Democracy's Dawn American Judges and the Rule of Law Abroad

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Democracy’s Dawn
American judges and the rule of law abroad

Throughout the world we are witnessing what Professor Dick Howard of the University of Virginia has called democracy’s dawn. The rhetoric of Marx and Lenin has ended up on the ash heap of history, giving way to the promise of the Bill of Rights and the rule of law. What began in central and eastern Europe has spread to the Republics of the former Soviet Union and, to an extent, elsewhere. It is as dramatic as the constitutional revolutions of 1787 in America and 1848 in Europe. But success hangs in the balance—placed in jeopardy by failing economies, ethnic strife and intolerance, and widely disillusioned people. Liberal revolutions give no assurance of liberal societies, as the French Revolution taught us.

It is appropriate to recall Martin Luther King’s timeless words:

Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality; in a single garment of destiny. What affects one directly affects all indirectly. More than ever today, our future and that of the rest of the world are firmly intertwined.

That is why the fate of the rule of law abroad concerns us all, and places a special responsibility on American judges.

Building sound legal institutions in the nations now emerging from socialism is therefore a vital necessity. Although this is each individual nation’s responsibility, it also presents the United States with a unique opportunity, as well as an obligation—not out of belief in our

By William W. Schwarzer
own moral superiority, but rather because, though we are a young nation, we have the oldest functioning written constitution. No other country can claim a continuous constitutional history as long as ours.

To share not only the theory of constitutional democracy but also its practice and real-life experience under it can make a valuable contribution to these emerging democracies. No one is better situated to make that contribution than American judges—both state and federal. And in fact, for the past four years, judges, together with lawyers and law professors, have been engaged in a variety of programs to assist the development of the rule of law abroad.

The judiciary in the former socialist/communist countries is emerging from a long, dark night. Under the old system of socialist legality, judges were servants of the state and court instruments of state policy. While these countries had constitutions that promised a wide array of civil and human rights, those rights were little more than paper rights. Their realization was entirely subject to the will and whim of the state and rarely achieved. To make civil rights a reality in those countries will require that they develop a system based on the rule of law, and here American judges can be of help.

An essential foundation for the rule of law is an independent judiciary—a fact of which the reformers in these countries are well aware. A number of American judges have participated in efforts to further judicial independence, mainly in central and eastern European countries. Those countries have long been accustomed to "telephone justice," party control over judicial actions. But even in the absence of explicit directions, judges have been beholden to the party and its doctrines; to a large extent, their careers have been a reflection of their loyalty and dependability. Objective rules of law that applied equally to all did not exist as a basis for the administration of justice.

The concept of judicial independence is not readily assimilated and established in such an environment. American judges have been participating in seminars and conferences with judges and other legal officials in these countries to help them understand how judicial independence functions in our country and what it takes to make it work. Foreign judges have clearly welcomed these discussions; many have greeted the idea of judicial independence with enthusiasm, although they are having to accept the corollary of judicial responsibility for decisions.

Problems remain, however, concerning the commitment of judges who rose under the socialist system, who have known nothing else, and who may retain an attachment to it. Among those problems are finding appropriate measures for evaluating judges and providing legal checks and balances where needed. American judges may be able to provide assistance here.

Judicial independence will require structural change. Romania, for example, has drafted a judiciary article for its constitution that seeks to accommodate the traditional institution of a career judiciary to judicial independence. It is not an easy task to reconcile provisions for supervision, promotion, evaluation and discipline of judges in a civil service bureaucracy with independence in the performance of judicial functions. American judges consulted in the drafting of this article, and similar articles in other countries.

The prospect of instituting life tenure has been of great interest in these countries. Many see it as a bulwark of judicial independence. And yet it is not easily accommodated to a career-track judiciary, in which appointment occurs at an early age. Nor does it, standing alone, assure that judges in such a system will be able to function with genuine independence. Discussions with American judges on the intricacies of life tenure and its strengths and weaknesses have helped central and eastern Europeans and others gain a better appreciation of it.

Judicial independence is inseparable from judicial competence. Maintaining programs for training new judges and providing continuing education are essential to competence. Little has been done in the past in these countries which have lacked the resources and probably the interest. Occasionally an enterprising group of judges would provide self-help, such as a group in Slovenia, which, faced with the necessity of learning how to deal with bankruptcy cases, organized its own program. Now there is great interest in judicial education in all of these countries.

The National Judicial College has taken the lead here. Groups of judges from Hungary, Poland, and other countries have attended courses at the college. American judges have also been meeting with others...
American judges can communicate what it means to be a judge in a system that values the rule of law

Soviet judges at their training institute in Moscow; the Federal Judicial Center has been providing assistance and advice to judicial delegations from countries throughout the world; and the American Bar Association, through its Central and Eastern European Law Initiative (CEELI), along with the State Department, the United States Information Agency (USIA), and Aid for International Development (AID) have effectively advanced these efforts. In the summer of 1992, the State Department, with assistance from various sources, will be conducting a three-week seminar for judges from the Commonwealth of Independent States.

In these kinds of programs, it is important to appreciate the differences in legal culture between the West and the East. European legal systems are largely code-based with few, if any, common law elements. Because decisions are based on detailed code provisions, legal reasoning tends to be didactic and categorical. But as judges begin to face constitutional questions—implicating broad issues of policy—legal reasoning will need to move beyond literalism. Judges will need to grapple with analysis of legislative purpose and public policies. Judges may be able to benefit from the study of American court decisions and their techniques of statutory and constitutional interpretation.

Another profound cultural difference concerns the role of judges. While American judges, operating under the adversary process, traditionally occupy a relatively passive role in the judicial process, civil law judges are themselves obligated to develop the record in the case, to bring forward and question witnesses, record their testimony, and direct the lawyers. American judges need to be sensitive to these differences. But it can be useful for foreign judges to learn the value of the lawyers’ role in developing the case and the contributions they can make to the administration of justice by representing their clients with courage and skill. Even within the limits of the civil law system, there is a need for a vigorous bar to make the guarantees of a bill of rights a reality. Mock trials presented by teams of American lawyers and judges have helped make this point.

