans experience justice—our state courts.

ACTION REQUESTED

We urge you to contact your U.S. senator or representative and make the case for keeping SJI.

We urge you to contact your U.S. senator or representative and make the case for keeping SJI, especially if they serve on the Appropriations Committee. We still have a number of members on the Appropriations Committee who have not been contacted. A list of the Appropriations Committee members, along with their fax numbers and e-mail addresses , accompanies this essay. Faxes and e-mails are more effective at this time due to increased scrutiny being given to the U.S. mail.

In addition, we must continue to highlight that a funding level of $13.55 million is needed for SJI to be truly effective in fulfilling its national mission. Finally, the "repetition effect" cannot be overemphasized. The busy lives of members of Congress necessitates this kind of strategy. If you have already communicated with your member, be sure to extend your thanks along with your hopes for a positive result for SJI.

For the full copy of the KPMG report, as well as a summary of the grants that have gone to your state, go to the SJI website at www.statejustice.org. Please keep the NCSC Government Relations Office informed of your outreach to congressional members as we are keeping a log of such efforts. Please let me know of your efforts, and feel free to call me with any questions or concerns.

José Dimas is a government relations associate at the National Center for State Courts. He has extensive experience in federal relations, having worked both on Capitol Hill and elsewhere in the federal government. Dimas has a bachelor's degree in government from the University of Texas at Austin and a master's degree in public policy from Baylor University.

CONTACTING MEMBERS OF CONGRESS

Funding for the State Justice Institute is under the jurisdiction of the Appropriations Committee of each house of Congress. Initial decisions are made by the Subcommittees on Commerce, Justice, State, and Judiciary.

HOUSE APPROPRIATIONS COMMITTEE
Subcommittee on Commerce, Justice, State, and Judiciary

REPUBLICANS
Frank R. Wolf, Va. - *chairman*
Harold Rogers, Ky.
Jim Kolbe, Ariz.
Charles H. Taylor, N.C.
Ralph Regula, Ohio
Tom Latham, Iowa
Dan Miller, Fla.
David Vitter, La.

DEMOCRATS
Jose E. Serrano, N.Y. - *ranking member*
Alan B. Mollohan, W.Va.
Lucille Roybal-Allard, Calif.
Robert E. "Bud" Cramer, Ala.
Patrick J. Kennedy, R.I.

SENATE APPROPRIATIONS COMMITTEE
Subcommittee on Commerce, Justice, State, and Judiciary

DEMOCRATS
Ernest F. Hollings, S.C. - *chairman*
Daniel K. Inouye, Hawaii
Barbara A. Mikulski, Md.
Patrick J. Leahy, Vt.
Herb Kohl, Wis.
Patty Murray, Wash.
Jack Reed, R.I.

REPUBLICANS
Judd Gregg, N.H. - *ranking member*
Ted Stevens, Alaska
Pete V. Domenici, N.M.
Mitch McConnell, Ky.
Kay Bailey Hutchison, Tex.
Ben Nighthorse Campbell, Col

DETAILED CONTACT INFORMATION

(Members of the Subcommittees on Commerce, Justice, State, and Judiciary appear in Bold)

HOUSE APPROPRIATIONS COMMITTEE

Member	Fax #	E-mail
Republicans (36)		
C.W. Bill Young, Fla. – *chairman*	202-225-9764	bill.young@mail.house.gov
Ralph Regula, Ohio	202-225-3059	http://wwwa.house.gov/regula/zipauth.htm
Jerry Lewis, Calif.	202-225-6498	http://www.house.gov/writerep/
Harold Rogers, Ky.	202-225-0940	talk2hal@mail.house.gov
Joe Skeen, N.M.	202-225-9599	joe.skeen@mail.house.gov
Frank R. Wolf, Va.	202-225-0437	http://www.house.gov/writerep/
Tom DeLay, Tex.	202-225-5241	http://www.house.gov/writerep/
Jim Kolbe, Ariz.	202-225-0378	http://www.house.gov/writerep/
Sonny Callahan, Ala.	202-225-0562	
James T. Walsh, N.Y.	202-225-4042	rep.james.walsh@mail.house.gov
Charles H. Taylor, N.C.		rep.charles.taylor@mail.house.gov
David L. Hobson, Ohio	202-225-1984	http://www.house.gov/hobson/formmail.htm
Ernest Istook, Okla.	202-226-1463	istook@mail.house.gov
Henry Bonilla, Texas	202-225-2237	http://www.house.gov/writerep/

Member	Fax #	E-mail
Joe Knollenberg, Mich.	202-226-2356	rep.knollenberg@mail.house.gov
Dan Miller, Fla.	202-226-0828	http://www.house.gov/danmiller/survey/survey.html
Jack Kingston, Ga.	202-226-2269	jack.kingston@mail.house.gov
Rodney Frelinghuysen, N.J.	202-225-3186	rodney.frelinghuysen@mail.house.gov
Roger Wicker, Miss.	202-225-3549	roger.wicker@mail.house.gov
George Nethercutt, Wash.	202-225-3392	george.nethercutt-pub@mail.house.gov
Randy "Duke" Cunningham, Calif.	202-225-2558	http://www.house.gov/cunningham/IMA/get_address3.htm
Todd Tiahrt, Kan.	202-225-3489	tiahrt@mail.house.gov
Zach Wamp, Tenn.	202-225-3494	http://www.house.gov/wamp/IMA/get_address4.htm
Tom Latham, Iowa	202-225-3301	latham.ia05@mail.house.gov
Anne M. Northup, Ky.	202-225-5776	rep.northup@mail.house.gov
Robert B. Aderholt, Ala.	202-225-5587	robert.aderholt@mail.house.gov
Jo Ann Emerson, Mo.	202-226-0326	http://www.house.gov/writerep/
John E. Sununu, N.H.	202-225-5822	rep.sununu@mail.house.gov
Kay Granger, Tex.	202-225-5683	texas.granger@mail.house.gov
John E. Peterson, Pa.	202-225-5796	john.peterson@mail.house.gov
Virgil H. Goode, Jr., Va. (I)	202-225-5681	rep.goode@mail.house.gov
John T. Doolittle, Calif.	202-225-5444	doolittle@mail.house.gov
Ray LaHood, Ill.	202-225-9249	http://www.house.gov/writerep/
John E. Sweeney, N.Y.	202-225-6234	john.sweeney@mail.house.gov
David Vitter, La.	202-225-0739	david.vitter@mail.house.gov
Donald L. Sherwood, Pa.	202-225-9594	http://www.house.gov/writerep/
Democrats (29)		
David R. Obey, Wis. - *ranking member*	202-225-3240	http://www.house.gov/writerep/
John P. Murtha, Pa.	202-225-5709	murtha@mail.house.gov
Norm Dicks, Wash.	202-226-1176	http://www.house.gov/writerep/
Martin Olav Sabo, Minn.	202-225-4886	martin.sabo@mail.house.gov
Steny H. Hoyer, Md.	202-225-4300	http://www.house.gov/hoyer/letstalk.htm
Alan B. Mollohan, W.Va.	202-225-7564	
Marcy Kaptur, Ohio	202-225-7711	rep.kaptur@mail.house.gov
Nancy Pelosi, Calif.	202-225-8259	sf.nancy@mail.house.gov
Peter J. Visclosky, Ind.	202-225-2493	http://www.house.gov/writerep/
Nita M. Lowey, N.Y.	202-225-0546	nita.lowey@mail.house.gov
Jose E. Serrano, N.Y.	202-225-6001	jserrano@mail.house.gov
Rosa DeLauro, Conn.	202-225-4890	http://www.house.gov/delauro/message.html
James P. Moran, Va.	202-225-0017	http://www.house.gov/moran/letstalk.htm
John W. Olver, Mass.	202-226-1224	http://www.house.gov/olver/emailme.html
Ed Pastor, Ariz.	202-225-1655	http://www.house.gov/writerep/
Carrie P. Meek, Fla.	202-226-0777	http://www.house.gov/writerep/
David E. Price, N.C.	202-225-2014	david.price@mail.house.gov
Chet Edwards, Tex.	202-225-0350	http://www.house.gov/edwards/IMA/get_address2.htm
Robert E. "Bud" Cramer, Ala.	202-225-4392	budmail@mail.house.gov
Patrick J. Kennedy, R.I.	202-225-3290	patrick.kennedy@mail.house.gov
James E. Clyburn, S.C.	202-225-2313	jclyburn@mail.house.gov
Maurice D. Hinchey, N.Y.	202-226-0774	http://www.house.gov/writerep/
Lucille Roybal-Allard, Calif.	202-226-0350	http://www.house.gov/writerep/
Sam Farr, Calif.	202-225-6791	http://www.house.gov/writerep/
Jesse L. Jackson Jr., Ill.	202-225-0899	webmaster@jessejacksonjr.org
Carolyn Cheeks Kilpatrick, Mich.	202-225-5730	http://www.house.gov/writerep/
Allen Boyd, Fla.	202-225-5615	http://www.house.gov/writerep/
Chaka Fattah, Pa.	202-225-5392	http://www.house.gov/writerep/
Steven R. Rothman, N.J.	202-225-5851	steven.rothman@mail.house.gov

SENATE APPROPRIATIONS COMMITTEE		
Senator	**Fax #**	**E-mail**
Democrats (15)		
Robert C. Byrd, W.Va. – *chairman*	202-228-0002	senator_byrd@byrd.senate.gov
Daniel K. Inouye, Hawaii	202-224-6747	senate@inouye.senate.gov
Ernest F. Hollings, S.C.	202-224-4293	http://hollings.senate.gov/webform.html
Patrick J. Leahy, Vt.	202-224-3479	senator_leahy@leahy.senate.gov
Tom Harkin, Iowa	202-224-9369	tom_harkin@harkin.senate.gov
Barbara A. Mikulski, Md.	202-224-8858	http://mikulski.senate.gov/mailform.htm
Harry Reid, Nev.	202-224-7327	Senator_reid@reid.senate.gov
Herb Kohl, Wis.	202-224-9787	Senator_kohl@kohl.senate.gov
Patty Murray, Wash.	202-224-0238	Senator_murray@murray.senate.gov
Byron L. Dorgan, N.D.	202-224-1193	Senator@dorgan.senate.gov
Dianne Feinstein, Calif.	202-228-3954	http://feinstein.senate.gov/email.html
Richard J. Durbin, Ill.	202-228-0400	Dick@durbin.senate.gov
Tim Johnson, S.D.	202-228-5765	Tim@johnson.senate.gov
Mary L. Landrieu, La.	202-224-9735	http://landrieu.senate.gov/newsite/webform.html
Jack Reed, R.I.	202-224-4680	Jack@reed.senate.gov
Republicans (14)		
Ted Stevens, Alaska – *ranking member*	202-224-2354	http://stevens.senate.gov/webform.htm
Thad Cochran, Miss.	202-224-9450	Senator@cochran.senate.gov
Arlen Specter, Pa.	202-228-1229	http://www.senate.gov/~specter/webform.htm
Pete V. Domenici, N.M.	202-228-0900	http://domenici.senate.gov/contact/contactme.cfm
Christopher S. Bond, Mo.	202-224-8149	kit_bond@bond.senate.gov
Mitch McConnell, Ky.	202-224-2499	Senator@mcconnell.senate.gov
Conrad Burns, Mont.	202-224-8594	http://www.senate.gov/~burns/mailform.htm
Richard C. Shelby, Ala.	202-224-3416	Senator@shelby.senate.gov
Judd Gregg, N.H.	202-224-4952	Mailbox@gregg.senate.gov
Robert F. Bennett, Utah	202-228-1168	Senator@bennett.senate.gov
Ben Nighthorse Campbell, Colo.	202-224-1933	http://campbell.senate.gov/email.htm
Larry E. Craig, Idaho	202-228-1067	http://www.senate.gov/~craig/frontpage.htm
Kay Bailey Hutchison, Texas	202-224-0776	Senator@hutchison.senate.gov
Mike DeWine, Ohio	202-224-6519	Senator_dewine@dewine.senate.gov

COMMUNICATING WITH MEMBERS OF CONGRESS

Personal Visits: If possible, schedule personal visits with your Members of Congress either in Washington, D.C. or in their home offices as soon as possible. If you cannot schedule a visit for several weeks, precede it with a letter. It is critical that you convey your concerns in the next few weeks.

Phone contact: The office of any Member of Congress may be reached through the Capitol Switchboard: **202-224-3121.**

Letters: A letter succinctly expressing your concerns and the action you are asking the member to take should be sent, even if you plan to visit in person. A post-visit thank-you letter also is recommended because it is appreciated and gives you an opportunity to reiterate your message.

Mail delivery to Congress has been slow since the anthrax scare. If possible, **fax** your letters. Transmission by e-mail attachment is not as effective, because such letters do not always get printed out. In addition, please note that many offices block e-mail that is not from constituents.

Addressing Correspondence:

To a Representative
The Honorable (full name)
United States House of Representatives
Washington, DC 20515

To a Senator
The Honorable (full name)
United States Senate
Washington, DC 20510

ACS Full Page Ad

The Changing Role of a Judge and Its Implications

Roger Hanson

There is a lot of talk these days about the role of a judge, especially among trial court judges. Frequently the discussion is framed in terms of whether the judiciary should be expected to behave in one of two polar-opposite ways. Should they be primarily almost aloof finders of fact, impartial and nearly devoid of intimate contact with and knowledge of litigants and their circumstances? Or should they be one of many possible partners to a diagnostic, therapeutic oriented response process to ameliorate underlying and messy problems of litigants? These choices confront judges with the creation and development of drug courts, domestic abuse courts, gun courts, mental health courts, community courts, and other courts revolving around social maladies.

These are not negligible choices with few consequences. The contention of this article is that changes in judicial roles have profound implications, even though the advocates of particular role changes might see them as improvements in the manner in which judges make decisions and carry out their responsibilities. To support this argument, the article tries to sort out some of the implications of what has happened to the judicial role in past several years. Certainly there are few judges who would claim that judging today is just like it was 30 years ago, or like they think it was 30 years ago. For this reason, I think that there is a need for a deliberative and purposive discussion on the judicial role—past, present, and future. The intended contribution of this article is to encourage that dialogue by synthesizing scholarly observations on the importance of the judicial role, to suggest what have been implications of past role changes, and to recommend what should be on the future agenda of action and research.

I. INTRODUCTION

The notion that individuals play particular roles in society is a persuasive and pervasive proposition in the study of human behavior. *Role orientations* are defined as an individual's expectations on what he or she should do. And *role behavior* is defined as what an individual actually does in terms of identifying problems, searching for alternative responses to those problems, weighing the pros and cons of the alternatives to the current condition, selecting the most promising response, and then implementing that response. Cast in that light, it is understandable that the notion of roles has been applied to the study of decision makers. In fact, one of the first applications of this concept was to legislators, at both the national and the state levels.

Studies of judges have incorporated the notion of judicial roles to describe and to explain judicial decision-making behavior. Court reformers have embraced into their vocabulary the notion of roles and urged that judges adopt new ones to fit emerging needs and circumstances. Both scholarly researchers and visionaries of court improvement have accepted the fundamental premise that if judicial expectations or role orientations are changed, a judge's role behavior will be altered in meaningful and substantial ways. And those ways might, in turn, affect a litigant's behavior in a socially desirable manner.

The most recent chapter in the unfolding story of judicial roles is the current discussion surrounding problem-solving courts and problem-solving judges.[1] As we will see below, however, the analysis of roles has a history. This history allows us to talk about the implications of role changes more deeply than if the discussion just began with the contemporary issue of problem-solving courts. Hence, it is both possible and worthwhile to try to sort out the implications of past changes in judicial role orientations and judicial role behavior to enlighten the current condition.

The basic objective of this article, then, is to explore whether there are some common patterns to what happens with the introduction of new and different judicial expectations. To assess whether there are discernable patterns, I believe that it is fruitful to engage in a dual exercise of reflecting on what the scholarly literature on the subject of judicial roles has contributed and by considering essential aspects of court reforms that have occurred during the past 35 years.

Bringing past reforms into the discussion is useful in two ways. First, it provides well-known examples of how judges have changed their behavior and court policies. These illustrations establish the practical significance of thinking about the judicial expectations that underlie these important phenom-

This article was prepared with the support of a grant from the State Justice Institute (No. SJI-01-N-123). The points of view expressed do not necessarily represent the official position of policies of the State Justice Institute. Appreciation is extended to Mary De Carlo, program manager at the State Justice Institute. Several other individuals provided helpful comments on drafts of this essay. They include the Honorable Michael Dann, the Honorable Craig Enoch, Victor Flango, Bruce Harvey, Matthew Kleiman, Brian Lynch, Michael Planet, the Honorable Jonathan Silbert, the Honorable Roger Warren, and the Honorable J. R. Zepkin. Brenda Jones ably assisted in the preparation of this essay.

Footnotes

1. *See* Greg Berman, *What Is a Traditional Judge Anyway? Problem-Solving in the State Courts*, 84 JUDICATURE 78 (2000); John Feinblatt & Dereck Denckla, *Prosecutors, Defenders and Problem-Solving Courts*, 84 JUDICATURE 206 (2001).

ena. Second, reforms are a useful epistemological platform on which to sort out the implications of changing judicial expectations without first having to define *the* proper expectations and *the* proper behavior of a judge. Universal agreement has not been achieved in either area, but that situation need not inhibit the discussion of the implications of changes in judicial expectations. Implications of changing expectations can be seen, at least indirectly, from major court reforms.

The benefits of discussing the implications of changing judicial expectations are threefold: First, it is essential to know the whether the conscious decision by judges to change their expectations has recognizable implications. Persistent and consistent implications of changing judicial expectations permit the opportunity for reflection and deliberation by judges on whether to continue modifying their expectations or role orientations. Second, an understanding of the path that implications generally take will enable us to monitor role changes in progress. It is helpful to be able to know where role changes are headed to anticipate their eventual consequences. Third, knowledge of the pattern of implications wrought by changes in judicial expectations is vital because an all too common reaction to changes in judicial role behavior and corresponding policies is near hysteria. Because the American legal system is oriented favorably to maintaining both substantive and procedural precedents, change itself is greeted with skepticism by some observers. Before dismissing changes in judicial role behavior out of hand as inappropriate, the implications should first be understood as carefully as possible.

II. LEADING OBSERVATIONS AND POSSIBLE LESSONS FROM THE LITERATURE

Previous research has documented several important characteristics of judicial roles that serve as a useful analytical framework. The literature tries to clarify the general nature and significance of judicial roles. In contrast, visionaries and practitioners of court reform frequently assert the benefits to be derived from particular role changes and focus primarily on how to put corresponding court reforms into place. Hence, the scholarly literature provides a needed perspective on judicial roles.

