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The Federal Bar Association Mentoring Program, By Sheri H. Mecklenburg
Asserting Amount in Controversy Post-The “Jurisdiction and Venue Clarification Act”: A Trip To Wonderland?, By Katherine A. Winchester and Audra J. Ferguson-Allen
Consolidation of Related Arbitrations: Who Decides and How? The Seventh Circuit’s View, By Jeff Bowen
The Supreme Court’s Recent Examination of Post Conviction Counsel: Holland v. Florida, Maples v. Thomas, and Martinez v. Ryan, By Charles Redfern
“Lawtalk”: Book Review, By Jeffrey Cole

Doubts & Divergence
In This Issue

Letter from the President ................................................................. 1
Judge William J. Hibbler: In Memoriam, By Arlander Keys ........................................ 2-3
Judge Posner Revisited, By Jeffrey Cole ................................................ 4-21
Review of Co-defendant Sentencing Disparities by the Seventh Circuit:
Two Divergent Lines of Cases, By Alison Siegler ......................................... 22-27
Judge William Stiehl: 25 Years of Service to the Nation, By Lisa M. Tidwell and Julie Fix ...................................................... 28-29
The Federal Bar Association Mentoring Program, By Sheri H. Mecklenburg .................................................. 30
Asserting Amount in Controversy Post-The “Jurisdiction and Venue Clarification Act”:
A Trip To Wonderland?, By Katherine A. Winchester and Audra J. Ferguson-Allen .................................................... 31-34
Consolidation of Related Arbitrations: Who Decides and How?
The Seventh Circuit’s View, By Jeff Bowen .............................................. 35-38
The Supreme Court’s Recent Examination of Post Conviction Counsel:
Holland v. Florida, Maples v. Thomas, and Martinez v. Ryan, By Charles Redfern .............................................. 39-44
“Lawtalk”: Book Review, By Jeffrey Cole ................................................ 45-47

Send Us Your E-Mail .................................................................................. 21
Writers Wanted! ....................................................................................... 29
Get Involved. .......................................................................................... 44
Upcoming Board of Governors’ Meeting .................................................. 47
Annual Report Summary ................................................................. 48
Seventh Circuit Bar Association Officers for 2010-2011 / Board of Governors / Editorial Board .................................................. 49
Letter from the President

President Steven F. Molo
MoloLamken, LLP

I am writing to remind you that our annual meeting is just around the corner – May 6th through May 8th. Our meeting chairs, Beth Herrington and Tom Durkin, have put together an incredible event and I hope you will be able to join us.

We are honored to have as this year’s luncheon speaker, Baroness Patricia Scotland of Asthal, whose talk is entitled, Toward Corporate Honesty: The Challenges and Advantages of Global Compliance. The Baroness is the former Attorney General for England and Wales and Advocate General for Northern Ireland, and has a fascinating life story.

We look forward to the remarks of Justice Elena Kagan, who will be joining us again this year at dinner. Our keynote speaker will be one of the foremost legal thinkers of our time, our own Judge Richard Posner, whose speech is entitled, The Challenge of Complexity.

The programming this year is exceptional. Professor Erwin Chemerinsky will present his Supreme Court Review. George Terwilliger, former Deputy Attorney General of the United States, will moderate a panel – which will include David Meister, Director of Enforcement of the CFTC, Chris Wray, former Assistant Attorney General for the Criminal Division of the United States Department of Justice, United States Attorney Patrick Fitzgerald, and Illinois Attorney General Lisa Madigan – entitled, Practical Considerations that Determine Criminal vs. Civil Dispositions.

Val Hoeppner, Director of Education of the Freedom Forum Diversity Institute, will speak on Digital and Mobile Media Trends. A special Young Lawyer’s breakfast will feature Mark Herrmann, author of The Curmudgeon’s Guide to Practicing Law.

Our meeting venue, again, will be the Intercontinental Hotel on Chicago’s Magnificent Mile. However, Baker & McKenzie has graciously agreed to allow us to hold our Sunday evening cocktail event – featuring a program introducing new judges in the Circuit – at their spectacular new reception space that provides unparalleled views of the Millennium Park and the Chicago Skyline.

Perhaps as a reflection of the quality of this year’s program, we are off to our strongest start ever in terms of meeting registrations and dinner table sales. I urge you to act now if you would like to attend. We still have a few opportunities available to purchase a table of nine – the tenth seat is traditionally filled by a member of the judiciary – for the dinner. We are looking into whether we can exceed our historical cap of 450 registrants for the meeting.

You can register now by going to: www.register

This promises to be an outstanding event and I hope you will be part of it.
To put in perspective the story of the remarkable life and accomplishments of the late United States District Judge William J. Hibbler (“Bill”), it is necessary to start with and understand from whence he came. Born in rural Alabama in 1946, at a time when the Jim Crow laws were strictly enforced and African Americans were dissuaded from attending school and were expected only to perform back-breaking and arduous labor in the cotton fields from sunup to sundown, Bill’s parents, Arthur Lee and Mamie Lou, joined the “Great Migration” to the North in search of a better life for themselves and their children when Bill was two years old. They settled on Chicago’s West Side, where Bill attended elementary school and St. Mel High School. Bill excelled as a soccer player at St. Mel and was awarded a scholarship to the University of Illinois at Chicago. During his college years, Bill worked two part-time jobs – at United Parcel Service (UPS) and as a non-degree substitute teacher in the Chicago Public School System.
Graduating from college in 1969 was a first in Bill's family and was something that he was proud of, but he wanted more. In that same year, he married his long-time friend from elementary school, Regina. In that year, 1969, he decided that he wanted to become a lawyer and applied for and was accepted at the DePaul University College of Law. When he was notified that he had been accepted at DePaul, he was also advised that, because of the rigors of law school, he would need to quit his jobs, advice that he rejected because of his recent marriage and his desire to start a family.

Bill attended law school in the evenings and continued to work at UPS and to substitute teach during the day, graduating in 1973.

Unsure as to the area of law he would pursue, Bill would have been content to remain at UPS in its legal department, but there were no vacancies at the time, so he accepted a position as an Assistant States Attorney in the criminal division of the Cook County States Attorney's Office, where he worked for four years before becoming a partner in a small law firm. After four years at the law firm, he returned to the States Attorney's Office, where he served another five years before being appointed to the position of Associate Judge of the Cook County Circuit Court in the Criminal Division. During his tenure as an associate judge, he was also assigned as Assistant Supervising Judge in the Traffic Court and, finally, as Presiding Judge of the Juvenile Justice Division, where he served until 1999.

Recognizing Bill's remarkable background and achievements, in 1998, the Judicial Evaluation Committee that screened applicants for the filling of district court judge vacancies on the United States District Court for the Northern District of Illinois, recommended him to fill one of the vacancies. He confided that, when he applied for the position, he didn't think he had a chance because he had no political connections. President Bill Clinton nominated him, the Senate confirmed him in 1999 and the rest is history.

As only the sixth African American Article III judge to be appointed to the bench in the Northern District of Illinois, Bill was cognizant of the historical significance of his appointment. As such, he knew that, at least initially, the decisions he made would be scrutinized and that he would be challenged by those who questioned his competency to carry out the awesome responsibilities that had been placed upon him by virtue of his position. He readily accepted that scrutiny and, during his 13-year tenure, he made believers out of the doubters. Those who came into his presence expecting only fairness were invariably pleased while those who expected special consideration were sorely disappointed. He was proud of and never forgot the fact that he was brought up on the West Side of Chicago, with all its negative connotations, and was able to relate to the downtrodden as well as to those of more modest means. Bill treated everyone with whom he came in contact with respect, regardless of their stations in life. Some of his closest friends were those with whom he worked at UPS more than 40 years ago. He regularly engaged the court security officers, maintenance and janitorial employees in conversations, especially about sports. Upon learning of Bill’s untimely death, one could see a sense of sadness and loss on their faces.

Whether on the bench or in chambers, Bill was perceived as being a quiet, warm, unassuming, compassionate and fair-minded jurist who believed that everyone was entitled to their day in court and fair treatment, regardless of the merits of their complaints. Bill truly enjoyed being a judge, not because he expected people to look up to him or to defer to him, but because of the things that he was able to do for others. Off the bench, he preferred that individuals with whom he came in contact not know that he was a judge. He wanted to be just plain Bill.

During the last ten years of his life, Bill endured numerous medical challenges after each of which he bounced back in remarkable ways. Through it all, he never complained or questioned why. Rather, his primary concern was the impact that his frequent absences was having on his staff and the workload of his colleagues. Up until the last day of his life, March 18, 2012, Bill expressed his belief that he would be returning to work during the week of March 19th, even though those who knew of the seriousness of his illness had doubts about his ability to do so, considering the fact that he had just been discharged from the hospital. Bill departed this life in the early morning hours of March 19, 2012. He leaves to mourn his death Regina, his wife of 42 years, his son, William II, his daughter, Aviv and father, Arthur, as well as his chambers staff and the entire Court family. We will all sorely miss him.
In the introduction to her extraordinary interview with Judge Posner in the New Yorker in 2001, Larissa MacFarquhar said that “it is not apparent from his mild exterior that Posner is the most mercilessly seditious legal theorist of his generation. Nor is it obvious that, as a judge on the Seventh Circuit Court of Appeals, he is one of the most powerful jurists in the country, second only to those on the Supreme Court. He is powerful, moreover, not just by merit of his position: he is powerful because he has decided to be.” He tops almost every list of the most influential federal judges. He has even made it to Chicago Magazine’s list of the 100 Most Powerful Chicagoans – an “honor” that no doubt made him chuckle.

The recently opened papers of Henry J. Friendly at the Harvard Law School contain the rich correspondence between Judge Friendly and Judge Posner. See Domnarski, *The Correspondence of Henry Friendly and Richard A. Posner 1982 - 1986*, 51 Am.J. Legal Hist. 395 (2011). This remarkable archive will only add further luster to Judge Posner’s renown. The letters leave no doubt that Judge Friendly, undoubtedly the most influential judge of his era, thought Judge Posner the most influential judge of his. Indeed, he went so far as to say in one of the letters, that Posner was “already the best judge in the country.”

By rough count, Judge Posner has authored more than 2,500 majority opinions, 44 books (not counting supplemental editions), and almost 300 articles. And this does not include interviews, book reviews, introductions to books, commentaries, newspaper articles, and his regular blog that he writes with Nobel Prize winning economist, Gary Becker.

*Continued on page 5*
The Circuit Rider

Interview with: Judge Posner
Continued from page 4

If you want to know about sexuality and economics; nuance, narrative, and empathy in critical race theory; plagiarism, Holmes; originalism; Greek love and the institutionalization of pederasty; jurisprudence; law and literature; economic analysis and the law; Cardozo; radical feminism; eugenics; literary, feminist, how judges think, sex and reason, public intellectuals, problems of jurisprudence, aging and old age, failure of capitalism, communitarian perspectives on jurisprudence; or scores of other abstruse topics, Posner is your man. He is simply the most prolific federal judge in history, and one is hard pressed to think of anyone in any discipline who has written more than he.

But he is not easy. His work, both judicial and extra-judicial, is intricate, often labyrinthine – although he describes himself as “a simplifier.” But as his hero, Justice Holmes, was fond of saying, nothing which is worthwhile comes cheap. Judge Posner would no doubt appreciate the economic implication, for he is largely responsible for making systematic economic analysis part of the fabric of modern legal analysis.

In the pages that follow, Judge Posner talks about Posnerian pragmatism, his ideal Supreme Court, Justices Holmes and Frankfurter, judicial opinion writing, radical feminism, brief writing and oral argument, the present state of legal education in America, and much more. While the interview originally appeared in 1995, what Judge Posner has to say is as timely and incisive today as it was then and deserves to be reread by a younger generation of lawyers – for their sake, not for his. Whether or not you agree with what he has to say, he is always provocative, always penetrating, and always worth the price of admission.

Prologue: April 2012
Judge Posner Comments

Cole: Rereading the interview after 17 years, is there anything in it that you would change?

Judge Posner: I am surprised to find, rereading such a long interview after such a long interval, that I have not changed my mind about any of the answers that I gave to your questions. Of course I had already been a judge for 13 years, and I suppose that’s long enough for one’s thoughts about judging to crystallize; and I had been doing academic work for a much longer time. What seems to me to have dated the most in the interview is the discussion of sexuality, stemming from my book *Sex and Reason*. Not that I would change anything I said; it is rather that the particular issues of sexuality, such as the biological basis of homosexuality, that we discussed have receded as topics of debate. I think even most opponents of homosexual marriage probably acknowledge that homosexuality is innate and do not want to discriminate against homosexuals in the armed forces or elsewhere; they just draw the line at marriage. I do think it’s remarkable that contraception is once again controversial, and that Planned Parenthood is under attack—I could not have imagined such things in 1995, any more than I could have imagined the surge of political religiosity that we are seeing in the presidential campaign.

But although I’m not inclined to retract anything I said in our interview, if you were interviewing me today I imagine we would be discussing a number of new topics, such as Internet research by judges, lawyers — and jurors; the increased aggressiveness (as it seems to me) of the Supreme Court, as illustrated by the *Citizens United* and *Heller/McDonald* decisions; and, what is very salient in my thinking nowadays, the increased complexity of federal litigation. Part of this is technical: advances in computer technology and electronic communications, in medical technology, in forensic evidence, in statistical analysis, in financial instruments and transactions (“financial engineering”), in techniques of surveillance, in marketing, in management, in patents and intellectual property generally. Part of the increased complexity stems from globalization — the increasing number of international commercial transactions, the flow of asylum applicants from more and more countries many little known to American judges and administrative officials, the expanding scope of international law. I think we judges are having trouble keeping up with what is an ongoing technical revolution as dramatic and far-reaching as the Industrial Revolution. I think we need a lot of help from law schools and are not getting it.
Interview with: Judge Posner
Continued from page 5

The Interview

Q. Let me go back to the time after you graduated from Harvard and clerked for Justice Brennan and later worked in the Solicitor General's Office under Thurgood Marshall.

A. Right. There was a two-year interlude between them when I worked for a Commissioner at the Federal Trade Commission.

Q. Phil Elman?

A. Yes.

Q. There's a certain irony in that your early career was with Justice Brennan and Thurgood Marshall, who would not share your judicial views. Did they influence you in any way either positively or negatively?

A. Not really. It's good experience working in those offices. But Justice Brennan was not aggressive in pushing his views on anybody. He was a very genial, pleasant, warm person, nice to work for, but not someone who hammered you with his views as a Frankfurter might do. Thurgood Marshall was very detached from the work of the Solicitor General's Office. I had contact with him but he was not deeply or passionately involved in the work of the Office.

The Posnerian Pragmatist

Q. Judge, you describe yourself as a pragmatist, a member of the school of Legal Neopragmatists. What does it mean to be a Posnerian pragmatist?

A. The essential distinction is between a forward-looking and a backward-looking approach to law. Backward-looking means that you are preoccupied with maintaining continuity with previous decisions and with the texts that you're interpreting; your duty is to the past. The political decisions made in the past that are incorporated in the Constitution or in statutes or in decisions of the Supreme Court are regarded as the lodestar from which you cannot stray.

The forward-looking approach is interested in coming up with the best decision today, all things considered, without any sense of duty to the past. Now, given the peculiar competences and constraints and so on of courts, even the most pragmatic judge has to worry about continuity with the past. Congress relies on the courts to interpret its statutes more or less as written, and lawyers depend on adherence to precedents they can rely on to provide advice to clients. So the pragmatic judge is not indifferent to the claims of the policies of adhering to precedent and to text but he doesn't feel any duty towards these policies. They are useful policies and should be adhered to generally, but they are not the be-all and end-all. The pragmatic judge thinks it is very important in dealing with a new case to try to find out what, from a social and economic standpoint, is really involved in the case and not just try to find verbal similarities between the issue in the new case and some previous decision in the past.

Q. How does that differ from what Holmes did during the time he was on the Supreme Court?

A. It doesn't. You have to repeat these things every 50 years or so because people forget them.

Q. Well, Holmes said that after 50 years all thought is dead.

A. Yes. That's right.

Q. But you really don't see a great difference between what you try to articulate and what Holmes did in his judicial and extra-judicial writings?

A. No, but I don't think he was always faithful to his principles. His view of contract law was at times, though intermittently, rather formalistic and also his views of tort law at times.

Continued on page 7
And he was quite preoccupied with an abstract concept of sovereignty in a number of decisions not read much today. Sometimes the preoccupation was fruitful, as in his dissent that led up to the overwhelming of Swift v. Tyson. He liked to say that the common law was not some body of transcendental principles. It was just a device by which a particular state implemented its policies, using courts rather than legislatures. The sovereignty of the state helped him see that the common law was simply another form of positive law, not natural law. I don't think he was consistent, but as far as the basic conception of a pragmatic approach to law, all the essential points are in Holmes.

Q. Would you rate him as the preeminent figure in the history of American Law?
A. Yes.

The Ideal Supreme Court

Q. And if you had your ideal Supreme Court, who would be on it? You don’t have to exclude anybody, the living, the dead, colleagues and non-colleagues.
A. I think the people who are generally regarded as distinguished Supreme Court Justices are entitled to their seats, so to speak, on the Court. John Marshall. I don’t really know too much about the other nineteenth-century Justices, but coming to this century, Holmes, Brandeis, Cardozo, Jackson, Frankfurter — I think Frankfurter is underrated.

Q. Underrated? I would have thought that he held a very lofty place in American law.
A. Oh, I don’t think so actually. He is subjected to very harsh criticism these days, the most harsh in a book by Robert Burt at Yale about Brandeis and Frankfurter.

Q. The Brandeis-Frankfurter Connection? Is that the one?
A. No, that’s another book. The Brandeis-Frankfurter Connection is about Brandeis’ subsidizing of Frankfurter. I think Burt's book is called Two Jewish Justices. It is very harsh on Frankfurter.

Q. Is Burt Jewish?
A. Burt, yes, he is Jewish. He thinks Frankfurter was not an authentic Jew but an assimilationist. Yet while Brandeis had a big interest in Zionism, the idea was Zionism for Eastern European Jews so they wouldn’t come flooding into the United States and be an embarrassment to the assimilated German Jews like Brandeis. There isn’t much of a Jewish character to Brandeis’s work. Frankfurter was an immigrant and actually much more Jewish in his manner than Brandeis.