One of the most important services that American judges can perform abroad is to communicate what it means to be a judge in a system that values the rule of law. Bulgarian judges and officials were deeply impressed when a federal judge described to them how he issued a subpoena directing the President of the United States to appear in his court. No explications of constitutional theory or documentary analysis could bring home the meaning of judicial independence as effectively as this story. American judges can have a significant impact by, as one Bulgarian lawyer put it, demystifying the state and communicating their sense of self-esteem and personal authority.

The socialist legal system degraded and demeaned judges. They were seen as tools of the state. For example, during the revolution in Bulgaria, judges were attacked as agents of the old regime. Judges’ pay has been unattractive and their social status low. Ironically, this has resulted in most judges being women, men having sought out better-paying positions. Encouragement from American judges is important to these judges in their efforts to raise their professional status—to form professional associations, seek adequate compensation, and improve their public image.

In the typical socialist state, the judiciary was administered by the ministry of justice. But being a part of the executive is antithetical to genuine judicial independence. American judges, who are experienced in the reality of the separation of powers, can perform a useful service in translating theory into practice and demonstrating its importance as a safeguard of judicial independence.

Translating constitutional theory into practice is needed in other contexts as well, and judges are peculiarly well qualified to do it. Constitution writers in central and eastern Europe—many of whom are avid readers of the Federalist Papers—are struggling with the concept of judicial review. While it is clear enough to them that courts are needed to provide a check on legislative and executive excesses, it is much less clear what kind of courts to establish, what power to give them, and how to enforce their judgments. For example, one area of concern has been whether the judgment of the constitutional court should be prospective only, whether the legislature should be allowed a grace period to change the law, and whether the constitutional court could override the constitutions of the republics. Much of the dialogue between American and European colleagues has concerned these kinds of questions. The extensive experience of American judges has enabled them to give useful critiques of proposals for constitutional courts and to suggest refinements or modifications.

It is critical to distinguish between providing critique, evaluation, and comment, and giving advice that might be understood as telling foreign col-
leagues what they should do or how they should do it. It is not helpful to suggest that if they would just do things as we have done, or are doing, they too could solve their problems. American judges need to be responsive to the needs and priorities as defined by the countries they have set out to assist, recognizing that those countries have their own culture and history. They can be most helpful by describing the American legal institutions and experience, as simply offering one approach among a number of alternative models others countries might want to consider. Sometimes such presentations have had dramatic effects. One American judge's lecture to a government-sponsored human rights conference in Turkey led to the government's abandoning the prosecution of anti-war activists and its long-delayed granting of a permit legalizing their organization.

Some of the emerging democracies are in transition from authoritarian central control to new structures more consistent with individual freedom and autonomy. Many see American federalism as a model safeguard against renewed oppression from the center. In the new Republic of the Czechs and the Slovaks, for example, constitution writers were looking at models for a workable allocation of power between the central government and the republics. In Pakistan, federalism is seen as potential protection against the return of an oppressive military government. The downside of federalism of course can create a hazard of fractious ethnicity. American judges, for whom federalism and the protection of minority rights are everyday realities, can be a helpful resource.

Finally American judges have been able to contribute to the drafting of substantive provisions of the constitutions of the emerging democracies. Much as we admire our own bill of rights, however, our aim must not be to try to transplant it. While in some respects it reflects universal values, we cannot assume that it will suit other societies. Take the religion clause for example: notions of what constitutes religious freedom vary widely and the establishment clause is not readily assimilable under other value systems. Even countries that we regard as bulwarks of democracy—Norway for example—have a state religion and no guarantee of religious freedom in their constitutions. But American judges can contribute their experience in conveying to others how the Bill of Rights functions. In particular, they are able to discuss the reality of rights enforcement, the legal relationship between the citizen and the state, the proper scope and the limits of judicial power, and the distinction between aspirational provisions—such as rights to a job, food and housing—and those that create real rights capable of enforcement.

American judges can also remind their colleagues of the need to distinguish between subjects proper for inclusion in a constitution and those better left for legislation. They may reflect that the importance of the events of 1787 and 1791 lies perhaps less in the words of the American Constitution and Bill of Rights than in their message—that a people can create a government that can serve them and their successors well, if not for all time, then for a long time. That is a good message for judges to take abroad, and one in which they can take pride.

College

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the Bureau of Justice Assistance.

As the College begins its thirtieth year of service, participants will find many new changes at NJC. The curriculum is being reviewed from top to bottom to ensure that each course contains material of most value to the judges. Five faculty development workshops have been conducted over the past two years so that teaching techniques and classroom skills are enhanced. NJC's continuing effort to broaden its faculty base has increased percentages of female faculty to 24 percent, and the percentage of minority faculty, including persons with disabilities, to 7 percent.

New Courses. New courses for 1993 include Environmental Law, Mediation, and Financial Statements in the Courtroom. A new basic course, Tribal Court Jurisdiction, has been added to the General Jurisdiction, Special Court Jurisdiction, and Administrative Law Fair Hearing courses which are all directed at newer judges. The spring edition of Judicial Writing will make extensive use of word processing skills with an introductory two-day basic Word Processing for Judges session for those who need an introduction or brush-up on word processing skills.

With all that is new, much remains the same. The National Judicial College has a serious educational mission. Classes start each morning at 8:00 a.m. and everyone is expected to attend all sessions of each course. Faculty members, most of them volunteers, work extremely hard to keep their course material at the cutting edge. Structured discussion groups give the participants an opportunity to exchange views with colleagues from across the country and around the world. The NJC staff continues to do everything possible to make each course the best possible educational experience.

In 1993, we also expect to kick off a major development campaign to give NJC the resources and facilities it needs to continue its leadership role in judicial education. An important ingredient of the campaign will be the Annual Assembly, a term of art we use for our annual fund drive, in which our alumni are urged to help NJC remain a strong in-

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Traffic

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being used to permit people to pay their traffic tickets. These 24-hour machines even have bilingual (Spanish) capabilities. Some jurisdictions use plea-bargaining incentives such as eliminating or reducing points for traffic school attendance or if the fine is paid within a certain period.