Basically, I believe that there are five leading propositions extant in the literature, although readers might find it enlightening to examine referenced sources for more specific details of substance and methodology. Because the literature concerns both trial and appellate courts, some of the propositions might seem to be drawn from settings that are not relevant to the contemporary discussion ongoing in many trial courts. Yet, discussion of what is the most proper role of an appellate court judge parallels aspects of the trial court discussions. Hence, I think that they have relevance and I have tried to state them in the most relevant manner possible. The five propositions are as follows:

First, there is no single judicial role based on one distinct set of expectations or role orientation. There are multiple role orientations that any given judge can adopt. This now seemingly obvious statement is startling when set along the history of debate over the proper role of a judge.

One of the initial efforts to study judicial roles raised the prospect that there are at least five distinct sets of judicial expectations or role orientations.

As everyone knows, there has been a long-standing debate in the legal academy and among the participants engaged in the selection of judges, especially federal judges. Some participants contend that a judge's role behavior is to interpret the plain meaning of the law and apply it strictly to the facts in an instant case. Other observers contend that a judge's role behavior is to adapt the law to changing circumstances and technologies and to consider socially desired consequences in resolving specific disputes. As fascinating, intriguing, and compelling as the give and take among the participants to this debate may be, the discussions seem somewhat abstract and elevated in light of what judges have claimed are their jobs. Moreover, the less abstract judicial role orientations are seen in studies of both appellate judge and trial judges.

One of the initial efforts to study judicial roles raised the prospect that there are at least five distinct sets of judicial expectations or role orientations.[2] The following five names are given to role orientations believed to be held by justices of supreme courts in Louisiana, Massachusetts, New Jersey, and Pennsylvania:

- The Task Performer—emphasizes processing litigation and maintaining smooth court operations.
- The Adjudicator—emphasizes deciding cases.
- The Law Maker—emphasizes interpreting the law to fit changing circumstances and technologies.
- The Administrator—emphasizes the supervision of the bar and the lower courts.
- The Constitutional Defender—emphasizes strict adherence to the Constitution and the avoidance of basing decisions on socially desired outcomes. (This role presumably is a counter to the Law Maker.)

Of course, these categories reflect the context and setting in which the study was conducted—four state supreme courts in approximately 1970. Perhaps, more importantly, the construction and classification of judicial expectations is based on a

2. HENRY ROBERT GLICK, SUPREME COURTS IN STATE POLITICS: AN INVESTIGATION OF THE JUDICIAL ROLE 30-34 (1971).

A second theme in the literature is that expectations do in fact affect a judge's behavior.

classification of responses by individual justices to a single, open-ended question. That question was, "How would you describe the job of a supreme court judge?" Nevertheless, the multiple categories illustrate the elemental proposition that the role orientation of a judge is not a single task or responsibility that might be carried out in different ways. On the contrary, judges have distinctively different sets of expectations on what they should do.

This same research made a related observation concerning the dominance of particular role orientations. Justices from different states tend to emphasize one role over another, although justices cluster together more with justices from some states than from others. These differences are attributed to differences in tradition and position of the courts in their respective state governmental systems. For example, more of New Jersey Supreme Court justices emphasized the expectations associated with the Law Maker's role orientation than did the justices in the other states. The views of the New Jersey justices were interpreted as a result of the successful efforts of former New Jersey Chief Justice Arthur T. Vanderbilt to gain acceptance of the New Jersey Supreme Court's role in legal policy making by the other branches of government in New Jersey.[3]

A second theme in the literature is the proposition that expectations do in fact affect a judge's behavior. This proposition is one of the overarching premises on which the study of judicial roles is based. Because of the time and cost of just mapping a judge's expectations, most scholarly investigations of judicial roles have foregone the business of linking measured role orientations to independently measured role behavior. Fortunately, some scholars have made the linkage. Two studies are worth mentioning.

One study piggybacked an inquiry on roles and trial court timeliness onto a previous investigation. The previous investigation had conducted a study of trial court judges in Ohio and produced five categories of role orientations.[4] The categories were constructed through a quantitative analysis of responses to multiple, closed-ended questions about their agreement or disagreement that particular factors influence their decision making.[5] The names of the role orientations were as follows:

- The Law Interpreter—emphasizes adherence to judicial restraint.
- The Adjudicator—emphasizes concern for social consequences of decisions.
- The Administrator—emphasizes procedural goals and precedent only if they expedite case resolution.
- The Trial Judge—emphasizes a concern for timeliness, justice in individual cases, and precedent.
- The PeaceKeeper—emphasizes a balancing of contending principles and does not consider stare decisis to be the working rule of law.

The questions that made up the role orientation of the judge as an administrator were then asked of judges by another researcher in a subsequent study of trial court judges in three anonymous metropolitan courts in 1978.[6] Each judge was classified to the extent he or she emphasizes the role orientation of the administrator. The research question then became, "Do the judges that adhere to the administrator's role more closely than other judges resolve their cases more expeditiously?"

The answer was yes. Moreover, not only was timeliness related to the administrator's role at the individual judge level, but it also held true at the court level. The greater the extent to which the judiciary of each court emphasized the administrator's role orientation, the shorter the average amount of time that each court took to resolve cases.

Additionally, this research made several sage suggestions that went beyond the immediate conclusions. One observation was that judges are likely to adhere to different combinations of role orientations. No one orientation is likely to be all-inclusive for many individual judges. Another observation was that expectations can and likely will change over time. Expectations held by judges reflect their circumstances to some degree, especially perceived challenges. In a sense, to say that there have been changes in judicial priorities is another way of saying that expectations have changed.

Another study that connected judicial role orientations to behavior concerned trial judges in California and Iowa and their sentencing decisions in 1976.[7] Here, the expectations of judges were measured to determine if there was a single dimension underlying their views. The research advanced the hypothesis that the essential nature of the judicial role orientation is whether a judge believes that it is proper for extra-legal stimuli (*e.g.*, their own views and behavior) to influence his or her decisions more than legal stimuli (*e.g.*, recommen-

3. *Id.* at 36-37.
4. Thomas D. Ungs & Larry R. Bass, *Judicial Role Perceptions: A Q-Technique Study of Ohio Judges*, 6 LAW & SOC. REV. 343 (1972).
5. Basically, the names of the different roles were labels given to sets of questions whose answers clustered together statistically. That is, responses to some questions highly correlated with responses to other particular questions and were unrelated to the responses to still other questions. Each set of questions whose answers were inter-correlated were considered to be a particular role. By looking at the substantive nature of the inter-correlated questions, researchers gave them a name that they thought served a meaningful interpretation.
6. Keith Boyum, *A Perspective on Civil Delay in Trial Courts*, 5 JUSTICE SYS. J. 170 (1979). Boyum piggybacked his study onto the previous work of Ungs and Bass.
7. James C. Gibson, *Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model*," 72 AMER. POLITICAL SCI. REV. 911 (1978); James C. Gibson, *Discriminate Functions, Role Orientations and Judicial Behavior: Theoretical and Methodological Linkages*, 39 J. POLITICS 984 (1977).

dation of a district attorney). The findings suggest that judges who do give legitimacy to extralegal factors sentence defendants more leniently than those who do not. However, the judges who emphasized legal factors were not a closely knit group. Some of them imposed severe sentences, but others imposed more lenient ones.

A third proposition is that judicial role orientations exist beyond the borders of the American common-law adversary system. Following in the research tradition used in the previous studies of American judges, researchers in 1974 sought to see if judges in Switzerland and Austria exhibited expectations concerning their work. All German-speaking appellate judges were asked to respond to a battery of questions concerning the weight they gave to a series of factors in making their decisions.[8]

The investigators concluded that the judges under study did have definite expectations concerning two key dimensions: (1) the weight given to precedent and (2) the weight given to the litigants in individual cases versus the public.

Dividing each dimension into halves produced a fourfold typology of role orientations. They were:

- The Law Applier—emphasizes precedent and individual litigants.
- The Law Extender—emphasizes precedent and the public.
- The Mediator—emphasizes the individual and deemphasizes the importance of precedent.
- The Policy Maker—emphasizes the public and deemphasizes the importance of precedent.

In addition to suggesting the generality of the concept of judicial role, the research suggests a judge's expectations include more than what he or she thinks a judge is supposed to do in making decisions. Judges are cognizant of the role of previous courts in society and of other participants in the justice system.

A fourth proposition is that judicial roles are critical intervening factors between case management policies and the degree of the policies' successes. Researchers have asked the question, "Why do courts with the same case management policies and procedures governing the resolution of cases vary substantially in the time taken to resolve cases?" The answer is that there are some judicial role orientations that inhibit the effectiveness of case management policies and others that enhance policy effectiveness.

Based on interviews and observations of federal district court judges in Los Angeles, Miami, and New Orleans in 1977,[9] three sets of expectations seemed to be associated with the pace of litigation: the degree of a judge's perceived need to control attorneys, the perceived need to encourage settlement, and the perceived quality of justice shaped to a judge's willingness to use available policies and procedures of case management. Judges who believe that their job calls for them to control litigation and encourage settlement, and who do not see case management as sacrificing quality, tend to resolve cases faster than those judges with opposite expectations of what their jobs entail.

[J]udges who believe that their job calls for them to control litigation and encourage settlement, and who do not see case management as sacrificing quality, tend to resolve cases faster . . . .

A fifth and final proposition is that judicial expectations are manifestly discernable in how judges make decisions. The connection between judicial expectations and decisions is not a "black box." This idea is clearly a new addition to the study of judicial roles because the previous research mentioned above in the discussion of the first four propositions had examined only the nature of either judicial expectations or judicial decisions. How the expectations are translated into decisions has not been a topic until a recent study of prisoner litigation in the federal court system.

That study argues that federal court judges followed a particular role in crafting decisions beginning in the 1960s toward the conditions of state prisons.[10] The thesis of the study is that judges took a policy-making role and developed a body of legal doctrine that was the basis for their intervention and the setting of prison standards, such as the maximum number of prisoners, access to the courts, medical care, recreational opportunities, and so forth. Furthermore, judicial policy making was similar but not identical to legislative and executive policy making. Judges followed the basic steps that legislators and executives follow in responding to problems. The researchers claim that the basic decision-making steps of problem definition, goal identification, search for alternatives, selection of the most promising alternative, and implementation were observable in how the federal judiciary responded to challenges to prison conditions. The steps were not exactly the same as in legislative and executive decision making because the judges were creating doctrine. Their decision-making process was just as discernable, however, as in the case of legislative and executive decision making.

8. Victor Eugene Flango, Lettie McSpadden Wenner & Manfred W. Wenner, *The Concept of Judicial Role: A Methodological Note*, 19 AMER. J. POLITICAL SCI. 277 (1975).
9. David Neubauer, *Judicial Role and Case Managment*, 4 JUSTICE SYS. J. 223 (1978).
10. MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998).

Even if "outsiders" were present at creation, these reforms quickly were grafted onto existing court procedures.

Summing up, the research literature affirms the correctness of the cynosure of contemporary court reformers.[11] If changes in judicial decisions and the use of new procedures are desired, then efforts rightly are focused on changing judicial role orientations. New expectations coupled with new policies will trump the effects of new policies alone every time.

There are two limitations to the literature reviewed here. One of them arises because research on judicial roles has not continued into the present. Thus, there is no available catalog of expectations that connects specific subsets of expectations to particular goals of contemporary court reform, such as access to justice, expedition and timeliness, fairness and integrity, clarity of decisions, and so forth. As a result, there is no guide currently available that charts the extent to which a combination of judicial expectations in a court leads to particular combinations of court performance.[12]

A second limitation is that there is no prescriptive package that contains the mechanisms for changing expectations. Researchers recognize this limitation and fall back on the traditional ingredient of education and training. Researchers have left those "details" to others. Nevertheless, despite these limitations, it is worthwhile to begin sketching out the implications of changing expectations as a way to understand more fully the meaning and significance of changing judicial roles.

III. IMPLICATIONS OF CHANGING JUDICIAL EXPECTATIONS

A. A Short History of Contemporary Court Reform

During the past 25 years, there have been multiple court reforms that have gained national attention and varying applications of particular reforms. The enduring significance of these reforms is a matter of judgment, so the following reforms are offered as illustrations, not as a definitive list. The reforms include the following:

- The development of pretrial release and diversion policies under the general topic of "bail reform" in the 1960s.
- The development of case management in the 1970s.
- The development of alternative dispute resolution efforts in the 1970s.
- The development of drug courts in the 1980s.
- The broader development of specialized courts (*e.g.*, community, gun, and mental health) under the general topic of "problem-solving courts" in the 1990s.

Certainly all of these court reforms had precursors before they attracted widespread attention. However, despite their particular historical lineages, these reforms share some important and interesting attributes. They tended to be created by individuals either within or close to the courts themselves rather than being inspired by legislative or executive action (as contrasted with tort reform and sentencing reform, which generally were inspired by legislative action). Even if "outsiders" were present at creation, these reforms quickly were grafted onto existing court procedures. To a considerable extent, the integration of new policies and procedures into ongoing trial court systems boosted the stock of those court administrators who were especially competent at making the new and the old work smoothly and effectively. And all of these reforms led to the formation of professional associations that fostered or offered education and training programs for judges to attend for inspiration and knowledge building. For all these reasons, it seems reasonable to assume that changing judicial expectations were part of these reforms.

B. The Implications

Court reforms not only have their immediate, direct consequences. Because the reforms involve changing role orientations and role behavior, they have implications for the institution of the judiciary and its place in society and government. These implications are important to understand because they illuminate the profundity of changing judicial roles. The following five implications are offered as among the most substantial:

There is a change in the nature and source of information deemed essential to support judicial decision making. Judges not only make different decisions when they shift their role orientations, but the bases for their decisions shift. For example, recommendations for bail based on measures of a defen-

11. Previous research on the role of a judge has focused primarily on the expectations held by the judges themselves. There has been little effort to measure the expectations of others outside the courts (*e.g.,* litigants, attorneys, policy makers, and the attentive public). Hence, when considering changes in expectations, there is some ambiguity. Whose expectations are we talking about exactly? Looking at recent literature, which focuses on the rise of problem solving courts and judges as problem solvers, the expectations calling for change seem to include both judges and court reformers. I mention this ambiguity because I offer my thoughts on implications based on the assumption that the changing expectations involve both judges and others.
12. The idea that courts and individual judges within courts hold multiple combinations of distinct expectations is related to research now being conducted at the National Center for State Courts. That project focuses on court culture and performance. It is pursuing the hypothesis that those distinctive combinations of judicial and court staff expectations make up distinctive cultures among courts and that different court cultures lead to different performance outcomes.

dant's likelihood of making court appearances are a qualitative change from previous practices in most courts.

There is a change in the nature and range of viable alternatives for judges to consider in decision making. As an illustration, case management is less about telling a judge that he or she must meet a particular deadline in a particular way than suggesting there are alternative ways to screening and calendaring cases (*e.g.*, case differentiation is an alternative to the practice of "first in, first out").

Experts emerge who are knowledgeable in gathering and analyzing new information and who are knowledgeable in fashioning ways of integrating new procedures into court procedures. This implication signals the rise of court management in the broadest sense. Contrary to the idea that case management represents the rise of managerial judges, all of these reforms represent the rise of managerial nonjudges. As an illustration, one reason for the success of mediation in the thorny area of workers' compensation is that mediation has acquired a managerial aspect that it never had before.[13] Hence, judges may become less managerial than before if they change their expectations and permit others to manage.

Taken together, the first three implications suggest a fourth implication. Changing expectations can cost a lot of money. Information, experts, and management all call for resources. As a result, visionaries, court reformers, and judges need to think through thoroughly the priority and timing of court reforms and corresponding changes in judicial expectations.

The final implication builds on the fourth implication and concerns the source of the money connected to the social reforms. To a very great extent, resources made available by the United States Department of Justice have fueled all of the reforms mentioned above. Without automatically asserting that this situation is a benign bestowing of federal largesse or a corruption of the state judiciary, it is important to think about this relationship. It seems fair to ask: Are state judges changing their expectations and their behavior to secure resources?

If we assume that the third branch of state government is in a position of limited and dwindling resources, the possibility of being able to secure an extra judicial position through the acquisition of federal resources might seem attractive. As a result, is the role of the judge changing because of conscious policy choices that the change is warranted because it is the right thing to do? Or is the role changed merely because the carrot of additional resources is available if such changes are made?

IV. CONCLUSION

The literature on judicial roles, recent reforms of court policies, and the implications of past changes in judicial role orientations and role behavior have convergent conclusions. The expectations that judges have on how they should act in making decisions have profound consequences. The behavior of judges is altered. This in turn means that litigants are treated differently. In addition to these consequences, there are implications that arise from changes in judicial role orientations and role behavior. These implications concern the essential elements of judicial decision-making, including what is defined as relevant information, appropriate and viable decision making alternatives, the input and advice of experts, the prominence and role of court administrators, and the source of resources available for the judiciary to seek.

To a very great extent, resources made available by the United States Department of Justice have fueled all of the reforms mentioned above. It seems fair to ask: Are state judges changing their expectations and their behavior to secure resources?

Appealing to the future, there are three fundamental recommendations that arise from these conclusions and implications. First, it is essential to know much more than we currently know about the expectations of judges. The last studies of judicial role orientations and role behavior occurred several years ago. They likely have more value at a general level than at the street level where contemporary discussions are taking place. Yet it remains absolutely important to know the expectations that judges have, including their views on alternative ways of making decisions.

Judges need to be asked whether that they agree or disagree that they should make decisions in an impartial, fact-finding, and independent manner. Or should they make them in more of a partner's role along with many other partners in ameliorating problems vexing litigants? Obviously, the exact wording of questions and their measurement require care and attention, but the history of past scholarship provides a firm foundation.

Additionally, judges need to be asked about how they spend their time. Here the possible categories should parallel the alternative ways of making judicial decisions. Finally, judges should be asked how they would like to spend their time and how they would like to make decisions. These three clusters of questions should be asked in national, regional, and state surveys of judges. The information would give everyone a much more accurate sense of what today's judicial roles are and what judges think of prospective changes in role orientations.

Second, judges need to begin more formal and structured dialogues on the desirability and direction of changes in role orientations and corresponding court reforms. Policy changes do not happen naturally. And role changes do not happen because of some inexorable set of forces. A judge's role is the product of conscious choices. Because those choices have important and substantial consequences and implications, the judiciary has a responsibility to talk through the advantages

13. Roger Hanson, *Courts Have Surprising Success Mediating Workers' Comp Cases*, DISPUTE RESOLUTION 25-8 (Winter 2001).

and disadvantages of role changes. The allure of federal dollars underscores the importance of this dialogue. Certainly, the judiciary does not want to be or appear unconscious of the connection between court reforms and federal monies and act as if they stumbled into federally supported reforms. The judiciary should decide what shifts in their expectations are most warranted in serving the ends of justice and ones that they feel comfortable in adopting. Dialogue on this topic has begun, but far more extensive discussion is needed.

