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DIVERSITY JURISDICTION: THE CINDERELLA OF THE FEDERAL COURTS

Robert G. Begam* and John P. Frank**

When the founding fathers drafted the Constitution, they provided that the federal courts might have jurisdiction, if Congress should so provide, in cases "between citizens of different states." The Judiciary Act of 1789 picked up this option; Congress gave the federal courts jurisdiction in diversity cases. This then newborn concept has been received by the courts with less than unbounded enthusiasm over the years. It has been treated by many as a burden—an unwanted orphan. Diversity jurisdiction has been demeaned, insulted, and abused. But like Cinderella, it has survived and served well.

The movements to do away with diversity jurisdiction, particularly in the last fifty years, need to be sharply separated. In the century after *Swift v. Tyson,*[1] the era of federal common law, it was possible by adroit forum shopping to get different results in a case depending on the choice of federal versus state jurisdiction. An extreme example, which received intense criticism, was *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co*.[2] Such forum shopping was a clear evil, and in the first third of the twentieth century the focus of criticism of diversity jurisdiction was that it facilitated this device.

That era came to an end with the decision in *Erie Railroad Co. v. Tompkins,*[3] establishing that there was no federal common law and that the federal courts should apply state substantive law. This took the romance out of forum shopping for the sake of getting a different result in the federal court than would have obtained in the state court. And so, for a time, criticism of diversity jurisdiction was largely blunted.

Then in the 1970s a movement to eliminate diversity jurisdiction arose again, simply on the ground that the federal courts were too busy and the elimination of diversity jurisdiction would lighten the load. However, the bar overwhelmingly supported diversity jurisdiction, as did a good many though not all of the federal judges. (The argument over diversity is one of those instances of something of a class war between the bar on one hand and the judiciary on

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[1] 41 U.S. (16 Pet.) 1 (1842).
[2] 276 U.S. 518 (1928).
[3] 304 U.S. 64 (1938).

the other, although a polling of the judges shows that a substantial minority oppose abolition of diversity jurisdiction.) The American Bar Association and the Association of Trial Lawyers of America both supported diversity, and at one point one of the authors of this article represented the bars of all fifty states in asking that diversity be maintained. Ultimately, the proposals to eliminate diversity jurisdiction were overwhelmingly defeated in the House Judiciary Committee.

The practical consequence of the overwhelming defeat of the abolitionist point of view has been that the antidiversity group in the profession has come back, not with proposals to abolish, but with proposals to extirpate diversity one bite at a time. One of the two most popular nibbling proposals has been to keep increasing the required amount in dispute by a constant escalation, so that fewer and fewer cases would qualify. When the amount was raised from $30,000 to $50,000, there was, momentarily, something of a decline. Pressure to further that decline to the point of abolition by constant increases has been applied, though unsuccessfully.

The other major nibbling proposal is to eliminate diversity jurisdiction where the suit is brought against an out-of-state defendant by an in-state plaintiff. This, if successful, would substantially reduce diversity jurisdiction. However, a bill embodying this approach received so little support and was so vigorously opposed in the House Judiciary Committee, which held hearings for discussion, that the contemplated bill was never introduced.

The frontal attack on diversity having failed and the nibbling devices having been unsuccessful, those opposed to diversity jurisdiction have devised a somewhat different proposal to reduce its use. In the Contract with America, there is a whole section on various legal matters that includes a proposal requiring the loser in any diversity case to pay the fees of the other side. This "loser pays" provision is now contained in H.R. 10, a bill introduced in the present session to implement all of the legal provisions of the Contract with America. Senator Grassley of Iowa has introduced S. 243 to the same effect. The provision concerning diversity is a relatively minor though important part of the bills.

So much for the chronology of these battles. We can now address the arguments.

The *Erie Railroad* decision eliminated the last legitimate criticism of diversity jurisdiction. Once it was established that the law should be the same whether the suit was in state or federal court, the manipulative quality of the jurisdictional choice evaporated. With that decision, the choice of forum considerations shifted from what the professionals had felt to be an unfair advantage to legitimate advantages: the pace of the docket, the procedure ap-

plied, the quality of the available judges and juries, and so on. *Erie* eliminated the major flaw in the diversity system.

The argument made now is that the federal courts are too busy to handle the diversity cases; that somehow those cases are beyond the pale of intellectualism worthy of a federal judge; that this whole load can safely be dumped on the state courts. The argument becomes that a difficult contract controversy or tough problems in products liability or the issues arising out of an airplane crash are not on the same level of worthiness as, say, a narcotics case or an interpretation of the Internal Revenue Code or some Social Security issue.

The fundamental value of diversity jurisdiction—and this applies equally to the in-state plaintiff cases—is that it is one of the oldest and best social services of the federal government. The original federal court jurisdiction was almost entirely permissive; Congress was under no obligation to create federal trial courts at all and could have left all original matters except those in the Supreme Court to the states. And yet the Constitution did permit the creation of federal diversity jurisdiction, and the first Congress chose to take up the option, granting jurisdiction over private, civil cases in diversity only. The only other federal service of this antiquity is the postal service.

The obvious tangible value of diversity is its disposition of some 50,000 cases a year.

The basic argument for eliminating diversity jurisdiction is that this would relieve the federal courts of a significant burden. It is fully recognized that the federal courts are overburdened and that Congress, in federalizing what otherwise have been state matters, is adding materially to that burden. Hence, the precise dimension of the diversity burden needs to be assessed so that a conclusion may be drawn as to the significance of that burden.

The short of it is that diversity cases are not much of a burden and constitute, relatively speaking, a diminishing burden at that. As is commonly understood, the number of diversity cases which reach the appellate courts is quite small. In 1992, the total of all federal appellate cases was about 32,000, and the number of diversity cases was 3,000.[4] The total appellate load divided into about 21,000 civil cases and 11,000 criminal cases. Thus, the diversity cases comprise less than ten percent of all cases and less than fifteen percent of civil cases.

At the trial court level for 1992, the total number of civil filings was about 231,000. Cases filed by or against the United States accounted for about 62,000, private federal question cases numbered 118,000, and diversity cases were 49,000. The fact is that since 1978 the number of civil cases generally

[4] Unless otherwise noted, all statistics are taken from the 1992 Report of the Administrative Office of U.S. Courts and have been rounded for convenience.

has doubled, but the number of diversity cases has not significantly changed, so they are, proportionately, a receding segment of federal cases.

In terms of the trial burden of the federal district courts, diversity cases again are not a major factor. Of the 111,000 federal question cases terminated in 1992, 4,000 were disposed of during or after trial. For the same period of time, about half as many—57,000—diversity cases were terminated. About 13,000 were terminated with no court action (which presumably means that the great bulk of them were settled by the parties on the pleadings), 41,000 were terminated before, during, or after pretrial (again, presumably, almost entirely by settlement), and 3,000 were terminated during or after trial. We do not know how many of these diversity cases involved in-state plaintiffs, but all of the diversity cases together are not a very large segment of the federal court docket, and that segment is not increasing either numerically or proportionately.

The proposal to drop the diversity jurisdiction creates greater problems than it solves. The practical result of moving the diversity cases out of the federal system necessarily is to move them into the state systems. As has been inelegantly said before, manure is not made more attractive by moving it from one pile to another.

We know that the common response is that these cases will not make much difference when they are spread over the state systems. The rejoinder is that the spread will make a great deal of difference, a very tangible difference, to the people involved.

Let us be as concrete about this as we can. Unfortunately, the National Center for State Courts does not keep statistics on the length of time it takes for a case to move from filing to disposition in the various states. We have obtained recent figures for the two busiest New York areas, Manhattan and Brooklyn, which equate with the Southern District and the Eastern District of New York on the federal side; for Cook County, which equates with the Northern District of Illinois; and for San Francisco and Los Angeles/Orange County, which equate with the Northern and Central Districts in California. Those figures can be compared, at least in a way, with the figures in the federal Administrative Office report. The results provide support for the retention of diversity jurisdiction.

In the state courts in Chicago, the average time from filing to closing in civil jury cases disposed of in 1993 was 56.7 months.[5] This is almost five years. The median time for disposition in the federal court, the Northern District of Illinois, is four months. In the Northern District, only ten percent of the cases took more than twenty-one months. (Chicago has more than half of all the federal cases in Illinois, and yet the Northern District is faster than every district

[5] Telephone report from Mr. James O'Donnell, Illinois State Administrative Office.

but one in the Seventh Circuit.) We acknowledge that this is an apples and oranges comparison because we are comparing the federal median with state jury trials, but these figures do show that the Northern District is moving even its longest cases far faster than the state system.