There’s a lot of hostility toward Frankfurter. Part of it is political, because after having been a radical by the standards of the ‘20’s and ‘30’s he became conservative in the Supreme Court on most civil liberty issues, so he gets whacked for that. Also, he had poor personal relations with the other Justices because of his arrogance, which was considerable. Frankfurter was a person who had very good relationships with people who were below him or above him. He was sycophantic towards people like Franklin Roosevelt, and he was paternal and nurturing to young people. But with his peers, he didn’t do well. He didn’t respect them, and he treated them very stupidly from the standpoint of maximizing his influence. He was perhaps handicapped by not having previous judicial experience, so that he didn’t really know what he was getting into. So he gets knocked for his tactlessness with his colleagues.

Also, his prose style tended to be very florid on occasion, and sometimes full of baloney. He was very much an Anglophile, and very much a product of the progressive movement with its belief in the expertise of administrators. Paeans to the British system and to administrative justice appear in his opinions, and in retrospect they seem shallow and even ignorant. So as I say the primary attitude in the academy is critical, but if you actually look back at the body of his Supreme Court opinions, you find a number of opinions that have stood up very well in areas such as administrative law. I think he was a genuine big shot and deserved to be on the Supreme Court. And I think Robert Jackson was a great Justice. With the living people it's too soon to tell.
Interview with: Judge Posner
Continued from page 7

Q. Would you put Learned Hand on the Court?

A. Yes, I think I would put Learned Hand on the Supreme Court. I don't know how he would have done as a constitutional lawyer, but the Supreme Court has other things on its platter. Hand was certainly excellent. And Henry Friendly was a very great judge.

Q. You're very fond of Friendly aren't you?

A. Yes. I knew him after I became a judge, and I saw him fairly frequently until he died. He was outstanding. There are some very good judges on the lower federal courts today — Guido Calabresi has just been appointed; Michael Boudin in Boston; Kozinski on the Ninth Circuit; and on my court, Frank Easterbrook is brilliant. And these are just a few examples.

Q. Do you know Ray Randolph on the D.C. Circuit Court of Appeals?

A. Yes, and I think very highly of him. I met him, but I don't really know him. His opinions are very good. Silberman and Doug Ginsburg, the latter a former student my mine, on the D.C. Circuit, and also Steve Williams on that court are all excellent.

Q. Do you think that ghost writing of opinions, which you say is prevalent and even goes back to the ‘50’s, late ‘50’s on the Supreme Court...

A. Oh, it goes back earlier than that.

Q. Has had an adverse effect, or any affect at all...

A. At least to the ‘40’s. Justice Murphy didn't write his own opinions.

Q. Has it had an adverse effect on the development of principle or the quality of judicial decision making?

A. Well, it’s very complicated.

Q. I suppose in some instances it’s probably better.

A. Yes, because the law clerks are selected pretty much on a strictly meritocratic basis. They are the intellectual cream of the law school crop, whereas the judges are appointed on a much more diverse basis. Some are merit appointments, but many of them are political in one way or the other or just accidents of friendship, happening to know someone influential. The average intellectual quality of the law clerks is higher than that of the judges and therefore results, to a significant extent, in better opinions than the judges would produce. And they enable the judges to cope with the tremendous increase in cases without a corresponding increase in the number of judges. So those are good things.

What I don’t like about law clerks’ drafting opinions are basically three things. First, you don't really get a clear idea of what the judge is thinking. Second, it actually enables the appointment of incompetent judges. Judges who can’t write can hide behind their law clerks. This is at the appellate level. At the trial level judges have to make rulings on the spot, so it’s hard to get away with things, but at the appellate level they can hide behind their clerks. And third, the law clerks are inherently limited because although they are very bright, they have no experience, and it limits what they do with the opinions; they help to perpetuate an excessively formalist cast to American law. All they can do is recite and bring changes on what's in the briefs and what's in cases. The judge may have a much better feel for what's really going on in the case but often that doesn’t find its way into the opinion. I also think that if more judges wrote their own opinions they would find that they gained facility in opinion writing from just doing it a lot. This would free up the law clerk's time to do more and deeper research.

Continued on page 9
Holmes’ Influence

Q. In Justice Holmes’ speech entitled, “Law and the Court” he spoke of the “black gulf of solitude” in which the scholar works and the “secret isolated joy of the thinker,” who knows that “a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thoughts.” Have you experienced either that sort of isolation or to use Holmes’ phrase, “the subtle rapture of [this sort of] postponed power”?

A. Holmes was of a generation that was greatly impressed by the power of science and the challenge that it posed to conventional beliefs. He was an atheist and really taken by science. And one of the lessons of science is that the discoveries people make become absorbed in a stream of discovery and are changed and so on and the originator is often forgotten. The credit goes elsewhere. In literature and theology, Homer and St. Augustine never age, but in science the ideas of people like Newton and Galileo and the like are absorbed and people cease to read them in the original. Eventually they are proved to be wrong. Their theories are wonderful approximations but not quite right. So they are superseded, but nevertheless hundreds of years later their thought has left a permanent imprint on the world even though people are no longer thinking about them. Holmes, since he thought that what he was doing with law was science, must have thought of himself as someone who would have an influence long after people stopped thinking about him.

Also, he labored much of his life under the shadow of his father, who was a more famous person until late in Holmes’ life, and I think he felt underappreciated; and this passage you quoted was one way of saying, well even if you forget my name and confuse me with my father, my thoughts are going to influence you. He may also have felt that people were picking up his ideas and not giving him proper credit. So it’s complicated what he meant and a little odd since, of course, he’s famous and his fame will probably outlive the influence of his ideas.

Q. Almost a hundred years ago, Holmes wrote an article — which I think you said is the most important law review article ever written, “The Path of the Law”— in which he said: “To the rational study of the law the black letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.” You have certainly confirmed the wisdom of what he thought.

A. (Laughing) He was a little premature.

The Chicago School

Q. Could you describe briefly the school of economic thought that you have made so significant a part of American law today — the approach to problems that had not been systematically applied, at least to the study of law?

A. Well, it’s what is called, more or less accurately, the Chicago School of Economics. It’s tending now to merge with other schools; economics as a field is becoming more homogeneous and less divided into factions. Chicago economics treated economics as being intuitive and basically simple so that you didn’t have to be a mathematician in order to grasp the basic principles, and Chicago economists believed that you could take this handful of basic principles and apply it not only throughout the whole area of conventional economic behavior but also to activities that are not normally classified as economics.

Q. Sex?

A. Sex, marriage, crime, accidents, speech, religious observances, the whole range.

Q. First Amendment?

A. Yes. And you could come up with interesting insights and penetrate beneath the surface of legalisms which often are circular and unilluminating. So I guess what differentiates me from other people (or did 20 years ago) is, first, that I thought, and still think, that there is considerable parallelism between legal doctrine and economic theory, so that if you understood the economics this often enabled you to understand the point of the legal doctrine and evaluate whether it was a rational doctrine. I found a lot of intuitive economic insight in judicial opinions. And second, partly as a matter of personal predilection and partly as a result of the experience of being a judge, I have used this technique in more fields than most people.

Continued on page 10
Q. Did you discover it or create it, or a bit of both?

A. I don’t want to exaggerate my role. The most important document in the history of the movement is usually, and I think correctly, considered to be Ronald Coase’s article on social cost, published in 1961 when I was in law school; and I first read it seven or eight years after that.

Q. Was that the first or the second of the two articles?

A. He’s written a number of major articles but “The Problem of Social Cost” is the second of the two most important. The first is “The Nature of the Firm,” which he published in the 1930’s. But if you had to pick one paper to be the inspiration for the economic approach to law it would be “The Problem of Social Cost.” It discusses not a conventionally economic subject but instead pollution and damage caused by straying animals — the general domain of nuisance and tort law. So that was very fresh. And it was talking about cases, not just about economic doctrine. The notion that you could apply simple economic theory — simple, not necessarily simplistic or obvious, because the insights can be very subtle, but they are simple principles that once grasped are not highly technical or counterintuitive — to a range of noneconomic legal issues is also Coase’s legacy, along with, of course, the “Coase Theorem.”

Q. Does this supplant, supplement or do something else to traditional methods of legal thinking?

A. It supplements it, because the traditional methods are indispensable and dominant. Look at my opinions. Most of the analysis in them is conventional legal analysis. But there is a tension between the methods. The economist has more interest in facts and getting things substantively correct and in efficiency as a social norm than would be the inclination of lawyers.

Q. There is a criticism by some that you have reduced all of legal thinking to a kind of single supreme simplicity, namely the application of an economic model to every form of legal problem including those that no one ever dreamed could be susceptible to them. Is that accurate?

A. Yes, that’s true. There are simplifiers and complicators, and I’m a simplifier. I don’t much like it when postmodern scholars talk about nuance and thick description and complexity and the need for constant qualification. I don’t care for that outlook — it’s not my natural outlook. I’m one of the simplifiers and probably go too far on occasion, but that’s my bent. And because lawyers are so verbose, and so averse to useful generalizations, simplification has, I think, an important role to play in improving law.

The economist has more interest in facts, getting things substantively correct, and in efficiency...than...the...lawyers.

Q. In your book, Sex and Reason, you said that your purpose in writing it was to present an economic theory of sexuality. Can you explain what the theory is?

A. The basic distinction I make is between sexual preference — that is, the biological basis of sexuality which provides orientation and drive and impulse, creating the structure of peoples’ preferences in sexual matters — and sexual behavior. How one acts on the preferences depends on the costs and benefits that confront the actor — punishment costs, search costs, opportunity costs, ordinary monetary costs.

Q. Is this conscious thinking, Judge?

A. By the people involved? Well, sometimes it is. I suppose people who patronize prostitutes are very interested in what price they’re paying. Prostitutes care about their income. People are conscious of punishments. Punishment is something to be avoided. So I think there is a degree of conscious calculation, but in the sexual area, an emotional area, a lot is unconscious, intuitive. I don’t deny the existence of a lot of impulsive behavior, but the work I did with an economist at Chicago, Tomas Philipson, on AIDS suggested that the danger posed by AIDS was influencing people's behavior, even that of drug addicts and other people who might seem to have impaired rationality. Our approach did well in predicting the peaking of the AIDS epidemic in the United States at a time when many epidemiologists were predicting a continued increase.
Q. I read that you called rape, sex-theft, which could be explainable with an economic model.

A. Yes, this was one of the things the feminists didn’t like. There are two basic theories of rape: One is that it’s just a form of theft. If you want a car but you don’t want to pay for it, you may steal it. That’s theft. If you want sex, but you don’t want to pay for it either in cash to a prostitute or in the more usual way by establishing a relationship, you may take it through rape. That’s one theory. The other theory, the one radical feminists particularly like, is that rape is an expression of men’s hostility to women, and on that view it doesn’t have anything really to do with sex. It is just a way of humiliating women.

Some would go so far as to say that rape benefits all men, even the non-rapists, by reminding women of their powerlessness compared to men, their physical weakness. In the book I argued in support of the sex-theft hypothesis and pointed to such supporting evidence as that the rape rate is positively related to the ratio of young men to women — a measure of the scarcity of women in the market for sex — and to the percentage of young men who are not in the labor force and therefore lack good access to women because their resources are meager. There is also some evidence that rapists tend to be men with poor social skills, unattractive, who therefore would have poor opportunities in the “market” for voluntary sexual relations.

Q. Do the differences in theory yield different results? It’s one thing to explain the problem from an economic perspective and another to explain it from the feminists’. Having said that, if you opt for one or the other do you arrive at some different social or legal result?

A. That’s a good question. You do in a way. If you bought the sex-theft model and wanted to reduce the rate of rape, you might focus on improving the economic opportunities of young men. But if you thought that rape is a product of female subordination, you might wish to make changes in the gender hierarchy. What I found very peculiar about the feminists’ argument is that rape rates tend to be much lower in patriarchal societies than in more egalitarian societies. Japan and Saudi Arabia have very low rates of rape, but Sweden is relatively high by European standards. Of course, America has the highest of all.

Q. You’ve written that Japan has rather free laws on pornography depicting a lot of bondage activity.

A. I’ve never been to Japan but I’ve read that pornography is freely available in newsstands — more so than in the United States. It’s not as hard-core as our hard-core pornography but it is pornographic, and it is violent, yet the Japanese rate of rape is much lower than ours.

Q. Does this not have ramifications for the argument that pornography tends to encourage rape?

A. I think the international evidence greatly weakens the attempt to forge a causal link between them.

If you bought the sex-theft model [of rape]..., you might focus on improving the economic opportunities of young men.

Q. You have been the subject of a lot of criticism from radical feminists since you wrote Sex and Reason.

A. Right.

Q. I take it you think that criticism is not well deserved, and you refuted most of it in your new book, Overcoming Law. But for those who haven’t read those books, what’s the thrust of what the radical feminists say about Sex and Reason, and why is it offensive to them?

A. Well, they had a variety of criticisms. One was that I simply paid too much attention to men; women didn’t receive equal time. Another was that I placed too much weight on biological factors in explaining differences in the sexual behavior of men and women. And there were a number of specific criticisms about things I said about lesbians or this or that. But the most basic and substantial criticism is the radical feminists’ claim that sexual orientation and sexual behavior are created by social conditions rather than being hard-wired by our biology.

Continued on page 12
Q. But wasn’t your response that they could never quite
make up their minds whether it was innate or it wasn’t,
and they wanted to kind of have it both ways?

A. Right.

Well, it’s true with regard to homosexuality. Homosexuals,
whether male or female, are concerned that if homosexuality is
not innate, people, parents particularly, will be fearful that children
will be recruited into homosexuality by homosexuals. If it is
innate, if there is nothing you can do about it, then the parents
don’t have to fear. Their children either are homosexual or not,
and there is nothing they can do about it. So I think the innate
position is one much more consistent with the political goals and
interests of the homosexual population, and I also think it’s time.
But their concern is that to describe homosexual orientation as
innate is to suggest that homosexuals are almost a different
species. For example, research by Simon LeVay suggests that
the hypothalamus gland in the brain is actually different in
heterosexual and homosexual males, with the homosexuals’
being similar to the hypothalamus in women.

What worries homosexuals is that once a group of people is
classified as being physically different, the rest of the population
may feel more inclined to discriminate because, you know, we
do treat different people differently. In the extreme case, there
are so many differences between us and monkeys that we don’t
think that monkeys have rights. The homosexuals are worried
that if it turns out that they are physically different from
heterosexuals, even if the differences are very subtle and not
visible on the surface, they would be stigmatized as a
biologically inferior race. So I understand that concern, but it
results in this equivocation about whether it is biology or culture
that determines sexual orientation.

But with regard to heterosexual issues, feminists take a very
strong anti-biological, anti-scientific stand because they think
that the differences between male and female sexual behavior —
in particular the fact that men are sexually more aggressive and
the female more passive and less promiscuous, more nurturing
to children, and so on — if regarded as biological, condemn
women to their traditional role as wives and mothers. So they
would like to think that these things are all the product of culture,
and they look for examples in anthropology and primatology —
tribes or species of animals where the traditional sex roles are
reversed. Some species of monkeys do conform to that role
reversal. So, as I say, the heterosexual side of radical feminism
is unequivocally opposed to biological explanations for differences
in sexual behavior, while the homosexual side is ambivalent.

Q. What’s wrong with originalism as propounded by
Judge Bork and people who share his thinking?

A. First, I don’t know why we care, or why we should care,
about applying the Constitution strictly in accord with the
beliefs of the people who wrote it. That was more than 200
years ago, and we’ve learned a little since then. There’s obviously
some interest in continuity and respecting the text, but I don’t
know that it should be the only thing to be considered. I don’t
see how it makes us better off to have this extreme commitment
to fidelity to the original instrument. Secondly, I’m not sure
originalism is a correct interpretive theory. I don’t think we
interpret things by insisting always on establishing a sort of
mental link with the people who wrote the document that we
are interpreting. We often interpret things in a way that would
not be recognized by the author. I think that’s inevitable.

Q. What of the criticism then that you simply wind up
having government by nine folks adventitiously coming
together on the Supreme Court without regard for
“enduring” principles?

A. Well, it’s a danger, no question about it. The best arguments
for literalism, or originalism, or textualism — all these variants
of strict construction — is that it tends to shorten the leash for
judges and therefore imparts greater certainty and predictability
to law. You have to balance that against the loss in flexibility,
the danger of injustice, that you get from a rigid originalism.

Continued on page 13
Q. But does originalism really give you the measure of certainty that some say?

A. I don’t think so. I think it’s a facade often. It’s manipulated. So don’t think it’s that great a check. I think it’s some check. The Warren Court was wild and did a lot of crazy things, so I can understand the reaction against it and I think it’s healthy to a considerable extent. But different individuals strike the balance between the interest in certainty on the one hand and the interest in substantive justice on the other at different points.

Oral Argument

Q. What role does oral argument play in the decisional process for you and in this court generally? Does it have any meaning at all?

A. Yes. I think it’s valuable. We actually hear argument in a higher percentage of cases than most courts nowadays, and I think that’s a good thing. Argument is a chance to ask questions and sometimes lawyers are more effective on their feet than they are on the page. Also, oral argument ensures that there is a period of time, not necessarily a long period of time, in which the judges are entirely focused on the case, whereas if you’re just reading a brief you might get distracted. That concentrated focus in the presence of your colleagues helps to fix one’s mind on the case.

Q. Does it ever change votes?

A. Oh yes. I wouldn’t say often, but sometimes it changes votes just because the judges discover things in answers to their questions. Sometimes it changes votes either because one lawyer is really excellent and brings out things that the judges would not have gotten from the brief or because the other lawyer makes disastrous concessions and shows up the weakness of his case.

Q. How does your court work in deciding cases. Do you vote immediately after the argument?

A. Yes. We vote then, after the day’s cases, usually six cases. We discuss them and take a tentative vote. Then the cases are assigned for opinion writing by the presiding judge. But if the authoring judge changes his mind in the course of working on the opinion he will usually be able to pick up the vote of at least one other judge.