Already we are seeing new radar technologies and cameras that can capture license plates of speeding cars, perhaps obviating the need to have police pull over all offenders individually. What will this do to caseloads and even the basis of substantive traffic law and driver responsibility?

2. Information. With the advent of improved information communication systems, we may soon see the day when all states can share information on traffic violators—including both commercial vehicles and private cars. This technology may help us in having a complete record, for example, of DUI offenders from other courts. We, however, need to be cognizant of privacy issues and also of the accuracy of the information on these electronic records. Will automated records help control driver behavior?

3. Testing. We can expect that many jurisdictions will adopt the standardized field sobriety test, as one of the best means for detecting drunk and drugged drivers. Will we see more impaired drivers in court than the small percentage currently arrested?

4. Fine Collection. Many jurisdictions are now accepting credit cards for fine payment. Will we be able to negotiate favorable rates with the banks? Will municipalities give up a small percentage of the fine for quicker, more sure collections?

5. Public Relations. Early education for the youth of this country in driving responsibilities has been recommended in a number of state reports on the “future of the courts.” Traffic courts are for most Americans their primary introduction to this nation’s justice system—and an experience that directly affects their perceptions of our courts. We need to do what we can now to provide a positive courtroom experience.

6. Pollution. As is evident from federal regulations, air pollution from cars is a major health hazard in many areas. Should traffic courts expect to have a role in enforcement of environmental regulations?

7. Representation. Will we see growing number of pro se defendants and claimants, as legal services become more and more expensive? Should we provide materials so that pro se litigants can more effectively represent themselves? Can we find ways to work with the bar to provide pro bono representation?

8. ADR and Jail Overcrowding. In sentencing drunk drivers, for example, traffic court judges face the problem of jail overcrowding. Our sentence may ultimately be determined by space availability in the county jail. We need to be part of the dialogue about who goes to jail and who doesn’t. Judges are considering sentencing alternatives such as day fines, house arrest, monitoring bracelets, community service, and other measures that are punitive, but can we vouch for the effectiveness of these measures?

Lawyers

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showcase program on “Courts of the United States Compared to Courts of Other Countries: Is Our Justice System Making Us Less Competitive?” for the Annual Meeting of the American Bar Association. The new officers of the Conference are me, John Graecen as chair-elect, Bill Session as vice chair, Tony Cotter as your new secretary, and new board members Mary McQueen, Marla Greenstein, and Ira Raab. We are all committed to this direction for the Conference and hope that it will provide interesting, valuable, and attractive work for the members of the Conference in the years to come.

I told you earlier that this was not a new direction for the Conference. Indeed, in our meetings in May in Denver we were reminded by Ted Kolb that all of what we believed to be new directions and a different emphasis for the Lawyers Conference were those that had originally been contemplated for the Conference at the time of its formation in 1976. As I said at the beginning of this piece, the Lawyers Conference now finds itself back where it was in the beginning—focusing on the future of the courts and the practice of law in those courts.
9. Demographic. "Give us your tired and your poor" has been a slogan of this country's immigration heritage. Particularly in traffic court, judges are seeing more and more people who do not speak English. While some courts have Spanish language assistance, most do not, and hardly a court in the country has the capacity to deal with Hmong and the many other languages that we are hearing recently. Should courts subscribe to a language service? Can we trust a person's friend/translator to help? Where must we insist on accurate translation? These are but some of the questions that we must consider in dispensing justice.

Another demographic issue is the greying of America. For example, as people get older, reaction time slows. Will judges need to find ways to watch for deteriorating driving abilities? How will this be tested? Will judges or licensing agencies have to restrict or take away some seniors' drivers licenses?

These are but a few of the issues that traffic courts will have to deal with in the future. For many of us, the future is here.

State
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Lastly, much work remains to be done in the area of improving judicial performance. The state of Illinois has a program that is concerned not with discipline but with judicial performance and ways to assist all judges in improving their abilities in a positive fashion. It is hoped that the success and shortcomings of the Illinois program—and other programs—can be analyzed and the lessons from these can be applied to other jurisdictions seeking to improve judicial performance.

These are but a few of the goals of the Conference and a few examples of what we are doing to make our work meaningful to judges in all states. How successful we are ultimately depends upon member participation, which is why the Conference is evaluating its committee structure. Our Conference looks forward to working in a cooperative fashion with the other JAD conferences and ABA entities in making the ABA goal of promoting improvements in the American system of justice a reality. We also look forward to making ABA President J. Michael McWilliams's theme for this year, "Justice for All and All for Justice," more than just words.

Appellate
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important for state and federal judges to join together in an effort to articulate to the public, and to the legislative and executive branches of government, the importance of adequate support to ensure a fair, efficient, and thoughtfully independent judiciary.

The Appellate Judges Conference historically has been one of the few organizations where judges from all of the appellate courts across the nation could come together to address issues of mutual interest and concern. The current budget crises facing nearly every governmental entity in the country threaten some of the most basic principles and operating modes of our court systems. We bear a heavy responsibility to work together to build broader awareness of the centrality of such issues as providing adequate criminal defense counsel, sufficient jury support, court facilities that are safe and reasonably efficient, judges and staffs that are adequately and continually educated, etc. The list goes on and on.

The justice system is in many ways the most invisible branch of government. As a result, its needs are little known and even less discussed in public dialogues about spending. In appropriate ways, we judges must serve as the spokespersons for preserving and nurturing the court system that has been the bulwark and protector of the freedoms and the republic that has served us so well. Serious though they are, the transitory vagaries of public taxing and spending decisions simply cannot be allowed to undermine the very ability of the court system to serve the litigants and the nation. The Appellate Judges Conference will be working this year with other entities to provide informed baselines for, and descriptors of, the basic needs of a fair and functioning appellate court system. Much data is available. The task is to place the importance of maintaining the basic needs of the courts in a more prominent position in public dialogue.