Similar results are seen in the great cities of both coasts. In both the Southern and Eastern Districts of New York, the median time for all civil cases is eight months.[6] The state administrative office has no comparable figures; it does not keep records on the time from filing to disposition. However, it does have 1993 data on the time from the Notice of Issue or ready date—in other words, well into the case—to disposition. The median was 295 days, or ten months, in Manhattan and 498 days, or seventeen months, in Brooklyn. These again are hard to compare but permit the generalization that the state courts in New York City run far behind the parallel federal courts in disposing of business.

So also with San Francisco and Los Angeles. In the Northern District (San Francisco) the median time is seven months and in the Central District (Los Angeles) the median is eight months. On the state side, the normal time from filing to disposition in 1991 was twenty-two months in San Francisco and twenty-five months is Los Angeles. In Orange County, sixty percent took over two years.[7]

As the well-known specialist on courts, Professor Judith Resnik of the University of Southern California Law Center, said in a *National Law Journal* article, "State judges have their own reasons for resisting: Overburdened, they are often unable to deal with the cases already within their authority. The 1992 American Bar Association survey, 'Saving Our System: A National Overview of the Crisis in America's System of Justice,' described eight states that had closed their civil jury system for all or part of the year, 15 that had laid off personnel and 10 that had experienced unacceptable delays in decision-making.'[8]

Let us turn to the pending proposals:

1. The committee of the Judicial Conference on Long-Range Planning wishes to abolish diversity, trim diversity, increase the jurisdictional amount, get rid of the in-state plaintiff—in other words, abolish diversity if it can and nip away if it can't. The committee's plan invokes the wholesome aspiration of "cooperation between the bench and bar" but makes a mockery of it in its approach to diversity jurisdiction. We have noted that the bar is overwhelmingly in favor of diversity. Cooperation gets a bad name when the plan includes everything the judges want by way of lightening their workload and nothing the bar wants to solve its problems. Nothing so dramatizes the

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[6] The New York figures come from Ms. Martha Perez of the New York Court Administrative Office.
[7] The figures are from Mr. Ron Titus of the California Administrative Office.
[8] Resnik, *To Handle the Overload, Create a National Court*, Nat'l L.J., Jan. 30, 1995, at A21.

depersonalization of justice and the glorification of "prestige" as the recommended elimination of "disputes involving economic or personnel relations or personal liability." We appreciate that the recommendation is limited by the added phrase "in the work place," but the spirit of it reaches the whole economy. If we may be allowed to put the bar point of view savagely but earnestly, we must say this: If those universes of tort and contract that make up so much of American life and the American economy are unworthy of the attention of federal judges, the federal judges may well have excessively high standards.

2. The legal provisions of the Contract with America, embodied in H.R. 10, propose to make diversity losers pay, which is simply a veiled form of an attack on diversity jurisdiction. We adopt as our own the views of the Litigation Section of the American Bar Association:

> [This proposal] undermines access to the federal courts by the middle class and the poor . . . . The rule is in effect a regressive tax on the right to litigate . . . . The proposal is a frontal attack designed to end diversity jurisdiction.

Permit us to return to the fundamental theme. Dispute resolution is a basic service which the federal government has offered its people in diversity situations since 1798. It is a service like carrying the mail, providing for the national defense, or assisting in the settlement of labor disputes. It is an inexpensive service, as these things go. Limiting the service will force some unknown portion of 50,000 cases out of the federal forum. We don't know how many people would be affected, but it could well be hundreds of thousands. The most immediate practical consequence to those people is significant delay—in many cases delay measured in years—in the disposition of their disputes.

We are not here preaching the cult of the superman, arguing that all federal judges are abler than all state judges, or even that most of them are. We say only that many thousands of Americans have believed that they were better off in federal court than in state court. This may have been because of their perception of quality, their views of timing, or some wholly different reason. For example, the plaintiff whose state action would lie in a small rural county may legitimately prefer an urban center, which is where most of the federal courts sit. We emphasize "legitimately prefer" because an urban jury frequently has an ethnic, political, geographic, and vocational mix that is not available in the county courthouse of a small rural community.

Whatever the reasons for choosing federal court might be, the point is that for more than two centuries, Americans have been entitled to make that choice. They should not be deprived of that option now.

JUNK SCIENCE AND JUNK RESEARCH

Jim R. Carrigan*

Imagine a great public relations campaign to amend the United States Constitution and the fifty state constitutions to eliminate the right to trial by jury in civil cases. Imagine the richest target defendants pouring virtually unlimited funds into that campaign. These deep-pocket defendants could spend a ton of money but could not get such an amendment adopted. The American people would never deliberately give up the right to jury trial.

So how might the defendants achieve their goal of insulating themselves from fair trials by juries that act as the community conscience in the compensation of tort victims? How could they hope to undermine, restrict, and ultimately even abolish trial by jury in civil cases? By stealth?

Rights and freedom seldom are lost in a great, sudden stroke but are eroded away gradually, almost imperceptibly. Over the past two decades, we have seen step-by-step dismantling of the fundamental right of Americans to trial by jury, under the label of "tort reform." The latest step is a campaign against a fictional monster called "junk science."

A few weeks ago, I received in my chambers a complimentary copy of a book, *Phantom Risk*, by Peter Huber. All of my colleagues—state and federal trial judges across the country—received complimentary copies as well. Each copy contained an insert, the January 1994 issue of a publication called *Civil Justice Report*, which in turn contained a book review touting *Phantom Risk* as "reasoned" and "measured." *Phantom Risk*, however, is nothing more than propaganda. It is the latest effort by the Manhattan Institute for Policy Research—a fifteen year-old right-wing think tank masquerading as an educational institution[1]—to indoctrinate judges and public policy makers with its views on "junk science."

While it is true that most expert witnesses are biased toward the party that pays their fees, and there is perhaps too much reliance on expert opinion testimony in major trials, these are not new problems, nor are they ones beyond the capacity of lawyers, judges, and juries to handle under present rules. Nor is it true, as Huber's book suggests, that it is only plaintiffs who seek to present opinion evidence from experts who are for sale to the highest bidder.

The Manhattan Institute is one of many organizations crusading against consumers and tort plaintiffs. It has an annual budget of about five million

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[1] Traub, *Intellectual Stock Picking*, NEW YORKER, Feb. 7, 1994, at 36, 37.

dollars.[2] Most of its contributions come from right-wing foundations and frequent defendants such as insurance, chemical, pharmaceutical, and tobacco companies—its financial angels include Aetna, Bristol-Myers Squibb, Chase Manhattan Bank, Citicorp, Exxon, Phillip Morris, and State Farm[3]—which obviously are the potential beneficiaries of the Institute's "tort reform" campaign.[4] Not only was the widespread distribution of *Phantom Risk* funded by the Manhattan Institute, but the book's author, a former law clerk to Justice Sandra Day O'Connor, happens to be employed as a senior fellow on the Institute's payroll. Moreover, *Civil Justice Report*, the publication that reviewed *Phantom Risk* and was inserted in the complimentary copies, also is a Manhattan Institute publication!

Neat: You review your own book and make sure those whose attitudes you want to influence receive a copy of the glowing review as well as the free book! That is lobbying the judiciary. If a party in a case tried such a maneuver, we would call it back-dooring the judge. Besides being thrown out of chambers, that party would probably be thrown in—in jail for contempt, that is.

The Manhattan Institute long has prided itself on its ability to incubate and promote certain views.[5] In its own words, "[c]ommissioning a work, supporting it, and finding a publishing outlet are only part of what the Institute does . . . ; making sure a book reaches as wide an audience as possible is perhaps the most important service we provide."[6] The Institute and similar organizations lobby state and federal lawmakers, and some of them sponsor all-expense-paid seminars for judges at expensive resorts, to "educate" judges about the alleged need to restrict the right to trial by jury—and to further restrict the rights of consumers injured by defective products.[7]

A few years ago a major insurance company ran a national full-page ad campaign attacking alleged "runaway juries" and "greedy lawyers." Those ads, and the lobbying campaign that went with them, persuaded the Colorado legislature to adopt the most stringent tort reform measures in the nation. An added dividend was the conditioning of Colorado jurors so that they now are among the most conservative in the country. Of course, if one tried to influence a single juror in a specific case, it would be jury tampering, a felony. But, apparently, it is not a crime to influence jurors by the thousands or even millions.