Third, research is needed on the relationship between current judicial role orientations and role behavior. Is there a connection between judicial expectations and court performance? Previous studies have demonstrated an association between a judge's expectations and the timeliness of his docket. But is there any association with judicial expectations and court-level outcomes in the areas of access, fairness, public trust and confidence, and so forth? Do judges who embrace particular role orientations achieve particular levels of performance, as that notion is currently used? This information would provide the necessary grounding for the proposition that role orientations do make a difference and thereby serve as a foundation for the first two recommendations. Thus, there is a comprehensible set of ways to clear the path toward more coherent court policies in the future.

Court consultant Roger Hanson has worked with the bar, courts, corrections, and law enforcement agencies for more than 30 years. He has written extensively on civil and justice reforms and their effectiveness. He can be reached in Williamsburg, Virginia, either at www.factory7.com/~rah or at drhanson@widomaker.com.

Trial Lawyers College
Full Page Ad

Age Differences Among Judges Regarding Maternal Preference in Child Custody Decisions

Leighton E. Stamps

Over the last 30 to 40 years, sweeping changes have occurred in societal attitudes toward divorce. These changes have been reflected in the laws governing divorce and child custody as well as in the increasing rate of divorce in the United States. Just as divorce laws have changed, making the divorce process much less difficult, there have also been dramatic changes in custody and visitation statutes. From the mid-1800s until the 1960s, maternal preference was the general rule in the large majority of judicial custody decisions. During this period, the mother's "natural ability" to nurture the child was considered as a primary factor in custody decisions. This attitude was especially prominent with regard to younger children or children of the "tender years." This "tender years doctrine" developed in some jurisdictions through legislation and in others through judicial opinion. Reference was frequently made in judicial opinions to the mother's "natural superiority" in caring for children. There was little public controversy regarding this attitude since it seemed to reflect societal values at that time. Thus, from the second half of the nineteenth century until the 1960s, legal norms dictated that custody of children belonged with the mother unless she was incapable of providing appropriate care, usually due to mental illness or moral depravity as evidenced by adultery.[1] A finding of inability to care for the children was usually related to a finding of fault in the divorce proceedings.

In the 1950s and 1960s, there was a subtle shift in the tender years doctrine and maternal preference. Less emphasis was being placed on the mother's natural superiority in judicial opinions. The courts began to emphasize the "best interests of the child," giving more discretion to judges to consider other factors in custody decisions. In many jurisdictions, however, "the best interests of the child" standard was simply another name for the "tender years doctrine" since most courts held that maternal custody was usually in the best interests of the child. This shift in legal thought, however, did open the door for the consideration of other factors. This situation resulted in slightly more frequent assignment of custody to fathers although this shift was far from substantial.[2]

In the 1970s, social attitudes were again shifting. The preference for maternal custody was being questioned on several fronts. More and more women were entering the workforce as both part-time and full-time employees. Thus, differences between men and women were being reduced with regard to their roles in the family. In addition, the feminist movement was questioning the assumption that only women could do housework and raise children. As a result, fathers were becoming more involved in the parenting process at the same time that divorce was becoming more frequent. During this period, two opposing positions were often considered by the courts when determining the best interests of the child with regard to custody decisions. According to the traditional viewpoint, children need a stable home life and, therefore, should not be shuttled back and forth from parent to parent on a regular basis. The parent with whom the child lives should have almost exclusive responsibility for raising the child, with only occasional visitation with the noncustodial parent. This position, which had been used for many years, was supported by many mental health professionals at the time and was reflected in the book entitled *Beyond the Best Interests of the Child* by Goldstein, Freud, and Solnit.[3] Goldstein et al. also held that there should be no court-ordered visitation and that visitation with the noncustodial parent should be solely at the discretion of the custodial parent. This publication was frequently cited in judicial decisions as well as in the legal literature.

The alternative viewpoint, which was emerging in the 1970s, reflected parental desires for joint custody or a more equal sharing of time with and responsibility for the children following divorce. This position reflected changing middle-class lifestyles as well as demands from fathers' groups for more active participation in the parenting process. As a result of pressure from parents' groups, joint custody legislation was passed rather quickly and with little public opposition in the late 1970s and early 1980s. This legislation provided equal access to children for both mothers and fathers. At about the same time, states were also passing gender neutral custody legislation, which eliminated maternal preferences and the tender years doctrine. There was a great deal of opposition to joint custody in the legal and, to a lesser extent, the mental health communities. As indicated above, this approach ran counter to the opinions of some in the mental health community. There was also a great deal of resistance from both attorneys and judges since joint custody represented a dramatic change in the traditional approach to this situation.[4]

At the present time, all states have provisions for gender

Footnotes

1. Jay Folberg, Joint Custody and Shared Parenting (1979).
2. Herbert Jacob, Silent Revolution: The Transformation of Divorce Law in the United States (1988).
3. Joseph Goldstein et al., Beyond the Best Interests of the Child (1979).
4. Jacob, *supra* note 2.

neutral custody laws and joint custody arrangements. Since maternal custody is no longer automatic, and distinctions between maternal and paternal roles have been blurred over the past 30 years, judges must now consider a number of issues that were not relevant in the past. There has been a great deal of speculation in the legal literature, however, that many judges still have a preference for maternal custody.[5]

In approximately 90% of divorces involving minor children, the parents reach agreement on custody and visitation arrangements. This agreement is then approved by the court. In the remaining 10% of the cases, custody is contested and the decision must be made by the court. Judges are expected to make their decisions in the best interests of the child. This standard, however, gives judges a tremendous amount of discretion in making these decisions. Clearly, every judge has his or her own set of opinions and presumptions regarding custody issues, which affect rulings. A number of authors have suggested that judges are frequently free to impose their own personal values due to the indeterminacy of the substantive standards that apply in custody decisions.[6] These conclusions are based primarily on case law. Case law itself, however, is not necessarily representative of judicial attitudes in general, since published cases represent only a small minority of actual decisions.

Judges' assumptions regarding various issues related to custody decisions have been assessed through the use of judicial surveys in research done by the present author. In one study, Louisiana judges' preferences for various custody and visitation arrangements, as well as some of the factors considered in these decisions, were examined.[7] A similar study was completed with Quebec Superior Court judges.[8] In a third study, a variety of issues dealing with Louisiana judges' attitudes regarding custody issues were examined.[9]

THE SURVEY OF JUDGES

The purpose of the present study was to further assess judicial assumptions regarding custody decisions, specifically as they relate to the maternal preference issue. Several authors have suggested that maternal preference may still be the rule in

5. Joan B. Kelly, *Current Research on Children's Post-divorce Adjustment,* 31, FAM. & CONCILIATION CTS. REV. 29 (1993).
6. Robert J. Levy, *Custody Investigations in Divorce Cases,* 76, AM. B. FOUND. RES. J. 713 (1985).
7. Leighton E. Stamps et al., *Judicial Attitudes Regarding Custody and Visitation Issues,* 25 J. DIVORCE & REMARRIAGE 23 (1996).
8. Leighton E. Stamps & Seth Kunen, *Attitudes of Quebec Superior Court Judges Regarding Child Custody and Visitation Issues, 25* J. DIVORCE & REMARRIAGE 39 (1996).
9. Leighton E. Stamps et al., *Judges Beliefs Dealing With Child Custody Decisions,* 28 J. DIVORCE & REMARRIAGE 3 (1997).

many courts, with children of most ages, but especially when children of the "tender years" (young children) are involved, in spite of gender neutral custody laws in all jurisdictions.[10] This type of presumption could be justified if the judge assumes that mothers are superior to fathers as parents, especially with younger children. Thus, given this assumption, it would be in the child's best interests to be placed in the custody of the mother. The impact of the age of the judge was also assessed in the present research. It was hypothesized that older judges may be more inclined to favor maternal preference, while younger judges may tend to view mothers and fathers on a more equal basis.

In the present study, judges hearing custody cases in Alabama, Louisiana, Mississippi, and Tennessee were surveyed by mail. The number of judges responding in each age bracket was as follows:

30-39	5
40-49	60
50-59	47
60-69	26
70-79	7
No age listed	4

Because of the small numbers in the 30-39 and 70-79 brackets, they were excluded from the analysis. A list of items was constructed to measure the judges' beliefs with regard to maternal preference in custody decisions. The judges were asked to respond to each item on a scale of 1 - 5, with 1 indicating "Strongly Agree" and 5 indicating "Strongly Disagree." These items, shown below, were grouped into five pairs, with one item of each pair referring to the mother and an identical item referring to the father. The results were evaluated by examining the distribution of the judges' responses, divided by age groups. In the following tabulation, judges' responses of 1 or 2 were listed under "Agree," and responses of 4 or 5 were listed under "Disagree." Responses of 3 were considered "Neutral" or "Undecided" and were not listed below. The numbers under each category indicate the percentage of judges who gave that response.

A response of "Agree" to the "a" version of each item above indicates a preference for the mother, while a response of "Agree" to the "b" version indicates a preference for the father. The reverse holds with regard to the "Disagree" category. A response of "Disagree" to the "a" version indicates a preference for the father while a response of "Disagree" to the "b" version indicates a preference for the mother.

When examining the "Agree" column for items 1-4, the results show far more "Agree" responses for mothers than for fathers, which is indicative of a fairly consistent tendency toward maternal preference by the judges. There is also a definite pattern showing stronger signs of maternal preference with older judges, compared to younger judges. Some of these findings are highlighted in the following paragraphs.

JUDICIAL VIEWS ON MATERNAL PREFERENCE

ITEM NO.	AGE	AGREE	DISAGREE
1.a. Mothers are better parents than fathers due to more experience raising children.	40-49	14	45
	50-59	21	32
	60-69	28	24
1.b. Fathers are better parents than mothers due to more experience raising children.	40-49	0	63
	50-59	0	76
	60-69	0	71
2.a. Mothers are the preferred custodian when children are under the age of 6.	40-49	36	26
	50-59	35	31
	60-69	71	4
2.b. Fathers are the preferred custodian when children are under the age of 6.	40-49	0	56
	50-59	1	66
	60-69	1	68
3.a. Children of all ages show better adjustment when living with the mother.	40-49	3	49
	50-59	10	39
	60-69	16	20
3.b. Children of all ages show better adjustment when living with the father.	40-49	0	52
	50-59	0	66
	60-69	0	63
4.a. Mothers, by nature, make better parents than fathers.	40-49	5	39
	50-59	28	38
	60-69	46	17
4.b. Fathers, by nature, make better parents than mothers.	40-49	0	68
	50-59	6	70
	60-69	0	84
5.a. A mother who has performed most of the child's nurturing and maintenance activities would be favored in custody decisions.	40-49	97	3
	50-59	85	7
	60-69	96	0
5.b. A father who has performed most of the child's nurturing and maintenance activities would be favored in custody decisions.	40-49	95	0
	50-59	90	2
	60-69	81	4

10. Laura E. Santilli & Michael C. Roberts, *Custody Decisions in Alabama Before and After the Abolition of the Tender Years Doctrine,* 14 LAW & HUM. BEHAV. 123 (1990).

In examining Item 1, the percentage of judges agreeing that mothers are better parents than fathers due to greater experience, increases as the age of the judge increases. The percentage of judges disagreeing with the statement decreases as the age of the judge decreases. None of the judges felt that fathers were better parents than mothers due to greater experience.

Item 2 deals with the tender years doctrine, regarding custody of younger children. The percentage of judges agreeing that mothers are the preferred custodians of younger children increased dramatically with the age of the judge, with 36% of the youngest judges agreeing and 71% of the oldest judges agreeing. Only 2% of the judges in the entire sample felt that fathers are the preferred custodians for younger children.

On Item 3, only a small minority of judges agreed that children show better adjustment while living with the mother. Even on this item, however, the percentage agreeing was greatest for the oldest judges. None of the judges agreed that children showed better adjustment while living with the father.

On Item 4, the judges were asked whether fathers or mothers made better parents. With regard to mothers, there was a definite age trend, with only 5% of the youngest judges agreeing that mothers make better parents than fathers, while 46% of the oldest judges agreed with that statement. Only 6% of the entire sample agreed that fathers make better parents than mothers, with no age differences evident.

Item 5 deals with the primary caretaker standard. Judges were asked if the parent who had performed most of the child's care-taking activities would be favored in custody decisions. The judges in all age groups overwhelmingly agreed, whether that parent was the mother or father. Even on this Item, however, there was a slight tendency toward maternal preference among the oldest age group. When the question referred to a mother who had done most of the care-taking activities for the child, 96% of the oldest judges agreed that she would be favored in custody decisions. When the same question referred to a father who had done most of the child care, only 81% of the oldest judges agreed that the father would be favored in the custody decision.

The findings of maternal preference in the present study are consistent with various reviews of appellate cases as well as the opinions of a number of professionals in both the mental health and legal fields, all of which indicate that maternal preference still plays a definite role in many custody determinations. For example, Melton et al. concluded that maternal preference still remains the norm in many jurisdictions, after reviewing appellate decisions in South Carolina, Tennessee, and Virginia.[11] Emery described maternal preference as one of the "unarticulated values," "implicit norms," or "rules of thumb" used in many jurisdictions to guide judicial decisions in custody cases.[12] Dotterweich and McKinney reviewed state bar association studies of gender bias from Maryland, Missouri, Texas, and Washington. In summarizing the results of surveys of judges in these states, they concluded that maternal preference is still common among judges. On one item used in these surveys, judges were asked "Are custody awards made based on the assumption that young children belong with their mothers?" The results indicated that 44% of the judges answered "Always or Usually" indicating support for the tender years doctrine and maternal preference by almost half of the judges. Item 2 in the present study dealt with the same issue, with 42% of all judges agreeing that children under the age of 6 should be with their mothers. Dotterweich and McKinney also reported that judges were asked, "Do courts give fair consideration to fathers?" Thiry-three percent of the judges answered "Always or Usually," indicating that two-thirds of the judges believed that fathers *do not* usually get fair consideration in the courts.[13]

These types of assumptions held by judges often seem consistent with certain societal norms. In many groups within the United States, there is still a strong belief that mothers should raise the children, while the role of the fathers should be secondary.

The fact that older judges exhibit a greater tendency toward maternal preference seems to make intuitive sense. Since judges are given a great deal of latitude in deciding that which is in the best interests of the child, it does not seem unusual that a judge's personal experiences and beliefs may play a role in those decisions regarding child custody. Judges who are currently in their 60s would have grown up primarily during the 1930s and 1940s when divorce was rare and family roles were fixed, with mothers caring for children and doing housework, while fathers were employed to provide income for the families. The beliefs that children belonged with the mother were widely accepted within American society during that era and were also reflected in court cases at that time. These attitudes regarding family roles, established during childhood, and reinforced by society in general at the time, are difficult to change later in life.

Judges who are currently in their 40s and 50s grew up primarily during the 1950s to 1970s. That time in our history was a period of dramatic cultural change, with many women entering the work force, resulting in drastic changes in family structure and roles. The divorce rate also increased dramatically, with many children living in single-parent homes. Many of these judges have had firsthand experience with working mothers, fathers taking an active role in child care, single-parent homes, and a general blurring of the roles between men and women.

A judge could justify this belief of maternal preference if he/she believed that mothers, in general, are better parents than fathers and that awarding custody to the mother is usually in the best interests of the child. This belief appears to be prevalent among a substantial proportion of judges both in the present study as well as in other studies. Although mothers are the primary custodial parent in 80% to 85% of all divorces involving children, the psychological literature indicates that children's overall adjustment following divorce does not differ between those living with custodial mothers versus custodial

11. Gary B. Melton et al., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS (1997).
12. Robert Emery, MARRIAGE, DIVORCE, AND CHILDREN'S ADJUSTMENT (1999).
13. David Dotterweich & Michael McKinney, *National Attitudes Regarding Gender Bias in Child Custody Cases, 38* FAM. & CONCILIATION CTS. REV. 208 (2000).

fathers. This finding holds true even with infants and young children.[14] Thus, the research literature does not appear to support the presumption that maternal preference is usually in the best interests of the child. Given the findings of equal parenting abilities for mothers and fathers, it would seem that the best interests of the child would be served through a gender neutral assessment of the family as called for in state laws.

CONCLUSIONS

Judges' attitudes and opinions can affect custody arrangements in a number of ways. The most obvious impact occurs in contested cases when judges must make the final decisions, based on the information presented to the court. Judges' attitudes can also have an impact on the process outside of the courtroom. Approximately 90% of custody matters are settled before the parents come to court. Although these arrangements are considered voluntary, the negotiations are always completed in the context of that which is permitted within the legal system, or as Mnookin and Kornhauser have described, "Bargaining in the shadow of the law."[15] A more accurate description might be "bargaining in the shadow of the law and the judges' assumptions." Thus, if an attorney is aware of the attitudes of a particular judge or a group of judges regarding various custody-related issues, this information will have a very definite impact upon the advice that is given to the client with regard to decisions either to reach an agreement out of court or continue through the legal process in which a judge will make the custody decision. It has even been suggested that a judge's known attitudes may affect the recommendations of court-ordered custody investigations by mental health professionals, as the investigator sometimes tries to present recommendations that are consistent with a judge's previous rulings.[16] Thus, the attitudes of a judge can reach well beyond the decisions that are actually made by the court in disputed cases.

The indeterminancy of statutes dealing with divorce and custody issues allows the judiciary a great deal of flexibility in dealing with the widely varying circumstances of individual families. At the same time, this flexibility places tremendous responsibility upon the court to define the "best interests" for a given family. The manner in which a particular judge may define "best interests" will depend on the assumptions that the judge is making about child development and parent-child relationships. These assumptions may be based on information from various sources. These sources may include the judge's own family experiences, going back to his or her own childhood, the judge's experience as a parent, "common sense" derived from a variety of life experiences, the judge's participation in continuing education and self-study dealing with child development, information derived from mental health experts who have testified in the court, tradition and precedents from the legal system, and many other possible sources. Given the results of the present study, indicating that judges' attitudes about custody issues may vary depending on their generation and previous experiences, it may be worthwhile for all judges dealing with these types of cases to examine their own assumptions and determine how these assumptions relate to current sources of information and research on this topic.

Leighton Stamps is a professor of psychology at the University of New Orleans, where he has been a member of the faculty for 28 years. He received his Ph.D. from West Virginia University in 1974 and completed one year of postdoctoral study at the University of Illinois. He has published a number of articles dealing with judicial attitudes on child custody issues and is a member of the editorial board of the Journal of Divorce and Remarriage. *Stamps has served as an expert witness in numerous child custody cases. He also conducts continuing education seminars on child custody evaluations for both attorneys and psychologists.*

14. MARK BORNSTEIN, HANDBOOK OF PARENTING (1995).
15. Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce,* 88 YALE L. J. 950 (1979).
16. Levy, *supra* note 6.