Finally—a note of thanks to Professor Dan Meador and the faculty of the University of Virginia School of Law who have agreed to continue the highly respected L.L.M. program for appellate judges at the University of Virginia. The judges who have degrees from that program uniformly praise its intellectual rigor, profound effect on their thinking and work, and the benefit they derived as individuals. Recruitment has begun for the class to enter in the summer of 1993. Funding is available for most of those appellate judges interested in participating. Please consider attending the program if you have not done so and encourage others to apply. The first step for each of us in improving the court system is the improvements we can make in our own work. I am honored and humbled by the opportunity to work with you this year.
Hunt
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the parties did not agree to a “good cause” termination requirement. The good faith and fair dealing covenant does not become an implied-in-law basis for imposing one.

Advocates for expanding the employee’s common-law right to be terminated only for “good cause” seek to have the implied covenant give rise to a tort as well as a contract cause of action. These contentions are often presented to the judge as either pretrial motions to dismiss counts of the complaint or as requests to instruct the jury that it may award tort damages. If the implied covenant arises in tort law, the employee’s recovery would then include the full panoply of tort damages. A few states have expressly refused to recognize an alleged breach of the implied covenant as a tort cause of action. However, courts in Nevada and Montana have held that breach of the implied covenant of good faith and fair dealing does give rise to a tort cause of action and recovery of tort damages. Nevada has limited its decision to a narrow set of facts. The Montana legislature subsequently overturned the court’s ruling by enacting this country’s first general employment termination statute, which recognizes a wrongful termination cause of action but only in contract law.

UNIFORM MODEL ACT: PROPOSED LEGISLATIVE CHANGES

Beginning in 1988, a committee of the National Conference of Commissioners on Uniform State Laws began drafting model legislation to codify common law of employment termination. The lack of uniform development in either contract or tort common law of employment termination is reflected by the commissioners’ lack of consensus on a proposed uniform law. Instead, the commissioners approved and recommended a model employment termination act at its August 1991 annual conference. The Employment Termination Act (ETA) would expressly replace all common-law causes of action for wrongful termination. Briefly, the provisions of the act are as follows.

The ETA requires “good cause” to fire a nonpublic, nonunion employee who has worked for the same employer for more than one year. Exceptions are workers in shops of less than five employees who are part-time or probationary; who agree to a specified employment duration; or who waive the good cause requirement in exchange for severance pay at termination.

“Good cause” is defined from two perspectives. (1) It is having a reasonable basis for terminating a specific employee considering relevant factors such as his or her duties, responsibilities, on- and off-the-job conduct, and employment record. (2) It is also the exercise of “good faith” business judgment by the employer arising from setting economic and institutional goals; organizing, discontinuing, or consolidating its operations/positions; changing its work force size or nature; or changing the standards of employee performance.

The ETA also imposes the duty of “good faith” upon the parties in the formation, performance, and enforcement of their employment agreement. Good faith is defined as “honest in fact.”

Under the ETA, the preferred enforcement is arbitration. All statutory or regulatory forms of discovery are available at the discretion of the arbitrator. All parties may be represented by counsel. Either the employee or the employer may file a complaint. The complainant has the burden to prove the claim by a preponderance of the evidence. If the employee proves that the termination was based, in whole or in part, on impermissible grounds, the employer may prove that it would have terminated the employee anyway.

Two alternative enforcement means are provided. Alternative A provides for a commission. Alternative B provides for court enforcement. However, the same provisions apply to the commission and to the court as apply to the arbitrator. Obviously, in states that adopt the ETA, the enforcement choice selected by the legislature will have a substantial financial impact on the courts.

The remedies (“awards”) for wrongful termination are full or partial back pay; reinstatement to former or a comparable position; lump sum severance pay in lieu of reinstatement; and/or reasonable costs and attorney fees. The ETA expressly prohibits damages for pain and suffering, emotional distress, defamation, fraud, or any other common-law injury. It also prohibits recovery of punitive and compensatory damages or any other “monetary” award. Judicial modification of an award is permitted only upon a finding of arbitrator misconduct.

CHANGES: CONGRESS OVERTURNS THE SUPREME COURT

Whether the model ETA will be widely adopted by state legislatures is unknown. To the extent that it or similar statutory schemes are adopted, they will join the other two most influential bodies of law to effect job security for the greatest number of workers in the United States: the National Labor Relations Act of 1935 (NLRA) and Title VII of the Civil Rights Act of 1964. Under NLRA, collective bargaining agreements are enforced by the National Labor Relations Board, thereby removing the courts as the primary enforcer of congressional efforts to regulate employment termination on an industrywide basis. The courts, however, are the primary enforcers of Title VII of the 1964 Civil Rights Act.

In October 1991, Congress passed the Civil Rights Act of 1991. This legislation specifically overturns five 1989 United States Supreme Court employment law decisions. (See sidebar chart.) These changes affect not only pretrial practice, admissi-
bility of evidence, and jury instructions, but also the burden of proof at trial.

In its 1989 employment law decision, Wards Cove Packing Co. v. Atonio, the Court held that racial imbalance in one segment of an employer's workforce is not sufficient to establish a prima facie case of disparate impact on the selection of workers for other positions. Employees must show disparity between the number of minorities in the workforce and the number hired by the employer for that specific job. Employees must establish the disparate impact of each selection procedure that is challenged and may not rely on the cumulative effect of multiple procedures.

Under Wards Cove, the employer may avoid liability if it produces evidence that its discriminatory decision was based on a "not insubstantial" business reason. However, the burden of persuasion on this defense is on the employee. The burden is also on the employee to establish that less discriminatory alternatives would equally serve the employer's interest.

Prior to Wards Cove, the Court's 1971 decision in Griggs v. Duke Power Co. had established that facially neutral employer practices that have a disparate impact on minorities or women violate Title VII, regardless of the intent of the employer unless the employer proves "business necessity." If the employer provides such proof, then the employee has the burden to establish that the employer had an available alternative, which both had a less adverse impact and equally could have served the employer's interest. After Griggs, but before Wards Cove, employers were required to justify practices that had a discriminatory impact by proving that such practices were a "business necessity." To meet that burden, they had to prove that such practices were significantly tied to the requirements for performing the job under scrutiny.

Congress has changed the law back to what it was after Griggs, and before Wards Cove. Section 105 of the 1991 Civil Rights Act overturned Wards Cove and codified the proof burdens set forth in Griggs. Likewise, it reestablished that—to avoid liability for disparate-impact business practices—the employer must prove a close connection between the challenged practice and the requirements for performing the job in question.