The Manhattan Institute and others like it have given their sponsors full value for money spent in the area of tort reform. They have helped the insurance and manufacturing giants propagate the myths of "litigation explosion,"

[2] *Id.* at 39.
[3] Nace, *Exposed: The Campaign to Destroy Justice*, TRIAL, Jan. 1994, at 7.
[4] Traub, *supra* note 1, at 39-40.
[5] Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 AM. U.L. REV. 1637, 1709 (1993).
[6] *Id.* at 1709 n.327.
[7] Nace, *supra* note 3.

"lawsuit abuse," "run-away juries," and rampant punitive damages.[8] They seem to believe the motto attributed to Joseph Goebbels, Adolf Hitler's propaganda minister: "If you tell a big enough lie often enough, people will believe it."

THE "JUNK SCIENCE" DEBATE

I chose this topic as the focus of my discussion because it is the subject of *Phantom Risk*, as well as Huber's earlier book, *Galileo's Revenge*. In *Galileo's Revenge*, Huber set forth his pejoratively labeled "junk science" thesis that juries are being duped by testimony from scientists and physicians proffering half-baked, untested, and even fraudulent notions about the causes of illness, thus enabling plaintiffs to recover multimillion dollar judgments from deep-pocket corporations.[9]

One example Huber uses in *Phantom Risk* is the case of *Clark v. United States*.[10] The plaintiffs in *Clark* commenced an action against an Air Force base, alleging trichloroethylene (TCE) contamination of their well water and seeking to recover for property damage and emotional distress.[11] Huber reports that, although the trial judge concluded that there was "very, very slight likelihood of any actual harm coming to any plaintiff as a result of consumption of this contaminated water," he nevertheless awarded the plaintiffs $83,000 for emotional distress.[12]

What Huber does not tell his readers is that the Air Force base had violated state law as well as the Air Force's own guidelines by disposing of liquid waste containing TCE. Moreover, the plaintiffs had been told by the EPA not to drink the water, and the Air Force provided the plaintiffs with bottled water after the contamination was discovered.[13] These facts support the plaintiffs' claims that they suffered emotional distress after they learned they had been ingesting contaminated water. Huber ignores these facts, however, because he wants his audience to believe that the emotional distress award was unwarranted, unjustified, and a blatant example of what he calls a "diversion that is too expensive for even our wealthy society"[14]—that is, toxic tort litigation.

As Alfred, Lord Tennyson, said 130 years ago: "[A] lie which is half a truth

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[8] *Id.*
[9] P. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM (1991) [hereinafter GALILEO'S REVENGE].
[10] 660 F. Supp. 1164 (W.D. Wash. 1987), *aff'd*, 856 F.2d 1433 (9th Cir. 1988).
[11] *Id.*; *see* P. HUBER, PHANTOM RISK: SCIENTIFIC INFERENCE AND THE LAW 345 (1993) [hereinafter PHANTOM RISK].
[12] PHANTOM RISK, *supra* note 11, at 345.
[13] *Clark*, 660 F. Supp. at 1167, 1170.
[14] PHANTOM RISK, *supra* note 11, at 443.

is ever the blackest of lies."

Huber, who has little or no actual experience with either juries or expert witnesses, is not alone in his lack of faith in the jury. At least two federal courts of appeals have disparaged the ability of jurors to evaluate scientific evidence, saying, "Because of its apparent objectivity, an opinion that claims a scientific basis is apt to carry undue weight with the trier of fact."[15] And the author of a law review article has asserted, "The more liberal admissibility tests . . . often result[ ] in a jury rendering a verdict on emotion utilizing guesswork and speculation. This approach also permits a jury to give greater weight to a scientific theory than it has received in its own scientific field."[16] These reformers of little faith in juries apparently think jurors are ignorant fools likely to be bamboozled by a snake oil salesman pretending to be an expert. They argue: "The charisma of the expert, rather than the logic of his explanation, may then become paramount, allowing experts to function like oath-helpers of old in a manner antithetical to notions of rational proof."[17]

Thus, there have been myriad proposals by Huber and his ilk aimed at taking from the jury and giving to the judge the decisions on which expert witnesses to believe, and the determination of whether scientific evidence is reliable. Some of the self-styled reformers have endorsed pretrial screening of expert testimony by judges.[18] A court, they propose, should exclude as irrelevant the opinions of experts whose qualifications do not enable them to aid the jury, whose theories are invalid or irrelevant, or whose work is unreliable.

Such strict scrutiny of scientific testimony, it is argued, can be accomplished without amendment of the Federal Rules of Evidence. However, nothing in the wording of those rules, or the advisory committee notes, justifies such an interpretation. The rule most directly applicable, rule 702, provides in straightforward language:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 703 addresses the factual bases for an expert's opinion in these terms:

> The facts or data in the particular case upon which an expert bases an opinion

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[15] United States v. Baller, 519 F.2d 463, 466 (4th Cir.), *cert. denied*, 423 U.S. 1019 (1975); Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1208 (6th Cir. 1988) (quoting *Baller*).

[16] Christian, *Admissibility of Scientific Expert Testimony: Is Bad Science Making Law?*, 18 N. KY. L. REV. 21, 40 (1990).

[17] M. BERGER, PROCEDURAL AND EVIDENTIARY MECHANISMS FOR DEALING WITH EXPERTS IN TOXIC TORT LITIGATION: A CRITIQUE AND PROPOSAL 13-14 (1991).

[18] *See, e.g., id.* at 55-62.

> or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Until recently, rule 703 has been viewed as a rule that liberalized admissibility of expert opinion testimony because it permits experts to base opinions on hearsay and the opinions and analyses of others.[19] But the reformers now argue that rule 703 has a restrictive side as well. They contend that the rule's requirement that the data relied upon be of a type reasonably relied upon by experts in the field ties in with rule 702's helpfulness test and, therefore, an expert who goes beyond the methods or theories sanctioned or accepted in his field should not be considered capable of assisting the trier of fact.

Other reformers, perhaps acknowledging that the rules were intended to liberalize admissibility of expert testimony, have proposed amending them.[20] One suggestion is that rule 702 be amended by adding the word "reliable" so as to read "[i]f *reliable* scientific, technical, or other specialized knowledge will assist the trier of fact . . . . a witness qualified as an expert . . . may testify thereto." An alternative suggestion would amend rule 702 to add: "In the case of expert testimony based upon a scientific theory or technique, the court shall find that the theory or technique in question is scientifically valid for the purposes for which it is tendered."[21]

Still another recommendation is the addition of a sentence such as this to rule 702: "When the witness seeks to testify about a scientific principle or technique that has not previously been accorded judicial recognition, the testimony shall be admitted if the court determines that its probative value outweighs the dangers specified in rule 403." Rule 403, however, already provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Thus, this change would be more a reminder than an amendment; judges already have ample authority to apply rule 403 to expert testimony.

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[19] *See* the notes of the Advisory Committee on the Federal Rules of Evidence concerning proposed amendment of rule 702: "The use of opinion testimony on technical subjects has increased greatly since enactment of the Federal Rules of Evidence. This result was intended by the drafters of the rules, who were responding to concerns that the constraints previously imposed on expert testimony were artificial and an impediment to the illumination of technical issues in dispute."

[20] *See* Christian, *supra* note 16.

[21] *See* Christian, *supra* note 16, at 37-38.

RETURN TO "GENERAL ACCEPTANCE" STANDARD?