Q. Do you have a memorandum system like that in the Second Circuit when Learned Hand sat?

A. No.

Q. After the tentative vote is taken do judges get together and discuss the case?

A. No. The authoring judge will circulate an opinion and there will sometimes be written comments from the other judges; once in a while we will discuss it. But ordinarily there's no further oral discussion.

Q. And what are the most glaring deficiencies you find in oral argument?

A. Not knowing the case. That’s very common, so that they can’t answer questions. That’s really common. Unwillingness to answer questions.

Q. Is it really unwillingness or more inability?

A. Sometimes they aren’t willing because they think they have a right to give an uninterrupted argument. Sometimes they are afraid—maybe this is a dimension of inability — they’re afraid that if they answer a question, it’s a trap of some sort. They’ll fall through the trapdoor into the basement. Often they talk too fast; sometimes too slow. But I think the systemic problems are the problems with the briefs. The overuse of cases is also a problem in oral argument. Some lawyers seem able only to say that in case X the court said this; [they] are not willing to get outside the cases.
Interview with: Judge Posner
Continued from page 13

...Lawyers try too often to hit us over the head with a bunch of citations ... But usually there are no controlling cases. That's why it's an appeal.

Q. If you had to give some practice pointers to people who appear, not only before this court but before courts of appeals generally, what are the mistakes that you see commonly made and that ought to be avoided?

A. Well, one mistake is that they spend too much time discussing cases. If there really is a controlling case, chances are the case under appeal would not have been appealed at all; it would have been obvious what the outcome was. So usually in civil cases — in criminal cases defendants appeal routinely — but in civil cases, generally if there is a controlling case an appeal is unlikely. What lawyers try to do too often is hit us over the head with a bunch of citations to what they contend are controlling cases. But usually there are no controlling cases. That's why it's an appeal; that's why it's been set for oral argument. They would be much better off deemphasizing the cases and trying to show us why their side has a better, in the sense of a more equitable, case and that the result they are contending for is at least permitted by the cases as opposed to compelled by them.

Second, they assume too much knowledge on the part of the judges of the area of law out of which the case emerges. Judges, given the vast breadth of the jurisdiction of the federal courts and their heavy caseload, do not know a great deal about most areas. They usually don't understand the industry out of which the case arises or the specific corner of law it involves. The lawyers ought to try to educate us about the industry, the practice, the transaction, the relevant nook and cranny of the law, rather than assume that we know all that stuff. So, as I say, overreliance on cases and not giving us adequate grounding in what's really involved in the case are the two major vices. They're closely related because they both reflect a formalistic outlook, a belief that the only things worth knowing are what is in a judicial opinion somewhere and not what makes sense, what the practical stakes are in cases of this nature.

Q. Do you write your own opinions?

A. I do my own writing, but my clerks do a lot of research, finding relevant materials, and they criticize my opinions.

Q. Gently?

A. No. And I have academic research assistants at the University of Chicago Law School who do a lot of research for me which 50 years ago most people would have done themselves, using primitive indexes, card catalogs, the occasional journal index. The fact that people have law clerks and research assistants is an aspect of this being an incredibly wealthy society, unprecedented historically. Ordinary people, not completely ordinary but people well below the level of an aristocracy or possessing inherited wealth, have resources at their command that only kings once had. So if they want to work — of course there's a lot of leisure activities that tempt people away — but if they want to work, the facilities, the opportunities, are much greater today.

Q. You have written extensively on the present state of legal education in America. What are your thoughts about what's wrong with it and what can be done to improve it?

A. The biggest thing that's wrong with it is systemic, really. To become a lawyer you are required to attend three years at an accredited law school. Now, that's not universally true; in California, you can be admitted to the Bar without attending an accredited law school. But it's the standard requirement nationwide, and it creates a large captive audience of students who are in law school only because they have to be there in order to become lawyers.

Continued on page 15
They don’t necessarily have any interest in law, or in continuing in school, or in paying huge tuition. Whenever you have a captive market, it’s very difficult to assess the quality of the service being provided. I think that if there were not this requirement, what would be typical would be for people to go to law school for one or more likely two years and then go into practice and maybe come back to law school for a year or two; but some might go directly into law firms as associates and begin law school several years later, which is the pattern in business schools. If the legal professoriate did not have a captive audience, it would be forced to think more about how to provide a worthwhile education.

Q. Are you advocating in any way a return to the apprenticeship system that existed before the turn of the century?

A. Not a return in the sense that I think it would be good to abolish legal education and have simply apprenticeship; but I don't see why it shouldn’t be an option. Law has become exceedingly specialized, and much of what students study in law school is irrelevant to what they will actually do if they pursue a narrow specialty rather than become a law professor or a judge. For those people some combination of apprenticeship and training inside a law firm, some limited law school, and some law clerking, might be a good substitute for conventional legal education.

One result of the captive-audience phenomenon is that law professors have become encouraged to pursue forms of scholarship that are of interest only to other academics and not to the legal profession or to law students. Some of it is worthwhile scholarship but a lot is not. We have professors with very high salaries and great leisure pursuing interests that are only tangentially related to the needs of students or of the profession.

I think it’s a somewhat corrupt system and that the healthiest reform would be to allow the students and the law firms to decide for themselves what was the right amount of formal education.

Q. And do you believe that would provide the incentive for the professors to change their focus and do something different in the way of scholarship?

A. I think it would require them to focus more on the needs of legal training — what will actually help the students, give them a competitive advantage in practice? Since the students wouldn’t have to shell out $20,000 a year, you would have to offer the students something valuable. Now, it’s complicated. The students don’t have a good idea of what’s in their best interests. They do not know enough about law. They have intuitions that are often erroneous. So it’s not a perfect solution.

Q. Has the difficulty you described been exacerbated by minority recruitment on faculties in law schools — for want of a better term, affirmative action programs?

A. I’m not a fan of affirmative action, but I don’t think it has played a central role in the problems of the modern law school. The leading law schools have very, very few members of minorities on their faculty. I don’t know what the situation is at the lower rated, less prestigious law schools, but minorities are not a big presence in legal education as a whole. The law schools talk about the problem a lot but very little is done. The law schools have been affected — I think largely, although not entirely, adversely — by radical feminism, which has brought a lot of radical women into law teaching. I don't condemn it out of hand, because Catharine MacKinnon has been more influential in American law than virtually any male law professor in the last half century. And there are other radical feminists as well who do worthwhile scholarship. But a lot of it is neither of high quality nor particularly relevant to what law schools are about.

But radicalism and multiculturalism are not central to the problem with law schools. The central problem is that they are not operating in a competitive environment. Particularly the top ones. Lower-rated ones are more competitive and probably do a better job with their students. But since, traditionally, leadership in the Bar and indeed in the nation as a whole has come from graduates of the highly rated law schools, it is important that they receive a good education.

Continued on page 16
Q. Judge, you have been a critic of legal ethics as they are taught in the law schools.
A. Yes, I think that's correct.

Q. What's wrong with their approach?
A. There's nothing wrong with a course that simply acquaints law students with the ethical rules that they should obey. But the notion that these courses can be a means for raising the ethical level of the Bar is unrealistic. I don't think you can preach to people and make them better. If all you want to do is acquaint them with a bunch of rules, that can be done quite simply.

Q. What is the answer then for raising the ethical consciousness of the people who practice law today? Or is there a need?
A. Well, there are two possibilities. One is simply to make the sanctions for unethical behavior more severe. To disbar lawyers and not let them back in after six months. That's number one. Number two is more complicated. If you made the law business less competitive, lawyers would be under less client pressure and they could stand up to their clients more. Yet they would also be under less pressure to be ethical toward their clients. A competitive industry tends to serve its customers well. So, on the one hand, as law has become more competitive I think clients have become better served. On the other hand, with more competition lawyers do tend to become the pure agents of their clients and not interpose an independent ethical view.

Q. Are you a proponent of mandatory sanctions and increased sanctions?
A. I think sanctions have a useful role to play in law, but it's very complicated because the heavier the sanctions the more expensive the law becomes. And the costs are ultimately borne by the clients in large part. So when we punish lawyers we do tend to raise the ethical level, but we also raise the price of law.

Q. Is there an answer?
A. Probably the answer is to reserve sanctions for cases of blatant misconduct. You can make those sanctions severe, and then the only lawyers whom you are going to come down hard against are those who ought not to be in practice at all.

Rating Lawyers

Q. How would you rate, Judge, the over all quality of the briefs and oral arguments in your court?
A. Poor. The arguments are a little better than the briefs, but the briefs are poor. They can be divided into three segments. The briefs of criminal defense lawyers are, by and large, very poor. That's number one. There are exceptions, but the average quality is low. Briefs filed by state attorneys general also tend to be poor. At the other end of the spectrum are the briefs and arguments of the major law firms, which tend to be at least workmanlike though rarely inspired. In the middle are briefs by small firms and solo practitioners in civil cases, and they are a very mixed bag, sometimes good, often not quite so good. The federal government — the Justice Department and other federal agencies — tends to be good.

Q. Is it a function, Judge, of the lack of analysis, the lack of style, of rhetorical power, or both?
A. Oh, I'm more concerned about the weaknesses of these briefs in terms of legal and factual research than any want of rhetorical flair.

Q. Let me just go back to something you said a bit ago about ethics. You have written that you thought that the social welfare might increase if the I.Q. of all tax lawyers could be reduced by 10 percent.
A. Right.

Q. I guess two questions flow from that. One, what did you mean, and two, would your sense be the same if we were to reduce the I.Q. levels of lawyers across the board, antitrust lawyers, securities lawyers, criminal lawyers, or are we just going to limit the reduction to tax lawyers?
A. The reason for my example is that most of what tax lawyers do is finding and closing loopholes. They find loopholes if they're working for private people, and they close them if they're working for the government. Then after they've closed them working for the government, they go to work for private firms and try to find new loopholes.
The whole process of creating and closing these loopholes, an economist would say, has no social product; it does not increase welfare. It makes some taxpayers wealthier, and many lawyers wealthier, but it does not improve the operation of the economy. Having a complicated tax code is no better for society than having a simple one.

The complications are due in part to the high level of ingenuity of these lawyers. It is very difficult for the Internal Revenue Code to impose taxes on affluent individuals or substantial enterprises because the lawyers employed by these people are so skillful in finding devices for defeating the tax laws. That in turn generates loophole-closing activity which makes the law more complicated and opens up new loopholes. So it’s a sterile activity that these people engage in, and if they were dumber they wouldn’t do as much of it. And also, of course, the very intelligent people employed in this lawyering activity, because the returns are very high, would be contributing more to society if they used their brains in a more constructive fashion. This excess of brains problem is a general problem wherever law is adversary. It is adversary in the tax area because the clients are trying to beat the government. Litigation obviously is adversary.

On the other hand, if you look at contract law and commercial law generally, and merger and joint venture law and the like, there legal brains are being used primarily to create solid structures of cooperation between contracting parties, between joint venturers, and the like. They are facilitating transactions, and that’s usually constructive. Some tax lawyers, I have to admit, are also engaged in constructive work because they are facilitating transactions by showing how the transaction can be accomplished without being derailed by a tax problem. So there is some social benefit even to tax lawyers. (Laughing). But I think there’s more in transactional work as opposed to adversary work. And while I have just said tax lawyers occasionally do something socially constructive by finding their way around a tax obstacle to an economically productive transaction, they also engineer many economically unproductive transactions as devices for beating taxes. There are all sorts of corporate reorganizations that are designed just to beat taxes.

Q. You are a proponent of little governmental influence in mergers and takeovers. Do you think there’s a social disutility in government regulations?

A. In general. There are some monopolistic mergers, but they’ve become rare, and there are some which are done for reasons such as tax that probably shouldn’t take place. But in general, yes, I think the contemporary fluidity in corporate identities, the frequent reorganizations and so forth, are probably a good thing.

Q. There is a feeling, Judge, that given your views and those of Judge Easterbrook, this isn't the Circuit for antitrust cases to be brought. Is there some truth to that?

A. Yes, I’ve heard that. I wouldn't put that much weight on Judge Easterbrook and me because we are only two out of eleven. But this is a conservative circuit. The juries in this circuit tend to be rather conservative, too, so I wouldn't think it's the most promising area for far-out antitrust suits. On the other hand, I don’t think there are many other areas in the country which are really hospitable to antitrust suits today.

Q. Is that simply the nature of the composition of the federal Courts of Appeals?

A. Partly that, but more of a general loss of interest in antitrust in the society as a whole. As the international economy becomes more integrated, concern with anticompetitive practices on a national level becomes less urgent. Thirty years ago the Detroit auto makers seemed to have a lock on the auto market. Now they are confronted by effective foreign competition.

Q. Is there less enforcement under this administration?

A. I think there’s a little more, a little more sound and fury anyway. I don't know what it signifies.

Q. In your book on Justice Cardozo, you offered what you called the “controversial thesis” that rhetorical power may be a more important attribute of judicial excellence than analytical power. And you used the word excellence, not reputation. Why do you say that, and why is it controversial?

A. Well, the reason I say it is that the conditions under which judges work, with the heavy workload and very broad jurisdiction, and the fact that the issues are largely framed and much of the analysis done by the lawyers, don’t really give them much opportunity to display analytic distinction.
Especially in recent times, as the legal academy has expanded and as law has become more specialized and complex, most ideas come from professors or practitioners or practitioners’ clients rather than from judges. On the other hand, with so many cases being produced — I think there are about 10,000 published federal and state appellate decisions per year — there is a great premium on writing an opinion in a way that will make it clear and concise and informative about the problems that give rise to litigation, and these are basically rhetorical skills, how you present your decision.

Poetic Opinions

Don’t the two really sort of merge? I suppose you could have good analysis without great rhetoric.

A. Yes.

Q. But can you have the other? Can an opinion be great merely because of its lambent prose even though it lacks significant underlying analysis?

A. Yes. There have been opinions that are very brief and that are not very analytic but that are very well written, effective, memorable opinions. There’s the famous opinion. *Buck v. Bell*, in which Holmes upheld a compulsory sterilization law for the feeble minded, and he has this great line about “three generations of imbeciles are enough.” It’s a brilliantly written opinion. It doesn’t have a great deal in the way of analysis. Even the *Lochner* dissent, though very eloquent, very powerful, doesn’t have much in the way of analysis, much less than the dissent in the same case by Justice Harlan, which is largely forgotten, although he really went into the New York maximum hours law and tried to show that it was reasonable. So I think a certain amount of judicial prose operates more like poetry than prose and makes its points by metaphor, the cadence of the lines, and so on, rather than by trenchant analysis.

Q. And yet, you have called *Lochner* the greatest judicial opinion in the last hundred years.

A. That’s consistent with my emphasis on the rhetorical as a very important dimension of judicial performance.

Q. You have talked about conventional legal standards as being radically incomplete. And I think you said it in a context of *Lochner’s* being measured by conventional standards of legal reasoning. How are they incomplete, and what’s wrong with conventional standards of legal reasoning?

A. Professionalism is often associated with a narrowing of the focus of attention. Professionals tend to want to do well what they do well and ignore what may be larger tasks that they wouldn’t do as well but that would be more productive for the society as a whole. Conventional legal standards emphasize things that lawyers can do well without getting into other disciplines where they may stub their toes; in particular they emphasize very careful marshaling of cases, abstracting rules from cases, which is difficult to do, trying to create space between legal doctrine and social policy, thinking generally, trying to make law an intellectual discipline, heavy emphasis on logic, because logic explores internal relations — relations between two parts of a sentence or a paragraph or a system of interlocked premises and conclusions.

The individual lawyer likes to view the legal system as a set of doctrines and view his task as making sure that the doctrines fit together in a logical way. The view is incomplete. If you think of law as a tool of social betterment, then you will see that maintaining its autonomy and its logical integrity, while worthy objects, helpful in various ways, are not the whole of what you want out of law.

As the international economy becomes more integrated, concern with anticompetitive practices on a national level becomes less urgent.

Q. Are there areas, Judge, where economic theory is either irrelevant or inappropriate in terms of analysis of legal problems?

A. Well, that depends on what the level of analysis is. If you’re talking about academic analysis there are very few problems in law which cannot be viewed fruitfully from an economic standpoint. But if you think about it on a practical level, what a judge can do with economic analysis, yes, there are interesting economic questions which are ruled out of bounds because legal doctrine or popular feelings exclude change in the direction economists might take.
Q. Is the economic analysis that you’re associated with an organon for judging or is it something you apply to problems to determine the appropriate solution?

A. Primarily the latter. I think it’s useful in cases. Many cases raise explicit or implicit economic issues. For example, in sanctions, which you mentioned. As I’ve said, they have these two effects: the heavier the sanctions, the less unethical behavior, but the more costly the practice of law is, and therefore the less access people have to lawyers.

Q. Do you make a decision on a given case based upon the competing values or do you follow... if sanctions, for example, are mandatory, do you simply employ the sanctions, without regard to the economic consequences?

A. Well, as I say, a lot of interesting economic issues are not relevant to the work of a judge because the legal landscape is not hospitable.

Q. When you have free speech cases, do they admit of economic analysis in terms of outcome determination of cases?

A. I think economics is relevant in free-speech cases because, after all, what the courts are trying to do is maintain a marketplace for ideas and opinions. Economists can help inform judges of what is needed in order to have a healthy market.

Q. Does it aid you in the resolution of a given case or First Amendment theory generally? Maybe I’m not asking you the right question. There has been a lot of — criticism is not the right word — a lot of discussion about your approach to legal problems without considering whether your economic theories actually enter into the task of judging or whether they are simply outlooks on larger social issues and legal problems.

A. They do enter into judging because there are cases which fairly cry out for economic analysis; antitrust is one. Labor is another area where I frequently use economic analysis and in all sorts of contract cases. Taxation too, because very often the issue of tax policy buried in a case depends on some implicit economic view: what happens if a tax is placed on X rather than Y. So I think there are many areas in which economics is very helpful in resolving legal questions.

Now, your specific question was, are there actually cases in which economic analysis of a free-speech issue or a free-exercise-of-religion issue would actually change the outcome?

Q. Right.

A. It’s possible. For example, the Supreme Court has used the First Amendment to make it difficult to fire public employees who criticize their bosses. There’s a question whether that kind of freedom is compatible with an efficient workplace. That question has a significant economic dimension.