Congress also overturned the Court's second 1989 employment decision, Price Waterhouse. In that case, the Court held that in a "mixed motive" case, even if an employee establishes that a prohibited discriminatory factor was sufficiently involved in an employment decision, the employer will not be liable under Title VII if it proves that it would have made the same job decision even in the absence of the illegal discrimination.

Congress changed that ruling in a 1991 amendment to Title VII. Section 703 provides that it is unlawful to rely on any prohibited factor in making a job decision even if there are other factors that justify the decision.

The third Supreme Court decision overturned by the 1991 Civil Rights Act is Martin v. Wilks. The Court in Martin held that under Federal Rules of Civil Procedure (FRCP) Rules 19 and 24, persons not joined or who did not intervene in a suit alleging discriminatory employment practices were not precluded from collaterally attacking consent decrees or judgments entered in the case. Congress overturned that decision by adding a new section to Title VII which prohibits collateral attacks by two groups. Subsequent attack is barred against persons who had notice of the original action and had an opportunity to participate. It is also barred against persons who raise a challenge that had already been adequately raised.

In its fourth significant 1989 employment decision, Lorance, the Court held that the 300-day limitations period allowed by section 706(e) of Title VII begins to run at the time the employer adopts a seniority system. Challenges to a facially neutral seniority system are barred if not filed within the Equal Employment Opportunity Commission within that time. Congress amended section 706(c) to permit challenges to seniority systems until the latest of three events. The limitation period runs when the system is adopted; when an individual becomes subject to it; or when an aggrieved person is injured by the application of the seniority system.

Finally, the Court in Patterson v. McLean Credit Union held that 42 U.S.C. 1981 does not apply to conduct which occurs after the formation of an employment contract unless it implies discrimination in the making of it. On-the-job racial harassment, failure to promote, or discriminatory termination is actionable under Title VII, not section 1981. The effect was to reduce employers' risk of adverse jury findings and punitive damages.

Congress amended section 101 to prohibit intentional discrimination in the making or the performance of a contract regardless of its subject matter. Section 102 (damages) broadens the award of damages to all persons within all categories of Title VII and the Americans with Disabilities Act. Codified as 42 U.S.C. 1981A, this section permits employees to proceed under both section 1981 (racial/national origin) and section 1981A (all other prohibited discriminatory conduct). Punitive damages are available subject to the section 1981 restriction against recovery of punitive damages from government entities.

With passage of the 1991 Civil Rights Act, Congress expanded the statutory law governing employment termination for the covered, identified groups. If the recommended model employment termination act is codified by state legislatures, those legislative bodies will change the statutory law governing employment termination. The courts' reexamination of the 19th century "at-will" rule has changed the common law of contracts. The incor-
poration of public policy duties into employment termination law has changed the common law of torts. As a result, every complaint alleging wrongful employment termination triggers new and different issues and decisions. Fewer complaints are subject to pretrial dismissal. A wide range of written and oral evidence is now admissible because it is relevant and material. The burden of proof is shifted and moves during trial. Finally, different instructions to the jury are required both on the issues of liability and on the issues of damages. An area of law unchanged for decades is on the move, and the only constants are the changes themselves.


Albrecht
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Television, radio stations, subject to state law limitations. Such practices encourage open communications with the press and may establish working relationships with the mass media that will be of value to judges and probation departments.

Another method of managing media interest in a case is to prepare complete explanations of the rationale for sentencing offenders. These could be written and provided to the press upon completion of the sentencing hearing. These communications could include a short statement that could be used as an accurate "sound bite."

These ideas illustrate some of the changing court practices that are not directly related to sentencing or probation but may be helpful in managing sentencing problems. New solutions to the challenges facing today's sentencing judges are needed.

J udges and courts also interact with community groups, on occasion. For example, a judge may decide that a victim/offender reconciliation program, proposed by a victim's rights group, might be a good idea. The judge may want the probation department to establish such a program, but doing so would take personnel and other resources away from other probation department programs. One way to handle this is to have the judge apply management strategies, for example, involving the probation department in the decision and seeking a joint agreement on such a project—rather than merely ordering the probation department to establish one.

Because the courts interact with so many agencies within the criminal justice system, it is essential for judges and court personnel to develop effective communications and management skills.

SENTENCING OPTIONS

Course participants reviewed the various sentencing options available to judges and probation officers—and analyzed them. This included the full range of penalties, conditions, and services. The penalties described were prison, "boot camp," jail, fines (including day fines), costs, and restitution. The services involved chemical dependency services, probation, intensive probation, specialized caseloads, and educational programs. The conditions comprised house arrest with or without electronic monitoring, day reporting centers, payment of child support, community service, and attendance at victims' panels or victim/offender reconciliation programs. The above list is not meant to be exhaustive. A more complete description of probation conditions and the validity of those conditions is provided by Andy Klein in an article, "Make Probation Work," published in the Winter 1990 Judges Journal. A comprehensive review of alternatives to prison and jail is also provided in Klein's book Alternative Sentencing. There were two reasons for this review of sentencing options. First, the participants were given the opportunity to compare their jurisdiction to other jurisdictions—and to consider what new options to adopt. Second, the participants could examine whether certain options, either alone or in combination with others, would fit a particular offender.

Consider an offender who is an alcoholic. A residential chemical dependency program for 28 days along with probation could suffice as sufficient punishment, including isolating the offender, and could also address the offender's alcoholism at the same time. Another "double-duty" sentence might include, in addition to restitution, the requirement that an offender attend a victim's panel or victim/offender reconciliation program. Both of these options might provide a degree of satisfaction to the victim—as well as an education for the offender. One such program, a "Victim Offender Reconciliation Program" (VORP), is being run in Elkhart, Indiana, by the Center for Community Justice.