These rule-modification proposals, if adopted, would force the pendulum to swing back toward the "general acceptance" standard that governed the admissibility of expert scientific testimony prior to the adoption of the Federal Rules of Evidence.[22] And that is precisely what those who seek to restrict evidence to "mainstream" science would like to see. Huber, for example, observes that "[t]he best test of certainty we have is good science."[23] To him, that's the science of establishment consensus and peer review. Judges, he says, should determine just where the scientific consensus lies, based on "[c]areful reviews of current learning . . . published in top-notch scientific journals."[24]

But would it be judicious for courts to reject all science that is not mainstream? Albert Einstein's theory of relativity wasn't "generally accepted" for years. Consider some "mainstream" evaluations of relativity by Einstein's contemporaries: In 1913, Ernst Mach, professor of physics at the University of Vienna, remarked, "I can accept the theory of relativity as little as I can accept the existence of atoms and other such dogmas." In 1924, Professor T. J. J. See, director of the United States government observatory at Mare Island, California, stated that Einstein's "theory of relativity [is] entirely worthless and misleading." In 1931, Jeremiah J. Callahan, president of Duquesne University, said: "We certainly cannot consider Einstein as one who shines as a scientific discoverer in the domain of physics. . . . Einstein has not a logical mind." In 1940, Dr. Walter Gross, the Third Reich's official exponent of "Nordic science," commented: "The so-called theories of Einstein are merely the ravings of a mind polluted with liberal, democratic nonsense which is utterly unacceptable to German men of science." Finally, in 1940, the Astronomical Journal of the Soviet Union reported: "The theory of a relativistic universe is the hostile work of the agents of fascism. It is the revolting propaganda of a moribund, counter-revolutionary ideology."[25]

Apparently, Albert Einstein was one of the leading "junk scientists" of his time.

Those who support retention of the more liberal admissibility standards established nearly twenty years ago argue vigorously that the reformers' proposals:

(1) misunderstand the nature of science;

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[22] The general acceptance standard, commonly referred to as the *Frye* test, was announced in Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923).
[23] GALILEO'S REVENGE, *supra* note 9, at 228.
[24] *Id.* at 200.
[25] These examples were taken from C. CERF & V. NAVASKY, THE EXPERTS SPEAK: THE DEFINITIVE COMPENDIUM OF AUTHORITATIVE MISINFORMATION (1984).

(2) undermine the goals of tort law;
(3) lack empirical support; and
(4) alter inappropriately the long-standing division of roles between judge and jury.

As the Einstein example indicates, legitimate scientific inquiry is not just a simple process of accumulation and incorporation of knowledge within existing theories. It is a revolutionary process in which new theories constantly challenge and seek to replace existing scientific orthodoxy. "'Good scientists' often disagree, the 'generally accepted' view often is wrong, and it is only by considering all scientists' points of view that the search for scientific truth proceeds."[26] Among theories now widely accepted that for some time had insufficient support in the scientific community to be considered by a jury under a general acceptance standard are:

(a) the theory that the earth is round;
(b) Darwin's theory of evolution;
(c) the theory that Vietnam veterans may suffer post-traumatic stress disorder; and
(d) the theory that battered spouses may suffer an identifiable psychological syndrome.

The result of requiring expert testimony to be based on premises already accepted in the scientific community would be to decrease the capacity of courts to learn from experts on the cutting edge of research in a particular field. Such a standard threatens to freeze the search for truth in areas where new scientific theories are emerging. Our judicial system cannot afford to close its doors on scientific advances simply because their support in the scientific community has not yet fully crystallized.

More specifically, relying on publication in peer-reviewed journals as the hallmark of admissible "good science" is a mistake for at least two reasons: First, scientists themselves frequently rely on unpublished data and studies. Second, many scientific articles contain misinformation. Typically, the authors of such articles survey the literature and state as facts footnote reports from other studies, without ever considering the thoroughness or integrity of those studies. Thus, misinformation may be picked up and repeated many times over by authors who are remote from and have never examined the original sources. The worst kinds of statistical distortions may become the basis for

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[26] TLPJ Found., *Supreme Court Rejects "General Acceptance" Requirement for Scientific Testimony*, PUB. JUST., Summer 1993, at 11.
[27] T. Warshafsky, Epidemiology: A Good Tool in the Wrong Hands 13 (July 2, 1991) (on file with author).

untenable beliefs in the general scientific community.[27]

Moreover, the reformers' insistence upon epidemiological studies is misplaced. It is well recognized that such studies are insensitive when it comes to proving that chemical substances produce specific effects in humans. This is because hundreds or even thousands of participants are needed to draw significant conclusions in most cases. Moreover, it is unlikely that a toxic substance will be the sole known cause of a particular malady, so it is difficult to isolate the effects of the toxic substance. The demand that epidemiological studies be presented in court as a prerequisite to a causation finding is, therefore, a Catch-22: "[I]nstead of disproving your case by your actions, you find yourself forced to prove your case by a methodology that is inherently incapable of providing such proof.[28]

Finally, epidemiological studies may easily be perverted by industry, government, and special interest groups.[29] Such perversion is nothing new: Remember the decades when prestigious authors disputed a causal connection between cancer and tobacco? Between asbestos and lung disease? Some of you may not, but I do. "With the geometric proliferation of chemical toxins and increase in medical malpractice litigation," trial lawyers say, "the distortions have become an endemic epidemic."[30]

A rather sweet example of how special interest groups pervert the scientific literature appeared in the *Baltimore Sun* in April, 1992. The article reported that:

> For two years now, thousands of dentists have received newsletters from the Princeton Dental Resource Center. And the Center has asked the dentists to pass them on to their patients.
>
> The newsletters contain some unexpected advice—including bulletins of good news for chocolate lovers. One issue reported that eating chocolate might be as beneficial as an apple a day. "So the next time you snack on your favorite chocolate bar or bowl of peanuts," the newsletter said, "remember—if enjoyed in moderation they can be good-tasting and might even inhibit cavities."

But "hold on to your dental floss," the *Baltimore Sun* article warned. What most dentists who distributed the newsletter did not realize was that the Princeton group was sponsored by a candy company, M&M/Mars![31]

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[28] A. Roisman, An Attack on "Junk Law" 3 (on file with author).
[29] T. Warshafsky, *supra* note 27, at 13.
[30] *Id.*
[31] Meier, *Report Touting Chocolate as Cavity-Fighter Derided*, Baltimore Sun, Apr. 15, 1992, at 1A.

IMPACT ON TORT LAW GOALS AND ROLE OF JURIES

In addition to misunderstanding science, the reformers' proposals thwart the three basic goals of tort law:

(1) corrective justice;
(2) compensation; and
(3) fewer accidental injuries.[32]

Consider the Fifth Circuit case, *Christophersen v. Allied-Signal Corp.*[33] Albert Christophersen died in 1986 from a rare form of colon cancer that metastasized to his liver. He had been exposed to the defendants' nickel and cadmium fumes for thirteen years before his retirement, the year before his death. Believing that this exposure had caused his death, his wife and child brought a wrongful death suit.

Dr. Lawrence G. Miller—a specialist in internal medicine affiliated with Tufts University—testified as the plaintiffs' expert on causation. Dr. Miller holds a masters degree in public health and has studied oncology at Harvard Medical School. He stated his opinion, to a reasonable medical certainty, that exposure to nickel and cadmium fumes had caused Mr. Christophersen's death.

The defendants moved for summary judgment on the ground that Dr. Miller's expert opinion would be inadmissible at trial, and thus the plaintiffs would be unable to prove causation. The defendants included with their motion affidavits of four medical experts who stated that there was no scientific proof that exposure to nickel and cadmium fumes could cause the type of cancer from which Mr. Christophersen had died. Of course, there was no opportunity to cross-examine those affidavits. Despite Dr. Miller's contradictory affidavit, the trial court granted the summary judgment motion. The circuit court affirmed, holding that Dr. Miller's testimony failed to meet the general acceptance standard.

Such judicial vetoes of scientific evidence thwart the tort goal of corrective justice through deterrence. Exposure to nickel and cadmium fumes clearly does cause some kinds of cancer, including lung cancer. Dr. Miller believed that Mr. Christophersen's exposure had caused his colon cancer, and the doctor could explain his reasoning. If he was right, an injustice was done by allowing Allied-Signal and the other defendants to escape liability. The trial judge, not the jury, decided that Dr. Miller was wrong. The Seventh Amendment guarantees not trial by affidavit, but trial by jury.

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[32] Bell, *Strict Scrutiny of Scientific Evidence: A Bad Idea Whose Time Has Come*, 20 Prod. Safety & Liab. Rep. (BNA) 79, 85-86 (1992).
[33] 939 F.2d 1106 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1280 (1992).

Tort law's compensation goal also suffers from the *Christophersen* court's approach. Mr. Christophersen and his surviving family clearly were seriously injured. Physical injuries and death are the very injuries for which tort damages always have been the most appropriate means of compensation. The form of judicial fact finding exemplified in *Christophersen*, combined with other legal doctrines such as plaintiffs' heavy burden of proving causation, assures that many deserving plaintiffs will not be compensated, even though exposure to toxic chemicals probably caused their injuries.