View of Trial Judges

Q. You sat by designation a few times as a district judge?

A. Yes.

Q. Did you ask that you be assigned?

A. Yes.

Q. How do you like the difference sitting in the district court from the appellate court?

A. Well, it’s very different. I don’t think I could stand actually being a district judge.

Q. Why not?

A. Too much of the time is consumed with details of case management rather than actually thinking about or writing about interesting intellectual problems. There are too many nuts and bolts for my taste. But I certainly respect the people that do it well and enjoy doing it because it’s a very difficult job, emotionally taxing — harder work than our work because many of them are in a courtroom 200 days a year and that’s very wearing, very taxing.

Continued on page 20
Interview with: Judge Posner
Continued from page 19

They’re dealing with a lot of emotional people and with a lot of lawyers’ shenanigans. But I think I’ve learned a lot about trial process from conducting trials, because I wasn’t a practicing lawyer. I think it’s a very valuable experience and that all judges in my position should do it. You learn the difference between what a trial looks like from reading a transcript and what it looks like when you are actually there. You get a feel for a jury, which is something I hadn't had at all. I hadn't seen juries before.

Q. Has it changed your outlook on review of cases or the way you look at records?

A. Well, a little. I have more respect for juries than I did coming into the job because I’ve seen them. They don’t talk much, although I allow jurors to ask questions if they want, but you watch them and you can see how attentive they are and also when you look at the verdict you realize that they are very thoughtful and responsible about their duty. They don’t always get it right. I think they are at sea when it comes to complex commercial cases; but in personal injury cases and relatively simple contract cases, and I am sure in criminal cases, although I’ve never tried a criminal case, they do a good job and often do a better job than the judge would because often they are closer socially to the people in the case than a judge would be, so they have more insight into who's telling the truth. So the jury system is better than I thought. And also you do get the sense that a lot of particular rulings at trial or the particular wording of jury instructions do not make a great deal of difference. The way that lawyers and the jurors and witnesses approach the case is pitched more on a common sense level than a legal technicalities level.

Q. Would you be for abolition of the jury in certain kinds of complex cases? Tax cases? Complex antitrust cases?

A. Yes, I mean, of course, it would require a constitutional amendment so it’s not going to happen. But yes, I think it’s unfair really to put people through the task of trying to understand a subject which people of higher education and intellectual attainment spend a lifetime studying with imperfect understanding.

Q. Does the system work tolerably well even in those kinds of cases though?

A. Well it works tolerably well because through summary judgment and other pre-trial devices the one-sided cases are weeded out. You just have juries in cases that are tossups so it doesn’t really matter what they do. The alternative would be to toss a coin. It’s an expensive coin to toss because it greatly lengthens the trial to have a jury, but it's not a disaster.

Q. In Professor Gunther’s recent biography of Learned Hand, he described Hand’s substantial disappointment in not being appointed on two or three occasions to the Supreme Court. Like Hand, you have been considered from time to time as a possible Supreme Court nominee. If you were to suffer Hand’s fate of merely being perhaps the most influential appellate court judge, how would you feel?

A. I'd be perfectly happy. I have no desire to be on the Supreme Court.

Q. Just as happy here?

A. Yes

Continued on page 21
Q. In your book on Justice Holmes, you quote a speech he gave in 1900 just before his appointment to the Supreme Court in which he recalled the thousand or so decisions he had written on the Supreme Judicial Court of Massachusetts and wondered what he had to show for half a lifetime’s work. Do you ever think about that? Have you ever had those sorts of elegiac feelings?

A. I gave up a lot of money to be a judge and also gave up certain opportunities to do academic research, so, of course, I wonder whether I made the right decision. And there is a cost because although the judicial work is fun, a lot of it is very ephemeral as Holmes realized because you deal with problems that either are of minute significance or are based on shifting sands.

I wrote a number of opinions in my early years, which I thought well of, dealing with something called the Enelow-Ettelson doctrine, involving the appealability of stays, a complex doctrine with interesting historical ramifications. I had urged in one opinion that the Supreme Court abolish the doctrine and, sure enough, the Supreme Court did abolish it. Well, then all my opinions on it became completely irrelevant. They had a strictly and very limited antiquarian interest. A lot of my opinions, all federal judges’ opinions, deal with various ramifications of the diversity jurisdiction, and if Congress ever gets around to abolishing the diversity jurisdiction, as I expect it some day will, all that law will be totally obsolete. So I understand what Holmes felt. That’s the downside. But the work is fun, and also it provides a lot of ideas and avenues of thinking for academic work. But if I didn’t do any academic writing, I would have some doubts about what exactly my thousand-odd opinions, now almost 1,300 opinions, add up to. Are they just 1,300 grains of sand? I think all judges probably feel from time to time the way Holmes felt.

Q. Would you be for the abolition of diversity jurisdiction?

A. I would like to see it retained but in a more limited range of cases. I don’t think there’s any reason to allow a resident of a state, corporate or individual, to bring a diversity suit in that state. I do think that a nonresident sued by a resident still has a basis for wanting to sue in federal court. But just not allowing the resident to bring a diversity suit would eliminate a fair number of cases. If Congress raised the minimum amount in controversy from $50,000 to $100,000 that would knock off some more cases. And I think eventually, as the country becomes more geographically uniform, with everybody moving around so much, people will decide that the problem with local bias is not sufficiently serious to warrant this jurisdiction. So I think eventually it will go down the drain.

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In the past few years, the Supreme Court and every federal Circuit Court of Appeals have recognized that 18 U.S.C. § 3553(a) grants judges the discretion to consider co-defendant disparities at sentencing. In United States v. Statham, 581 F.3d 548, 556 (7th Cir. 2009), the Seventh Circuit reached the same conclusion, stating unequivocally that it is “open in all cases to an argument that a defendant’s sentence is unreasonable because of a disparity with the sentence of a co-defendant.” Nonetheless, the Seventh Circuit has issued several recent decisions in which it has, without explanation, ignored Statham and held that a district court cannot consider co-defendant disparities under § 3553(a). In the interest of stare decisis, the Seventh Circuit should clarify that district courts are permitted to consider co-defendant disparities under § 3553(a).

The issue of co-defendant disparities typically arises when two or more co-defendants in a case are facing the identical sentencing range under the United States Sentencing Guidelines but have differing culpability or played very different roles in the offense. For example, imagine a bank robbery case in which Defendant Driver drove to the bank with Defendant Robber as his passenger, and then Defendant Robber entered the bank, held the teller at gunpoint, and ran away on foot with $12,000. Assuming neither defendant had any criminal history, they would both be facing a guidelines range of 78–97 months. The sentencing judge might grant Driver a minor role reduction under U.S.S.G. § 3B1.2 to differentiate between his role and that of Robber. Under Supreme Court precedent and Statham, the judge also has the authority to vary from the guidelines range under § 3553(a), either by granting Driver a below-range sentence or Robber an above-range sentence, in order to ensure that their respective sentences track their respective culpabilities and roles.
The Supreme Court made it clear in \textit{Gall v. United States}, 552 U.S. 38 (2007), that two separate aspects of the sentencing statute — § 3553(a)(6) and § 3553(a)(2) — afford district judges this discretion. Section 3553(a)(6) directs the district court to consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” The Eighth Circuit had held in \textit{Gall} that the sentencing judge had failed to consider the statute’s directive to avoid unwarranted disparities in sentencing him to probation, a lower sentence than his co-defendants had received. \textit{See Gall}, 552 U.S. at 54. The Supreme Court disagreed and explained:

\begin{quote}
[I]t is perfectly clear that the District Judge considered the need to avoid unwarranted disparities, but also considered the need to avoid unwarranted similarities among other co-conspirators who were not similarly situated. The District Judge regarded Gall’s voluntary withdrawal as a reasonable basis for giving him a less severe sentence than the three codefendants discussed with the AUSA, who neither withdrew from the conspiracy nor rehabilitated themselves as Gall had done. 
\end{quote}

The Supreme Court thus endorsed sentencing court discretion to consider co-defendant disparities under § 3553(a)(6) and to grant a differently situated defendant a lower sentence than his co-defendants.

\textit{Gall} also demonstrated that it is entirely appropriate for sentencing courts to compare co-defendants’ relative culpability under another subsection of the sentencing statute, § 3553(a)(2), and to reduce one defendant’s sentence accordingly. In addressing § 3553(a)(2)(A)’s requirement that the sentence imposed “promote respect for the law,” the Supreme Court approved the sentencing judge’s decision to compare Gall’s culpability with that of his co-defendants and to sentence Gall to probation rather than prison based on his lesser culpability. The Court held:

\begin{quote}
[T]he unique facts of Gall’s situation provide support for the District Judge’s conclusion that . . . “a sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing.”
\end{quote}

It is thus clear from \textit{Gall} that both § 3553(a)(6) and § 3553(a)(2) entitle sentencing judges to consider co-defendant disparities.

Before \textit{Gall}, the Seventh Circuit took the position that § 3553(a)(6) was only concerned with “an unjustified difference across judges (or districts) rather than among defendants to a single case.” In two 2009 decisions, however, the Seventh Circuit recognized that this view was no longer tenable. In the first case, \textit{United States v. Bartlett}, 567 F.3d 901, 908–09 (7th Cir. 2009), the court relied on § 3553(a) generally, explaining that the sentencing statute as a whole permits consideration of co-defendant disparities. For that reason, \textit{Bartlett} deduced, “if the district judge thought himself forbidden to take account of [the co-defendants’] (relatively) low sentences when deciding what punishment to impose on [the other defendants], he was mistaken.”

While \textit{Bartlett} clearly authorized sentencing judges to consider co-defendant disparities under § 3553(a) generally, its interpretation of whether § 3553(a)(6) also authorized consideration of co-defendant disparities was less clear. The Seventh Circuit explained that the defendants’ arguments in \textit{Bartlett} raised two questions: “first, does § 3553(a)(6) require a judge to reduce anyone’s sentence below the Guideline range because other persons who committed the same crime but pleaded guilty and cooperated received lower terms?; second, does § 3553 as a whole permit a judge to go below the Guideline range for this reason?”

\textit{Continued on page 24}
Two Divergent Lines of Cases

Continued from page 23

The court answered the first question in the negative, explaining that “[a] difference justified by the fact that some wrongdoers have accepted responsibility and assisted the prosecution, while others have not, is not ‘unwarranted.’” The court then qualified this statement as follows:

[Section] 3553 permits a judge to reduce one defendant’s sentence because of another’s lenient sentence—not because of § 3553(a)(6), but despite it. Avoiding “unwarranted” disparities (as the Sentencing Commission or a court of appeals defines them) is not the sumnum bonum in sentencing. Other objectives may have greater weight, and the court is free to have its own policy about which differences are “unwarranted.”

The court’s point was that even though § 3553(a)(6) does not require a sentencing judge to take account of co-defendant disparities, a judge is permitted to account for such disparities in one of two ways: the judge may determine that those disparities are “unwarranted” under the court’s own definition of that word, or the judge may place greater weight on a different § 3553(a) objective. The court thus answered the second question in the affirmative, holding that § 3553(a) as a whole allows a judge to give one co-defendant a below-range sentence to equalize his punishment with that of another co-defendant.

A few months after Bartlett, the court clarified in Statham that § 3553(a)(6) also permits a judge to reduce one defendant’s sentence based on a low sentence given to a co-defendant (even if it does not require the judge to do so). The court found that this conclusion was inescapable after Gall, which had “endorsed a district court’s consideration of the need to ‘avoid unwarranted disparities, but also unwarranted similarities among other co-conspirators’ when calculating a reasonable sentence.” The court in Statham went on to conclude that the Seventh Circuit was “therefore open in all cases to an argument that a defendant’s sentence is unreasonable because of a disparity with the sentence of a co-defendant.” Although Statham recognized that the Seventh Circuit had previously operated on the “presumption that a sentencing disparity is problematic only if it is between the defendant’s sentence and the sentences imposed on other similarly situated defendants nationwide,” Statham explained that “[s]uch a categorical rule is now foreclosed by Gall.”

Statham and Bartlett therefore unambiguously granted sentencing judges within the Seventh Circuit the authority to consider co-defendant disparities under two different § 3553(a) factors. In doing so, the Seventh Circuit explicitly abrogated an entire line of cases that forbade sentencing judges from considering disparities among co-defendants, including Omole v. United States and Woods v. United States, and implicitly abrogated those cases upon which Omole and Woods relied. Every other court of appeals to consider the issue since the advent of advisory guidelines has likewise determined that either § 3553(a)(6), or § 3553(a) generally, grants district judges the discretion to consider co-defendant disparities.

Since Statham, the Seventh Circuit’s co-defendant disparity jurisprudence has diverged into two opposing lines of cases. One line of cases expressly follows Statham and authorizes district courts to take co-defendant disparities into account. The other line of cases forbids consideration of co-defendant disparities and denies relief to defendants raising that issue. Most of the opinions in the latter line cite Omole — one of the cases explicitly abrogated by Statham — and do not cite Statham. One of the opinions cites other cases in the Omole lineage that were in essence overruled by Statham and Bartlett. And none of the post-Statham opinions that forbid consideration of co-defendant disparities recognizes the impact of Statham and Bartlett or acknowledges that they are deviating from settled Seventh Circuit and Supreme Court precedent. Perhaps the two lines of post-Statham precedent can be explained by the fact that, in certain cases, the government continued to rely on the very proposition that Statham held was “foreclosed by Gall” and failed to acknowledge that the old rule was no longer good law. The quality and accuracy of parties’ briefs serve an important role in ensuring that courts have the most recent case law before them when making decisions. See, e.g., United States v. Hicks, 122 F.3d 12, 13 (7th Cir. 1997) (observing that the government had “misled the [district] judge about the state of the law” by relying on obsolete precedent). It is possible that the divergence in the Seventh Circuit’s co-defendant disparity case law is the result of the government’s reliance on the rule that Statham deemed obsolete. It is also possible that the divergence stems from the fact that Statham does not appear to have been circulated under Seventh Circuit Rule 40(e), which requires that any “proposed opinion . . . adopting a position which would overrule a prior opinion of this court” be circulated to all of the active judges before publication.
Two Divergent Lines of Cases

Continued from page 24

Regardless of the reason for the diverging lines of precedent, it is essential that the Seventh Circuit bring its co-defendant disparity case law back in line with Gall and Statham. Forbidding consideration of co-defendant disparities not only deviates from circuit precedent but also rests on a rationale that is no longer constitutionally viable. The Seventh Circuit’s original justification for prohibiting courts from considering co-defendant disparities was that “the Sentencing Commission implicitly considered the potential for disparity of sentences, whether justified or unjustified, between co-defendants in its creation of an applicable sentencing range,” and “district courts must only consider factors that have not been considered by the Sentencing Commission.” But in United States v. Booker, 543 U.S. 220 (2005), the Supreme Court deemed the section of the sentencing statute from which that rule was derived to be “a necessary condition of the constitutional violation” and excised that provision to bring the guidelines into compliance with the Sixth Amendment. The prohibition is thus inconsistent with Booker itself. It is also incompatible with the entire thrust of the Supreme Court’s post-Booker jurisprudence, which has consistently reified district court discretion — including discretion to vary from the guidelines to account for disparities. Like the Supreme Court, the Seventh Circuit has acknowledged in other contexts the breadth of sentencing court discretion to take disparities into consideration and to grant sentences that vary from the guidelines.

Furthermore, as the Supreme Court has recognized, the sentencing statutes grant judges the authority to ensure that the punishment imposed on co-defendants tracks their relative roles and culpability. Judges likewise have the discretion to punish participants who are equally culpable, and to similarly punish participants with divergent culpability differently from one another. And judges have the power to grant a lighter punishment to a co-defendant like Driver, who played a lesser role or is less culpable, and to impose a higher punishment on a co-defendant like Robber, who played a greater role and is more culpable. As noted earlier, § 3553(a) may not require judges to consider co-defendant disparities, but it certainly authorizes judges to account for those disparities at sentencing.

The Seventh Circuit would advance the principle of stare decisis if it were to examine the apparent dissonance in its co-defendant disparity jurisprudence and acknowledge that its own precedent and Supreme Court law authorize district courts to take co-defendant disparities into account at sentencing. Stare decisis is one of the bedrocks of our common law system. As Justice Cardozo once observed, the “labor of judges would be increased almost to the breaking point if . . . one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.” The Nature of the Judicial Process 149 (1921). Statham represents this secure foundation, as it is the only case in which the Seventh Circuit has conducted a full analysis of the Supreme Court’s reasoning in Gall. A court’s failure to adhere to its prior law causes “the instability and unfairness that accompany disruption of settled legal expectations.” Randall v. Sorrell, 548 U.S. 230, 244 (2006) (citations omitted). Stare decisis, to the contrary, “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” Id. at 243. To promote these laudable objectives in the sentencing context, the Seventh Circuit should return to the secure foundation of Gall, Statham, and Bartlett.

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1 See Gall v. United States, 552 U.S. 38, 56 (2007). For a listing of the other circuits’ relevant precedents, see infra note 21.
2 In doing so, Statham specifically abrogated United States v. Woods, 556 F.3d 616, 623 (7th Cir. 2009) and United States v. Omole, 523 F.3d 691, 700–01 (7th Cir. 2008), which had precluded district judges from considering disparities among co-defendants in imposing sentences.
3 See infra notes 23–24.
4 The defendants’ offense levels would be 28, because each would have a base offense level of 20, would receive an additional 2 levels because a financial institution was involved, would receive an additional 5 levels because a firearm was brandished, and would receive an additional 1 level based on the amount of loss. See U.S.S.G. § 2B3.1. The relevant conduct rules would ensure that Defendant 1 received the identical specific offense characteristic enhancements as Defendant 2. See U.S.S.G. § 1B1.3.
5 Gall, 552 U.S. at 55–56; see also id. at 54 (“[A]s we understand the colloquy between the District Judge and the USA, it seems that the judge gave specific attention to the issue of disparity when he inquired about the sentences already imposed by a different judge on two of Gall’s co-defendants.”).
6 Id. at 54 (quoting the district court’s sentencing decision in United States v. Gall, 374 F. Supp. 2d 758, 763–64 (S.D. Iowa 2005), and referring to § 3553(a)(2)(A)’s dictate that judges must consider “the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense”).
7 Gall’s holding is consistent with the plain language of the sentencing statute. The relative conduct, roles, and culpabilities of co-defendants are clearly relevant under § 3553(a)(1)’s requirement that sentencing courts consider “the nature and circumstances of the offense.” Information about the relative conduct of co-defendants is also relevant to determining what punishment is sufficient but not greater than necessary to “reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense” for each co-defendant under § 3553(a)(2)(A). And nothing in the plain language of § 3553(a)(6) limits consideration of “unwarranted disparities” to nationwide disparities, or prohibits the sentencing judge from considering disparities among co-defendants.
8 United States v. Boscarino, 437 F.3d 634, 638 (7th Cir. 2006).
9 Bartlett, 567 F.3d at 909.
Two Divergent Lines of Cases

Continued from page 25

Those cases included Statham, 581 F.3d at 556.