Some creative sentencing alternatives appear to provide the public with a personalized involvement that others do not. An example of this type of program is the Community Service Harvest Garden Program.
administered by Judge John N. Fields, in Berrien County, Niles, Michigan. In that community, non-violent offenders may be sentenced to work for a set number of hours in a vegetable garden. The produce is donated to charitable organizations. The project reduces the number of offenders who are jailed. Further, organizations, individuals, and businesses donate tools and supplies giving them a stake in the success of the project. Finally, although this is community service, it may also satisfy a community’s concept of punishment, because the work is menial and unpaid. This project with its high visibility presents a positive public image of the courts.

The course also compared the advantages and disadvantages of community service. The advantages of community alternatives were described as relieving prison overcrowding, costing less than incarceration, having a greater impact, punishing in some circumstances, and being more successful than traditional probation. The disadvantages included costing too much, not working, not punishing, difficulty in monitoring, and placing the public at risk.

These advantages and disadvantages initially seem contradictory. For example, community alternatives are less expensive than jail but still expensive and extra work for the entity running them. Also, some programs are seen as having a great benefit to offenders, while the community impact is not as apparent.

Consider some potential problems that starting a literacy program might bring. Such a program is less expensive than jail but would be a new expense for a probation department. Further, the quality of a literacy program would have to be examined and monitored. If the program was successful in teaching people to read, it would have a great impact on offenders and it would benefit the community by giving otherwise unskilled people new skills and a new sense of self-confidence—but this benefit is less visible and less easy to document. Of course, if the program is of low quality and only a few people are learning to read, then it would be just another frustrating experience for the offenders. All community alternatives should be closely examined, their goals reassessed periodically, and the quality of the service monitored. Judges and probation officers need to examine such programs closely.

**MANAGEMENT TRAINING**

A significant amount of time in the course was devoted to management strategies. These include improving and enhancing communications between the judge and probation staff, building a team-like sense of purpose between the judge and probation officer, and developing joint action planning. Consensus is goal. Even if courts have the final say, the judges learned that often using that authority resulted in poor decisions. This was because they did not have all information needed to make a decision without consultations with others. Further, decisions may be undermined if those responsible for fulfilling them do not understand them. During this segment of the course, the judge and probation officer teams worked closely together.

Judges were taught that improved relationships or teamwork may result in increased positive results. Further, the reality is that judges do not work alone. The courts are part of the criminal justice system. The system contains many agencies and people. If judges improve their working relationships with those people and create a team-building atmosphere, productivity on all fronts will increase.

After articulating a specific problem that they wanted to resolve, the judge-probation officer teams would design a method to help resolve the problem in question. Focusing on their objective, the teams wrote out all of the facilitating forces, hindering forces, necessary actions, and needed resources. Time lines were established for the necessary actions. Strategies were discussed for dealing with the hindering forces.

<table>
<thead>
<tr>
<th>TABLE 1</th>
<th>Subject of Plans</th>
<th>Selecting Subject</th>
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<tbody>
<tr>
<td>1.</td>
<td>Management of probation and other justice services (e.g., unify adult and juvenile probation services.)</td>
<td>7</td>
</tr>
<tr>
<td>2.</td>
<td>Improve communications between judges and probation staff (e.g., set up regular meetings.)</td>
<td>7</td>
</tr>
<tr>
<td>3.</td>
<td>Change in presentence investigation practices (e.g., include risk management information in the presentence).</td>
<td>8</td>
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<tr>
<td>4.</td>
<td>Establish types of probation services or probation services themselves (e.g., literacy evaluation and services).</td>
<td>4</td>
</tr>
<tr>
<td>5.</td>
<td>Training for either judges or probation officers (e.g., training judges about probation services).</td>
<td>3</td>
</tr>
<tr>
<td>6.</td>
<td>Inconsistent sentencing and follow-through</td>
<td>1</td>
</tr>
</tbody>
</table>
The objective selected could be one of the sentencing options described during the course that was not currently available in the jurisdiction. Or, it could be a policy or practice (e.g., better media relations) that would assist the judge in managing some of the sentencing controversies. Another objective on many lists was developing better communications between judges and probation departments.

All of this was analyzed in class, and written out in a one-page action plan that each team took home.

**ACTION PLANS**

The teams were free to select any problem and develop an action plan. The factors that they used to decide what problem problem to tackle included: the importance of the problem, likelihood of success, individual potential for direct influence, and the time and cost. After weighing all of these factors, each team selected one problem to focus on.

The top categories, management of probation agencies and improving communications, illustrate the changing roles of judges in the criminal justice system. Twenty-five percent of the plans were devoted to changing the internal management of the agencies within the criminal justice system. Previously, many judges would have thought this outside their area of concern. These teams recognized that they need to be concerned with the entire operation of the system.

In addition, twenty-five percent of the plans called for improving communications between the court judges and probation office. For many participants, one of the easiest, and yet most important improvements that they could bring to the criminal justice system was to establish regular meetings between judges and probation officers to enhance confidence in each other and to serve as a forum for ideas.

Some judges were concerned about the need for specific probation services. They planned to work with the probation departments to obtain additional resources in order to add new services or programs.

Although the plans described a range of goals and concerns expressed by the judge and probation officer teams, most of them focused on internal management of probation services and the probation department’s interaction with the court. The judges view themselves as prepared to listen to the suggestions of the probation departments in improving probation services and programs. And the probation officers seem eager to work with judges to develop solutions to common problems.

**FOLLOW-UP SURVEY**

The project included a follow-up survey on the actual changes that occurred since the judge and probation officer teams returned home. This follow-up survey was done approximately one month after the courses were completed. A separate survey was mailed to the judge and probation officer of each team. They were asked if they correctly identified all of the facilitating forces, hindering forces, necessary actions, and were asked to describe the changes in practices, policies, or procedures which had been accomplished since returning from the course.

Thirty-one participants from 23 states responded to the survey. Of those that answered, 94 percent said that they correctly identified the facilitating forces, 81 percent responded that they had accurately identified the hindering forces, 87 percent answered that they had correctly identified all the necessary actions, and 94 percent said that they had accurately identified all the needed resources. From these high percentages, one could conclude that the training was very helpful in planning to accomplish change.

However, of the 23 states responding, only three said that they had accomplished their goal. Nine said that they were still in the process of fulfilling their objectives. A total of 11 made no mention of the status of the goal or their action plan.