AMERICAN JUDGES ASSOCIATION FUTURE CONFERENCES

2002 ANNUAL MEETING
Maui, Hawaii
September 8-13
The Westin Maui
($155.00 single or double – golf/mountain view;
$169.00 single or double – ocean view)

2003 MIDYEAR MEETING
Billings, Montana
May15-17
Sheraton Billings Hotel
($65.00 single or double – run of house;
$75.00 single or double – executive king)

2003 ANNUAL CONFERENCE
Montreal, Quebec
September 14-19
Hotel Omni Mont-Royal
$220.00 single or double – Canadian
(currently about $138 US)

Drug Treatment Programs:
Policy Implications for the Judiciary

Arthur H. Garrison

Drug use in the United States has been cited for the growth in American prisons over the past decade. Heroin, once considered a drug to be avoided and scorned, has had resurgence in use by middle-class youth and white-collar professionals due to the increased purity of the drug and the lack of need to use needles for ingestion. Naltrexone has been used as a method of helping heroin addicts to end their drug dependency, but such programs have limitations in their use and effectiveness. This paper is drawn from an evaluation of a drug treatment program in Wilmington, Delaware. The goal of this paper is to review the factors that lead to successful drug treatment and the limitations on the success of drug treatment that the judiciary should consider when sentencing drug addicts.

More than 13 million Americans used an illicit drug at least once in 1998, and 977,000 Americans classified themselves as hardcore heroin users in 1999.[1] The growth of increased drug use has impacted the criminal justice system. "In 1997, over one third of prison commitments involved drug offenses, compared to only 7% in 1980. In 1980, about half of all commitments were for violent offenses; by 1997, only about one third were."[2] In 1999 Americans spent an estimated $63.2 billion for cocaine, heroin, methamphetamine, and other illicit drugs.[3] The impact of this increased drug use can be seen in the fact that the number of Americans incarcerated (prison only) reached more than one million (1,078,542) in 1995 for the first time in U.S. history.[4] According to the Bureau of Justice Statistics, the percentage of prisoners in federal prison incarcerated for dugs increased from 57.9% of the total population in 1991 to 62.6% in 1997 and the percentage of drug offenders in state prisons decreased from 21.3% of the total population in 1991 to 20.7% in 1997.[5]

"The majority of heroin users are still older, chronic users who inject the drug. At the same time, the number of new, young users who snort or smoke the drug continues to rise."[6] According to the DEA, the "typical heroin user today consumes more heroin than a typical user did just a decade ago, which is not surprising given the higher purity currently available at the street level."[7] Historically heroin is taken intravenously, subcutaneously (under the skin), or intramuscularly[8] but due to the high level of purity (as high as 98%), it can be snorted or smoked. The purity of the heroin now makes heroin snorting possible, and makes heroin more "appealing to new users because it eliminates both the fear of acquiring syringe-borne diseases . . . and the historical stigma attached to intravenous heroin use."[9]

The author would like to thank Janice Hunter, Medical Librarian, Delaware Psychiatric Center, Delaware Department of Health and Human Services for her help in securing articles and citation corrections. Her help was invaluable for the preparation of this paper.

This paper is based on a study supported by grant No. 98–DD–BX–0022 awarded by the Bureau of Justice Assistance. For the full report, *see* ARTHUR H. GARRISON, SODAT–DELAWARE, INC., NALTREXONE ALTERNATIVE PROGRAM (SNAP), A HEROIN ADDICT OUTPATIENT TREATMENT PROGRAM: AN OUTCOME EVALUATION (1999).

An earlier draft of this paper was presented at the 29th Annual Meeting of the Society for Police and Criminal Psychology, Canton, Ohio, and was awarded the 2000 C. Edward Shaffer Memorial Research Award for Best Research Paper.

Footnotes

1. OFF. OF NAT'L DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY 2000 ANNUAL REPORT (2000) at 115–116. Seventy-four million Americans have tried an illicit drug at least once in their lifetime; 2.4 million have tried heroin at least once, 22.1 million have tried cocaine at least once, and 4.6 million have used crack at least once. OFF. OF NAT'L DRUG CONTROL POLICY, DATA SNAPSHOT–DRUG ABUSE IN AMERICA 1998 (1998) at 32-33. In 1999, 1,254,577 Americans were in federal and state prisons. OFF. OF NAT'L. DRUG CONTROL POLICY (March 2001), *infra* note 2 at 1.
2. OFF. OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, CRIME AND JUSTICE ATLAS 2001 UPDATE (2001) at 5. The Office of National Drug Control Policy recently reported the following:

   > In 1999, approximately 6.3 million adults—3.1% of the Nation's adult population—were under correctional supervision (that is, incarceration, probation or parole). Drug offenders accounted for 21% (236,800) of the State prison population in 1998, up from 6% (19,000) in 1980, and 59% (55,984) of the Federal prison population in 1998, up from 25% (4,749) in 1980. Also, in 1998, an estimated 26% (152,000) of all inmates under local supervision were incarcerated for drug offenses. This increase in the drug offender prison population mirrors the steady increase in arrests for drug offenses.

   OFF. OF NAT'L DRUG CONTROL POLICY, DRUG TREATMENT IN THE CRIMINAL JUSTICE SYSTEM FACT SHEET (March 2001) at 1.
3. OFF. OF NAT'L DRUG CONTROL POLICY, *supra* note 1, at 114.
4. BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1999 (2000) at 484.
5. Id. at 513. See also NELS ERICSON, SUBSTANCE ABUSE: THE NATIONS'S NUMBER ONE HEALTH PROBLEM.(OJJDP Fact—Sheet #17) (May 2001).
6. OFF. OF NAT'L DRUG CONTROL POLICY, PULSE CHECK: NATIONAL TRENDS IN DRUG ABUSE (Summer 1998), at *i*.
7. DRUG ENFORCEMENT ADMIN. & THE NAT'L GUARD, DRUGS OF ABUSE (1997) at 13.
8. *Id.*
9. *Id.* The DEA estimated that purity levels of heroin in 1981 were 7%, and in 1998 the average purity rate was 41 % nationwide. Estaban Parra, *infra* note 18. The ingestion of heroin either by smoking or snorting has increased from 55% in 1994 to 71% in 1997. OFF. OF NAT'L DRUG CONTROL POLICY, *supra* note 6 at 30.

In Newark, Delaware, the purity of heroin has been found to range from 20% to 90%.[10] The New Castle County Police have reported that purity levels have been found to be as high as 97% in Dover, Delaware.[11] According to the Office of National Drug Control Policy, Newark, Delaware sources report that there has been a "'definite increase in teenage users'. . . dealers, some from nearby Philadelphia, are making a clear attempt to establish a new market. For example, by encouraging young females to begin use, dealers hope to attract older male users. In that area, users start at around 13, and the source reports that there are 'chronic' users aged 15 - 17."[12] It has recently been reported that between 1993 and 1995, 88% of new heroin users were between the ages of 12 to 25 years old.[13] The "average age of addicts seeking treatment is getting younger. In 1993, only 17.2 percent of heroin addicts who reported for treatment were 24 or younger. By 1997, the percentage had climbed to 31.7 percent."[14] The number of people who are treated for heroin addiction in Delaware has increased from 336 in 1991 to 1,767 in 1997, an increase of 426%.[15] The impact of the increase in heroin usage can be seen in the number of heroin-related deaths. Deaths related to heroin have increased from 14 in 1991, to 29 in 1997.[16] The national average of heroin purity is 35%.[17] The average purity level for heroin in Delaware is 85%.[18]

In an effort to deal with the growing heroin use problem in Delaware, SODAT-Delaware, Inc., received more than $1,650,000 over a three-year period (1995–1997) to implement an intensive outpatient therapy program (SNAP), which uses the blocking medication naltrexone to assist heroin addicts in their attempts to discontinue the use of heroin and other drugs and to promote pro-social behavior with no new criminal arrest.

[B]etween 1993 and 1995, 88% of new heroin users were between the ages of 18 to 25 years old.

A BRIEF REVIEW ON THE USE OF HEROIN AND NALTREXONE

Heroin is a semi-synthetic derivative of opium prepared from morphine.[19] Heroin was first introduced into medicine in 1898 and was used as a pain medication until the addictive nature of opioids in general was found.[20] Heroin is classified as a narcotic due to its ability to produce mood and behavior changes, potential for dependence and tolerance following continued use, and derivation from opium.[21] In 1914 the Harrison Act was passed, which is "interpreted as excluding the provision of opioids to addicts as a legitimate medical use."[22] Although the use of opiates was illegal, "heroin addiction persisted and its prevalence rose following World War II [and by] the early 1960's [many recommended] remedicalizing heroin distribution as a way to reduce crime associated with heroin addiction."[23]

With the increase of heroin addiction in the U.S. Military during the Vietnam War and in society as a whole, federal funds were expended for both research and treatment of heroin addicts.[24] Over the past 30 years, various techniques have

10. Off. of Nat'l Drug Control Policy, *supra* note 6 at 4.
11. New Castle County Police Heroin Alert Task Force, "Heroin: The New Serial Killer That Is Stalking Our Children," presentation made on Sept. 26, 1998.
12. *Supra* note 6 at 3. "The hub of the area heroin trade [is in] the Kensington section of Philadelphia. That's where many Delaware addicts go to get [their heroin]. Through the first 10 months of 1998 [there were] 716 arrests for heroin" of which 30 were people from Delaware. Tom Feeney & Esteban Parra (1998). *Hooked on Heroin: Police Sound the Alarm*, Sunday News Journal, Nov. 29. 1998, at A1.
13. New Castle County Police Heroin Alert Task Force, *supra* note 11.
14. Feeney & Parra, *supra* note 12.
15. *Id.* at A1.
16. *Id.*
17. Drug Enforcement Admin. & The Nat'l Guard, *supra* note 7 at 13.
18. New Castle County Heroin Alert Task Force, *supra* note 11. DEA investigations have discovered that heroin sold in Dover and Kent County originates in New York City. The heroin market in the U.S. is dominated by two sources, Columbia and Mexico. Columbian heroin is dominant along the east coast in cities like Boston, New York City, Newark, N.J., and Philadelphia. Columbian heroin averages at almost 68% pure, but the Columbian heroin in Dover has been found in the high 90% range. The heroin purity rate in Dover has been found to be higher than in Philadelphia, which is about 80%. The combination of the high purity rate of heroin in Delaware and the low cost is blamed for the increase of heroin use in suburban areas in Delaware. Estaban Parra, *Purity Is Part of the Local Problem,* Sunday News Journal, Jan. 21, 1999, at A7. The dividing line between South American (high purity white) and Mexican (lower purity "black tar") heroin is the Mississippi River. Office of Nat'l Drug Control Policy, *supra* note 2 at 31.
19. Stedman's Medical Dictionary (25th ed.1990). Harold Kaplan & Benjamin Sadock, Comprehensive Textbook of Psychiatry (6th ed. 1995). Joseph Ternes & Charles O'Brien, *The Opioids: Abuse Liability and Treatment for Dependence*, *in* Addiction Potential of Abused Drugs and Drug Classes (Barry Stimmel ed., 1990)
20. Kaplan & Sadock, *supra* note 19 at 844.
21. *Id.* "Heroin crosses the blood-brain barrier more rapidly than morphine and produces greater euphoric effects when given in equal doses. Once in the brain, heroin is hydrolyzed to morphine almost immediately." *Id.* at 31. Both heroin and morphine are derivatives of opium and as such are considered opiates.

    Opiates attach to the opioid receptors of the brain and produce similar euphoric and pleasure reactions to natural occurring pain suppressants in the brain (endorphins and enkephalins) which also attach to the opioid receptors of the brain. Substance Abuse and Mental Health Services Admin. (SAMSHA), Naltrexone and Alcoholism Treatment: Treatment Improvement Protocol (TIP) (1998), series #28 at 28. Both endogenous opioids (endorphins and enkephalins) and exogenous opiates (heroin and morphine) act as neurotransmitters that transfer information through the nervous system. In the case of opioid neurotransmitters, the information is pain relief and pleasure responses. See *infra* note 32 for discussion on the cycle of addiction theory.
22. Kaplan & Sadock, *supra* note 19 at 844.
23. *Id.*
24. *Id.* See also, *infra* note 25, and Robert Greenstein et al., *Methadone and Naltrexone in the Treatment of Heroin Dependence*, 7 Psychiatric Clinics of North America, 671 (1984).

Early studies and theoretical use of naltrexone proposed that naltrexone would be effective in dealing with impulsive and compulsive heroin use in addicts who are in treatment.

been developed to treat heroin addicts. One of the treatment methods developed over the past 25 years involves the use of long-acting opioid antagonists for heroin addicts.[25] Antagonist treatment methods differ from substitution (maintenance) treatment programs in that the antagonist programs use medication to eliminate an addiction. Substitution treatment methods use one drug, methadone, for example, as a replacement for another drug, heroin. The SNAP program was an antagonist treatment program that used the opioid antagonist naltrexone, which "blocks or reverses the physiologic and psychological effects of opioids by binding opiate receptors" in the brain.[26]

Naltrexone "prevents or reverses opioid effects [and] will precipitate abstinence . . . in narcotic addiction."[27] The use of naltrexone is based on "the assumption that classically conditioned withdrawal symptoms and operantly reinforced drug seeking behaviors contribute to high relapse"[28] in heroin addicts.

> Theoretically, by blocking the euphoric effects of opioids, treatment with antagonists would lead to the extinction of operantly reinforced drug seeking; by preventing the reestablishment of physical dependence, treatment with antagonists also leads to the eventual extinction of conditioned withdrawal phenomena. Recently, . . . empirical and laboratory observations [show] patients taking naltrexone experience less craving in the presence of opioid-related cues, presumably because, on a cognitive basis, they are aware that they are unable to experience the opioid effects.[29]

Early studies and theoretical use of naltrexone proposed that naltrexone would be effective in dealing with impulsive and compulsive heroin use in addicts who are in treatment.[30] Early researchers of heroin addiction recognized that recovering heroin addicts could recidivate and develop full addiction due to impulsive heroin use by environmental stimuli. The stimuli could be an interaction between the recovering addict and a friend, whom the addict had a history of heroin use with, or being in a neighborhood in which heroin is used. The stimulus causes a craving for the heroin that could cause readdiction. Goldstein explained that "naltrexone can protect against impulsive use and can prevent the consequences of impulsive use. The protective medication, [the naltrexone], is taken at a time when motivation [to end the addiction] is high, then later, if circumstances arise that would typically lead to use the agonist drug [heroin], there is a strong reason to avoid that behavior" because the subject knows the heroin will not have any effect.[31] Naltrexone can also aid in the reduction of compulsive addiction. The cognitive knowledge that the use of the heroin will

25. Kaplan & Sadock, *supra* note 19 at 844. For a review of early research on naltrexone in heroin addiction, see Richard Resenick et al., *Narcotic Antagonists in the Treatment of Opioid Dependence: Review and Commentary*, 20 COMPREHENSIVE PSYCHIATRY, 116 (1979). See also, DEMETRIOS JULIUS & PIERRE RENAULT, NARCOTIC ANTAGONISTS: NALTREXONE (National Institute on Drug Abuse Research Monograph # 9, 1976),which encompasses 25 articles on naltrexone treatment studies for the first half of the 1970s that were funded by the National Institute on Drug Abuse, U.S. Department of Health, Education, and Welfare.
26. Robert Greenstein et al., *supra* note 24 at 675; Joseph Ternes & Charles O'Brien, *supra* note 17 at 43. See also, Vis Navartnam et al., *Determination of Naltrexone Dosage for Narcotic Antagonist Blockade in Detoxified Asian Addicts,* 34 DRUG AND ALCOHOL DEPENDENCE, 231 (1994), which found naltrexone to be effective in blocking the physiological and psychological effects of heroin for at least 48 and 72 hours, respectively. Opioid antagonists like naltrexone "block opioid receptors and reverse the effects of endogenous opioid peptides as well as exogenous opiates [and it is theorized that] these agents may prevent the reinforcing effects" of consumption of heroin. SAMHSA, *supra* note 21 at 32.
27. DRUG FACTS AND COMPARISONS (1998) at 3579. See also, Joseph Volpicelli, *Naltrexone and the Treatment of Alcohol Dependence*, 18 ALCOHOL HEALTH & RES. WORLD: JOURNAL NAT'L INST. ON ALCOHOL ABUSE AND ALCOHOLISM 272 (1994).
28. Kaplan & Sadock, *supra* note 19 at 857. See, Abraham Wikler, *Dynamics of Drug Dependence: Implications of a Conditioning Theory for Research and Treatment*, 28 ARCHIVES OF GENERAL PSYCHIATRY 611 (1973), and Wikler, *Conditioning Factors in Opiate Addiction and Relapse*, in NARCOTICS (Daniel Wilder and Gene Kassenbaum eds., 1965) at 85 for early work on the use of narcotic antagonists for treating heroin addiction. See also, Karen Allen, *Essential Concepts of Addiction for General Nursing Practice,* 33 NURSING CLINICS OF NORTH AMERICA 1.
29. Kaplan & Sadock, *supra* note 19 at 857. See also, Charles O'Brien et al., *Use of Naltrexone to Extinguish Opioid-Conditioned Responses*, 45 J. CLINICAL PSYCHIATRY 53.
30. See Avram Goldstein, *Naltrexone in the Management of Heroin Addiction: Critique of the Rationale,* in NARCOTIC ANTAGONISTS: NALTREXONE (National Institute on Drug Abuse Research Monograph # 9) (Demtrios Julius & Pierre Renault eds., 1976) 158, 159. See also, Richard Resinick, et al., *supra* note 25, and Richard Resnick & Elaine Schuyten-Resnick, *A Point of View Concerning Treatment Approaches with Narcotic Antagonists, in* NARCOTIC ANTAGONISTS: NALTREXONE 84 (1976).
31. Avram Goldstein, *supra* note 30 at 159. "Relapse to heroin use in abstinent ex-addicts is rarely cogitated and planned in advance. Conditioned abstinence ('craving') can be elicited by accidental encounters with active addicts . . . or other major stress." *Id.* On the issue of behavior, Goldstein noted that humans have the ability to "anticipate consequences and to modify our behavior accordingly. In this connection, the observation that naltrexone can diminish 'craving' is entirely understandable, since 'craving' is generally elicited by the possibility of obtaining a drug rather than by its unavailability. It follows from this analysis that naltrexone can only work if the patient understands how it works and believes that it will work." *Id.* at 159–160. Goldstein also asserted that because the patient knows that the naltrexone will block the affects of heroin and thus taking the drug will be futile, "it is not surprising that many subjects taking naltrexone may not use

not have an effect reduces the obsessing over the craving for the heroin. Thus naltrexone will assist the addict in developing behavior re-enforcers to resist the thoughts and desires for the drug, in turn reducing compulsive addictive behavior.