Statham, 581 F.3d at 556.

523 F.3d at 700–01 (“This court refuses to view the discrepancy between sentences of co-defendants as a basis for challenging a sentence. ‘We will not disturb the appealing defendant’s sentence even when a co-conspirator’s sentence is lenient.’ We will only disturb a sentence based on an unjustifiable disparity between co-defendants . . . if it actually creates a disparity between the length of the appellant defendant’s sentence and all other similar sentences imposed nationwide.”) (quoting United States v. White, 406 F.3d 827, 837 (7th Cir. 2005); United States v. Simpson, 337 F.3d 905, 909 (7th Cir. 2003)).

556 F.3d at 616, 623 (7th Cir. 2009) (“[W]e do not view a discrepancy between sentences of co-defendants as a basis for challenging a sentence. We look at a disparity only if it is between the defendant’s sentence and all other similar sentences imposed nationwide.” (citing Omole, 523 F.3d 691; Simpson, 337 F.3d 905)).

Those cases included Simpson, 337 F.3d at 909 (“As we have said on numerous occasions, ‘a disparity among co-defendants’ sentences is not a valid basis to challenge a guideline sentence otherwise correctly calculated.’” (quoting United States v. Simmons, 218 F.3d 692, 696 (7th Cir. 2000))), the precedent on which the Omole and Woods decisions relied. See Omole, 523 F.3d at 700–01; Woods, 556 F.3d at 623. They also included (in chronological order): United States v. Edwards, 945 F.2d 1387, 1398 (7th Cir. 1991) (“A sentence which is mistaken, too draconian or too lenient as to co-defendant A does not grant co-conspirator B the license to benefit from a lighter sentence nor does it impose the added burden of a tougher sentence.”); White, 406 F.3d at 837, relied on by Omole, 523 F.3d at 700–01; Boscariino, 437 F.3d at 638 ("[T]he kind of ‘disparity’ with which § 3553(a)(6) is concerned is an unjustified difference across judges (or districts) rather than among defendants to a single case."); United States v. Pisman, 443 F.3d 912, 916 (7th Cir. 2006) ("[T]he § 3553(a) concern with sentence disparity is not one that focuses on disparities among defendants in an individual case, but rather is concerned with unjustified differences across judges or districts."); United States v. Mendoza, 457 F.3d 726, 730–31 (7th Cir. 2006) ("Disparity in sentences among defendants for the violation of the same statute is only warranted when the facts of a surrounding crime demonstrate to the sentencing judge that one defendant should receive a greater or lesser sentence based on the circumstances of that particular case."); United States v. Davila-Rodriguez, 468 F.3d 1012, 1014 (7th Cir. 2006) relied on by Omole, 523 F.3d at 701.

21 See e.g., United States v. Vázquez-Rivera, 470 F.3d 443, 449 (1st Cir. 2006) (recognizing that “a district court may consider disparities among co-defendants in determining a sentence”); United States v. Wills, 476 F.3d 103, 110 (2d Cir. 2007) (“We do not, as a general matter, object to district courts’ consideration of similarities and differences among co-defendants when imposing a sentence,” but abrogated on other grounds by United States v. Cavera, 559 F.3d 180 (2d Cir. 2008)); United States v. Parker, 462 F.3d 273, 277 (3d Cir. 2006) (“Although § 3553(a) does not require district courts to consider sentencing disparity among co-defendants, it also does not prohibit them from doing so.”); United States v. Gomez, 215 F. App’x 200, 202 (4th Cir. 2007) (implying that consideration of co-defendant disparities is allowed, but concluding that Gomez was not similarly situated to the co-defendants); United States v. Bennett, 664 F.3d 997, 1015 (5th Cir. 2011) (“[A]voiding unwarranted sentencing disparities among co-defendants is a valid sentencing consideration.”), cert. denied, 11-9109, 2012 WL 733887 (Apr. 2, 2012); United States v. Simmons, 501 F.3d 620, 624 (6th Cir. 2007) (“A district judge, however, may exercise his or her discretion and determine a defendant’s sentence in light of a co-defendant’s sentence.”); United States v. Lazenby, 439 F.3d 928, 933 (8th Cir. 2006) (invalidating a sentence that resulted in unwarranted disparities between the sentences of the defendant and less culpable members of related conspiracies); United States v. Suecuen, 504 F.3d 1175, 1181–83 (9th Cir. 2007) (upholding as a legitimate generalized § 3553(a) consideration the district court’s decision to compare defendant with his co-defendants and sentence him accordingly with his role); United States v. Smart, 518 F.3d 800, 804 (10th Cir. 2008) (“[A] district court may also properly account for unwarranted disparities between co-defendants who are similarly situated, and...the district court may compare defendants when deciding a sentence.”); United States v. Zavala, 300 F. App’x 792, 795 (11th Cir. 2008) (“It is not erroneous for the district court to have considered the ‘unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct’ when the statute specifically mandates such consideration.”); United States v. Mejía, 597 F.3d 1329, 1344 (D.C. Cir. 2010) (considering and rejecting an argument that a disparity between co-defendants’ sentences was unwarranted), cert. denied, 131 S. Ct. 586 (2010).
Two Divergent Lines of Cases

Continued from page 26

24See United States v. Scott, 631 F.3d 401, 405 (7th Cir. 2011) (“[W]e remain true to our precedent, holding that in order for § 3553(a)(6) to be applicable, the court must be presented with disparate sentences not among codefendants or coconspirators but among judges or districts.” (citing Bartlett, 567 F.3d 907-08; Pisanu, 443 F.3d at 916; Boscarrino, 437 F.3d at 637-38)).

25Statham is mentioned by only one of the post-Statham opinions that prohibit consideration of co-defendant disparities. In United States v. Vaughn, 431 F. App'x 507 (7th Cir. 2011) (unpublished), cert. denied, 132 S. Ct. 1068 (2012), the court cited Statham and Bartlett for the narrow proposition that a disparity between one defendant and a co-defendant who cooperated is not unwarranted. However, Vaughn also implied that co-defendant disparities are never unwarranted based on the obsolete rationale of the pre-Statham cases. See id. at 509 (“§ 3553(a)(6) is addressed to unjustified differences in sentences imposed by different judges or across judicial districts, not sentences imposed upon defendants in the same case.”).

26Statham, 581 F.3d at 556.

27For example, in Durham, the government stated: “This Court has held consistently that the court must be presented with disparate sentences not among co-defendants or coconspirators but among judges or districts.” Brief of the United States at 41, Durham, 645 F.3d 883 (No. 10-1308) (quoting Scott, 631 F.3d at 405). In 2011, it was inaccurate for the government to contend that the Seventh Circuit had “consistent[ly]” prevented judges from considering co-defendant disparities given Statham’s clear statement to the contrary in 2009. Likewise, in Vaughn, the government stated that the “kind of ‘disparity’ with which § 3553(a)(6) is concerned is an unjustified difference across judges or districts” rather than among defendants to a single case. Brief of Plaintiff-Appellee at 15, Vaughn, 431 F. App’x 507 (No. 10-3972) (quoting Bartlett, 567 F.3d at 907 (quoting Boscarrino, 437 F.3d at 628)). Less egregiously, but still in error, the government in Courtland failed to note that Omole had been abrogated on other grounds when it cited Omole for an unrelated proposition. Brief of Plaintiff-Appellee at 25, Courtland, 642 F.3d 545 (No. 10-2436). Had the abrogation been brought to the court’s attention, the Courtland opinion might not have relied on the portion of Omole that was abrogated by Statham. See Courtland, 642 F.3d at 554 (“[w]e do not view the ‘discrepancy between sentences of codefendants as a basis for challenging a sentence’ and will disturb a sentence only if it creates an unwarranted sentence disparity between similar defendants nationwide” (quoting Gooden, 564 F.3d at 891 (quoting Omole, 523 F.3d at 700))).

28Seventh Circuit Rule 40(e) (“A proposed opinion... adopting a position which would overrule a prior opinion of this court... shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted.”). The Seventh Circuit typically indicates Rule 40(e) circulation with a footnote, and there is no such footnote in Statham.

29See United States v. McMuturity, 217 F.3d 477, 489-490 (7th Cir. 2000) (citing 18 U.S.C. § 3553(b)).

30Booker, 543 U.S. at 259 (excising § 3553(b)). As Bartlett held, courts are now free to vary from the guidelines regardless of whether the Commission has implicitly deemed a given disparity warranted or justified. See Bartlett, 567 F.3d at 909 (“[T]he court is free to have its own policy about which differences are ‘unwarranted.’”).

31See, e.g., Booker, 543 U.S. at 233 (“We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.”); Kimbrough v. United States, 552 U.S. 85, 108 (2007) (granting district courts discretion to determine that the disparity created by the guidelines’ treatment of crack and powder cocaine is unwarranted, and to grant below-range sentences accordingly); Spears v. United States, 555 U.S. 261, 264 (2009) (per curiam) (clarifying that a district court may grant a below-guidelines sentence on the basis of a categorical, not merely case-by-case, disagreement with the disparities produced by a proper application of the guidelines).

32See, e.g., United States v. Reyes-Hernandez, 624 F.3d 405, 416, 422 (7th Cir. 2010) (reversing prior Seventh Circuit precedent that prevented sentencing judges from granting below-guidelines sentences based on a different disparity—the fast-track disparity—and authorizing district courts to disagree with directives issued by Congress to the Sentencing Commission); United States v. Corner, 598 F.3d 411, 415-16 (7th Cir. 2010) (concluding that “district judges are entitled to disagree with the Commission’s policy choices . . . ,” that “every judge is at liberty to . . . sentence at variance with a Guideline,” and that “Booker, Kimbrough, and Spears hold that the floors (and ceilings) in Guidelines are not legally binding”).

33See supra note 7. In connection with another sentencing statute, 18 U.S.C. § 3661, the Supreme Court recently emphasized the importance of “[p]ermitting sentencing courts to consider the widest possible breadth of information about a defendant,” and emphasized that “Congress could not have been clearer in directing that ‘[n]o limitation . . . be placed on the information concerning the background, character, and conduct’ of a defendant that a district court may ‘receive and consider for the purpose of imposing an appropriate sentence.’” United States v. Pepper, 131 S. Ct. 1229, 1240, 1241 (2011) (quoting § 3661). Information about a defendant’s “conduct” surely includes information about how his culpability and role in the offense compare with those of his co-defendant.

34Of course, recognizing this discretion leads to the question of whether a sentencing judge should adjust a given defendant’s sentence in a particular case, understanding that neither Bartlett nor Statham requires it. That next decision will depend on the facts of the case and should be left to the discretion of the sentencing judge. As the Supreme Court has acknowledged, “The sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case.” Gall, 552 U.S. at 51 (citations omitted); see also Rita v. United States, 551 U.S. 338, 363 (2007) (Stevens, J., concurring) (“[D]istrict courts have an institutional advantage over appellate courts” because they “must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing.”) (quoting Kimbrough, 552 U.S. at 108). That is exactly what the district judge did in Statham. As the Seventh Circuit recognized, the district judge properly took into account the fact that “Statham’s co-defendants entered plea agreements with the government, cooperated in the investigation, and had less-extensive criminal histories.” Statham, 581 F.3d at 556. It was appropriate for the sentencing judge to conclude, in light of those facts, that “the different members of the conspiracy were not similarly situated.” Id. Given that conclusion, “there is . . . nothing unreasonable about the fact that the sentences [Statham and his co-defendants] received were also different.” Id. Just as the authority to deny a co-defendant disparity reduction request on the ground that two defendants’ divergent conduct justifies different sentences rests with the sentencing judge, so, too, does the authority to grant a co-defendant disparity reduction request on the ground that two defendants’ conduct justifies similar sentences. This inquiry necessarily will be fact-specific and case-specific.
On August 29, 2011, Senior United States District Judge William Donald Stiehl celebrated his twenty-fifth anniversary on the federal bench. On the anniversary date of his investiture, he opened the doors of his courtroom and chambers to over 200 members of the bench and bar, and the Courthouse family, to celebrate this milestone. As part of his comments to the large gathering, Judge Stiehl noted that he is “now starting his next 25 years on the bench.”

Judge Stiehl became the third district judge in the Southern District of Illinois after President Reagan nominated him in 1986, and the senate confirmed him the same year. He served as Chief Judge from 1992-93 and assumed senior status on November 30, 1996.

Continued on page 29

*Ms. Tidwell is the Courtroom Services Supervisor for the United States District Court for the Southern District of Illinois and Ms. Fix is the Judge’s career law clerk.*
Judge William Stiehl: 25 Years of Service

Continued from page 28

Born in Belleville, Illinois in 1925, Judge Stiehl served in the United States Navy during World War II from 1943-46. He received his LL.B from Saint Louis University School of Law in 1949. Shortly after passing both the Illinois and Missouri bar exams, he was recalled to serve in the Navy during the Korean War, where he served on the staffs of several admirals from 1950-52.

Perhaps the most interesting and challenging assignment was serving on the staff of Rear Admiral Arleigh A. Burke when he was Commander, Cruiser Division 5, and later when he became one of the five United Nations delegates on the Korean Armistice Conference staff. After his tour of duty, Judge Stiehl returned to Illinois and began a private practice career that would span three decades, from 1952–1986. He served as an Assistant State’s Attorney in Belleville from 1956–60 and a Special Assistant Attorney General for the State of Illinois from 1970-73.

For the past 25 years, Judge Stiehl has presided over many trials, civil and criminal. Among his opportunities to serve the public, he counts his 1991 decision to establish the East St. Louis Community Fund as a high-water mark. The Fund was established as part of the imposition of a unique criminal penalty of community service following the guilty plea of the corporation Matthews & Wright, a Wall Street brokerage firm. The defendant firm was guilty of illegal activities related to a fraudulent riverfront development scheme. A sanction was imposed against Matthews & Wright in the amount of $7 million dollars, and Judge Stiehl directed that the sanction be used to fund the apolitical, not-for-profit, East St. Louis Community Fund designed to benefit the citizens of East St. Louis, the city in which the Melvin E. Price Federal Courthouse sits. This community constantly struggles with poverty, addiction, and violence, and Judge Stiehl established the Fund with its mission to help improve the community as a whole, without the influence of politics or a political agenda.

In January 1995, Judge Stiehl imposed a second community service sanction, sentencing defendant H.L. Enterprises to a $1 million dollar sanction as part of a plea agreement on charges related to illegal activities of several adult entertainment establishments in neighboring Brooklyn, IL. Thereafter, the Fund was authorized to expand its civic activities to include the Village of Brooklyn. The Fund, now known as the Greater East St. Louis Community Fund, is administered by a Board of Directors, with oversight by Judge Stiehl.

The Judge appoints board members to one-year, unpaid terms. The Fund has received public and private in-kind contributions from establishments such as the Ford Foundation, and the John D. and Catherine T. McArthur Foundation. Some of the civic contributions the Fund contributes to are the maintenance of East St. Louis public swimming pools and the construction of a park and playground in Brooklyn. In addition, the Fund has been responsible for cleaning up hundreds of abandoned lots and establishing both a 911 system in the East St. Louis area and regular trash collection. Judge Stiehl is proud of the many accomplishments of the Greater East St. Louis Community Fund and believes it will benefit the region for many years to come.

Writers Wanted!

The Association publishes The Circuit Rider twice a year. We always are looking for articles on any substantive topic or regarding news from any district — judges being appointed or retiring, new courthouses being built, changes in local rules, upcoming seminars.

If you have information you think would be of interest, prepare a paragraph or two and send it via e-mail to:
Jeffrey Cole, Editor-in-Chief, at Jeffrey_Cole@ilnd.uscourts.gov or call 312.435.5601.
The Federal Bar Association, Chicago Chapter, has announced that it will conduct a new lawyer-to-lawyer mentoring program, a one-year program expected to begin in May 2012. The program has been approved for six hours of CLE professionalism credit by the Illinois Supreme Court Commission on Professionalism. Federal Bar Association members can sign up already paired or as an individual to be paired. Members can sign up with a partner from the same work place, or someone outside of their work place. The Applications for the program are drawing a variety of mentors and mentees. Mentor applications have arrived from the bench, big firms and boutique firms, as well as high-ranking government employees. Young lawyers from law firms (big and small) and government have submitted applications to be mentored. The program will provide mentoring by experienced members of the Illinois bar that not only will greatly benefit the individual young attorneys, but also is essential for our profession to continue to produce the kind of lawyers we will be proud to see practicing in the future.

The CLE qualifications for mentors and mentees are available at www.fedbarchicago.org. The website also will direct you to on-line submission of applications. If you have questions, you can contact Sheri H. Mecklenburg by telephone at (312) 469-6030 or by e-mail at sheri.mecklenburg@usdoj.gov http://www.fedbarchicago.org. The program will kick-off with an orientation meeting in early May for all participants, location to be announced, allowing the participants to get to know each other as well as their mentoring partner. The program promises to be a great opportunity for both experienced lawyers and young lawyers who are members of the Federal Bar Association.

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ASSERTING AMOUNT IN CONTROVERSY POST-THE “JURISDICTION AND VENUE CLARIFICATION ACT”: A Trip to Wonderland?

By Katherine A. Winchester and Audra J. Ferguson-Allen

“If you don’t know what you mean, what are you doing?” the March Hare went on.

“I mean what I say,” Alice hastily replied; “at least—what I say is what I mean—that’s the same thing, you know.”

“Not the same thing a bit!” said the Hatter. “You might as well say that “I see what I eat” is the same thing as “I eat what I see”!”