These statistics seem to indicate that the participants believed that the training was worthwhile in teaching how to plan. However, it is unknown how much actual change was accomplished. Further an in-depth study of the participating courts is necessary before any conclusion can be reached.

* * *

Today’s judges and probation officers are faced with changing concepts in sentencing and probation. The “Traditional Model” of sentencing is no longer adequate. Limited financial resources, increased victim awareness, and increased media coverage are all contributing to the challenges that courts must face. New sentencing alternatives are providing new problems as well as new opportunities.

The course taught the judges and probation officers to work together. One measure of this is the plans that were developed. Fifty percent of the plans included the goal of improving communications and improving internal management of probation and other criminal justice agencies. This would seem to indicate that the participants believed that their relationships with other agencies were very important. They believe that their effectiveness is intertwined with that of other public agencies and entities.

One judge said that the course would result in "more utilization of [the] team approach to solve departmental problems." Another participant said, "Overall [the] course was excellent... most of our problems would ultimately be solved if we just took the time to communicate between courts and probation." One probation officer called the session "outstanding." Another probation officer concluded by saying: "We now have a one-on-one relationship that we have never had before."
This curriculum teaches the advantages of teamwork between judges and probation officers. But the principles apply to relationships that judges also have with others. The courts can benefit from better relationships with law enforcement agencies, prosecuting and defense attorney offices, bar associations, parole agencies, and legislatures. The judge's job will be easier if these team-building principles are applied to all working relationships.

Courts do not exist in a vacuum. The steps that they take to meet these new challenges will affect other agencies and entities within the justice system. Management training for judges and others is needed to increase court effectiveness.


Special
(Continued from page 30)

I also want to thank Thomas Clark Dawson and Albert E. Derobbio for cochaired the Court Facilities, Security, Space, and Access Committee; Fred Grimm, chair of Criminal Justice and Sentencing; Louraine Crawford Arkfeld, chair of the Domestic Violence Committee; Louis Condon and F. A. Goss, cochair of the Education Committee; Ira Sandron and Phil Montante, cochair of the Immigration Law Judges Committee; Bill Shelton, chair of the Judicial Administration Committee; Allen Gless, chair of the Judicial Ethics Committee; Fred Rodgers, chair of the Judicial Immunity Committee; Jan Gradwohl, chair of the Jury Management Committee; Sal Mule and John Steketee, cochair of the Juvenile Law and Family Courts Committee.

My last paragraph of thanks goes to Cloyd Clark, chair of the Literacy and the Courts Committee and cochair of the Rural Courts Committee; Aubrey Ford, cochair of the Rural Courts Committee; Tom Sims, chair of the Local Ordinance Reform Project; Sandra Thompson, chair of the Metropolitan Courts Committee; James Heupel, chair of the Military Courts Committee; Ben Aranda and Ben Logan, cochair of the Minorities in the Legal Profession Committee; Roger LaRose and Bill McMahon, cochair of the Modern Technology in the Courts Committee; Charles Cloud and Arvo Mikkanen, cochair, the Native American Tribal Courts Committee; Robin Smith, newsletter editor; Michael Higgins, parliamentarian; Hunter Patrick, chair of the Part-time Judicial Officers Committee; Floyd Propst, chair of the Probate and Surrogate's Courts Committee; Arthur Kellman, chair of the Small Claims Courts Committee; Andrew Hearst and Jim Rodgers, cochair of the Traffic Courts Committee; Karl Grube, chair of the Uniform Laws Committee; Frank Larkin, Conference representative and chair of The Judges' Journal editorial board; and Bernice Donald, for serving as chair-elect and chair of the United States Bankruptcy Courts Committee.

You will soon be receiving a newsletter from the National Conference of Special Court Judges. The newsletter will be a form which will indicate your interest in committee work. Committees are the lifeblood of this Conference. As a judge I have too little time to devote to the Conference. But if everyone pitches in we will continue to have a dynamic Conference. I assure you that the more active you become in the Conference, the more you will get back from the Conference.

Finally, if you see the movie A League of Their Own, keep your eye out for the doctor. The doctor is played by Wintland Sandel, Jr., the staff director of the Judicial Administration Division. He did not get the same billing as Madonna or Rosie O'Donnell, but he is forever memorialized on the silver screen.

Administrative
(Continued from page 31)

Such a measure would not prevent any agency from influencing and directing its chief judge, who still would be an administrative officer of the agency. Neither would it prevent an agency from requiring that the chief judge disclose his evaluation of the agency's judges. The chief judge is appointed by the head of the agency. This is a political appointment. While OPM has a say as to whether an agency will have a chief judge, OPM plays no part in the appointment of any judge to that position. The role contemplated for chief judges by the recommendations, together with the changes in the selection process discussed above, would risk politicizing the present system, and risk the destruction of the APA's most important protections for decisional independence.

Under the recommendations, judges would be evaluated for adherence to agency policies, either made known through procedures currently required by the APA or "other appropriate practices." ACUS's research director said agency policy could include speeches by agency officials as well as press releases. This would turn administrative law judges into judges of both the law and some ill-defined policy area beyond the law. This mischievous idea would create both a legal quagmire and an evaluation nightmare. It would bring the entire
Court News

(Continued from page 3)

of Hispanic, African-American, and Asian ancestry, and those representing other ethnic groups.

Judge Constance Baker Motley, the keynote lunch speaker, was described by Justice Allen E. Broussard of California as “a beacon of light on whose shoulders many of us stand.”

Judge Motley was the first black woman to become chief judge of a U.S. district court; she served as chief judge of the U.S. District Court for the Southern District of New York from 1982 to 1986. She is now a senior judge.

In her talk, Motley described discriminatory experiences, starting in 1945 when she graduated from Columbia University Law School and passed the bar in New York. She described not even being considered for jobs in white law firms, encountering Jim Crow discrimination relating to access to public facilities, and the reaction of shocked bar association personnel upon discovering that she was a member and entitled to use the bar library. Motley commented on “the double handicap of being black and a woman.”