Although use of naltrexone has been found to block the effects of heroin, one of the biggest problems in heroin addiction[32] treatment, along with heroin detoxification of addicts, is low compliance in taking the naltrexone by the addicts and their high dropout rate.[33] Kaplan and Sadock noted that in one study, "the dropout rate was quite high: 25 percent of subjects who started treatment dropped out within two weeks; 94 percent stopped by nine months."[34] In a study in Israel, the average retention rate for program participants was 56.3 days.[35] Out of a total of 32 patients, 58 percent completed the program.[36] Forty percent of the patients dropped out of the program within two weeks, and 60% of the patients who dropped out did so within the remaining ten weeks of the program.[37]

PROGRAM THEORY DESCRIPTION

The SNAP program was based on the theory that the heroin addict (once detoxification is completed) will be assisted in ending his or her heroin addiction if medication was provided that blocked the effects of the heroin. The heroin-blocking medication provided was naltrexone. Naltrexone is an orally administered medication, which prevents the uptake and effects of opioid compounds. Thus, when taking this medication, any person who uses heroin by any route will not experience any effects whatsoever. The naltrexone protocol was used in conjunction with intensive outpatient therapy and therapeutic case management services.

The general focus of the SNAP treatment was on client stabilization, maintenance of a drug-free and crime-free lifestyle, a recovery-oriented support network, and relapse prevention education. The SNAP program was designed to provide a four-phase treatment strategy for heroin addicts over a 12-to-18-month period.

The SNAP program was based on the theory that the heroin addict (once detoxification is completed) will be assisted in ending his or her heroin addiction if medication was provided that blocked the effects of the heroin.

METHODOLOGY

Between October 7, 1993, and July 22, 1998, the SNAP program provided 73 participants naltrexone as part of their treatment for heroin addiction. Data was collected from the case files of all 73 participants, which included basic demographic information (age, gender, race), employment status, history of

heroin to test and verify the protection." *Id.* at 159. For research showing that heroin addicts will test the blocking ability of naltrexone, see *infra* note 40. For a study looking at impulsive heroin addicts and self-control, see Gregory Madden et al., *Impulsive and Self-Control Choices in Opioid-Dependent Patients and Non-Drug-Using Control Participants: Drug and Monetary Rewards,* 5 EXPERIMENTS IN CLINICAL PSYCHOPHARMACOLOGY 256 (1997). For a study looking at compulsive use of heroin and the opioid receptors and naltrexone, see Jane Stewart, *Conditioned and Unconditioned Drug Effects in Relapse to Opiate and Stimulant Drug Self-Administration,* PROGRESS IN NEUROPSYCHOPHARMACOLOGY & BIOLOGICAL PSYCHIATRY 591 (1983).

32. In the development of the cycle of addiction, the intake of heroin leads to an increase in opioid receptor activity. "Once opioid receptor activity has been primed, more [heroin] is needed to ensure continued opioid receptor activity. Therefore, a cycle may ensue during which the desire to increase or recapture feelings of pleasure or euphoria is translated into cravings for [the heroin]. The loss of control that follows the initial consumption of a reinforcing agent [the heroin] may provide the root mechanism for . . . addictive behavior." SAMHSA, *supra* note 19 at 31–32. Thus the use of heroin can have a "priming" for additional use. The use of heroin, even a small amount, can effect a release of endorphins (which produce feelings of pleasure), which in turn increase the desire for more heroin, which in turn produce more release of endorphins. Addiction research has found "that opiates can have an effect equal to that of having an appetizer before dinner. A small dose of a substance that effects the opiate receptor sites can increase the drive to consume more of the same." The first ingestion of the heroin increases the motivation to have another. Alfred Turner, *Naltrexone: The Magic Bullet for Alcoholism* (1995), available at www.enteract.com/~alturner/neltrexo.html. "This appetizer or priming effect provides good reason to look at opiate receptor blocking pharmacological agents in the battle to reduce relapse in early recovery." *Id.* See also, D. Colin Drummond. *Theories of Drug Craving, Ancient and Modern,* 96 ADDICTION 33 (2000). For a discussion on opiate receptor sites within the brain, see Roy Wise, *Opiate Reward: Sites and Substrates*, 13 NEUROSCIENCE AND BIOBEHAVIORAL REVIEW, Summer-Fall 1989, 129, and Jane Stewart, *supra* note 31.

33. High dropout rates can be partially explained by the nature of addiction. As noted in footnotes 21 and 32, the consumption of heroin produces a pleasurable experience that can be stronger than natural pleasurable experiences. The experience in turn produces chemical reinforcers to the use of heroin. The reduction or stopping of the behavior (heroin use) produces the chemical reinforcers in the brain, which in turn produce craving for the behavior (heroin use). The craving in turn produces the continuation of the behavior (heroin use). Negative reinforcement and addiction are achieved. Treatment programs using naltrexone block the pleasure reaction of opiates and opioids in the brain. But the psychological desire for the heroin and the resulting pleasure from using the drug causes the person to stop taking the naltrexone in order to have the heroin have its desired effect. It is here that treatment modalities like cognitive therapy and group therapy can have an effect, for therapy addresses the emotional need for the heroin and how to resist the need.
34. Kaplan & Sadock, *supra* note 19 at 857. See also, Emi Shufman et al., *The Efficacy of Naltrexone in Preventing Reabuse of Heroin after Detoxification*, 35 SOCIETY OF BIOLOGICAL PSYCHIATRY 935 (1994).
35. Emi Shufman et al., *supra* note 34 at 939. "In this study, 75% of the patients stayed in the program after 1 month, and 58% completed the 3 months treatment period." *Id.*at 942.
36. *Id.* at 942.
37. *Id.* at 939.

The majority of SNAP patients did not test positive for drugs while in the program.

drug abuse, and drug use after the first ingestion of naltrexone.

SUMMARY OF FINDINGS

The majority of SNAP participants were single-male African-Americans. The median age of SNAP participants was 31 years old. Almost all of the participants had prior drug histories. The majority, 81%, began drug use before the age of 18. The main two introduction drugs were alcohol and marijuana. More than 70% of SNAP participants used at least one of these drugs as the first drug in their drug use histories. The median age for first drug use was 15, and 14 years old was the mode.

The majority of SNAP patients did not test positive for drugs while in the program. More than 75% of the participants remained drug free. But there was not a corresponding result in successful treatment by SNAP participants. The majority of SNAP participants did not successfully complete the program. While the majority of participants did not use drugs, only 13% successfully completed the treatment. These results may suggest that drug treatment success may not be related to remaining drug free during treatment. The majority of participants who entered the SNAP program did so unemployed (52%). At time of discharge, the majority of participants were employed (57.5%).

Previous drug treatment histories did not provide an increased chance of successful completion in the SNAP program. Of the 71 SNAP participants who had prior drug treatment histories, 84.5% failed to successfully complete treatment. As would be expected, the longer participants remained in the program the higher the rate of program success. Out of the ten participants who succeeded in treatment, nine remained in the program longer than six months. Conversely, 60.7% of those who failed to complete treatment remained in the program less than six months. The median length of time SNAP participants remained in the program was almost five months.

Being married did not prove to be a positive factor in successful treatment. Participants who were married and successfully completed treatment accounted for only 6.7% of the married SNAP population. Those participants who were single and successfully completed treatment accounted for 15.8% of the single SNAP population. Those who were married and failed to complete treatment accounted for 93.3% of the married SNAP population. Those participants who were single and failed to complete treatment accounted for 80.7% of the single SNAP population. Thus, a higher percentage of those who were single successfully completed treatment than those who were married, and a higher percentage of those who failed treatment were married than those who failed and were single. The data may suggest that there may be an inverse relationship between successful completion and being married. An alternative theory could be that these married addicts had unstable marriages or were married to addicts. If so, these negative relationships could be decreasing the opportunity for the SNAP participants to take advantage of the program and successfully complete treatment.

Being employed was associated with program success. Those participants who were employed and successfully completed treatment accounted for 21% of the employed SNAP population. Those participants who were unemployed and successfully completed treatment accounted for 3.4% of the total unemployed SNAP population. Those who were employed and failed to successfully complete treatment accounted for 76% of the employed SNAP population. Those participants who were unemployed and failed to complete treatment accounted for 93% of the unemployed SNAP population. Thus, a higher percentage of those who were employed successfully completed treatment than those who were unemployed, and a higher percentage of those who failed treatment were unemployed than those who failed and were employed.

The majority of the SNAP patients started to use drugs in their early teen years. Longer periods spent using drugs were associated with failure to complete treatment successfully.

The SNAP program achieved a 75% negative test for drug use and 13.7% treatment success rate. A review of the literature shows that success rates in naltrexone treatment programs for heroin addicts can range from 12% to 20%.[38] For example, O'Brien and Greenstein[39] note in their study that only 12% of those who began treatment remained in the program beyond six months. In a study conducted by Tennant and his colleagues, only 16% of the program participants completed the program successfully. D'Ippoliti and his colleagues conducted a study on treatment retention in Italy and found that after one year, the retention rate among 1,503 heroin users using naltrexone was 18%.[40] Some of the results of the SNAP program showed better

38. *See* Michael Stark & Barbara Campbell, *Personality, Drug Use, and Early Attrition from Substance Abuse Treatment,* 14 AM. J. DRUG & ALCOHOL ABUSE 475 (1988); Charles O'Brien et al., *Clinical Experience with Naltrexone*, 2 AM. J. DRUG & ALCOHOL ABUSE 365 (1975); Steven Sideroff et al., *Craving in Heroin Addicts Maintained on the Opiate Antagonist Naltrexone,* 5 AM. J. DRUG & ALCOHOL ABUSE 415 (1978); Richard Greenstein et al., *Naltrexone: A Short-Term Treatment for Opiate Dependence,* 8 AM. J. DRUG & ALCOHOL ABUSE 291 (1981); Len Derogatic & Nick Melisaratos, *The Brief Symptom Inventory: An Introductory Report*, 13 PSYCHOL. MEDICINE 595 (1983); Richard Greenstein et al., *Naltrexone: A Clinical Perspective,* 45 J. OF CLINICAL PSYCHIATRY, Sept. 1984, 25; Herbert Kleber & Thomas R. Kosten, *Naltrexone Induction: Psychological and Pharmacological Strategies,* 45 J. OF CLINICAL PSYCHIATRY, Sept. 1984, 29; Forest Tennant et al., *Clinical Experience with Naltrexone in Suburban Opioid Addicts,* 45 J. OF CLINICAL PSYCHIATRY, Sept. 1984, 42; Miguel Gutierrez et al., *Retention Rates in Two Naltrexone Programmes for Heroin Addicts in Victoria, Spain*, 10 EUR. PSYCHIATRY 183.

39. Charles O'Brien & Richard Greenstein, *Treatment Approaches: Opiate Antagonists,* in SUBSTANCE ABUSE: CLINICAL PROBLEMS & PERSPECTIVES (Joyce Lowenson & Pedro Ruizeds, 1981) 403.

40. Forest Tennant et al., *supra* note 36; Daniella D'Ippoliti et al., *Retention in Treatment of Heroin Users in Italy: The Role of Treatment Type and of Methadone Maintenance Dosage*, 52 DRUG & ALCOHOL DEPENDENCE 167 (1998). See also, George W. Joe et al., *Recidivism Among Opioid Addicts After Drug Treatment: An Analysis by Race and Tenure in Treatment,* 9 AM. J. DRUG & ALCOHOL ABUSE, 371 (1982-83).

results than some of the work in the literature. The research literature suggests that patients in a naltrexone program will "test naltrexone's opiate blockade at least once during treatment."[41] The results of this program show that the patient on naltrexone may not test the blocking effect of the drug. The large majority of patients, 75%, did not test positive for any drugs during their participation in the program.

The program achieved other measures of drug treatment success noted in the literature, including employment status change and post-program arrest history. The majority of SNAP program participants left the program employed, regardless of their discharge status. Those who were employed at time of discharge had a higher rate of successful treatment than those who were not employed. Additionally, the percentage of those who were employed and who failed the treatment program was less than those who were unemployed and failed the treatment program.

Other observations about drug addiction in the literature were confirmed, specifically that "softer" drugs serve as an introduction to "harder" drugs and that drug use starts in the early years of adolescence. Alcohol and marijuana proved to be the two introduction drugs to the SNAP patients. Heroin proved to be a distant third. Drug use of SNAP participants began in their teen years. A majority of the SNAP patients were between 13 and 18 when they first began using drugs. These results support the general belief that drug use begins in the early years of the addict's life, and if a person can remain drug free through these early years the chances of becoming an addict decrease.

POLICY IMPLICATIONS FOR THE JUDICIARY ON THE DESIGN AND UTILITY OF DRUG TREATMENT PROGRAMS

I. The judiciary should assess what type of addict is before the bench before ordering the addict to a drug treatment program. If the case involves a non-professional, high-addiction-level, street addict, the likelihood of successful completion ranges between a low of 12% to a high of 20%. The court should review the type of drug treatment programs that are available and make sure that the program is designed to handle the type of addict the court is dealing with.

There are different types of heroin addicts with different expectancy rates of successful treatment completion.

There are different types of heroin addicts with different expectancy rates of successful treatment completion.[42] Treatment programs are more successful with addicts who have a stable family structure; are married to a nonaddicted mate; are highly motivated to stop using heroin; have good jobs; have minimal antisocial behavior; have low drug craving/addiction; or have high professional, social, or economic status.[43] Programs with addicts who use heroin as a "self-medication" have a higher rate of program discontinuation or failure.[44]

II. Assessment of success of drug treatment programs should be made using multiple measures, including abstinence rates, improvement in employment status, success in therapy treatment, reaching of social goals, positive behavior changes, and the level of involvement in criminal activity, rather than on retention rates alone. The court should not assume that failure to complete the program is analogous to failure.

41. Robert Greenstein et al., *supra* note 24 at 677. See also, Robert Greenstein et al., *supra* note 38 at 27. See *supra* note 31 to the contrary.
42. See, Jonathan Rabinowitz, et al., *Compliance to Naltrexone Treatment After Ultra-Rapid Opiate Detoxification: An Open Label Naturalistic Study*, 47 DRUG & ALCOHOL DEPENDENCE, Aug. 1997, at 77; Domingos Neto et al., *Sequential Combined Treatment of Heroin Addicted Patients in Portugal with Naltrexone and Family Therapy,* 3 EUR. ADDICTION RES., July 1997, at 138; Philip Robson & Margaret Bruce, *A Comparison of "Visible" and "Invisible" Users of Amphetamine, Cocaine and Heroin: Two Distinct Populations*, 92 ADDICTION, 1729 (1997); Michael Gossop et al., *Severity of Dependence and Route of Administration of Heroin, Cocaine and Amphetamines*, 87 BRIT. J. ADDICTION, 1527 (1992); and Arnold Washton et al., *Successful Use of Naltrexone in Addicted Physicians and Business Executives,* 4 ADVANCES IN ALCOHOL AND SUBSTANCE ABUSE 89 (1984). See also, *infra* note 41. For the assertion that there is a distinction between compulsive/addictive users of heroin and nonaddictive, long-term moderate users of heroin see, Wayne M. Harding, *Controlled Opiate Use: Fact or Artifact?,* 3 ADVANCES IN ALCOHOL & SUBSTANCE ABUSE, Fall-Winter 1983, at 105.
43. See, Augusta Roth et al., *Naltrexone Plus Group Therapy for Treatment of Opiate-Abusing Health Care Professionals*, 14 J. SUBSTANCE ABUSE TREATMENT, 19 (1997); Walter Ling & Donald Wesson, *Naltrexone Treatment for Addicted Health Care Professionals: A Collaborative Private Practice Experience*, 9 J. CLINICAL PSYCHIATRY, Sept. 1984, at 46; Arnold Washton et al., *Naltrexone in Addicted Business Executives and Physicians*, 9 J. CLINICAL PSYCHIATRY, Sept. 1984, at 39; John Gonzalez & Rex Brogden, *Naltrexone: A Review of Its Pharmacodynamic and Pharmacokinetic Properties and Therapeutic Efficacy in the Management of Opioid Dependence*, 35 DRUGS, Mar. 1988, at 192; Richard Resnick et al., *supra* note 23. See also, OFF. NAT'L DRUG CONTROL POLICY, WHITE PAPER: TREATMENT PROTOCOL EFFECTIVENESS STUDY (1996); A. Thomas McLellan, *Patient Characteristics Associated with Outcome*, in RESEARCH ON TREATMENT OF NARCOTIC ADDICTION 500 (James Cooper ed., 1983).
44. See, Richard Resnick et al., *supra* note 25. See also, Richard Resnick et al., *A Cyclazocine Typology in Opiate Dependence,* 126 AM. J. PSYCHIATRY, 1256; Richard Resnick & Arnold Washton, *Clinical Outcome with Naltrexone: Predictor Variables and Follow-up Status in Detoxified Heroin Addicts,* 311 ANNALS NEW YORK ACAD. SCI., 241 (1978).

Research on program treatment dropouts . . . notes that treatment programs work with patients who are future oriented, have a positive motivation to change, and are at a stage in their addiction when preparation for change is achieved.

High dropout rates are "the rule for all drug treatment modalities as for treatment of other psychological problems."[45] While the "retention rate" has been the most used and widespread criterion for success, this criterion alone is unreliable for assessing the success of a treatment program or the individual client in treatment because it does not take into account changes in the behavior and lifestyle of the individual.[46]

One of the limitations to the retention rate criteria is that it does not take into account the factor of self-selection.[47] Use of retention rates as a determination of success is vulnerable to selection bias because those who successfully stay in a treatment program do so because the program expels them or they choose to remain in the program. Thus, the "success" or "failure" of the program based on retention is artificially inflated or deflated by those who are removed from the program either by the participants' choice or by the program. Selection bias produces an outcome, i.e., success or failure that can be explained as function of individual differences among the patients and not the treatment program.

Although, the "single most important predictor of success [is] the length of stay in treatment,"[48] "the so-called retention rate . . . simply measures the length of time an addict stays in a program,"[49] not the change in the addict due to the program. It has also been noted that retention rates can be associated with factors outside of the program, including environmental support for drug addiction, personality characteristics of the addict, employment status, status and health of the addicts' family, psychological status of the addict, criminal history,[50] the readiness of the addict to change,[51] and multiple drug use history.

III. Research shows that more than 80% of the clients in a drug treatment program drop out from the program during a first attempt at drug treatment. The court should determine if the addict is at a point in his or her addiction that allows for successful treatment.

Research on program treatment dropouts as well as theory on behavior change notes that treatment programs work with patients who are future oriented,[52] have a positive motivation to change,[53] and are at a stage in their addiction when preparation for change[54] is achieved. The future-oriented addict has

45. George DeLeon & Nancy Jainchill, *Circumstances, Motivation, Readiness and Suitability as Correlates of Treatment Tenure*, 18 J. PSYCHOACTIVE DRUGS, 203 (1986).