The tort law goal most obviously thwarted by strict judicial scrutiny and intervention, however, is that of increased safety through reduction of toxic injuries. Tort law holds defendants liable for injuries caused by their wrongdoing so that they, and others similarly situated, will be appropriately deterred. In *Christophersen*, for example, a liability judgment would have encouraged those who produce nickel and cadmium fumes to spend money creating safer work environments in order to avoid paying tort judgments. The summary judgment for the defendant removed whatever modest pressure tort law normally puts on industry to discover the health effects of the substances to which they expose their employees and others, and to protect against them.

I submit that the reformers' proposals themselves lack empirical support. "The 'junk science' debate has yielded much heat, but little light; there simply is not sufficient data to justify" the proposed changes.[34] Critics have charged that Huber's book, *Galileo's Revenge*, fails Huber's own "first test" for good science: citation to, and reliance on, verifiable factual data.[35] Even the Carnegie Commission on Science, Technology, and Government, which advocates greater judicial control over scientific testimony, has concluded from an examination of the cases that the concerns expressed by Huber and others are "greatly exaggerated."[36]

Assuming that there are attempts to introduce junk science in trials, lawyers, judges, and juries already have adequate means available to deal with them. To suggest diminishing the jury's historic, constitutional role as factfinder is to overreach. The price is too high!

The reformers' proposals clearly would alter the long-standing division of roles between judge and jury. If, as proposed, judges are required to assess the reliability of scientific testimony, they inevitably must evaluate and make judgments about the credibility and persuasiveness of the witnesses and their testimony. Thus, these proposals would take the truly radical step of removing credibility and weight-of-evidence decisions from the jury and entrusting

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[34] TLPJ FOUND., COMMENTS TO PROPOSED CHANGES TO THE FEDERAL RULES 21 (1992).
[35] Chesebro, *supra* note 5, at 1652.
[36] CARNEGIE COMM'N ON SCIENCE, TECH., & GOV'T., SCIENCE AND TECHNOLOGY IN JUDICIAL DECISION MAKING: CREATING OPPORTUNITIES AND MEETING CHALLENGES 13 (1993).

them to the judge. Such a profound change should not take place without a constitutional amendment.

It is particularly unsound to permit courts to exclude scientific testimony as misleading or prejudicial by relying on evidence that judges consider to be "better."[37] There is no guarantee that a judge's research, education, or experience on complicated scientific issues is adequate, or that her understanding of the evidence presented is accurate.

Juries, like judges, and even legal scholars, can make mistakes. In general, however, juries do no worse job than judges. Indeed, most trial lawyers, as well as many if not most seasoned trial judges, feel juries do a better and fairer job at evaluating evidence than many judges. Jury deliberation studies demonstrate that juries perform well the task of detecting liars. There is no better "b.s. detector" than a jury!

Further, juries do very well at comprehending technical analysis. They recall scientific evidence well and seem able to analyze and utilize complex materials. They operate with eight memories (or twelve, or six), and each juror may recall an aspect of the evidence the others had forgotten.

Judges, on the other hand, lack that ability to make use of collective recall and debate. While we assume that judges have substantially higher levels of formal education than the average juror, one need only spend a little time in a law school to recognize how limited, generally, is the scientific background of those who earn law degrees. After all, didn't we become lawyers because we weren't gifted in practical or technical pursuits?

No legitimate information suggests that juries are worse decisionmakers in dealing with scientific evidence than judges. Even where toxic tort causation issues are unusually complex, the relative merits of judges versus juries remain similar. Studies show that judges are no more likely to disagree with juries in "difficult" cases than they are in "easy" ones.[38]

Even if judges were more capable than juries of assessing the reliability of scientific evidence, there is no justification for allowing the factual dispute to be decided without a trial, or at least a full and fair opportunity to cross-examine the experts. All other witnesses must face cross-examination; why shouldn't experts?

Finally, the Sixth and Seventh Amendments to the Constitution plainly preclude procedural changes that restrict or take away the historical role of juries. The Sixth Amendment guarantees the right to a trial by an impartial jury in criminal cases, and the Seventh Amendment declares: "In suits at common

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[37] Toker, *Admitting Scientific Evidence in Toxic Tort Litigation*, 15 HARV. ENVTL. L. REV. 165, 183-84 (1991).
[38] *Id.*

law . . . the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

THE SUPREME COURT'S RESPONSE

The United States Supreme Court was confronted by the "junk science" debate for the first time in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[39] *Daubert* was a products liability lawsuit filed on behalf of two children born with severe limb-reduction birth defects. Their mothers had taken the anti-nausea drug Bendectin during the limb-development phases of their pregnancies. The drug's manufacturer, Merrell Dow, removed it from the market after a deluge of similar suits were filed. Citing more than two dozen epidemiological studies, however, Merrell Dow insists to this day that Bendectin does no harm. Before *Daubert*, the company had persuaded a number of appeals courts to overturn jury verdicts for plaintiffs on the ground that the epidemiological studies established a scientific "consensus" with which experts—and juries—could not legally disagree.

In *Daubert*, the plaintiffs presented eight experts, each of whom said it was more likely than not that Bendectin had caused the birth defects. A federal district court in California, however, granted summary judgment for the defendants, including Merrell Dow. The Ninth Circuit affirmed, stating that the plaintiffs' lack of peer-reviewed epidemiological evidence was fatal to their claim.

The Supreme Court's majority opinion, written by Justice Blackmun, held that the Court's adoption of the Federal Rules of Evidence in 1975 effectively overruled the previously enforced general acceptance standard.[40] The Court acknowledged that nothing in the rules or their legislative history requires "general acceptance" as a precondition for admitting expert testimony. The opinion specifically relied upon rule 702, which declares: "If scientific . . . knowledge will assist the trier of fact" an expert "may testify thereto." It further noted that "[t]he adjective 'scientific' implies a grounding in the methods and procedures of science" and that "the word 'knowledge' connotes more than subjective belief or unsupported speculation," but that neither "general acceptance" nor "certainty" is required.

At that point in the opinion the law was clear: Rule 702 meant what it said, and the plaintiffs had won a clear victory.

However, the opinion didn't stop there. In further explanation, Justice Blackmun wrote, "[I]n order to qualify as 'scientific knowledge,' an inference

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[39] 113 S. Ct. 2786 (1993).
[40] *See* note 22, *supra*.

or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation . . .,"[41] and he proceeded to discuss what he later termed the judge's "gatekeeping role." In conclusion, the opinion said, "[T]he Rules of Evidence . . . assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands."[42]

Justice Blackmun described the admissibility inquiry as "a flexible one" and outlined a variety of factors courts might consider, including: (1) whether a theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error and the existence and maintenance of standards controlling the technique's operation; and (4) whether the theory or technique has general acceptance.[43] The Court made clear, however, that these were only some of many factors. "The focus, of course, must be solely on principles and methodology, not on the conclusions they generate."

The Court also noted that vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof, rather than wholesale exclusion under an uncompromising "general acceptance" standard, are the appropriate means by which "shaky but admissible evidence" may be challenged.

Thus, the opinion left room for both sides in the "junk science" debate to claim victory. Chief Justice Rehnquist, in partial dissent, stated that rule 702 on its face disposed of the case and that Justice Blackmun's opinion should have stopped there.

A TRIAL JUDGE'S VIEW

For my part, I have long believed that the best antidote to junk science in court is vigorous, well-prepared, controlled cross-examination. Experts carrying unfounded opinions to court are no match for an able trial lawyer cross-examining in a court where the judge has the intestinal fortitude to enforce strictly the rules of cross-examination. Primarily, the judge must require that the experts' answers on cross be responsive to the questions asked and not argue or editorialize beyond those direct responses.[44]

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[41] 113 S. Ct. 2786, at 2795.
[42] *Id.* at 2799.
[43] *Id.* at 2796-97.
[44] *See* Carrigan, *Lawyers, Juries, and Judges in the '90s*, 27 INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY 387, 390-91 (1992).

Defendants certainly have the resources and incentives to choose and carefully prepare scientific experts who represent mainstream views. In any scientific field the population of experts should be greatest in the "mainstream." Thus, defendants should be able to find witnesses who can speak plainly about science in the area in question. Similarly, defense attorneys have the time, the intellect, and the incentives to learn the relevant science well enough for telling cross-examination of plaintiffs' experts.