In fairness, the Jurisdiction and Venue Clarification Act (“the Act”), which amended provisions in 28 U.S.C §§ 1441 and 1446, as advertised, provides some “clarification” regarding civil removals. Issues, however, remain or have been created by the new law. While a brief outline of certain “clarifications” and the Effective Date are provided below, this article will focus on the narrow issue of asserting amount in controversy in removals of civil diversity cases post-the Act. This is where the Act gets “curiouser and curiouser.”

New Answers Provided by the Act

First, the Act codifies the later-served defendant rule, i.e. that each defendant, regardless of order of service, has thirty (30) days in which to attempt removal and earlier-served defendants may consent to the later removal even if their removal period has elapsed. 28 U.S.C. § 1446(b)(2)(B), (C). Prior to this new enactment, Circuit Courts of Appeals, and even district courts within some Circuits (including our own) had been divided on the issue. Secondly, the Act codified the longstanding, judicially-created rule of Unanimous Consent (all properly joined and served defendants must consent to removal), see 28 U.S.C. § 1446(b)(2)(A), traced back to the Supreme Court decision of Chicago, Rock Island & Pac. Ry. Co. v. Martin, 178 U.S. 245, 251 (1900). This issue had not been in serious debate for a number of years, but nevertheless, the Act provides finality to the issue. This is where, at least in this Article, the answers end.

Continued on page 32

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A Trip to Wonderland?
Continued from page 31

A Caution About the Effective Date

Before addressing Amount in Controversy, a word should be said about the Act's Effective Date. The Act applies to all actions "commenced in a United States district court" or "removed from a State court to a United States district court and that had been commenced, within the meaning of State law, on or after" the Act's Effective Date, i.e. January 6, 2012. The operative word here is "commenced." In Wisconsin, Illinois and Indiana, an action is "commenced" when a complaint is filed. However, in Pennsylvania, for example, an action is "commenced" when a writ of summons is filed with the court. There are also states in which an action is not "commenced" until the defendant has been properly served with the Summons and/or Complaint. Accordingly, caution is urged in considering whether the Act applies to a particular case.

The Amount in Controversy Debate Continues

Asserting amount in controversy for removal has been an issue of dispute, both real and academic, among the courts and commentators. In particular, the issue arises in cases where the state court complaint does not set forth an amount in controversy or the asserted amount in controversy is less than $75,000. Given that § 1332(a) and § 1441(a) confer original jurisdiction upon civil actions where the "matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs," the question arises for the adverse (removing) party and thereafter the court, what, if anything, must be pled in or supplied with the removal to meet the jurisdictional threshold? What standard of proof applies? Because the answers to these questions differed among, or even within Circuits, an analysis needed to be made of the applicable district's case law prior to removal. As such, a case removable in one jurisdiction may not have been removable in another.

The Act provides some limited remedy to this prior dilemma. Now, under the Act, a removing party may assert an amount in controversy in its removal papers under two circumstances: (1) the pleadings seek nonmonetary relief; or (2) the forum State does not permit the amount in controversy to be set forth in the pleading or permits recovery in excess of the amount demanded. 28 U.S.C. § 1446(c)(2)(A). While helpful, these provisions do not resolve a number of the same quagmires faced by courts and parties prior to the Act.

First, the Act leaves unanswered a scenario: the forum state, e.g. Alabama and Connecticut, permits the amount in controversy to be pled, but does not require it. In such case, may a removing defendant still assert an amount in controversy? The answer may lie in Latin: Expressio unius est exclusio alterius - the inclusion of one is the exclusion of others. However, as the Seventh Circuit has recognized, "[n]ot every [statute's] silence is pregnant," and it seems illogical that Congress intended to foreclose a defendant from asserting an amount in controversy where plaintiff could have, but failed to, allege an amount in controversy in excess of the jurisdictional amount. To impose such a result would allow plaintiffs in certain States, but not others, to foreclose removal at the outset by simply omitting the amount in controversy.

Consider, for example, a wrongful death claim. Although it may seem axiomatic that such claims, even if silent as to amount, would place into controversy an amount exceeding the jurisdictional requirement, this issue has sparked debate, as addressed in the 2010 Roe opinion from the Eleventh Circuit. Roe addressed whether a claim for loss of life under the Alabama Wrongful Death Act ("WDA"), could – without a number attached in the complaint and no other evidence – be enough to find that more than $75,000 was at issue. The question was complicated by the fact that Alabama's WDA only provides for punitive and not compensatory damages. Lacking Eleventh Circuit precedent, the Roe Court looked to the Fifth Circuit for guidance on when a facially-silent complaint could be construed to meet the amount in controversy in light of Louisiana's prohibition on specifying the numerical value of claimed damages.
A Trip to Wonderland?

Continued from page 32

Ultimately, the Roe Court found that common sense dictated that the jurisdiction amount was satisfied. Significantly for the instant discussion, however, if the Act had pre-dated the controversy faced by the Eleventh Circuit in Roe, it still would not have answered the question. Paradoxically, although state court complaints filed pursuant to, for example Louisiana law, no longer pose an issue after the Act and may be removed (assuming the removing party can allege the minimum required amount in controversy), it is unclear whether complaints filed in amount-permissive states such as Alabama present the same opportunity. This could lead to the result in amount-permissive states that "a plaintiff could 'defeat federal jurisdiction simply by drafting his pleadings in a way that did not specify an approximate value of the claims and thereafter provide the defendant with no details on the value of the claim' . . . Plaintiffs skilled in this form of artful pleading could, with this 'trick,' simply 'make federal jurisdiction disappear.'" This issue is likely one that the courts will have to address.

A second issue raised by the Act is the standard of proof a removing party must meet regarding the amount in controversy. The Act provides that a removal filed on the face of the complaint and within thirty (30) days of service ("facial" removal) is governed by the preponderance of the evidence standard (see § 1446(c)(2)(B)). However, the standard for later, "other paper"-based removals (i.e. removals under § 1446(b)(3), (c)(3)(A)) remains unclear.

Prior to the Act, the Seventh and Tenth Circuits had adopted the "preponderance of the evidence" standard for "other paper" removals. In Meridian Security Insurance Co. v. Sadowski, 441 F.3d 536 (7th Cir. 2006), the court not only confirmed that this was the applicable standard, but also discussed the "evidence" that a proponent may use to establish the amount in controversy, including interrogatory and request for admission responses, plaintiff's informal estimates or settlement demands, and affidavits from defendant's employees or experts about how much it cost to meet plaintiff's demands.

Other courts, notably the Eleventh and Fifth Circuits, have placed a higher burden on "other paper" removals, concluding that "the documents received by the defendant must contain an unambiguous statement that clearly establish[s] federal jurisdiction." Accordingly, whereas evidence of jury verdicts in other similar cases may be sufficient to support a "facial" removal, such evidence is not sufficient (and perhaps not even admissible for consideration) under these elevated standards for an "other paper" removal. Similarly, although a settlement demand received before suit would be sufficient to support a "facial" removal, a refusal to admit in discovery whether (or not) a claim exceeds the amount in controversy as well as an imprecise statement that one's claim may be worth "a million dollars" are insufficient to support a later "other paper" removal where the burden is higher than the preponderance of the evidence standard.

In addressing the applicable burden of proof in "other paper" removals, the Congressional report for the Act states that the Act adopts a preponderance of the evidence standard and "would follow the lead of recent cases," citing McPhail and Meridian Security. The Report notes the Act does not require that the amount in controversy be established with a reasonable certainty. Rather, "defendants may simply allege or assert that the jurisdictional threshold has been met. Discovery may be taken with regard to that question." In contrast, the Act is silent on this issue. Rather, the Act provides only that removals wherein the amount in controversy is asserted under "subparagraph [(c)(2)](A)", i.e., when the complaint seeks nonmonetary relief or the state practice does not permit the amount in controversy to be pled, are governed by the preponderance standard. See 28 U.S.C. § 1446(c)(2)(B). No mention is made of the standard governing "other paper" removals, which are governed by subsection (c)(3). Moreover, unlike the Report, the Act does not provide for post-removal discovery nor further define "other paper", leaving open the issue of what "evidence" (including whether jury verdicts and other information not received from the plaintiff) may be submitted to support the amount in controversy. The Report suggests that Congress intended to make it easier for defendants to establish the amount in controversy. The problem, however, is that the Act does not clearly reflect this intention.

Continued on page 34
Continued from page 33

A Trip to Wonderland?

Coming full circle, if a state allows a complaint to assert an amount in controversy but does not require it, can the defendant remove and, if so, when? What standard of proof applies (and when)? What "evidence" can a defendant use to establish the amount in controversy? Can a defendant take discovery to meet that standard? The Act leaves these questions of statutory interpretation and Congressional intent unanswered. Therefore, practitioners and, ultimately, courts must sort through these issues for themselves. So be it. Down the rabbit hole we go. “But I don’t want to go among mad people,” Alice remarked. “Oh, you can’t help that,” said the Cat: “we’re all mad here. I’m mad. You’re mad.” “How do you know I’m mad?” said Alice. “You must be,” said the Cat, “or you wouldn’t have come here.”

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1 Lewis Carroll, Alice's Adventures in Wonderland, Chapter VII (1865).
2 The Act made a host of other changes affecting civil removals which are not discussed herein.
3 Lewis Carroll, Alice's Adventures in Wonderland, Chapter II (1865).
5 The Act, Sections 105, 205.
6 Craft, 2003 WL 1984347, at *2; Granado v. Sentry Ins., 599 N.W.2d 62, 64 (Wis. Ct. App. 1999); 735 ILCS 5/2-201(a).
10 A number of states follow this rule typically by statute including Illinois (735 ILCS 5/2-604), Indiana (Ind. T.R. 8(A)(2)) and Wisconsin (W.S.A. 802.02 (1m)(a)).
11 See, e.g., Asbury-Castro v. GlaxoSmithKline, Inc., 352 F.Supp.2d 729, 733 (N.D. W. Va. 2005) (West Virginia case law provides that “the ad damnum clause is only an estimate” and “the plaintiff is not restricted or bound by the relief requested.”) (internal citations omitted).
12 See, e.g., Roe v. Michelin N. Am., 613 F.3d 1058, 1060 (11th Cir. 2010) (applying Alabama law) (declaring that “[t]he complaint [did] not specify the amount of punitive damages [the plaintiff] [sought], but merely prayed[ed] for damages allowed under Alabama’s Wrongful Death Act, in an amount to be determined by a jury”); McLaughlin v. People's United Bank, Inc., 586 F. Supp. 2d 70, 72 (D. Conn. 2008) (stating that “the Connecticut Rules of Practice do not require a specific demand, but rather only a statement that the amount in controversy is sufficient to confer [state court] jurisdiction” and that “[w]here the complaint fails to allege a specific amount of damages, the removing defendant must prove by a preponderance of the evidence that the amount in controversy exceeds the jurisdictional amount”) (internal citations omitted).
14 Roe v. Michelin North America, Inc., 613 F.3d 1058 (11th Cir. 2010).
15 Id. at 1061.
16 Id. at 1062.
17 Id. at 1064 (quoting Pretka v. Kolter City Plaza II, Inc., 608 F.3d 744, 766 (11th Cir. 2010).
18 Of course, if a "facial" removal is unavailable due to an issue as to the amount in controversy, a defendant may remove within thirty (30) days after receiving discovery or "other paper" from which the amount in controversy may be determined. § 1146 (b)(3), (c)(3)(a). However, where the issue is "silence" rather than an amount below the jurisdiction amount, the removing party availing itself of this subsection risks a challenge to the timeliness of the removal where an argument can be made that the complaint could be construed to place into controversy an amount in excess of the jurisdictional requirement. See, e.g. Benstock v. Arrowood Indem. Co., No. 8:11-cv-2493, 2011 WL 6314236, at *1 (M.D. Fla. Dec. 16, 2011); Barnes v. Hownmedica Osteonics Corp., No. 3:09-cv-02556-CLS (N.D. Ala. Feb. 11, 2010).
19 This is at least the case wherein a "facial" removal meets one of the two exceptions set forth above, i.e. nonmonetary relief or money judgment in a state where ad damnum is not permitted or more may be recovered than requested).
20 McPhail v. Deer & Co., 529 F.3d 947 (10th Cir. 2008); Meridian Security Insurance Co. v. Sadowski, 441 F.3d 536, 541-42 (7th Cir. 2006).
21 Meridian, 441 F.3d at 541-42.
22 Bosky v. Kroger Texas, LP, 288 F.3d 208, 212 (5th Cir. 2002) (stating that evidence supporting a removal must be "unequivocally clear and certain.") (footnotes omitted).
23 The Eleventh Circuit, through Lowery, has also followed the rule that if an "other paper" removal is attempted, the "other paper" must have come from the plaintiff. Pretka v. Kolter City Plaza II, Inc., 608 F.3d 744, 762 (11th Cir. 2010) (distinguishing facial and "other paper" removals on the issue of whether the submitted evidence must have come from the plaintiff).
24 Lowery v. Alabama Power Co., 483 F.3d 1184, 1213 (11th Cir. 2007).
26 Lowery, 483 F.3d at 1213 n.63.
31 H.R. Rep. No. 112-10, at 16 (2011). In contrast to the Report, some courts, including the Eleventh Circuit had addressed – and rejected – the idea that post-removal discovery (in federal court) could be used to support a challenged removal. See, Lowery, 483 F.3d at 1215-16 “Post-removal discovery for the purpose of establishing jurisdiction in diversity cases cannot be squared with the delicate balance struck by Federal Rules of Civil Procedure 8(a) and 11 and the policy and assumptions that flow from and underlie them.”
33 Lewis Carroll, Alice's Adventures in Wonderland, Chapter VI (1865).
In recent decades, arbitration has become an attractive alternative for many potential litigants. Courts have become more willing to enforce agreements to arbitrate and, when necessary, to enforce arbitration awards themselves. Arbitration can provide significant advantages over traditional litigation for some litigants, including heightened guarantees of confidentiality and the opportunity to draw upon rules providing expedited or more limited discovery. In some circumstances, arbitration can provide a more cost effective and faster means of resolving disputes, though this of course depends upon the nature of the dispute and the arbitration procedures adopted. Because arbitration is largely a creature of private contract, parties may craft the specific parameters and procedures they deem appropriate.

The private, contractual nature of arbitration, however, raises particular challenges for the potential consolidation of closely related disputes arising out of separate but related contracts. For example, a dispute arising out a large scale construction project may involve separate contracts among contractors, subcontractors, purchasers, and others. A corporation seeking insurance coverage for a sizeable claim may face numerous separate contracts with its various primary and excess insurers. If such disputes were litigated in a judicial forum, the governing procedural rules would typically provide various possibilities for bringing the parties together in one proceeding. For example, the Federal Rules of Civil Procedure provide for potential joinder of parties, joinder of claims, and consolidation of actions in a single trial.

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Who Decides and How?

Continued from page 35

Arbitration proceedings, by contrast, lack the same overarching rules, and parties have frequently asked the courts to order (or to prevent) consolidation of related arbitrations.

Such requests raise competing concerns. On the one hand, requiring separate arbitrations of closely related disputes would reduce many of the advantages of arbitration, slowing the process and increasing the cost. Separate arbitrations would also raise important questions about the preclusive effect of early decisions on later arbitrations, such as the impact of an earlier panel’s construction of contract terms. On the other hand, arbitration generally arises out of a specific contract between two parties, and forcing those parties into a consolidated proceeding might contradict their intent when they entered into the relevant contract.

The Seventh Circuit has held that consolidation is possible if the arbitration clause in the relevant contract permits consolidation. At the same time, the Seventh Circuit has also held that the question of whether consolidation is permissible must generally be answered by the arbitrators rather than the courts. Thus, in most circumstances, a party seeking to consolidate an arbitration must first file for arbitration and address the question of consolidation to the panel. Furthermore, a party opposing consolidation may be required to make that argument before a single, consolidated panel.

The Seventh Circuit first examined the potential for consolidation in a case involving the arbitration of reinsurance contracts. Employers Insurance Co. of Wausau v. Century Indemnity Co., 443 F.3d 573 (7th Cir. 2006). An insurance company, Century, had purchased reinsurance from several different companies and then sought reimbursement from them after paying out a sizeable asbestos claim. Century sought one consolidated arbitration with all of the reinsurers who had declined to pay. Employers Insurance of Wausau agreed that its dispute with Century should be arbitrated under the contract but argued that it could not be forced to participate in a consolidated arbitration with another reinsurer or to arbitrate both of its reinsurance contracts in a single proceeding. Wausau therefore sought declaratory judgment that separate arbitrations were required. The district court held that the arbitrators, rather than the court, should decide whether consolidation was appropriate, and Wausau appealed, arguing that the question of whether it had to participate in a single, consolidated arbitration was a question of “arbitrability” for the court to decide. The Seventh Circuit panel rejected this argument, holding that “the question of whether an arbitration agreement forbids consolidated arbitration is a procedural one, which the arbitrator should resolve.” Id. at 577. The court explained that “arbitrability” refers instead to questions such as whether the parties were bound by an arbitration clause or whether the arbitration clause covered the claims at issue. Id. The court further refused to consider whether forcing Wausau to arbitrate the question of consolidation of both of its reinsurance contracts before a single panel would itself violate the arbitration clauses. Because the arbitration clauses did not specify who should decide the question of consolidation, Wausau was required to make its argument about the appropriate procedures to a single panel, as ordered by the district court. Id. at 581-82. If that panel agreed with Wausau that two panels were required, it could issue an appropriate order.

In referring the question of consolidation to the arbitration panel, the Seventh Circuit drew upon two recent Supreme Court cases. The first, Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, (2002), involved an arbitration demand brought by a customer against a brokerage firm allegedly providing inaccurate investment advice. The relevant arbitration rules from the National Association of Securities Dealers required that claims be brought within six years, and the brokers argued that, as a result of a long delay, the dispute was no longer eligible for arbitration. The Supreme Court held that application of this six-year limitation was a question for the arbitrators, not the courts. Although the court recognized that “[l]inguistically speaking, one might call any potentially dispositive gateway question a question of arbitrability,” courts had traditionally limited that category to more fundamental questions, such as whether the parties had agreed to arbitrate the dispute at all.
Who Decides and How?