    It has been asserted that treatment programs are destined for failure because they don't consider the multifaceted factors of why the treatment is being offered, the difference between treatment and therapy, why an addict is seeking treatment, who is offering the treatment, and why the addict has an addiction. Additionally, the lack of specific and meaningful goal setting for the individual addict, the lack of specific diagnosis of the individual addict, the confusion of goals to help the addict become an effective patient with goals to make the patient a better citizen by improving his or her lifestyle, and confusing different theories of therapy and treatment modalities all help to create program design problems that lead to failure. See, Stanley Einstein, *Factors Initiating/Affecting the Treatment of Drug Use and the Drug User,* 15 INT'L J. ADDICTIONS 773 (1980).
46. Nachman Ben-Yehuda, *Success and Failure in Rehabilitation: The Case of Methadone Maintenance*, 9 AM. J. COMMUNITY PSYCHOL., 83 (1981). It has also been observed that since treatment programs generally are not evaluated using random selection of patients and control groups and established baseline measurements and have reliability and validity limitations, the fact of high attrition rates should not be the sole assessment of success. William Berg, *Evaluation of Community-Based Drug Abuse Treatment Programs: A Review of the Literature,* in THE ADDICTIVE PROCESS: EFFECTIVE SOCIAL WORK APPROACHES 81 (E. Freeman ed., 1992).
47. William Berg, *supra* note 46 at 84.
48. *Id.*
48. Nachman Ben-Yehuda, *supra* note 46 at 85.
50. *Id.* at 86.
51. George DeLeon & Nancy Jainchill, *supra* note 45. For two theories on the readiness to change and its impact on behavior change see, James Prochaska et al., *The Transtheoretical Model of Behavior Change*, in THE HANDBOOK OF HEALTH BEHAVIOR CHANGE 59 (Sally Shumaker et al. ed., 2nd ed., 1998), and Neil Grunberg et al., *Biological Obstacles to Adoption and Maintenance of Health-Promoting Behaviors*, in THE HANDBOOK OF HEALTH BEHAVIOR CHANGE 269 (Sally Shumaker et al. ed., 2nd ed., 1998).
52. Nachman Ben-Yehuda, *supra* note 46. The future-oriented individual looks to the future and makes plans to make his or her life better in the future. Decisions are meant to generate change as supposed to a past-oriented person who lives from moment to moment, who is resistant to change or unwilling to take account of behavior and make decisions that produce benefits in the future. *Id.* at 88, 97. "Future-oriented patients apparently benefit most from their therapeutic experience in [drug treatment] programs." *Id.* at 97. This classification as either past or future oriented can be helpful in the designing and the selection of clients for a potential drug treatment program. "Upon admission . . . patients could be classified . . . as to the behavior expected of them while [in] the program. This information could potentially help clinical and administrative personnel working with drug-abuse to better deal with their patients, construct differential treatment plans for them, and assess success more meaningfully." *Id.* at 97.
53. George DeLeon & Nancy Jainchill, *supra* note 45. A positive motivation is " a desire to forge a new lifestyle; a belief that one can be successful and have the good things in life; or a desire for personal growth, to be a better person . . . as well as to have healthier relationships." *Id.* at 203.
54. James Prochaska et al., *supra* note 51. In the preparation stage "people are intending to take action in the immediate future, usually measured as during the next month. These individuals have a plan of action. . . . These are the people we should recruit for . . . action-oriented programs." *Id* at 61.

decided to make a change and end his or her addiction. The addict is positively motivated because the change is self-desired—*the addict wants* a better life. The addict is prepared to change and demonstrates this preparation by the formation of a plan to end the addiction. The addict enters the program having decided to enter a treatment program with the desire and expectation to successfully complete it, as compared to entering the program to avoid incarceration.

If the program is servicing addicts who have not reached the point of having a future-oriented, positively motivated, prepared mental state to make a change in their lives (i.e., end their heroin addiction) success rates will be low regardless of the value of the program.

IV. The presence of psychological dysfunction on potential clients can affect retention and successful completion rates. The court should determine whether the treatment modality can accommodate clients who have psychological problems. Treatment programs need to be designed to address the individual addict and quality-of-life issues that the addict is experiencing, along with the addiction to the drug itself.

Many of those who enter drug treatment programs have moderate to severe mental illness.[55] More significant is the fact that only about half of those addicts who have a mental illness receive treatment for the mental illness and the drug addiction together.[56] The presence of mental illness and dropout rates have been shown to be associated.[57] Research has also found that mental illness can affect the ability to function and how drugs impact the individual.[58] Programs that address both drug addiction and mental illness should design treatment modalities to take into account the importance of the client's quality of life. Recent research has noted that the patients' quality of life (family support, employment, positive self-image, etc.) can predict successful treatment independent of other factors, including the psychiatric status of the client.[59]

Many of those who enter drug treatment programs have moderate to severe mental illness.

V. Drug addiction is not a problem in which the addiction to a specific drug is the only focus of attention. Drug addiction is usually one member of a family of issues within the life of the addict.

The nature of addiction has been described as a state in which the addict (1) has a persistent regular use of a drug; (2) attempts to stop such use leads to significant and painful withdrawal symptoms; (3) continues to use the addictive drug despite damaging physical or psychological problems, or both; (4) engages in compulsive drug-seeking behavior; and (5) needs a constant increasing level of dosage of the drug to get "high."[60]

Treatment programs should implement program modalities in the light of recent research that has observed that (1) drug use occurs within a broader family of social and psychological problems, (2) cognitive-behavioral abilities are fundamentally psychological in nature, (3) the motivation to change is a cognitive-behavioral process, and (4) the skills and the relationship between the client and the individual counselor has an impact on final outcome.[61]

VI. The court should consider if the drug treatment program design encompasses the biochemical as well as the cognitive-behavioral aspects of addiction when designing drug addiction treatment modalities.

Virtually "all drugs . . . have common effects, either directly or indirectly, on a single pathway deep within the brain."[62] In

55. Peggy el-Mallakh, *Treatment Models for Clients with Co-Occurring Addictive and Mental Disorders,* 12 ARCHIVES PSYCHIATRIC NURSING, Apr. 1998, at 71.
56. *Id.*
57. H. Lawrence Ross et al., *Retention in Substance Abuse Treatment: Role of Psychiatric Symptom Severity,* 6 AM. J. ADDICTION 293 (1997).
58. Jennifer Tidey et al., *Psychiatric Symptom Severity in Cocaine-Dependent Outpatients: Demographics, Drug Use Characteristics and Treatment Outcome,* 50 DRUG & ALCOHOL DEPENDENCE, Mar. 1998, at 9.
59. Joan Russo et al., *Psychiatric Status, Quality of Life, and Level of Care as Predictors of Outcomes of Acute Inpatient Treatment,* 48 PSYCHIATRIC SERVICE 1427 (1997). For research on addressing the emotional and spiritual factors that can affect heroin treatment success or failure see Karen Miotto et al., *Overdose, Suicide Attempts and Death Among a Cohort of Naltrexone-Treated Opioid Addicts,* 45 DRUG & ALCOHOL DEPENDENCE Apr. 1997, at 131, and Leslie Green, et al., *Stories of Spiritual Awakening: The Nature of Spirituality in Recovery*, 15 J. SUBSTANCE ABUSE TREATMENT, 325.
60. Rao Rapaka & Heinz Sorer, *Introduction*, in DISCOVERY OF NOVEL OPIOID MEDICATIONS (Nat'l. Inst. on Drug Abuse Res. Monograph # 147) (Roa Rapaka & Heinz Sorer eds., 1995), at v.
61. William Miller & Sandra Brown, *Why Psychologists Should Treat Alcohol and Drug Problems,* 52 AM. PSYCHOL. 1269 (1997). James Inciardi explains:

    > drug abuse as overdetermined behavior. That is, physical dependence is secondary to the wide range of influences that instigate and regulate drug-taking and drug seeking behaviors. In the vast majority of drug offenders, there are cognitive problems; psychological dysfunction is common; thinking may be unrealistic or disorganized; values are misshapen, and frequently, there are deficits in education and employment skills. [D]rug use is a response to a series of social and psychological disturbances.

    James Inciardi, "Drug Treatment in Prisons," presentation at the Summit on U.S. Drug Policy, U.S. House of Representatives, Committee on the Judiciary, Washington, D.C. (May 7, 1993), at 3–4. See also, Robert Hooper et al., *Treatment Techniques in Corrections-Based Therapeutic Communities*, 73 PRISON J., Sept./Dec., 1993, at 290.
62. Alan Leshner, *Addiction Is a Brain Disease, and It Matters,* 278 SCIENCE, Oct. 1997, at 45, 46.

The use of naltrexone addresses the results of heroin use due to impulsive and compulsive behavior.

regard to the effect of heroin on the brain, research has found that heroin focuses on the opioid receptors of the brain. As previously noted[63] the pleasure from opiates "can be more powerfully rewarding than that produced by natural reinforcers."[64] This assessment is significant in the study of how and why drug addiction is developed and maintained through positive and negative reinforcement.

In studies dealing with positive and negative reinforcement, it is believed that if pleasure responses can be secured artificially a person will choose the artificial stimulation even over natural positive stimulation such as food or sex.

> [The] process in which a pleasure-inducing action becomes repetitive is called positive reinforcement. Conversely, abrupt discontinuation of alcohol, opiates, and other psychoactive drugs following chronic use . . . results in discomfort and craving. The motivation to use a substance in order to avoid discomfort is called negative reinforcement. Positive reinforcement is believed to be controlled by various neurotransmitter systems, whereas negative reinforcement is believed to be the result of adaptations produced by chronic use within the same neurotransmitter systems.[65]

The use of heroin creates both positive and negative reinforcement through its processing within the brain. The heroin acts as an exogenous opiate within the brain and acts as a neurotransmitter for pleasure within the brain. The heroin produces a stronger pleasure reaction than endogenous opioids (endorphins and enkephalins).

The chronic use of exogenous opiates within the pleasure-seeking system drives the need for the exogenous opiates, and the opioid receptors are now only stimulated by the exogenous opiates, rather than by natural pleasure stimuli. "Natural reinforcers such as food, drink, and sex [which] activate [pleasure] pathways in the brain [are replaced by the exogenous opiates] as surrogates of the natural reinforcers."[66] It is also believed that the use of these opiates and the negative reinforcement they produce (the need for the opiates to avoid pain due to lack of presence of the opiate) are aided by other natural occurring neurotransmitters in the brain, such as dopamine and serotonin. Dopamine produces immediate feelings of pleasure and elation that reinforce certain behaviors, such as eating or sex, and motivates repetition of these activities.[67] Dopamine is believed to be produced with the use of opiates. "Serotonin is associated with the reinforcing effects of many abused drugs through its mood regulating and anxiety reducing effects. Low levels of serotonin are associated with depression and anxiety."[68] The lack of stimulation by opioid receptors is believed to be a cause for low levels of dopamine and serotonin. The lack of these two chemicals is thought to produce depression, which in turn produces the craving for the heroin to relieve feelings of depression and to restore feeling pleasure or at least feeling "normal."

The cycle of addiction and compulsive and impulsive drug use is compounded by biochemical change within the brain[69] and cognitive-behavioral cues. The cycle of addiction is started by positive reinforcement and then driven by negative reinforcement. Heroin produces a strong pleasure effect, and cognitively, the user decides to use the drug again to receive the same pleasurable effect. The opioid receptors of the brain become addicted to the presence of the heroin and then require the heroin stimulation continuously. Here is where negative reinforcement takes control. The user no longer takes the heroin to feel pleasure, but to feel "normal." The purpose in taking the heroin is to avoid painful sensations not to enjoy pleasurable sensations. During drug treatment the addict will desire to take heroin on two levels. Impulsive use will occur due to cues in the environment or by memories of taking the drug. The addict takes the drug *almost* without thinking about the consequences. Compulsive (craving) drug use occurs due to the addict obsessing over the pleasure gained by the drug. The addict thinks about the drug, and the thoughts drive the addicts to relapse.

The use of naltrexone addresses the results of heroin use due to impulsive and compulsive behavior.[70] But the issue treatment programs need to contend with is the cognitive behavior of addicts in that they decide that life without heroin is not desirable and simply choose to stop taking the naltrexone so that they can enjoy the pleasure of the heroin. The treatment therapy must create new cognitive pathways within the brain to allow for controlling the cravings[71] for the heroin and new behavior patterns to deal with the social factors of their lives. Since human beings have the ability to cognitively choose to do or not do something, drug treatment programs need to focus on how the individual addict handles life stres-

63. See, *supra* notes 21, 31–33.
64. SHAMSHA, *supra* note 21 at 27.
65. *Id.*
66. *Id.*
67. *Id.* at 28. See also, Robert Swift, *Medications and Alcohol Craving*, 23 ALCOHOL RES. & HEALTH: J. NAT'L. INST. ALCOHOL ABUSE & ALCOHOLISM, 207 (1999). See also *infra* notes 69 and 71 for studies dealing with craving and the biochemical dynamics of drug addiction.
68. SHAMSHA, *supra* note 21 at 27. See also, *infra* notes 69 and 71.
69. See *Neuroscience: Pathways of Addiction,* 21 ALCOHOL HEALTH & RES. WORLD: J. NAT'L INST. ALCOHOL ABUSE & ALCOHOLISM (1997) for a series of articles on the biochemistry of addiction.
70. See, *supra* notes 27–32 and accompanying text.
71. For general discussion on craving and drug use see, Raymond Anton, *What Is Craving? Models and Implication for Treatment*, 23 ALCOHOL HEALTH & RES. WORLD: J. NAT'L INST. ALCOHOL ABUSE & ALCOHOLISM, 165 (1999); Stephen Tiffany, *Cognitive Concepts of Craving*, 23 ALCOHOL HEALTH & RES. WORLD: J. NAT'L INST. ALCOHOL ABUSE & ALCOHOLISM, 215 (1999); and Mary Jo Breiner et al., *Approaching Avoidance: A Step Essential to the Understanding of Craving*, 23 ALCOHOL HEALTH & RES. WORLD: J. NAT'L INST. ALCOHOL ABUSE & ALCOHOLISM 197 (1999).

sors and train the addict to resort to socially positive alternatives to reduce stress, rather than resort to the use of heroin.

VII. The biochemical and cognitive-behavioral aspects of drug addiction present the criminal justice system with political as well as social policy issues. The criminal justice system needs to contend with the implications of the fact that drug addicts have altered brain chemistry, while maintaining its inherent purpose of focusing on individual accountability and responsibility. Conversely, drug treatment designers and drug addiction scientists must contend with the fact that personal responsibility and accountability will always be a demand of policy makers and the public regardless of the science of addiction.

Research on addiction shows that prolonged drug use "causes pervasive changes in the brain [and] the addicted brain is distinctly different from the non addicted brain" and this fact leads to the conclusion that on a general policy level "the addicted individual must be dealt with as if he or she is in a different brain state."[72] In other words, treat drug addicts as those whose minds have been "altered fundamentally by drugs."[73] Although the literature is settled on the fact that addiction causes changes in the brain, there is some debate on the cause of addiction. For example, O'Brien defined addiction as acts of "a chronic disease produced by thousands of exposures to drugs. Each drug taking episode activates specific brain structures, leaving a memory trace that persists long after the drug has disappeared from the body."[74] Goodman explains that addiction is not formed by repeated use of a drug, but develops through a combination of environmental and genetic characteristics.[75]

Although the literature is settled on the fact that addiction causes changes in the brain, there is some debate on the cause of addiction.

Heyman, while agreeing, "changes in brain function alter voluntary behavior," notes that *addiction is still a behavior* of which social and economic costs can persuade addicts to end their addiction.[76] Heyman asserts that there are two types of addicts, those who take drugs voluntarily and those who do so involuntarily. The former can be persuaded cognitively but the latter will "not be persuaded by costs and incentives to stop using them."[77] O'Brien asserts that three factors should be kept in mind when considering addiction and how to deal with

72. Alan Leshner, *supra* note 62 at 46. See also, George Koob et al., *Neuroscience of Addiction*, 21 NEURON 467 (1998). Some recent research has asserted that addiction can be traced to genetics, see Thomas Kosten, *Addiction as a Brain Disease,* 155 AM. J. PSYCHIATRY 711 (1997).
73. Alan Leshner, *supra* note 62 at 46.
74. Charles O'Brien, *Progress in the Science of Addiction,* 154 AM. J. PSYCHIATRY 1195, 1195 (1997). O'Brien asserted that

    > Drug exposures . . . paired with environmental cues (persons, places, things) . . . acquire the ability to activate the same or complementary brain circuits even in the absence of the drug. *Id.* Drug-related cues alone have [been shown to produce] increases in limbic blood flow in formerly dependent cocaine users . . . . Drug cues have also produced increases in the metabolism of specific brain areas. *Id.* at 1196.

    This explains why addiction is considered to be a chronic disease. Although the use of drugs has ended, pathways and brain chemistry have been altered so as to produce the effects of the "disease" although the agent causing the disease is no longer present. Although this chemical analysis may be true, the choice of whether to indulge in an impulse or compulsive need (chemically created or not) is not destroyed. One still chooses to indulge a desire and one chooses to frequent an area that provides those cues of addiction.
75. Aviel Goodman, *Science of Addiction* (Letter to the Editor), 155 AM. J. PSYCHIATRY 1642, 1642 (1998). Goodman goes on to say the following:

    > I would describe addiction as a chronic condition that develops through a process that involves complex interactions over time between genetic and environmental factors. More specifically, I would propose that two sets of determinants are involved in the development of an addictive disorder: 1) those that concern underlying neurobiological abnormalities that are shared by all addictive disorders and 2) those that relate to the selection of a particular substance as the one that is preferred for addictive use. I would add that each set includes both genetic and environmental factors. Environmental factors in the development of the underlying neurobiological abnormalities include deficiencies in the child's caregiving environment during the first years of life, when the maturing brain is most sensitive to external influences and depends on particular qualities of interchange with the caregiving environment for healthy development. Genetic factors in selection include genetically based variations in 1) the sensitivity of the reward system to different substances, 2) the body's sensitivity to immediate aversive consequences of using a substance (such as flushing or standing ataxia after ingestion of alcohol), and 3) the intensity of the individual's sensitivity to various painful effects [which are] associated with . . . negative reinforcement.

    See, Bruce Lawford et al., *The D(2) Dopamine Receptor A (1) allele and Opioid Dependence: Association with Heroin Use and Response to Methadone Treatment,* 96 AM. J. MED. GENETICS: NEUROPSYCHIATRIC GENETICS 592 (2000), for research showing that heroin addicts that have a certain type of dopamine receptor are more likely to drop out or fail a methadone treatment program than those without this variation. The research noted that there were significantly more heroin addicts with this variation (TaqI A(1) allele of the D(2) dopamine receptor) in a group of addicts that had poor treatment outcomes compared to those who had successful treatment outcomes. The researchers also found that 19% of the heroin addicts had this variation compared to 4.6% of a control group of people free from drug and alcohol use and free from a family history of alcohol and drug use.
76. Gene Heyman, *On the Science of Substance Abuse* (Editorial), 278 SCIENCE, 15 (1997).
77. *Id.* at 15.