At bottom, the junk science campaign is just one more attempt to undermine and minimize the role of the jury in our justice system. The end effect of these developments is that jury trial has been substantially undermined as a means for resolving civil disputes in America. The next wave will seek to eliminate or further restrict criminal jury trial. Indeed, that wave already has begun with restrictions on peremptory challenges (à la *Batson* and its progeny)[45] and erosion of lawyer participation in voir dire.

Juries are the one place where common citizens play an important role in the governmental process. Jury service is the last vestige of direct, participatory democracy. The civil jury system allows community values to play a role in the dispute resolution process and thus ensures that a community's sense of fairness is an integral part of resolving disputes. Justice is not some abstraction. Justice is fairness enforced.

Both historically and in a very real sense today, the jury system is the one refuge where individuals can seek justice against those more powerful. If jury trial is lost, the most vulnerable in our society could easily be victimized by an arbitrary and potentially oppressive government and industrial system.

It was lawyers such as Patrick Henry, Elbridge Gerry, and John Adams who led the fight to guarantee jury trial in the Sixth and Seventh Amendments. So it must be lawyers who lead the present fight to retain the right to trial by jury, so that our children and grandchildren may enjoy the protection jury trial affords.

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[45] Batson v. Kentucky, 476 U.S. 79 (1986); *see* Fahringer, *The Persecution of the Peremptory Challenge*, 29 INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY 441 (1994); Grimes, *Peremptory Challenges in Danger*, 29 INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY 436 (1994).

SHAW V. RENO: A PLAINTIFF'S PERSPECTIVE ON RACIAL GERRYMANDERING†

Robinson O. Everett*

Many courtroom advocates dream of arguing a big case in the Supreme Court. Two years ago I had that opportunity in a case entitled *Shaw v. Reno*,[1] which concerned racial gerrymandering of congressional districts. When I was invited to speak to you, it was suggested that this case and its ramifications might be a suitable topic for me to discuss. Because these ramifications are evidenced by the fact that four cases involving the issue of racial gerrymandering are now pending before the Supreme Court,[2] I decided to accept the suggestion.

My appearance before the Supreme Court had some unique aspects. For example, one of the opposing counsel was my colleague from Duke, Professor Jefferson Powell; and I was later informed that this apparently was the first time in the Court's history that two law professors from the same school had argued against each other.

Perhaps more unique was the circumstance that I was one of my own clients, despite the old maxim that a lawyer who represents himself has a fool for a client. I should add that my other four clients were Ruth Shaw, the lead plaintiff, Melvin Shimm, an esteemed colleague at Duke Law School, my secretary, Dot Bullock, and my son Greg. I'll mention later how this fabulous five was assembled.

I should note by the way that for Professor Shimm it was probably the first appearance in any courtroom—much less in the Supreme Court. When we learned that I would be arguing the case in the Supreme Court, Professor Shimm asked me about getting a seat. We finally decided that, since he had the requisite qualifications, I would move his admission to the Bar of the Court, and then he would have a seat among the attorneys. Incidentally, I assumed my motion to have him admitted would probably be granted, so that I would have at least one victory to my credit. Ultimately Professor Shimm wound up seated beside me at the counsel table.

Still another unique aspect of our case was that it went directly to the Supreme Court from a three-judge district court. While at one time direct ap-

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[1] 113 S. Ct. 286 (1993).

[2] Hays v. Louisiana, 839 F. Supp. 1188 (W.D. La. 1994); Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994); Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga. 1994); Vera v. Richards, 861 F. Supp. 1304 (S.D. Tex. 1994) (all four cases from decisions by three-judge courts).

peals were more common, today they are very limited; perhaps one-tenth of one percent of its cases reach the Court by direct appeal. Fortunately, however, an attack on the constitutionality of a statewide voting law does qualify not only for trial by a three-judge district court but also for direct appeal to the Supreme Court. The Supreme Court then, instead of exercising a discretionary jurisdiction as it does with petitions for certiorari, must decide whether probable jurisdiction exists.

Now let me go into the history of the case and my involvement. I am not a regular practitioner of voting rights law. However, in the mid-1960s, in the wake of *Baker v. Carr*,[3] the North Carolina General Assembly adopted a congressional redistricting plan which was a political gerrymander, one of whose apparent purposes was to block the intended candidacy for Congress of one of my closest friends. With this encouragement I led the attack on that gerrymander; and my good friend, Ruth Shaw, whom I had represented in litigation arising out of her husband's death, was my lead plaintiff intervenor in that case, *Drum v. Seawell*.[4] We were successful in overturning the gerrymander although the state was granted a two-year delay to draft a new plan. Significantly, the three-judge court ruled that any new plan should produce a district that was compact and contiguous, which generally had been true of North Carolina's congressional redistricting from the end of the 18th century until the mid-1960s.

In 1991, as a result of the 1990 census, North Carolina moved up from eleven to twelve congressional seats; and redistricting was necessary. Because 40 of the State's 100 counties are subject to preclearance by the Justice Department under Section 5 of the Voting Rights Act, no redistricting plan could be put into effect without preclearance. Initially, in the summer of 1991, the General Assembly adopted a plan which provided for a single "majority-minority district"—the First District, in the northeastern part of the state. Incidentally, "majority-minority district" is a term of art which, as applied to North Carolina by the Justice Department, means that a majority of the voting age population must be black; it is not sufficient for whites to be a minority in a district.

Despite efforts of state officials to establish that the redistricting plan complied with the Voting Rights Act, the Civil Rights Division denied preclearance. This denial reflected a policy of maximizing majority black districts, sometimes referred to as "if you can, you must." That this policy was being followed by the Bush Administration was probably due to a view that, since blacks in North Carolina have been registered about 95% Democratic for vot-

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[3] 369 U.S. 186 (1962) (one person, one vote); *see also* Wesberry v. Sanders, 376 U.S. 1 (1964).
[4] 249 F. Supp. 988 (M.D.N.C.) (1966), *aff'd,* 383 U.S. 831 (1966).

ing, packing them into these majority black districts would "bleach" the remaining districts, which then would be more likely to become Republican.[5]

Devising two majority districts would obviously be difficult in North Carolina, where the population is 76% white, 22% black, and the remaining 2% predominantly Native American, and where only five counties, the largest being Edgecombe County, have a majority of blacks. However, a plan was brought to the attention of the Democrats that offered the potential for guaranteeing two black seats in Congress while not allowing the Republicans to add a new congressional seat. The downside was that some of the districts would be non-compact and even "bizarre" in appearance. For example, the majority-black Twelfth District, which stretches more than 160 miles from Durham to Gastonia, has been referred to as the "Serpent" or the "I-85 District." Actually, in driving from Durham to Gastonia on I-85, someone would cross the Twelfth District boundary over twenty times. According to some analysts, this is the least compact of all 435 congressional districts in the country. The First District in northeastern North Carolina has sometimes been called the "Ink-blot District" or the "Rorschach District." In all, four of the state's congressional districts are among the twenty-eight least compact in America.

In January 1992, I became aware of what was going on, and I found the non-compact, racially gerrymandered districts hard to reconcile with the recent Supreme Court precedents about which I was teaching my law students. For example, the *Batson*[6] line of cases emphasizes racial neutrality in jury selection and makes the point that jury service is the second most important right of citizenship. If that be the case, I asked myself why racial neutrality was not also required in dealing with the most important right of citizenship—the right to vote.

I decided that someone needed to take some legal action and that, if nobody else did, I would. However, my thoughts were suddenly redirected by my mother's death on January 28, 1992. Also, I heard radio reports that the North Carolina Republican Party would challenge the gerrymander; and I decided that I could leave the problem to others.

The Republicans did bring a suit; but their attack was predicated on "political gerrymandering" rather than on "racial gerrymandering." Probably this choice of legal theories was because of political constraints to which the Republicans themselves were subject. By a two-one vote of a three-judge district court, their action was dismissed.

At this point I decided to move forward. When I spoke to Ruth Shaw, whom I had represented in 1966, we decided that this gerrymander was "déja

[5] In 1994 this took place when the state went from eight Democratic representatives and four Republicans to eight Republicans and four Democrats.

[6] Batson v. Kentucky, 476 U.S. 79 (1986).

vu all over again." I decided that she should be the lead plaintiff, just as she had been before. This could emphasize the continuing nature of our opposition to gerrymanders of whatever nature. Mel Shimm, my colleague at Duke, was very upset by the racial gerrymander, which he considered to be the antithesis of a "color-blind society." Like Ruth Shaw, he lived in the new Twelfth District and had been politically active, chiefly in liberal causes. He was the second plaintiff.