Continued from page 36

In the second case, Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003), two groups of borrowers sued their lender in South Carolina state court. The state courts compelled arbitration of the disputes, which were also certified as class action arbitrations (in one case directly by the court and in one case by the arbitrator, though only after the first court had ruled class arbitration was permissible under the arbitration provision). Following awards to the plaintiffs, the lenders challenged those awards in court, arguing that the arbitration agreements did not, in fact, permit class arbitration. A four-member plurality of the Supreme Court held that the permissibility of class arbitration was a procedural question for the arbitrators and remanded so that the arbitrators, not the state court, could make that determination. Justice Stevens concluded that remand was unnecessary because the state court had determined that, as a matter of state law, class arbitration was permissible if not prohibited by the agreement. Faced with these differing rationales, the Seventh Circuit panel declined to rely directly on Bazzle but concluded that Supreme Court precedent clearly required procedural questions, including consolidation, to be determined by the arbitrator. 443 F.3d at 581.

In the wake of Bazzle and Howsam, other circuits also determined that consolidation is a procedural question for the arbitrators to decide. For example in Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co., 489 F.3d 580 (3d Cir. 2007), Westchester filed two consolidated arbitration demands against its reinsurers under a series of reinsurance contracts. The reinsurers filed a petition to compel arbitration in federal court, insisting that the separate arbitration clause in each reinsurance contract mandated a separate arbitration. They therefore argued that the court should compel individual arbitrations for each of the reinsurance contracts and force Westchester to submit the consolidation question to those individual panels. The district court noted that it was “not presented with the question of whether a valid arbitration agreement exists”, but, rather, the question of whether the parties had contractually agreed to separate arbitrations, and that was a matter for the arbitrators to decide.” Id. at 583-84. The court therefore enforced the original consolidated arbitration demands, and the Third Circuit affirmed, relying in part on Howsam and Bazzle. Id. at 586-87. Similarly, in Shaw’s Supermarkets, Inc. v. United Food and Commercial Workers Union, Local 791, 321 F.3d 251 (2003), the First Circuit held that the arbitrator could determine whether a union’s three separate contracts with

Shaw’s (covering three separate stores) should be consolidated, because the question merely involved specific arbitration procedures rather than arbitrability of the dispute.

Thus, a rough consensus developed across the federal circuits that consolidation is a procedural question and, therefore, arbitrators rather than courts should decide the issue, at least when the relevant arbitration contract is silent or ambiguous on the subject. In 2010, however, the Supreme Court decided Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 130 S.Ct. 1758 (2010), which vacated an award by an arbitration panel following certification that class arbitration was appropriate. In that case, certain customers of trans-oceanic shipping companies had filed arbitration demands against their shippers, alleging price fixing and other antitrust claims. The parties then entered into a supplemental agreement submitting the question of potential class arbitration to a panel of three arbitrators. The arbitration panel ruled that the parties’ arbitration agreement, which was silent on the question, permitted class arbitration in light of custom in the industry following the Supreme Court’s Bazzle decision. The Supreme Court, however, vacated the award, holding that the panel exceeded its powers by ordering class arbitration when the contract was silent on the issue, rather than inquiring as to the appropriate default rule under the relevant governing law. Instead, the Supreme Court held that the parties had not, in fact, agreed to class arbitration and thus could not be required to submit to class arbitration. Id. at 1776. The court stressed that the “differences between simple bilateral and complex class action arbitration are too great” to presume that parties agreed to class arbitration. Id. at 1775. In dissent, Justice Ginsburg objected that the majority disturbed a legitimate procedural decision by the arbitrators, taken after due consideration of the parties’ arguments and relevant expert testimony. Id. at 1781-82.

In the wake of Stolt-Nielsen, commentators wondered whether courts would become more willing to vacate arbitration awards based on consolidated proceedings or even to construe arbitration provisions in the first place. Although consolidation was not at issue in Stolt-Nielsen, the Court stressed that “it is clear from our precedents and the contractual nature of arbitration that parties may specify with whom they choose to arbitrate their disputes.” Id. at 1774.
The Circuit Rider

Who Decides and How?
Continued from page 37

The Court also cited the proposition that an “arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement.” *Id.* (quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 20, (1983)). Commentators noted that these observations could also apply to consolidation of arbitration proceedings. *See*, e.g., James F. Butler, “The Supreme Court Decision In *Stolt-Nielsen* and Consolidation Requests Under the AAA Construction Rules,” 65 *Dispute Resolution Journal* 96 (October 2010).

Late last year, the Seventh Circuit directly addressed this question and concluded *Stolt Nielsen* left Seventh Circuit precedent on consolidation undisturbed. In *Blue Cross Blue Shield of Massachusetts, Inc. v. BCS Ins. Co.*, --- F.3d ----, 2011 WL 6382203 (7th Cir. Dec. 16, 2011), twelve state-level Blue Cross plans demanded arbitration with their national insurer over its refusal to assume the defense against various Florida class action suits. The plans initiated one consolidated proceeding, and both sides named an arbitrator. When these two arbitrators could not agree upon a third arbitrator, some of the plans asked the court to appoint one. The insurer responded with a petition to compel a de-consolidated arbitration, arguing that *Stolt-Nielsen* required that parties expressly assent to consolidation and, furthermore, permitted a court to decide whether consolidation was appropriate. The district court denied the petition, and the insurer appealed.

The Seventh Circuit first observed that the appeal was an improper interlocutory appeal, as the arbitration was still pending. Moreover, even if the insurer had refused to appoint an arbitrator, thus forcing the plans to compel arbitration in district court, that court still would have referred the question of consolidation to the arbitration panel. *Id.* at *3. Although *Stolt Nielsen* held that the arbitrators had exceeded their powers after review of the final award, the Blue Cross panel explained that parties are not entitled to anticipatory review of “whether arbitrators would exceed their powers if they reached a particular procedural decision during the course of an arbitration.” *Id.* at *4. The court noted that the arbitrators may end up agreeing with the party seeking anticipatory review, rendering judicial review unnecessary. Finally, the court observed that consolidation does not change the nature of arbitration in the way class certification could, rendering many of the *Stolt-Nielsen* concerns inapplicable to consolidation.

Given the unusual procedural posture of *Blue Cross*, the exact precedential value is somewhat unclear. Nonetheless, it does seem clear that the Seventh Circuit will continue to direct the question of consolidation to the arbitrators, rather than the court, at least when an arbitration provision is ambiguous. Nonetheless, some procedural questions remain unresolved. For example, which arbitration panel should decide the consolidation question? In *Wausau*, the district court ordered two separate arbitrations, one for Wausau and one for Allstate, and directed that the two panels address the consolidation question. 2005 WL 2100977 at *4. At the same time, the appellate court rejected Wausau’s contention that two separate arbitration panels must address potential consolidation under its own two policies. 443 F.3d at 581-82. Courts elsewhere have referred questions of consolidation to a single dedicated panel, to multiple arbitration panels, or even to the earliest constituted arbitration panel. *See* Mitchell S. King & John E. Matosky, “Considering Consolidation,” 78 *Defense Counsel Journal* 70 (January 2011).

In light of the potential uncertainty over what arbitration procedure may be used to determine consolidation, parties would be well advised to address consolidation directly when drafting arbitration agreements, including both the extent to which consolidation is contemplated by the parties and, in the event of any dispute, what procedures should be used to resolve that question. If the arbitration agreement does not resolve those issues, parties will most likely need to address their arguments on consolidation to the arbitrators in the first instance.
The Supreme Court has issued three recent opinions, *Holland v. Florida*, 130 S. Ct. 2549 (2010), *Maples v. Thomas*, 132 S. Ct. 912 (2012), and *Martinez v. Ryan*, No. 10-1001, 2012 WL 912950 (U.S. Mar. 20, 2012), that are favorable to prisoners raising ineffective assistance of counsel arguments in post conviction settings. These cases share a common concern for the quality of representation afforded to indigent prisoners (assuming they receive any representation at all — many prisoners proceed pro se). Despite this concern, the Court has not gone so far as to overturn its prior precedents holding that there is no constitutional right to effective assistance of counsel beyond a criminal trial and the first level of direct appeal. These two principles — the Court’s recent openness to ineffective assistance of counsel arguments contrasted against an unwillingness to expand the constitutional right to counsel — have introduced tension within the Court’s jurisprudence. A logical application of the Court’s recent decisions would require an expansion of the constitutional right to effective assistance of counsel beyond trial and direct appeal. However, the practicalities of extending such a right may be deterring the Court from taking this step. This article explores the situation and evaluates potential paths forward.

To start, the underlying constitutional principles governing this area. There is no dispute that a criminal defendant has a Sixth Amendment right (applied to the states via the Fourteenth Amendment) to effective assistance of counsel at trial. *Evitts v. Lucey*, 469 U.S. 387, 392 (1985) (citing *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)). This right is “a bedrock principle of our justice system,” a necessary component to “test the prosecution’s case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged.” *Martinez*, 2012 WL 912950, at *8 (U.S. Mar. 20, 2012) (citing *Gideon*, 372 U.S. at 344). “The defendant requires the guiding hand of counsel at every step in the proceedings against him [because] [w]ithout it, though he be not guilty, he faces the dangers of conviction because he does not know how to establish his innocence.” *Martinez*, 2012 WL 912950, at *8 (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)).

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Despite the great importance of counsel, the Sixth Amendment right to counsel only applies at trial, and any type of constitutional guarantee quickly fades. The Supreme Court has held for over a century that the state is not required to provide an automatic right to a direct appeal following a criminal conviction. Evitts, 469 U.S. at 393 (citing McKane v. Durston, 153 U.S. 684 (1894)). However, when a state direct appeal is “an integral part of the system for finally adjudicating the guilt or innocence of a defendant,” the procedure used in deciding appeals must comport with the demands of the due process and equal protection clauses of the constitution.” Evitts, 469 U.S. at 393 (quoting Griffin v. Illinois, 351 U.S. 12, 18 (1956)). It must be remembered that the Sixth Amendment does not apply following the trial; the right to counsel on direct appeal is predicated solely on due process and equal protection guarantees. Evitts, 469 U.S. at 396.

The Court is also clear that the constitution provides nothing more beyond the first round of direct appeal. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (“Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further.”). There is no constitutional right to counsel in an appeal before a discretionary court (such as the United States Supreme Court or a state court of last resort), Ross v. Moffit, 417 U.S. 600, 618-19 (1974), or in a collateral post conviction proceeding. Finley, 481 U.S. at 555.

As due process and equal protection principles support the right to counsel on direct appeal, it is unconstitutional for the state to “arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons.” Ross, 417 U.S. at 607. When viewed from an equal protection setting, the point is straight forward for the Court. The constitution accepts income inequality so that the poor receive a basic constitutional guarantee of counsel, while recognizing that the rich likely receive better counsel purchased through their own funds. Id. at 612. The legislature certainly can remedy this situation by providing free legal aid, but there is no constitutional requirement to do so. Id. at 618-19. For example, Congress has chosen to provide counsel for prisoners facing the death penalty in federal proceedings, including federal habeas corpus cases, 18 U.S.C. § 3599; Martel v. Clair, 132 S. Ct. 1276 (2012), but this is not constitutionally required. Income inequality cannot justify denying counsel on a direct appeal, but inequality can be tolerated as the defendant moves to a discretionary appeal and then collateral proceedings.

As to due process, the Court equally finds less of a concern the further a defendant moves from the original trial. As to a discretionary appeal:

It is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the effects of the State prosecutor but rather to overturn a finding of guilt by a judge or jury below. The defendant needs an attorney on appeal not as a shield to protect him against being ‘haled into court’ by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt. This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of the proceedings without a criminal defendant’s consent, it is clear that the State need not provide any appeal at all. McKane v. Durston, 153 U.S. 684 (1894). The fact that an appeal has been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way.

Finley, 481 U.S. at 555-56 (quoting Ross, 417 U.S. at 610-611) (emphasis in original). The Court speaks in equal terms of collateral proceedings:

Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature. It is a collateral attack that normally occurs only after the defendant has failed to secured relief through direct review of his conviction. States have no obligation to provide this avenue of relief, and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well.

Finley, 481 U.S. at 556-57 (internal citations omitted).
Recent Examination of Post Conviction Counsel

Continued from page 40

As to the Sixth Amendment, the Court has historically explained that although the right to counsel provides important guarantees to the defendant at trial, it imposes costs on society because the state is required to bear the burden of ineffective assistance provided by defense counsel. Coleman v. Thompson, 501 U.S. 722, 754 (1991). But when a prisoner does not have a constitutional right to counsel, he must bear the burden of attorney error. Id. at 752-53.

Neither the state nor the prisoner is at fault for the attorney’s deficient performance, but one must bear the burden of the error and the other may receive a possible windfall. If the state bears the burden (which it must do when counsel’s failings result in violation of the Sixth Amendment right to counsel), then the state must, at a minimum, continue to defend the case when it otherwise would not be required to do so. This could mean a retrial or even possibly releasing the prisoner if the state is unable to retry the prisoner due to the degradation of its case through the passage of time. This raises a possible windfall to the prisoner because he receives a second chance at a case that would otherwise have been rejected. In contrast, when the prisoner does not have a constitutional right to counsel, then he must bear the burden of the error, including possibly facing the death chamber without the state collateral or federal habeas court hearing the merits of his arguments. The state receives a benefit because it was not put to its burden of defending the case in those proceedings due to the attorney’s error.

The law has the advantage of providing a simple dividing line. When a constitutional right to counsel applies in the proceeding where the counsel provided deficient performance, the state bears the burden of deficient counsel performance. If the right does not apply in the proceeding, the prisoner bears the burden of counsel’s error. The analysis does not change even when the defense counsel is appointed, or supported by state funds, because the performance of privately retained and publicly funded defense attorneys are governed under the same constitutional standards. Vermont v. Brillon, 129 S. Ct. 1283, 1291 (2009) (citing Coleman, 501 U.S. 722, 753 (1991); Palk County v. Dodson, 454 U.S. 312, 318 (1981)).

With this framework understood, we can turn to the first of the three recent decisions, Holland v. Florida, where the Court did not apply this constitutional standard, instead adopting a different approach. Holland was convicted of murder and sentenced to death in Florida. 130 S. Ct. at 2555. After completing his direct proceedings, the State of Florida appointed a lawyer to represent him in state post conviction and federal habeas corpus proceedings under state statute. Id.

Unfortunately for Holland, his appointed attorney allegedly turned out to be much more of a harm than a help. Holland faced a rather strict one-year statute of limitations for filing his federal habeas corpus. 28 U.S.C. § 2244(d). He was also required to first exhaust his claims in the Florida state post conviction proceedings before raising them in a federal habeas petition. See generally Rhines v. Weber, 544 U.S. 269, 275 (2005).

Holland kept in constant communication with his appointed counsel while his case was in the Florida courts. Holland, 130 S. Ct. 2556-59. Most importantly, Holland repeatedly mentioned the upcoming one-year federal statute of limitations. Id. This limitation period was tolled while his Florida proceedings were ongoing, but would continue upon the completion of the state proceedings. 28 U.S.C. § 2244(d)(2). Thus, it was very important for Holland’s lawyer to file the federal habeas petition after the Florida proceedings were completed, but prior to the expiration of the one-year federal habeas corpus limitations period. Holland’s letters to his lawyer repeatedly recognized this concern, and sought to insure that his counsel followed up on this critical point. Holland, 130 S. Ct. 2556-59.

Appointed counsel allegedly failed Holland and did not bring the federal petition within the one-year requirement. Id. The communication (and the relationship) between Holland and his attorney broke down, and Holland had to write the Florida courts directly to determine that his state post conviction proceedings had been completed. Id. But Holland learned this fact from Florida only after the federal statute of limitations had expired, meaning that he was out of luck under the federal statute of limitations period. Holland now faced the prospect of an untimely federal habeas petition despite his best efforts.

The Supreme Court held that Holland could argue that his lawyer’s failings could constitute equitable tolling, excusing his failure to bring his federal habeas corpus petition within the one-year limitations period. Holland, 130 S. Ct. at 2562. Although much of Holland focuses on interpreting the federal statute of limitations, the notable part for our purposes is the Court’s response to the argument that Holland must bear the burden of his attorney’s mistakes. Id. at 2563.

As a reminder, the general rule is that Holland bears the burden of his lawyer’s mistakes because the alleged errors occurred during proceedings (the state post conviction and federal habeas) where Holland did not have a constitutional right to counsel. Thus, Holland should be a straightforward case. There is no constitutional right to counsel, Holland bears the burden of the error, and so any equitable tolling argument should be rejected.
But the Supreme Court sidesteps the argument. The Court addresses two prior cases, Lawrence v. Florida, 549 U.S. 327, 336-37 (2007), and Coleman v. Thompson, 501 U.S. 722, 756-57 (1991), where the Court had previously explained that a prisoner bears the burden of attorney error when there is no constitutional right to counsel. Holland would seem to be controlled by Lawrence and Coleman. However, the Court distinguishes both cases on their facts without reaching the constitutional rule. 130 S. Ct. at 2563-64.

Holland provides legally appropriate grounds for distinguishing Lawrence and Coleman. But Holland can be critiqued for failing to address the broader question of how can Holland obtain relief when there is no constitutional right to counsel. Furthermore, the Court says nothing about due process or equal protection — the foundation of the old line of cases. In summary, the Court’s approach in Holland allowed it to provide Holland relief in his case without reaching the larger issue of the lack of a constitutional right to counsel. Holland was followed a year and half later by Maples, where the Court again adopted the same approach of avoiding the constitutional issue by distinguishing cases that raised the general rule that the prisoner bears the burden of attorney error when there is no constitutional right to counsel. Maples was convicted of a double murder and sentenced to death in Alabama. 132 S. Ct. at 916. He brought a postconviction petition in the Alabama state courts. Id. This petition was written by two attorneys from a prominent New York law firm. Id. These attorneys subsequently left their law firm for other employment. Id. at 920. When the state trial court denied the petition, it mailed a copy of the ruling to the New York lawyers but the law firm’s mailroom returned the envelopes with the ruling (unopened) back to the Alabama court because the attorneys no longer worked there. Id. By the time Maples had learned about the situation, his time to appeal the ruling had expired, and the Alabama courts ruled that he was liable for the error. Id. at 921.