[T]he judiciary should make sure that a proposed drug treatment program modality includes personal responsibility and behavior modification as one of the tools to address drug addiction.

addicts: (1) the availability of the drug and its cost and purity; (2) the genetic predisposition of the addict; and (3) the applicable social and environmental pressures on the addict to continue or stop drug use.[78]

Although neuroscientists are convinced that addiction is a biological issue involving brain damage, "the more common view is that drug addicts are weak . . . unwilling to lead moral lives and to control their behavior and gratifications."[79] Although the point of drug addiction and personal responsibility for addiction has been belittled in some of the literature, there is value in the common belief that human beings think and thus can control their behavior. The ability to be responsible for an addiction accompanies the power to end addiction. The mere fact that one has damaged his or her brain and formed neuropathways for certain stimuli does not mean that the ability to choose has been destroyed. The fact that human beings have the ability to think, learn (form new neuropathways), and choose between behaviors seems to be acknowledged as an afterthought by some of the literature on addiction. The political (used here to mean philosophical) view that behavior is a cognitively controlled activity that is at least equal in the cause and maintenance of addictive behavior needs to be considered by treatment program designers and neuroscientists. Those who make political policy may not be aware or care about the science of addiction, especially if the idea of personal responsibility is not reflected in theories of addiction. For example, Congress has recently restricted social security payments and other social benefits from those who have drug addictions.[80] Similarly, the judiciary should make sure that a proposed drug treatment program modality includes personal responsibility and behavior modification as one of the tools to address drug addiction.

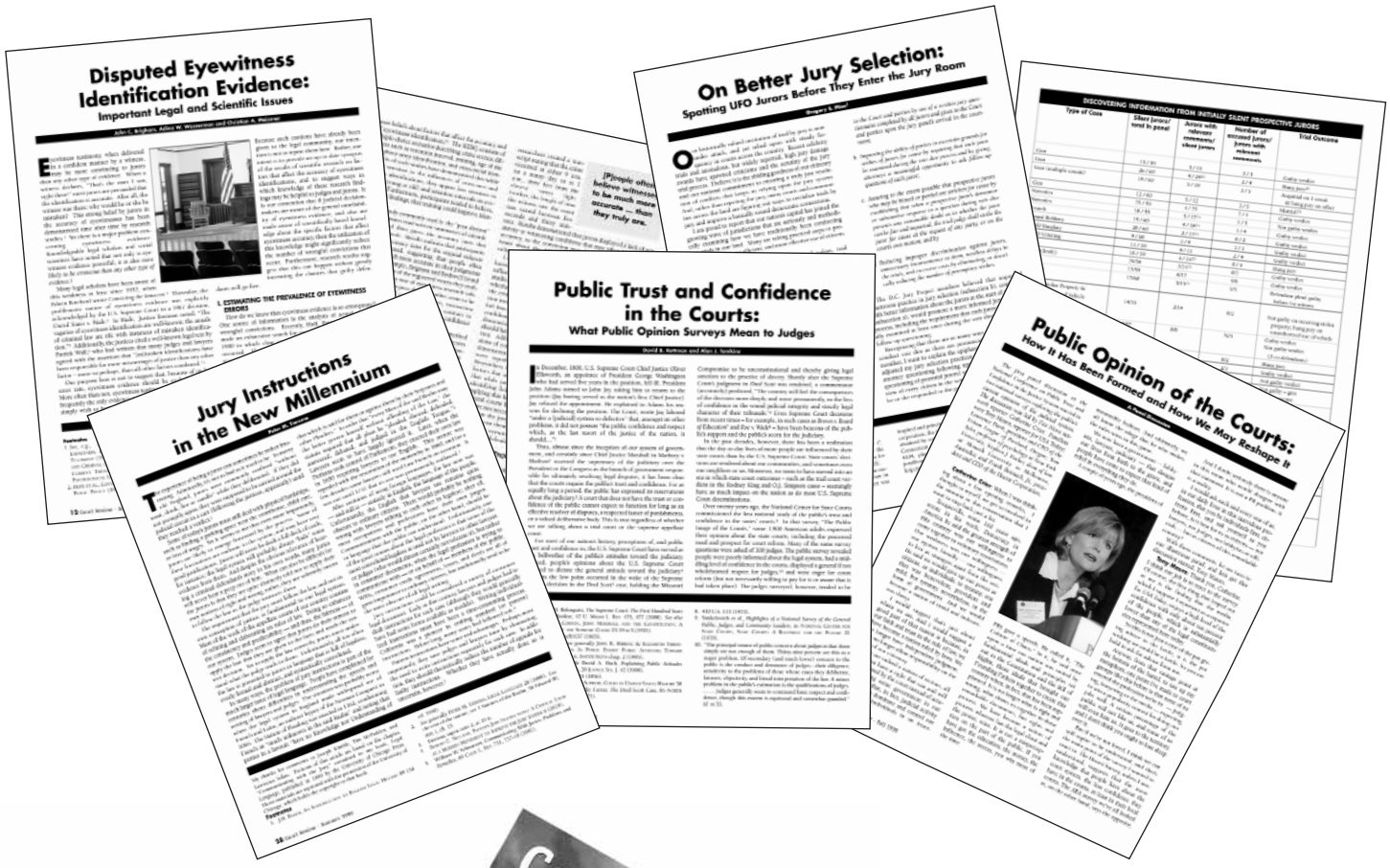
Both the science of addiction and personal responsibility add to the understanding of addiction and addiction treatment. Moral responsibility aside, drug addiction brings serious and chronic physical and social consequences.[81] As noted by Heyman, three factors should be kept in mind when trying to understand addiction: "[1] drug use in addicts can be altered by the proper arrangements of costs and benefits, [2] addictive drugs reduce options but do not eliminate choice, and [3] the biology of addiction is the biology of voluntary behavior."[82]

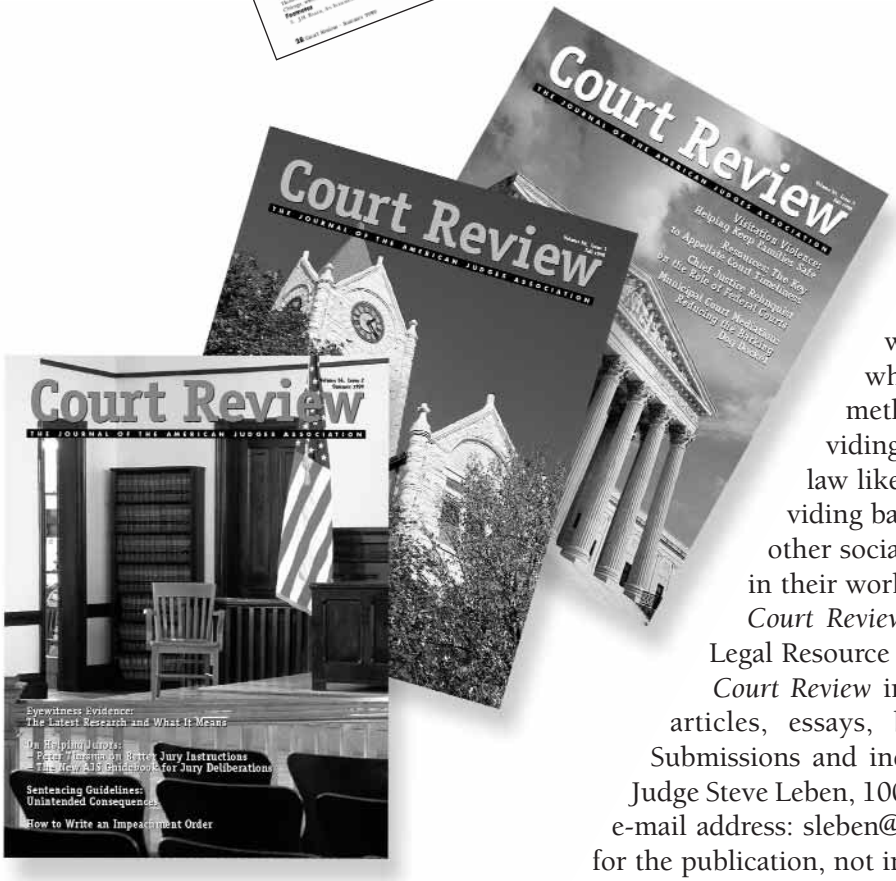
Arthur H. Garrison is the criminal justice planning coordinator for research and program evaluation at the Delaware Criminal Justice Council. He is a member of the Society of Police and Criminal Psychology. Garrison has published articles in various journals, including the New England Journal on Criminal and Civil Confinement, Journal of Police and Criminal Psychology, Police Studies, Issues in Child Abuse Accusations, American Journal of Trial Advocacy, *and* Juvenile and Family Court Journal. *Garrison received his B.S. (1990) from Kutztown University of Pennsylvania and his M.S. (1995) from West Chester University of Pennsylvania.*

78. Charles O'Brien, *Dr. O'Brien Replies* (Letter to the Editor in Response to Dr. Goodman), 155 AM. J. PSYCHIATRY 1642 (1998). See Goodman, *supra* note 75.
79. Alan Leshner, *supra* note 62 at 45.
80. See, Carole Gresenz et al., *Supplemental Security Income (SSI), Disability Insurance (DI) and Substance Abusers,* 34 COMMUNITY MENTAL HEALTH J. 337 (1998).
81. For studies on long-term affects of heroin use see, Yih-Ing Hser et al., *A 33-Year Follow-Up of Narcotics Addicts,* 58 ARCHIVES GEN. PSYCHOL. 503 (2001). See also, Yih-Ing Hser et al., *A 24-Year Follow-Up of California Narcotics Addicts,* 50 ARCHIVES GEN. PSYCHOL. 577 (1993); Edna Oppenheimer & Gerry Stimson, *Seven-Year Follow-Up of Heroin Addicts: Life Histories Summarized,* 9 DRUG & ALCOHOL DEPENDENCE 153 (1982); and DWAYNE SIMPSON & B. SAUL SELLS, OPIOID ADDICTION AND TREATMENT: A 12 YEAR FOLLOW-UP (1990).
82. Gene Heyman, *supra* note 76 at 16.

Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION





Court Review, the quarterly journal of the American Judges Association, seeks to provide practical, useful information to the working judges of the United States, Canada, and Mexico. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to 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 indexed in the Current Law Index, the Legal Resource Index, and LegalTrac.

Court Review invites the submission of unsolicited, original articles, essays, book reviews, and letters to the editor. Submissions and inquiries may be sent to *Court Review*'s editor: Judge Steve Leben, 100 North Kansas Avenue, Olathe, Kansas 66061, e-mail address: sleben@ix.netcom.com. Comments and suggestions for the publication, not intended for publication, also are welcome.

Illinois v. Wardlow:
The Empowerment of Police, the Weakening of the Fourth Amendment

Pamela Richardson

The Fourth Amendment of the United States Constitution protects the right of the people against unreasonable searches and seizures by requiring a probable cause showing in order to obtain a warrant before conducting such searches.[1] Since the United States Supreme Court decided *Terry v. Ohio*[2] in 1968, however, the words of the Fourth Amendment have been questioned and the rights of the individual challenged. When the Court decided *Illinois v. Wardlow*[3] in 2000, it was made clear that the words once written to protect all Americans do not pertain to those residing in locations deemed "high-crime areas."[4]

In *Terry*, the Supreme Court held that law enforcement officials could stop and frisk an individual, without probable cause, if there was a reasonable suspicion that the individual is involved in criminal activity.[5] During the next 25 years, many cases fleshed out *Terry's* rules, gradually requiring less and less evidence for a stop and frisk.[6] Most recently, the Supreme Court expanded *Terry* to include justifying a stop and frisk of those located in high-crime areas who take flight upon seeing the police in *Illinois v. Wardlow.*[7]

In *Wardlow,* two officers were patrolling an area known for heavy narcotics trafficking.[8] The officers stopped and frisked a man who took flight upon seeing them.[9] They discovered a .38 caliber handgun and arrested the man.[10]

The Illinois trial court held that the gun was recovered during a lawful stop and frisk.[11] The Illinois Court of Appeals reversed, concluding that the officers did not have enough supporting evidence to show that the location of the stop and frisk was a high-crime area; thus, the officers lacked grounds for reasonable suspicion.[12] The Illinois Supreme Court affirmed, but rejected the intermediate appellate court's reasoning and found that sudden flight in a location deemed a high-crime area by police is insufficient to create reasonable suspicion.[13]

The United States Supreme Court reversed.[14] The Court found that while headlong flight is not indicative of wrongdoing it is certainly suggestive of such.[15] The Court held that Wardlow's presence in a high-crime area and unprovoked flight justifiably led police to believe that he was involved in criminal activity.[16]

This article first progressively examines how the Supreme Court has developed exceptions and limitations to Fourth Amendment protection. Next, it analyzes the reasoning of the majority and dissenting opinions in *Illinois v. Wardlow*. Finally, it analyzes the effect that *Wardlow* will have on future Fourth Amendment cases and concludes that this decision grants the state more power to protect its citizens at the cost of subjecting low-income, primarily minority, Americans to disproportionately higher instances of personal invasion.

THE STEADY PROGRESSION OF STATE DOMINANCE OVER INDIVIDUAL RIGHTS

Reasonable Suspicion Replaces Probable Cause

The Supreme Court broke new ground when deciding *Terry v. Ohio*. For the first time, questions referring to the restrictions placed on law enforcement officials to conduct legal searches and seizures were being raised. Law enforcement was looking to the Court for a little latitude in the "probable cause" requirement of the Fourth Amendment. Their argument was that this would allow them to better fulfill their duties and obligations to the public, while protecting themselves from unnecessary risks; the cost being a relatively slight intrusion on the individual.[17] The Court agreed and held it constitutional to perform a "stop and frisk" with less than probable cause.[18]

In *Terry*, a plainclothes officer was walking his usual beat when he observed two men standing on a corner.[19] After watching the men for some time, their

Editor's Note: This article was the winning entry in 2001 in the American Judges Association's annual essay contest for law-school students. Each year we publish the winning essay in that contest in Court Review.

Footnotes

1. U.S. CONST. amend. IV.
2. 392 U.S. 1 (1968).
3. 528 U.S. 119 (2000).
4. *See* People v. Wardlow, 678 N.E.2d 65, 67 (Ill. App. 1997)(defining high-crime area as a location with a high incidence of narcotics trafficking).
5. 392 U.S. at 30.
6. David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 660 (1994).
7. 528 U.S. at 120.
8. *Id.* at 121.
9. *Id.*
10. *Id.*
11. *Id.* at 122.
12. 684 N.E.2d 1341 (Ill. App. 1997).
13. 701 N.E.2d 484 (Ill. 1998).
14. 528 U.S. at 123.
15. *Id.* at 124.
16. *Id.*
17. *See* Terry, 392 U.S. at 10, 12.
18. *Id.* at 27.
19. *Id.* at 7.

conduct suggested they were planning to rob a nearby jewelry store.[20] The officer approached the men, identified himself as a police officer and asked for their names.[21] When they "mumbled something" in response to his inquires, the officer patted down the outside of the defendant's clothing and discovered a pistol in the breast pocket of his overcoat.[22]

The Supreme Court found that the officer's stopping of the men was a "seizure" under the Fourth Amendment and that the officer had acted without probable cause.[23] The Court then weighed these factors against the state's interests of crime prevention and protection of its police officers.[24] Upon evaluation, the Court held that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer when he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.[25]

To create the balance that needed to be struck in this type of case, the Court formed a two-part test.[26] First, the officer must be able to point to specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant the intrusion.[27] Due weight must be given, not to the officer's inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences that he is entitled to draw from the facts in light of his experience.[28] Second, the suspect must be believed to be armed and dangerous and the frisk must be limited to that which is necessary for the discovery of weapons that might be used to harm the officer or others nearby.[29]

Terry gave police the power to stop and frisk civilians when they reasonably believe criminal activity is afoot during street encounters, but limited that power by excluding an officer's unsubstantiated suspicion. What the Court did not do was to explain what the boundaries were concerning reasonable suspicion and hunches. What did the Court believe the proper balance was between a precautionary frisk for police protection and an unjustifiable intrusion into an individual's privacy? Four years after *Terry*, this issue presented itself in *Adams v. Williams*,[30] when the Supreme Court was asked if reasonable suspicion could be inferred from a tip received by an informant and not from actual events witnessed by the officer himself.[31]

In *Adams*, an officer was patrolling a high-crime area when an informant told him that an individual seated in a nearby car was in possession of a gun and narcotics.[32] Acting on this tip, the officer approached the parked car and asked the man inside to step out.[33] When the suspect opted to roll down the window instead, the officer reached into the car and removed a fully loaded revolver from the man's waistband, precisely the place indicated by the informant.[34]

The Supreme Court agreed with the state and found that reasonable cause can be based on information supplied by another person.[35] The Court held that in instances when a credible informant warns of a specific impending crime it is justifiable that the officer act on his tip and conduct a further investigation.[36]

The decisions in *Terry* and *Adams* gave the lower courts a reference point to look to when deciding whether to suppress evidence produced from a stop and frisk. From *Terry*, it was understood that a police officer might stop and frisk an individual with a reasonable suspicion that the person was involved in criminal activity. It was also understood that officers were expected to use their experience to draw rational inferences that would then lead to reasonable suspicion. *Adams* supplemented *Terry* by allowing a tip received from an informant to be used to create a reasonable suspicion. However the lower courts still did not know at this point what was not a sufficient basis for a *Terry* stop. The Supreme Court got an opportunity to answer this in *United States v. Brignoni-Ponce,*[37] and later in *Brown v. Texas*.[38]

A Look into What Is Not a Sufficient Basis for Reasonable Suspicion

In *Brignoni-Ponce,* the issue before the Supreme Court was whether to allow the Border Patrol to stop vehicles solely because the driver or occupants appeared to be of Mexican descent.[39] The Supreme Court balanced the public interest served by the prevention of illegal aliens with the interference of individual liberty that results when an officer stops an automobile and questions its occupants.[40] The Court concluded that to allow patrol stops of all vehicles, without any suspicion that the vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of highways, solely at the discretion of Border Patrol officers.[41]

20. *Id.*
21. *Id.* at 6-7.
22. *Id.* at 7.
23. *Id.* at 16, 20. The Court defined a "seizure" as whenever a police officer accosts an individual and restrains his freedom to walk away. These seizures were then described as more than a "petty indignity," but a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment. *Id.* at 16.
24. *Id.* at 21-27.
25. *Id.* at 27.
26. *Id.* at 20-27.
27. *Id.* at 21.
28. *Id.* at 27.
29. *Id.* at 26.
30. 407 U.S. 143 (1972).
31. *Id.* at 144.
32. *Id.* at 144-45.
33. *Id. at 145.*
34. *Id.*
35. *Id.* at 147.
36. *Id.* at 146-47; *see id.* at 156-57 (Marshall, J., dissenting) (noting that the only tip the informant had given the officer previously pertained to alleged homosexual conduct in a local train station; the officer used the tip to conduct a further investigation that resulted neither in an arrest nor in any finding of substantiating evidence).
37. 422 U.S. 873 (1975).
38. 443 U.S. 47 (1979).
39. 422 U.S. at 874.
40. *Id.* at 878-89.
41. *Id.* at 880, 882.