My son, Greg, was majoring in politics at Wake Forest and thinking of law school. Because of these interests, I invited him to be a co-plaintiff with us. When he hesitated because he had not yet registered to vote, I explained that this omission could be readily solved by registering absentee. Finally, my administrative assistant, Dorothy Bullock, did so much work in getting the complaint ready that I asked her if she would also like to be a plaintiff. With her assent, we had our "fabulous five." I should add that when two of your clients are your administrative assistant and your son, it is hard to forget about the litigation.

I have been asked whether I tried to enlist an African-American as co-plaintiff, on the theory that this might have been helpful for purposes of standing to sue and public relations. I did not do so for two reasons: First, under my theory the race of the plaintiff should make no difference and every registered voter in the state had standing to protest the racial barriers and racial polarization that I believed would result from the gerrymandering. Secondly, I felt that an African-American who joined our suit might experience ostracism from other blacks; and I did not want to create such a situation for anyone inadvertently.

In any event, we filed suit in March 1992—against the Attorney General and Assistant Attorney General of the Justice Department, as well as against the governor and numerous state officials. Our theory was that the racial gerrymander originated in Washington and then was consummated by state officials. We relied on Article I, Section 2, providing that members of Congress shall be elected by the "people" of the state, which we interpreted to mean "people" unpolarized by race; equal protection, which is extended by the Fourteenth Amendment to "any person" rather than to "any group"; and the Fifteenth Amendment, which prohibits abridging the right of any citizen to vote.

By a two-one vote, the three-judge district court, after taking judicial notice that all five plaintiffs were white, ruled that as white voters we lacked standing, and that we had failed to state a claim for relief against any defendant. We persisted. We gave notice of appeal and then filed our jurisdictional statement. This pleading is the functional equivalent of the petition for certiorari, and it is subject to the same printing requirements.

In this connection, I should note that the formal requirements for an appeal to the Supreme Court are significant. For example, the statute under attack

must be printed in full; and our redistricting statute covered some fifty printed pages because of the manner in which the 229,000 census parcels had been moved around by computer technology to form the twelve districts. Since the Republicans had appealed their case and had filed a jurisdictional statement which contained the North Carolina statute verbatim, it seemed a waste of money to reprint the lengthy statute; and since the plaintiffs were personally paying the expenses, this prospective cost of several thousand dollars was discouraging. Fortunately, I learned that it might be possible for us to "lodge" with the Clerk of Court ten copies of the redistricting statute as it had been printed in the appendix to the Republicans' jurisdictional statement, and so a great deal of time and expense was saved.

As became evident, no one thought at the time that we had any chance of obtaining judicial review by the Court, for apparently our theory was far more novel than I had realized. Then, on December 7, 1992, a date which now became doubly memorable to me, we learned that the Supreme Court had found probable jurisdiction. Its order prescribed briefing and argument on a single issue stated by the Court, even though we had set forth five questions for review. Moreover, the language of the questions stated by the Court was somewhat puzzling to us, as well as to the appellees.

We then began to work on our brief. Also, it was suggested to us that obtaining amicus briefs might be helpful to our cause; and I made several overtures. Ultimately, the Republican National Committee, the American Jewish Congress, and the Washington Legal Foundation submitted amicus briefs on our side. Senator Helms was among those who co-signed one of the amicus briefs, and I realized that I had never dreamed that Senator Helms and I would be on the same side of a political issue. The NAACP, ACLU, and Democratic Party filed amicus briefs on the side of the appellees.

In preparing for argument a former colleague of mine on the Court of Military Appeals suggested that it might be helpful for the Court to see a map of the redistricting plan. My associate, Jeff Parsons, who was volunteering his time, obtained a beautifully colored map for $100. However, after the map had been prepared, we encountered a problem in finding how to comply with the Court's rules for having it present in the courtroom. Ultimately, we succeeded and that map probably did more for our cause than did my entire argument. Apparently ours was one of only two arguments during the entire 1992 term in which visuals were used in the courtroom. Incidentally, visuals don't always help. I heard that six months later a counsel used a map in a redistricting case[7]

[7] Johnson v. De Grandy, 114 S. Ct. 2647 (1994).

but was rather crestfallen when one of the justices pointed out that part of a legislative district appeared to be out in the Atlantic Ocean.

In preparation for my appearance, I went to Washington a month before argument in order to hear some other cases being argued in the Supreme Court. Also, I reviewed some transcripts of other arguments before the Court, and to my surprise I discovered that the official transcripts of arguments before the Supreme Court fail to identify which justice asked any particular question.

A day or two before the scheduled argument, counsel for one of the amicus groups asked if I would like for him to arrange a moot court. Fortunately, I accepted the offer, for the moot court resulted in many changes in my planned argument. For example, I had planned a somewhat lengthy and literary introduction with a quotation from Robert Frost; but I was told that I should get into my argument immediately and get my main point across quickly. Otherwise, I would have no chance to make that point because after two or three minutes the Court would begin questioning me, and this would occupy the rest of my allotted time. Actually in my case, the justices waited about four minutes to launch into constant questioning; the delay probably was because they were looking closely at my map.

During argument there is a great immediacy of counsel to the nine justices. Also the justices seemed very well prepared. I recall that once I misidentified Justice Souter as Justice Scalia, or vice versa. Also, I was so enthusiastic about a question from Chief Justice Rehnquist that I responded with animation, "Yessiree," which is not the customary response to a question from the Court.

In any event, we won five to four, with Justice O'Connor writing the majority opinion and with several dissenting opinions. We were remanded to the three-judge district court for a trial to determine whether there was a racial gerrymander; if so, whether there was a compelling state interest to justify such gerrymandering; and, finally, whether the redistricting plan was narrowly tailored.

After lengthy discovery, a six-day trial beginning late in March 1994 led to another two-one decision against us in early August. All three judges agreed that the redistricting plan was a racial gerrymander. However, Circuit Judge Phillips and District Judge Britt believed the plan to be justified by a compelling state interest in complying with Sections 2 and 5 of the Voting Rights Act; they also found the plan to be narrowly tailored. District Judge Voorhees rejected the purported justification and the claim of narrow tailoring.

Meanwhile, *Shaw v. Reno*, which is now *Shaw v. Hunt*, has spawned cases elsewhere. Congressional redistricting in Louisiana, Georgia, and Texas has been held invalid by three-judge district courts on grounds of unconstitutional racial gerrymandering. Just as we, along with eleven plaintiff intervenors,

have appealed the North Carolina decision, the state defendants in Louisiana, Georgia, and Texas, along with their allies, have appealed the decisions in their cases.

After suspenseful waiting, we have learned that the Supreme Court has entered orders noting probable jurisdiction in the Louisiana and Georgia cases; and they now have set these cases for argument on April 19th. Meanwhile, our case and the Texas case are being held in limbo without action. Presumably decisions will be rendered late in June in the Louisiana and Georgia cases, and the North Carolina and Texas cases will then be disposed of summarily by the Court, one way or another. Obviously, we hope for reversal in our case and for affirmance of all the other decisions. After all, nine of the twelve federal judges who have considered congressional redistricting cases since *Shaw* have ruled for the plaintiffs attacking racial gerrymandering.

I was asked recently, "Robinson, how do you feel about it—you've been at this for three years without pay and with great expense of time and money, and you still haven't won." My response was that, at least, I have had the satisfaction of fighting hard for something that I believe to be really important. I trust that each of you distinguished barristers will also have an opportunity to use your advocacy skills to help achieve results that you believe will be really significant for your community.

PEREMPTORY CHALLENGES

Editor's note: The thesis of the following two articles is that peremptory challenges are in jeopardy. Providing historical perspective, Judge Grimes traces the evolution of equal protection limitations on the use of peremptories and demonstrates how those developments have led to calls for their elimination. Mr. Fahringer emphasizes the value of peremptory challenges and decries the movement to limit them as an overreaction to limited cases of abuse and the desire for greater efficiency in the administration of justice.