After passing the bar, her first job was working with Thurgood Marshall, then head of the NAACP Legal Defense Fund in New York. She praised Marshall for his “unique personal contribution to the advancement of women in the law at a time when no one was hiring women.” She worked at the Legal Defense Fund from 1945 to 1963, and was lead counsel in many historic civil rights cases during that period. She was appointed to the federal bench by President Johnson in 1966.

As a federal judge, she initially found herself excluded from court committee assignments and found herself introduced by her first name when her male colleagues were introduced by their titles. On one occasion, when all her white male colleagues were introduced with full titles and curriculum vitae, she was introduced in terms of her social activities. Motley commented that Marshall taught her “how to laugh off some of the ludicrous, anti-feminist attitudes” that confronted her.

Motley, in commenting on the situation today, said that the “paucity of racial and ethnic minority judges on all levels is a direct reflection of historic reality”—namely, racism—and warned that “in the next century we could move backward.”

In her address, Motley enumerated a list of “remedies for sorry times.” She noted that discrimination is still a major factor, which arises largely from “vote dilution schemes.” She commented that after various circuit courts split over whether Section 2 of the Civil Rights Act applied to judges, the U.S. Supreme Court ruled that it did. This “is a remedy now, and should be helpful in resolving the situation.” Motley also said that with an increase in minority voting, there should be an increase in the number of minorities elected or appointed.

At a round-table discussion later with the 30 honorees, moderator Justice Dennis W. Archer, a practicing attorney formerly on the Michigan Supreme Court, posed questions to the panel involving three areas: obstacles and discrimination that had been encountered, pathways that minorities had taken to ascend to the bench, and obstacles faced once they were on the bench.

In commenting on the difficulty of the white majority understanding what it would be like to be black, Archer said that it was “difficult for me to appreciate what it might be like to be part of the majority.”
Justice Joyce Kennard of the California Supreme Court commented on the poverty that a number of minority justices faced. Where she grew up in Indonesia, she said, there was no bath. Justice Annice Wagner of the District of Columbia Court of Appeals noted "the problem of getting labeled and categorized," with the result that a person's actions are seen as representative not of an individual but as representative of a group.

A number of other justices mentioned that race was an issue in their judicial campaigns. Three minority justices noted that their white opponents ran photographs of both candidates in their literature, which was distributed in white areas. Under one white opponent's picture was the slogan, "Looks like a judge."

Another difficult area for minorities seeking to be justices is finding the money to run in judicial elections. A number of participants told this reporter that they found it very difficult to jeopardize, or to give up, a small law practice to run for a judgeship. Judge Bernice Donald, of the U.S. Bankruptcy Court in Memphis, Tennessee, and the current chair of the JAD's Task Force for Opportunities in the Judicial Administration Division, said that she financed her election to the Tennessee bench with a loan on her car. Judge Donald is the first black female in the history of the United States to be appointed to the federal bankruptcy court.

Justice Donald mentioned that there is an initial reluctance on the part of many white voters to vote for a minority candidate. In responding to this issue, Judge Wagner said: "I think that people want to change, but they think they are not biased." Donald said that it was tough to overcome "voting for someone different" in general elections and that it is even harder to do this with merit selection committees that are controlled by an "old boy" network. "You have to prove yourself over and over again," she said, adding that there is extra pressure when one is trailblazing.

Justice Rosemary Barkett, of Florida, noted that she and a black Florida Supreme Court justice, Justice Shaw, were the only members of that court who had to face contested elections. She said that people challenged people who were different. She noted that the groups attacking her and Justice Shaw were attacking them for rulings in cases that the supreme court had decided unanimously.

Throughout the discussion, the judges mentioned the importance of having both models and mentors in their pioneering efforts. Justice Robert Klein of the Hawaii Supreme Court stated that Hawaii's courts are made up of ethnic minorities because the chief justice knocked down barriers.

Mississippi Supreme Court Justice Fred L. Banks, Jr., from Mississippi, a former civil rights lawyer with the NAACP, said that his election was influenced by a state that will soon see minorities representing over half the population. Banks said that his appointment has caused people to look at Mississippi in a different light and has enhanced the image of that state's justice system.

As to the problem of isolation on the bench that is magnified by "being the only one," Justice Morris L. Overstreet of the Texas Court of Criminal Appeals commented that "you can't separate yourself from society. Judges have to build a support group to help them express their feelings."

A number of judges spoke of the importance of staying in touch with the community and serving as role models, particularly for children. They noted that judges can do this in a variety of ways; examples mentioned included occasionally holding a naturalization ceremony in schools to participating in bar and community activities. One judge commented on his extrajudicial role as a baseball umpire, saying that he had to get used to being booed when he rendered decisions on the playing field, but here too he was as fair and independent as he could be.

Justice Robert D. Glass of the Supreme Court of Connecticut stated while this group of justices was certainly successful, "a lot of good people go before you who weren't picked." Justice Charles Z. Smith of the Washington Supreme Court said that most of the minority justices are "tokens," historical accidents, and that the state of Washington ought to be embarrassed that it waited so long to have a minority justice on the bench.

Another common theme among the judges was their concern over judicial independence and its erosion.

One of the points often raised at this conference was the importance of a diversified bench to achieve equal justice under the law. Judge Wagner noted the influence of minorities and women on the formation of judicial task forces studying discrimination against minorities and women in the courts.

Justice Benham of the Georgia Supreme Court spoke about that court's 150-year history when it had no minority justices on it, and only now in 1992, with two black justices on the supreme court, had any judge been disciplined for racist conduct on the bench in that state.

Justice Archer, in conclusion, said the honorees were "highly qualified," "doing a superb job," and "not always given the thanks you deserve."

In Memoriam

A former chair of the Judicial Administration Division, from 1984-85, U.S. District Court Judge James E. Noland, died this past August. Professor William F. Harvey of the Indiana University School of Law in Indianapolis described Noland as a "great judge . . . one of the finest in our time." Noland served as chief judge of the U.S. District Court for the Southern District of Indiana and served on the U.S. Foreign Intelligence Surveillance Court. In one of Noland's last cases he ruled that four Cypriot mosaics, which had been taken from a church in Cyprus, should be returned.