When Maples brought his federal habeas petition, the state argued that he could not raise his claims because the failure to bring a timely appeal in the state court meant that his claims were procedurally defaulted. Id. As mention in the above discussion of Holland, a state prisoner must present his federal claims to the state courts first in order for the federal court to reach them on habeas corpus review. The failure to bring a timely appeal in the state court would be considered a default, barring the petitioner from raising the underlying constitutional claims on federal habeas review. The default of a claim on habeas corpus review can be excused in limited circumstances. But, in 1991, the Supreme Court in Coleman held that ineffective assistance of postconviction counsel would not qualify to excuse a default. 501 U.S. at 756-57. Thus, Coleman, which applied the general rule that a prisoner must bear the burden of his attorney error when there is no constitutional right to counsel, should have controlled Maples.

However, once again, the Supreme Court came out with the opposite result, holding that Maples should not bear the burden of his attorneys’ shortcomings. Despite recognizing the general rule that a client is responsible for the errors of his attorney when there is no constitutional right to counsel, the Court concluded that Maples could not be held responsible for the attorneys’ errors because they had effectively abandoned him. 132 S. Ct. at 922-23. The Court looked to agency law to support its ruling, instead of addressing the constitutional requirement. Id. at 924. Finally, in Martinez, which was issued a few months after Maples, the Court again declined to reach the constitutional issue, but instead held, consistent with Maples, that ineffective assistance of counsel postconviction counsel can excuse a procedural default on federal habeas review. 2012 U.S. 912950 at *6, *11.

There are several conclusions one can draw from Holland, Maples and Martinez. The first is that the Supreme Court is showing a hesitation in applying the general rule that a prisoner must bear the burden of counsel’s error occurring in proceedings where there is no constitutional right to counsel. All three cases should have been decided the other way under the general constitutional rule that the prisoner bears the burden of the error. The failure to impose the rule in these cases suggests the Court is concerned that the constitutional rule is unfair in practice because the prisoner has no control over the counsel’s performance (and the prisoner should not be held liable for his own mistakes when he proceeds pro se).

This concern is certainly noteworthy — why should a prisoner face a possible death sentence or life imprisonment when his proceedings are undermined by his own counsel’s failure to bring a timely petition or appeal or otherwise perform competently (or the prisoner’s own ignorance). However, the Court’s concern is unlinked from the underlying constitutional framework. This area of law was previously governed by due process and equal protection principles. In Holland, Maples, and Martinez, the Court avoids the constitutional analysis. Holland simply distinguishes the cases raising the constitutional concerns on a factual basis. Maples goes to agency law and Martinez applies the rule from Maples. In none of the three cases does the Court base its decision on what is an otherwise controlling constitutional rule that would mandate an opposite result.

Continued on page 43
Recent Examination of Post Conviction Counsel

Continued from page 42

This shortcoming is critical because the constitutional issue can be viewed as allocating who shall bear the burden of error. By not applying the rule, the Court is reallocating this burden. The concern for the prisoner was historically small to non-existent in these collateral proceedings when the Court was viewing cases in the due process / equal protection contexts.

However, with apparent uncoupling of the due process / equal protection foundation from the constitutional issue, the Court is now left only with general concerns of unfairness to the prisoner. This point is best show by the Martinez’s quotations from Gideon v. Wainwright, and Powell v. Alabama. 2012 WL 912950, at *8 (quoting 372 U.S. at 344; 287 U.S. at 68-69). Gideon and Powell are the leading cases on the great importance of counsel to guarantee the fairness of the criminal justice proceedings, but have not been extended to the non-Sixth Amendment contexts of post conviction proceedings. The due process / equal protection line of cases hold that the need for counsel to provide a fair adjudication of guilt and innocence is not present in the postconviction arena, and so Gideon and Powell technically should have been irrelevant in Martinez.

Martinez’s discussion of Gideon and Powell shows a possibility that the Court is now expanding its view of what is necessary for a fair criminal justice process — it may be moving away from its view of the trial and direct appeal as the central (and only necessary) part of the process. If the Court begins to view postconviction proceedings as a central part of the process, then prisoners bearing the burden of counsel’s and their own errors in these proceedings does begin to seem unfair.

So where does this leave the Court’s jurisprudence? The Court has not gone so far as to directly overturn its prior case law holding that there is no right to counsel on postconviction proceedings, and its corresponding rule that the prisoner must bear the burden of attorney error in those cases. Only the Supreme Court has the power to overturn prior case law even when subsequent cases undermine the validity of those decisions, so the old line of cases technically remain good law. State Oil Co. v. Khan, 522 U.S. 3, 20 (1997).

Yet, if Holland, Maples, and Martinez are any indication, the foundational support for the old constitutional rule is under attack. The Court has not mentioned due process / equal protection in these three recent cases. This is a possible indication that the prior case law is unappealing to the Court, and they are seeking to move to more traditional Sixth Amendment / Gideon notions in these types of cases.

So why, then, is the Court unwilling to go all the way and hold there is a constitutional right to counsel under the Sixth Amendment / Gideon in post conviction proceedings? This would address the Court’s apparent concerns about the unfairness of holding a prisoner accountable for the errors of counsel in these type of proceedings. One possibility is this would greatly expand the demands placed on the states for counsel. There is only a constitutional right to counsel at trial and the first round of a direct appeal. If the right to counsel is expanded, this would potentially touch discretionary review, state post conviction proceedings and habeas corpus review. That could entail more than a half a dozen new court proceedings because there are corresponding appellate proceedings for state postconviction and federal habeas review.

Furthermore, the question would be what level of retroactivity would apply to any new right to counsel. The Supreme Court has suggested that the basic right to counsel guaranteed by the Sixth Amendment / Gideon is a type of rule that should apply retroactively so that all prisoners should receive the benefit of any extension of Gideon to new proceedings, regardless of when their case was decided. Beard v. Banks, 542 U.S. 406, 417-18 (2004) (citations omitted).

This may explain why the Court is taking its present approach of distinguishing the cases that raise the general rule that there is no constitutional right to counsel on postconviction review without confronting the constitutional rule outright. To expand the constitutional rule may represent a Pandora’s box to the Court.

Continued on page 44
Recent Examination of Post Conviction Counsel

Continued from page 43

It would not only impose a significant burden going forward, but would raise the possibility that every prior conviction, no matter how old, could be reopened.

So the Court is left with this middle approach of trying to serve right to counsel ideas in cases without expanding the right. This approach works in *Holland*, *Maples*, and *Martinez* because the Court is dealing with Court made doctrines of equitable tolling and procedural default. The Court can create an exception into the established rules if it so desires without reaching the larger (and more difficult) constitutional issue.

But honeycombing exceptions onto the general rule has its own shortcomings as New York Times reporter Linda Greenhouse recognized. A week after *Maples* was decided, Ms. Greenhouse pointed out how *Bowles v. Russell*, a 2007 Court ruling, was different “in particulars — the missed deadline occurred in federal rather than state court — but was strikingly similar in atmospherics.”


*Bowles* concerned an untimely appeal from the denial of a federal habeas corpus petition. 551 U.S. 205 (2007). The Court rejected any attempt to excuse the untimely filing of a notice of appeal in the district court, explaining that the time for a notice of appeal is a jurisdictional rule, and federal courts have no power to excuse this jurisdictional defect. *Id.* at 214.

As a matter of law, *Bowles* is easily distinguishable from *Maples*, (and for that matter a second case, *Roe v. Flores-Ortega*, 528 U.S. 470 (2000)). The federal courts lack authority to excuse jurisdictional defects, and so there was nothing that could be done in *Bowles*. Something could be done in *Maples* because the Court is not cabined by a strict jurisdictional rule and can find an exception to excuse the default. *Roe v. Flores-Ortega* also provides a remedy for a prisoner when his attorney fails to file a notice of appeal from the original criminal trial. 520 U.S. 470 (2000). The attorney’s failure to file the notice of appeal can constitute ineffective assistance of counsel. *Id.* at 477. *Flores-Ortega* addressed the failure when there was a constitutional right to counsel and so the prisoner did not bear the burden of the error.

As the example shows, the Court’s choice of charting this middle course to avoid the constitutional issue has its own shortcomings. When the notice of appeal was not properly filed in *Bowles*, there was nothing that could be done for the prisoner. However, when the same error occurred in *Maples* and *Flores-Ortega*, the prisoner was able to obtain relief. *Bowles* can be legally distinguished from *Maples* and *Flores-Ortega*. *Bowles* dealt with jurisdiction, while *Maples* addressed default in habeas and *Flores-Ortega* involved ineffective assistance of counsel in a proceeding covered by the Sixth Amendment. But as the comparison of *Bowles* to *Maples* and *Flores-Ortega* demonstrates, creating exceptions to solve one problem (such as *Maples* and *Flores-Ortega*) can result in its own apparent inequity when compared to the prior treatment of another prisoner (*Bowles*). The Court certainly risks this resulting inequality by charting its middle course established in *Holland*, *Maples*, and *Martinez*. But the Court has apparently concluded that this is the best that can be done at this time because avoiding the larger constitutional issue may be of greater concern to the Court.

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"Lawtalk: The Unknown Stories Behind Familiar Legal Expressions" is an almost 400-page, richly annotated, book that is divided into 86 short chapters, each of which explores a separate, well known legal expression. The chapters are arranged alphabetically from “abuse excuse” to “the whole truth.” The book has been variously described by reviewers as: lively and entertaining, enormously erudite, elegant, deliciously detailed, authoritatively insightful, extraordinarily original, imaginative, a work of serious scholarship, fascinating, and a gem of a book. Lawtalk is all this and more.

Most of the terms in Lawtalk are familiar not only to lawyers and judges, but in the main, to non-lawyers as well. Or at least that is what you might think. In fact, the reader quickly becomes aware that they really know little about the evolution of those terms. And therein lies the rich scholarship, the real charm, and the ultimate allure of the book. Here are a few examples: in the chapter on “attorney and lawyer,” the authors take the reader on a fascinating journey from the practice of law’s inauspicious beginning in the 13th century to the present. The same is true of other chapters, which transport the reader to the birth of equity courts in England and trace their expansion as a separate court with its own body of law. Who would think a chapter on the phrase, “age of consent,” would hold any interest. Yet, the early response of society to the protection of young girls and women could scarcely be more interesting or more revealing.

Continued on page 46
England no doubt thought itself to be the most civilized of countries. And yet, it was not until the first statute of Westminster, in 1275 that Parliament made it a crime to have sexual relations with a girl under 12. All others were fair game. Later statutes, in what was no doubt thought by many to be an unnecessary paroxysm of sensitivity to the imagined plight of young women would raise the age of consent to 13 -- although not without opposition.

Lawtalk’s tracing of the evolution of the terms it discusses show that law truly does “embod[y] the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is we must know what it has been and what it tends to become.” Holmes, The Common Law, 5 (Howe ed. 1963) (Harvard University Press).

There are constant complaints about lawyers’ wordiness, which manifests itself in their penchant for saying the same thing in multiple ways in the same document – and there are those who think it not limited to the written word. Lawtalk’s chapter on the phrase “aid and abet (and the like)” tells the story in an entertaining and revealing way. Here is an excerpt:

The most direct way in which lawyers say things two or three times over is by peppering formal documents with stock phrases that are – as such a document might put it – redundant and repetitive: “Aid and abet.” “By and with.” “Cease and desist.” “Due and payable.” You can go from A to Z and back again and find different such expression for almost every letter. Here is a modern example, from a case against directors of a corporation named Midcom Communications who had signed a certain consent form, obviously drafted by the company’s lawyer. As extracted by the court, this instrument ‘authorized, empowered and directed the officers to ‘do and perform. . . all such acts,

Deeds and things, and to make, execute and deliver . . . all such other agreements . . . undertakings, documents, instruments or certificates as any such officer or officers may deem necessary or appropriate to effectuate and carry out fully the purposes and intent of the foregoing resolutions and that any action [already] taken by any of the officers of MIDCOM . . . is hereby ratified, confirmed and approved.’

Meaning: the officers of Midcom are authorized to implement the board’s resolutions.” (Lawtalk at 13)(emphasis in original).

How did things get this way? Lawtalk points to a letter from John Adams to his great adversary and (almost) lifelong nemesis, Thomas Jefferson: “I hope . . . that common sense in common language will, in time, become fashionable. But the hope must be faint as long as clerks are paid by the line and the number of syllables in a line.’” (Lawtalk at 16).

These sorts of little-known anecdotes are part of the scintillating scholarship that pervades Lawtalk and makes reading it a delight. Unfortunately, Adams’ hope continues to just that, as the following observation by a district judge (in a case not cited in Lawtalk) shows:

We do not wish to be unduly harsh with counsel in the present case, but prior similar experiences compel us to record our observation that this type of legal practice harks back to the time when lawyers were scriveners of legal documents and paid at the rate of a penny a word. This practice did not advance the development of the law but it did produce a wonderful efflorescence of English vocabulary. Lacking the gift of prophecy I cannot imagine what collateral benefit will ensue from the present proliferation of paper. One thing will result for sure, we will be much more careful in the future in asking for [additional] briefs.

The chapter dealing with the phrase, “badge of slavery,” is no less than an overview of the Civil Rights movement in the United States. The “billable hour” is a concept near and dear to those who run law firms. Surprisingly, it is a creation of recent origin. What began, the authors tell us, as a control on “inventory,” encouraged by the American Bar Association, became the “inventory” – to the dismay of all those who believe that the practice of law has become merely a business that involves the selling of time. For an incisive assessment of the problem and the contribution of at least some law schools to it, see Steven Harper, Great Expectations Meet Painful Realities (Part I), The Circuit Rider, 24 (April 2011) and Great Expectations Meet Painful Realities (Part II), The Circuit Rider, 26 (December 2011).

“Black letter law” is a phrase that had an entirely different meaning at its inception than it does today. The tale of the evolution of that phrase and of the phrases, “Chancellor’s foot,” “boilerplate” “third degree,” “thinking like a lawyer,” “Chinese wall,” “fishing expedition” (a topic on which Professor Thornburg has written an entire law review article), “kill all the lawyers,” “pound of flesh,” and “rule of thumb” – to name only a few of the chapters – are, alone, worth the price of admission.

All lawyers know about Brown v. Board of Education and the Supreme Court’s instruction to the lower courts to proceed to integrate the schools “with all deliberate speed.” But few know the extraordinary story of how, at the urging of Justice Frankfurter, that phrase came to be used in Chief Justice Warren’s opinion for a unanimous Court or the unintended effect that phrase would have integration in the South. And fewer still know that contrary to Frankfurter’s view (and apparently that of Justice Holmes), the phrase did not have its origin in early English equity practice. It is a story and a part of history that every lawyer should know.

Lawtalk is entertaining and educational in equal parts. The scholarship that is apparent in every chapter is strikingly impressive, but never ponderous. The stories are told in a witty and sparkling way that makes reading the book in one sitting almost irresistible. As Bryan A. Garner, Editor in Chief, Black's Law Dictionary, and co-author with Justice Scalia of Making Your Case: The Art of Persuading Judges, put it: “Lawtalk combines enormous erudition with loads of levity-the result being a compulsively browsable book that will leave readers wordly-wise.” But its structure and style also allow for reading a chapter or two at a time. On every level and measured by any standard, Lawtalk is a terrifically entertaining book. Or, to follow the design of the book, itself, it is a “must read.”

Upcoming Board of Governors’ Meeting

Meetings of the Board of Governors of the Seventh Circuit Bar Association are held at the East Bank Club in Chicago, with the exception of the meeting held during the Annual Conference, which will be in the location of that particular year’s conference. Upcoming meetings will be held on:

Tuesday, May 8, 2012 (at the annual conference)
Saturday, September 8, 2012

All meetings will be held at the East Bank Club, 500 North Kingsbury Street, Chicago at 10:00 AM
Summary for the Year 2011

With the exception of the United States Bankruptcy courts, the caseload statistics for rest of the United States Federal Courts have exhibited a reliable pattern of slight growth or slight decline in the last few years.

For example, in the United States Courts of Appeal, new filings remained almost exactly the same as last year, dropping only 30 cases from last year to 55,817 cases. That translates into decline of only one tenth of 1% for all circuits. The Seventh Circuit appellate filings dropped to 3005 cases, a decline of 3%. This minor decline in filings continues the trend of the last three years and reverses the traditional 3% to 5% annual gain we were accustomed to seeing in appellate filings year after year. Specifically, the number of Criminal, Civil and Bankruptcy appeals declined slightly with only Administrative appeals showing a slight rise.

The median time for merit terminations in the Seventh Circuit for all appeals and original proceedings is 9.4 months. That is slightly less than the national average of 10.8 months. When measuring the median time from the filing in the lower court to the last opinion or final order in the appeals court the national median time is 29.1 months. The Seventh Circuit median time is slightly longer at 29.6 months.

When comparing cases terminated after oral argument versus cases terminated after submission on briefs, it was clear the Seventh Circuit hears a larger percentage of oral argument than any other circuit (45%). The national average of cases that go to oral argument is 22.5%.

Similarly, the Seventh Circuit’s ratio of published to unpublished opinions shows the court publishes a higher percentage of opinions than any other circuit. The national average percentage of published opinions is 19.8 %, whereas the Court of Appeals for the Seventh Circuit’s publishes 47.3% of their opinions.

In the nation’s district courts, civil case filings dropped 1.2% to 289,968 cases. Criminal case filings also decreased by 1.2% (77,859 cases).

However, civil filings in the Seventh Circuit district courts increased 1.9% (22,254 cases) Criminal case filings were down about 8.4% (2,354 cases).

Most of the civil cases dealt with Federal Question issues and 5% of those cases were Civil Rights cases. On the criminal side, drug cases are still the largest percentage of the district court’s work. Immigration case filings are the next largest group at 28% of the total filings.

The “exception” we spoke of earlier is demonstrated again in 2012. (See the above Fig.) In 2011 the bankruptcy courts experienced a 11.5% drop in filings in all circuits. The bankruptcy courts of the Seventh Circuit saw a 12.8% drop (139, 854 cases). New case filings in all Bankruptcy chapters decreased at about the same rate nationally and in the Seventh Circuit.

The courts of the Seventh Circuit remain very busy and productive. Statistics for the first half of 2012 indicate that caseload levels will continue to remain at about the same rates as 2011.
2011-2012
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