Although the Court held it unconstitutional to allow the Border Patrol to stop drivers strictly due to ethnicity, it did go on to conclude that the likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor in determining reasonable suspicion.[42] The Court permitted trained officers to use this factor, along with others,[43] to create rational inferences that would lead to reasonable suspicion.[44]

With this new limit set on *Terry*, the Court would next have to decide whether reasonable suspicion was created when an individual was observed in a high-crime area, in *Brown v. Texas*.

In *Brown*, officers were patrolling an area of El Paso with a high incidence of drug traffic when they saw a man unknown to them who looked suspicious.[45] The officers stopped and questioned the man.[46] When he refused to identify himself, the officers frisked and arrested him, charging him with violating a Texas statute that made it a criminal act for a person to refuse to give his name and address to an officer.[47]

The Supreme Court found that there was no basis for suspecting Brown of any misconduct.[48] The fact that he was in a neighborhood frequented by drug users, standing alone, was not a basis for concluding that he was himself engaged in criminal conduct.[49]

In *Brignoni-Ponce* and *Brown*, the Supreme Court began to set limits on what could constitute a *Terry* stop. No longer could one's ethnicity be the sole cause for reasonable suspicion, nor could one's location in a high-crime area. The pendulum seemed to swing, although slightly, back in the direction of protecting an individual's right to freedom from police intrusions. After *Brown*, though, the pendulum began to swing back in favor of law enforcement and protecting the states' interests in preventing crime, beginning with *United States v. Cortez*[50] and *United States v. Sokolow*.[51]

The Supreme Court Reinforces Its Belief in Law Enforcement's Ability to Define Reasonable Suspicion

Cortez concerned the stop of a vehicle believed to be transporting illegal aliens.[52] In deciding *Cortez*, and to clarify which factors constituted sufficient cause for a *Terry* stop, the Court devised the "whole picture" test. Instead of making a specific factor a *per se* rule of law in determining reasonable suspicion, all the circumstances and evidence are to be examined and weighed accordingly by law enforcement officials.[53] Although this gave a great amount of power to officers to determine inferences based on the evidence they had weighed, the Court believed this power was warranted since some inferences and deductions can elude an untrained person.[54]

In *United States v. Sokolow*, the Court needed to determine whether the "whole picture" test would include stopping an individual at an airport for committing a large cluster of innocent activities that could also be associated with the transporting of narcotics.[55] *Sokolow* involved a nervous young man traveling under an alias to a known drug-trafficking city, Miami, who paid for his ticket with $2,100 in cash.[56] He did not check his luggage and was traveling from Honolulu, a 20-hour round-trip flight, to stay in Miami for only 48 hours.[57]

The Court found that although any of these factors by itself may not be proof of illegal conduct, taken together they amount to reasonable suspicion.[58] Thus, *Sokolow* reemphasizes the message that lower courts should defer to law enforcement and its collective knowledge and experience in passing upon the propriety of *Terry* stops.[59]

DOES LOCATION PLUS EVASION EQUAL REASONABLE SUSPICION?

State Courts Were Split

The Supreme Court previously determined in *Brown v. Texas* that an individual's location in a high-crime area alone is insufficient to provide reasonable suspicion, but, until *Wardlow*, it had yet to hear a case that involved whether evasion from the police in a high-crime area would constitute a *Terry* stop. State courts were split three ways on deciding this issue. Some believed that evasion from police alone was sufficient grounds for a *Terry* stop,[60] for others an evasion from police in a high-crime area was sufficient,[61] but still

42. *Id.* at 884-87; s*ee also id.* at 886 n.12 (stating that Mexican appearance could be used as a factor, citing a 1970 census that 12.4% of persons of Mexican origin were aliens in Texas, 8.5% in New Mexico, 14.2% in Arizona, and 20.4% in California).
43. *Id.* at 884-85. The Court named other factors that may be taken into account in deciding whether there is reasonable suspicion to stop a car in a border area. Some include proximity to the border, whether the vehicle appears to be heavily loaded, and the characteristic appearance of persons who lived in Mexico, such as the mode of dress and haircut. *Id.* at 885.
44. *Id.* at 884.
45. 433 U.S. at 48-50.
46. *Id.* at 49.
47. *Id.* at 49.
48. *Id.* at 52.
49. *Id.*
50. 449 U.S. 411 (1981).
51. 490 U.S. 1 (1989).
52. 449 U.S. at 413-15.
53. *Id.* at 418.
54. *Id.*
55. 490 U.S. at 3.
56. *Id.* at 4-6.
57. *Id.* at 4-6.
58. *Id.* at 10. *Cf.* Florida v. Royer, 460 U.S. 491 (1983). Decided six years before *Sokolow*, the Supreme Court held in *Royer* that it could not allow every nervous young man exhibiting multiple characteristics that meet the "drug courier profile" to be arrested and held to answer for trafficking drugs. *See id.* at 504-07.
59. Harris, *supra* note 6, at 507.
60. *See* State v. Anderson, 454 N.W.2d 763 (Wis. 1990)(allowing police officers to stop an individual engaging in flight upon sighting law enforcement officers). *See also* Harris, *supra* note 6, at 673, n.137 (1994) (citing four other courts concluding that merely avoiding the police is enough to justify a *Terry* stop).
61. *See* Harris v. State, 423 S.E.2d 723 (Ga. App. 1992) (finding that a defendant's flight after observing police car in high-drug area gave officer sufficient articulable suspicion to conduct stop and frisk).

others believed neither scenario was acceptable.[62] The Supreme Court granted certiorari in *Wardlow* to clarify whether a location-plus-evasion stop was constitutional and set forth a bright-line rule.

The Supreme Court Resolves the Issue

Officers Nolan and Harvey were working as uniformed officers in a special operations section of the Chicago Police Department.[63] The officers were driving the last car of a four-car caravan converging on an area known for heavy narcotics trafficking.[64]

As the caravan passed a street, Officer Nolan observed Wardlow standing next to the building holding an opaque bag.[65] Wardlow looked in the direction of the officers and fled.[66] The officers eventually cornered him on the street.[67] Nolan then exited the car and stopped Wardlow.[68] He immediately conducted a protective patdown search for weapons because in his experience it was common for weapons to be found in the near vicinity of narcotics transactions.[69] Officer Nolan opened the bag and discovered a .38 caliber handgun.[70]

The Illinois trial court denied Wardlow's motion to suppress, finding the gun was recovered during a lawful stop and frisk.[71] The Illinois Court of Appeals reversed, concluding that the gun should have been suppressed because Officer Nolan did not have reasonable suspicion sufficient to justify a *Terry* stop.[72] The court found the evidence presented by the state insufficient to prove that Wardlow was found in a high-crime area.[73]

The Illinois Supreme Court affirmed, but on a different basis than the intermediate appellate court.[74] The Illinois Supreme Court determined that sudden flight in a high-crime area does not by itself create a reasonable suspicion justifying a *Terry* stop.[75] The court concluded that while police have a right to approach individuals and ask questions, the individual has no obligation to respond and may simply go on his or her way.[76] The court then determined that flight may simply be an exercise of this right to "go on one's way," and thus, could not constitute reasonable suspicion justifying a *Terry* stop.[77]

The Supreme Court rejected this rationale and reversed. The majority concluded that flight, by its very nature, is not "going about one's business," but is just the opposite.[78] The Court then reiterated its previous holdings, explaining that an officer may conduct a brief introductory stop when an officer has a reasonable, articulable suspicion that criminal activity is afoot.[79] The determination of reasonable suspicion is to be based on commonsense judgments and inferences about human behavior.[80]

The dissenting opinion focused on how much weight should be given to unprovoked flight in determining reasonable suspicion. After recognizing the fact that sometimes those who flee may be guilty of a crime, the dissent gave credence to the fact that there are those, particularly minorities, residing in high-crime areas who flee because they believe contact with the police itself can be dangerous.[81] The dissent argued that since many factors provide innocent motivations for unprovoked flight in high-crime areas, the character of the neighborhood arguably makes an inference of guilt less appropriate, rather than more so.[82]

WHAT ARE THE IMPLICATIONS OF *WARDLOW* AND WHAT WILL THE FUTURE HOLD?

Will Location-Plus-Evasion Stops Actually Reduce Crime?

Wardlow has removed the aura of unconstitutionality regarding location plus evasion in *Terry* stops. The majority justified its holding in part by reiterating the fact that the officers in *Wardlow* were in an area of expected criminal activity, but noted that this standing alone is not enough to support a reasonable suspicion.[83] The majority then turned to its belief that evasion is suggestive of wrongdoing.[84] The two factors combined would determine reasonable suspicion due to commonsense judgments and inferences about human behavior.[85]

This reasoning supported the Court's view that police need a freer hand to combat crime and to protect themselves,[86] but the majority offered no supporting evidence that allowing location plus evasion as a lawful basis for *Terry* stops would do this. While people may avoid the police for a variety of reasons,

62. *See* State v. Tucker, 642 A.2d 401 (N.J. 1994) (finding that flight alone, without other articulable suspicion of criminal activity, does not meet *Terry* standards); *see also* State v. Hicks, 488 N.W.2d 359 (Neb. 1992)(holding that flight is sufficient to justify an investigatory stop only when coupled with specific knowledge connecting the person to involvement in criminal conduct).
63. *Wardlow*, 528 U.S. at 121.
64. *Id.*
65. *Id.* at 121-22.
66. *Id.* at 122.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.; see also* People v. Wardlow, 701 N.E.2d 484, 487 (Ill. 1998) (finding, contrary to the intermediate appellate court, that Officer's Nolan's uncontradicted testimony was sufficient to establish that the incident occurred in a high-crime area).
76. 528 U.S. at 122.
77. *Id.* at 123.
78. *Id.* at 125.
79. *Id.* at 123 (quoting Terry v. Ohio, 392 U.S. 1, 30 (1968)).
80. *See id.* at 125.
81. *Id.* at 132.
82. *Id.* at 139.
83. *Id.* at 124.
84. *Id.*
85. *Id.* at 125.
86. *See generally* Williams, 407 U.S. at 148 n.3 (noting that officers have reasons to fear for safety, citing studies that found 97% of policemen murdered in 1972 were killed by gunshot wounds and 30% of police shootings occurred when a police officer approached a suspect seated in an automobile).

reported cases focus only on those with guilty motivations.[87] Others who are without guilt are nevertheless stopped and frisked.[88] They are not charged because the search yields no evidence and no reported case results.[89]

Will the Strained Relationship Between Minorities and the Police Become Further Aggravated?

The majority did not consider that most of these location-plus-evasion stops will involve disproportionately higher amounts of minorities and certainly will only involve those among the low-income class of society. Consequently, these are the same people who are more likely to evade police for reasons other than guilt.[90]

The dissenting opinion recognized that there are entirely innocent persons residing in high-crime areas who have reasons to flee from police.[91] Using compiled data from several sources, the dissent pointed to several specific reasons one may have for evading police: police brutality,[92] harassment,[93] and racial bias.[94] These factors were given little, if any, weight by the majority before rendering its opinion.

The majority saw the intrusion of a *Terry* stop as minimal and believed that the Fourth Amendment accepts the risk that innocent people may be temporarily detained.[95] The Court did not consider that these "minimal intrusions" are more than just physical—they are emotional as well. Since the stops must be conducted in high-crime areas, the innocent residents of those locations who are stopped could feel stigmatized as criminals by law enforcement simply due to their economic status and legitimate fear of police.[96] This could lead to the communities most in need of police protection regarding the police as a racist, occupying force.[97]

How Much Weight Will the Court Give an Officer's Testimony?

The dissent also discussed the vague testimony provided by Officer Nolan.[98] Officer Nolan could not recall whether he was driving in a marked or unmarked car, or whether any of the other cars in the caravan were marked.[99] The testimony also did not reveal whether anyone besides Wardlow was nearby when the incident occurred, nor how fast the caravans were driving.[100] The dissent reasoned that the testimony of Officer Nolan's observation gave insufficient weight to the reasonable-suspicion analysis.[101]

The majority and the Illinois trial court seemed to trust Officer Nolan's ability to interpret the situation and did not question the gaps left after his testimony. This is in line with the Court's decision in *Cortez* to allow officers to interpret evidence because of their experience and training in law enforcement. If Nolan believed Wardlow fled after noticing the caravan of cars containing officers, then it is assumed by the Court to be true. This clearly demonstrates the overwhelming power that police officers now possess in determining reasonable suspicion.

CONCLUSION

By allowing location plus evasion to provide reasonable suspicion, the Supreme Court has given police more power to fulfill their obligations to the public and to protect themselves from the possible risks associated with crime prevention. Officers have been given the authority to deem locations "high-crime" areas. While in those areas, police are allowed to stop and frisk anyone who happens to flee from them, regardless of the reason. These benefits come with the high price of depriving residents in low income areas from the same protection against personal invasion than those living in more affluent parts of America. Although some of the persons temporarily detained by officers will be guilty of some crime, the majority will not, leaving the taste of bitter resentment toward law enforcement and a greater probability of police evasion again in the future.

Pamela Richardson is a third-year law student at the Columbus School of Law of the Catholic University of America in Washington, D.C. She is Note and Comment Editor of the Catholic University Law Review *and serves as a research assistant to professor Clifford S. Fishman. She also serves as treasurer of the Latin American Law Students Association. Richardson received her B.A. in media studies in 1997 from East Stroudsburg University in Stroudsburg, Pennsylvania.*

87. Harris, *supra* note 6, at 679.
88. *Id.*
89. *Id.*
90. *See generally* Harris, *supra* note 6, at 681 (stating that police use *Terry* stops aggressively in high-crime areas; as a result African-Americans and Hispanics are subjected to a high number of stops and frisks. Feeling understandably harassed, they wish to avoid the police and act accordingly.).
91. *Wardlow*, 528 U.S. at 132 (Stevens, J., dissenting).
92. *Id.* at 132 n.7 (citing a study finding that 43% of African-Americans consider police brutality and harassment of African-Americans to be a serious problem).
93. *Id.* at 133 n.10 (arguing that the problem of disparate treatment felt by minorities is real—not imagined).
94. *Id.* at 133 n.8 (noting that many stops never lead to an arrest, which further exacerbates the perception felt by racial minorities and people living in high-crime areas); *see also* Harris, *supra* note 6, at 679 (police are much more likely to stop African-American men than white men).
95. *Id.* at 126.
96. *See generally* Harris, *supra* note 6, at 680 (finding that many African-American males can recount an instance in which police stopped and questioned them or someone they knew for no reason, even physically abusing or degrading them in the process).
97. Harris, *supra* note 6, at 681.
98. *Id.* at 138-39.
99. *Id.* at 138.
100. *Id.* at 138.
101. *Id.* at 139.

NCSC Consulting
Half Page ad

Court Review

Index to Volume 38

Editor's Note: All of the articles and other materials listed in this index can be found on the website of the American Judges Association. Go to http://aja.ncsc.dni.us/courtrv/review.html for the index of available materials from Court Review. *Generally, the full text of each issue is available for the past several years.*

The Resource Page

NEW BOOKS

ELLEN E. SWARD, THE DECLINE OF THE CIVIL JURY. Carolina Academic Press, 2001 ($40). 383 pp.

As we go about our daily tasks, all of us tend simply to take care of what needs to be done, without giving much thought to "the big picture." Those folks who sell day planners and Palm Pilots make money by telling us that we need to focus on our most important goals (the big picture) and then to plan our lives with that big picture in mind, using it to guide us about what to leave in and what to leave out.

Law professor Ellen Sward helps us to locate the big-picture view of the civil jury—and thereby to reorient our discussion of it. Her main thesis is a simple one: that the civil jury performs many functions that merit consideration and protection. She reviews in detail the functions that civil juries perform in our system; she then analyzes how legal changes, especially in the past 50 years, have undermined the ability of juries to perform those functions.

Sward's review of the functions played by civil juries is scholarly, comprehensive, and insightful. She identifies four overlapping functions or roles: dispute resolution, law-making, a political role, and a socializing role. Her discussion of the jury's political and socializing roles is intriguing. Sward argues that the jury is the only widespread governmental institution that provides both broad participation by citizens and actual deliberation between them. What's more, she argues, it is the only governmental institution that *requires* the participation of citizens in deliberation with their fellow citizens. Whether viewed from the traditional liberal perspective of freedom from governmental interference or from a civic republican perspective encouraging public involvement in government, she contends that this political role of the jury is an important one. For judges, it is important if only to recognize that we are presiding over one of the purest parts of the American democracy every time we convene a jury trial. Sward contends, however, that its importance is much broader than that. She also notes that various judicial settlement efforts may result in a substantial reduction in the number of civil jury trials. To the extent that having such trials promotes our democracy, she suggests that we should factor that value into our calculations when we decide how to manage cases and dockets.

To be sure, Sward recognizes that there are problems inherent in the civil jury. She discusses all of the major criticisms of it (competence and unbridled passion among them). But she concludes that there are important roles for the civil jury to play, both for the sake of our justice system and our democracy, so that we should make sure that enough cases continue to go to the jury to make them meaningful, without, as she puts it, "going to the opposite extreme of coercing unwilling litigants into trial."

Although the book is 383 pages long, it is a quicker read than that because it is written in law review style with extensive footnotes often taking up more than half of the page. Unless you're planning on writing your own treatise in the area, you can skip the footnotes and concentrate on the substance of her presentation. In so doing, you'll find some intriguing insights about the use of civil juries in the United States.

LAURA LANGER, JUDICIAL REVIEW IN STATE SUPREME COURTS: A COMPARATIVE STUDY. State Univ. of New York Press, 2002 ($20.95). 158 pp.

Judges like to speak of judicial independence both as a goal and as a reality. Political scientist Laura Langer tries in this book to determine how independent state supreme courts really are.

Her study focuses on decisions from 1970 through 1993 in which the constitutionality of a state statute was decided. Cases reviewing four types of statutes—campaign and election reform, workers compensation, unemployment compensation, and welfare benefits—were included in the study. Langer ran statistical comparisons based on a variety of factors, such as the manner of retention of appellate judges in each state.

Langer attempts to determine whether justices in contested cases voted sincerely, *i.e.*, based on their true preferences, or strategically, *i.e.*, based on possible retaliation by the governor, legislature, or voters. She concluded that strategic voting was involved in the high-profile world of campaign finance, but less so with welfare legislation. She presumes that campaign and election reform legislation is of great salience to the elected officials in the other branches, while welfare reform is less so.

Her book is not easy to read, as it contains lots of statistics and social science jargon, as well as some notions that, at least to a judge, just seem a bit foreign. For example, she says, "Like other politicians, judges are concerned when their electoral or policy goals are threatened." Not all judges are politicians and most judges we know are appropriately deferential to legislative policy initiatives. Still, the book raises interesting questions and is a valuable contribution to scholarship on state supreme courts.