I. PEREMPTORY CHALLENGES IN DANGER†

William A. Grimes*

Thirty years ago lawyers in the United States received a great honor. Clarence Gideon, from Florida, was charged with a crime. He appeared before the court without a lawyer and asked that the court appoint one for him. The judge said he couldn't. Clarence said, "I think I'm entitled to one under the Constitution," but the judge said, "I am sorry, but I cannot appoint counsel to represent you." Clarence was convicted and went to prison. He sat down in his prison cell and wrote a letter challenging the legality of his imprisonment, which ultimately was reviewed by the Supreme Court of the United States. The Court granted him a hearing and appointed an eminent lawyer to represent him. The result, in *Gideon v. Wainright*,[1] was the application to the states of the right to counsel under the federal Constitution. And in order to apply that right to the states, through the theory of selective incorporation, the Court had to find, and did find, that the services of a lawyer were so important to justice and liberty that they lay at the foundations of all our civil and political institutions. That I think is a great honor, and I am proud to be a lawyer.

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† Address delivered at the Annual Convention of the International Society of Barristers, The Phoenician, Scottsdale, Arizona, March 15, 1994.

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[1] 372 U.S. 335 (1963).

DISCRIMINATORY PEREMPTORY CHALLENGES: THE BASIC RULES

As far back as 1880, the Supreme Court decided that to exclude all blacks from juries was unconstitutional.[2] That was followed in *Swain v. Alabama*,[3] which said that you could not use peremptory challenges to exclude all blacks from juries. The difficulty with *Swain* was that a defendant could not show misuse of peremptory challenges by evidence in that particular case; a pattern or history over several past cases had to be shown.

Swain was overruled in *Batson v. Kentucky*,[4] which held that a person could raise a prima facie case of discriminatory challenge on the basis of facts and circumstances in the individual case before the court at that time. The Court laid down a formula for establishing the prima facie case of discrimination. Once that case is made, the burden shifts to the prosecution (this case was a criminal case, and the person exercising the allegedly discriminatory challenge was the prosecution) to show a nondiscriminatory reason or neutral explanation for the challenge. The reason doesn't have to rise to the level of a challenge for cause, but it has to be a reason that is not racially based and certainly cannot be an assumption that a potential juror would be partial to the defendant because of shared race. If the prosecution shows an adequate reason, the burden shifts back to the defendant to show that there was purposeful discrimination in the exercise of the challenge.

The *Batson* case was based upon the denial of equal protection and seemed to say that only a black person, for example, would be able to challenge the use of a peremptory challenge to exclude another black person, but *Powers v. Ohio*[5] did away with that limitation. Instead of focusing on injury to the defendant, the Court shifted to the rights of the excluded juror and of society to ensure that there was no discrimination on the basis of race. Thus, a white defendant could object to a challenge of a black juror and vice versa.

In *Hernandez v. New York*,[6] the Court established that a trial court's determination that a challenge was not based on intentional discrimination is entitled to great deference and may be overruled on appeal only if clearly erroneous. The Court also emphasized that the ultimate burden is on the person alleging that the peremptory challenge was based on race.

The rules regarding discriminatory peremptory challenges developed in criminal cases but were extended to civil cases in *Edmonson v. Leesville*

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[2] Strauder v. West Virginia, 100 U.S. 303 (1880) (statute limiting jury service to white males violated equal protection); *Ex parte* Virginia, 100 U.S. 339 (1880) (deliberate exclusion of blacks from jury violated equal protection).
[3] 380 U.S. 202 (1965).
[4] 476 U.S. 79 (1986).
[5] 499 U.S. 400 (1991).
[6] 500 U.S. 352 (1991).

Concrete Co.[7] They were applied to both the plaintiff and the defendant in a civil case. The Court found state action on the ground that the state created and permits peremptory challenges.

The next step was the application of the same rules to defendants in criminal cases. We started this series of cases with the decision that a prosecutor could not use peremptory challenges to discriminate on the basis of race; and in *Georgia v. McCollum*[8] the Court in effect said, "What's sauce for the goose is sauce for the gander." The defendant may not exercise a peremptory challenge on the basis of race, because that harms juries and the community.

TIMING OF THE OBJECTION

Ford v. Georgia[9] dealt with the timing of an objection to a peremptory challenge. The state had a procedural rule that the objection had to be made between the time the jury was impaneled and the time it was sworn, but that was not in effect at the time the defendant's case was tried. The Supreme Court said that although the rule would be reasonable, it could not be applied retroactively to Ford.

This decision, then, does not establish when you have to object to the exercise of a peremptory challenge; the Court merely indicated that Georgia's rule was a reasonable one. If your state has a procedural rule governing this, you ought to follow it because it probably would be upheld by the Supreme Court if it is reasonable. If your state does not have a rule, it would be prudent to make your objection before the jury is sworn. Such timing makes sense. The reason for the rule is to prevent the exclusion of a particular juror on the basis of his race. If you wait until after the jury is sworn, what is the remedy? The remedy would be to start the case all over again. If you make the objection before the jury is sworn and the peremptory challenge is disallowed, the juror who was challenged will have an opportunity to sit, and he ought to be given that opportunity.

EXTENSIONS OF THE PROTECTION

The lower courts have extended the rule against discriminatory peremptory challenges to just about every conceivable race or ethnic group that has raised the issue. The *Hernandez* case was a Supreme Court case in which the rule was applied to Latinos. In that case two jurors who were challenged were

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[7] 500 U.S. 614 (1991).
[8] 112 S. Ct. 2348 (1992).
[9] 498 U.S. 111 (1991).

Latinos who were bilingual but needed an interpreter. When the prosecutor challenged them, the defense objected and established a prima facie case of discrimination. The prosecutor gave this as the nondiscriminatory reason for their exclusion: When these jurors were asked on voir dire whether they would follow the interpretation of the interpreter rather than their own interpretation, they seemed to hesitate and looked away. The trial judge accepted that explanation and was upheld by the Supreme Court, so the jurors were excluded; but the *Batson* approach was applied to alleged discrimination against Latinos or Hispanics.[10] It also has been extended to Native Americans, Asian Americans, and even to whites and ethnic groups such as people of Italian heritage.[11]

The Minnesota courts faced an attempt to extend *Batson* to religiously motivated peremptory strikes. The Minnesota Supreme Court ruled that religiously motivated strikes do not violate equal protection because they are not "purposefully employed to perpetrate religious bigotry to the extent that the institutional integrity of the jury has been impaired."[12] The Minnesota court's refusal to afford broader protection against religiously based strikes, however, does not mean that no other court would so extend *Batson*. State courts are entitled to go as far as they find appropriate under their own constitutions, or to disagree with another state court's interpretation of the federal Constitution.

Before the Supreme Court now is a case on whether *Batson* will be applied to gender-based strikes. *J.E.B. v. T.B.*, out of Alabama, was argued in November.[13] This is a paternity case in which the state represented the woman. In Alabama, they have a venire, and each side exercises challenges until they get the venire down to twelve. In this case, the state challenged nine men, and the defendant challenged ten women plus one man. This left a jury of twelve women, who found that the defendant was the father.

This is a very important case, from two or three standpoints. Bear in mind that *Batson* is based upon equal protection, and gender is protected by the equal protection rule, at an intermediate level of scrutiny.[14] That supports in-

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[10] *See* Hernandez v. New York, 500 U.S. 352 (1991); *see also* United States v. Chinchilla, 874 F.2d 695 (9th Cir. 1989); United States v. Alcantar, 832 F.2d 1175 (9th Cir. 1987).

[11] *See* United States v. Iron Moccasin, 878 F.2d 226 (8th Cir. 1989); United States v. Chalan, 812 F.2d 1302 (10th Cir. 1987); Kline v. State, 737 S.W.2d 895 (Tex. Ct. App. 1987); Government of Virgin Islands v. Forte, 865 F.2d 59 (3d Cir. 1989), *cert. denied*, 111 S. Ct. 2262 (1991); Roman v. Abrams, 822 F.2d 214 (2d Cir. 1987), *cert. denied*, 489 U.S. 1052 (1989); United States v. Biaggi, 673 F. Supp. 96 (E.D.N.Y. 1987), *aff'd*, 853 F.2d 89 (2d Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989).

[12] State v. Davis, 504 N.W.2d 767, 770 (Minn. 1993), *cert. denied*, 114 S. Ct. 2120 (1994). "This is not to say that religious intolerance does not exist in our society, but only to say that there is no indication that irrational religious bias so pervades the peremptory challenge as to undermine the integrity of the jury system." *Id.* at 771.

[13] J.E.B. v. T.B., No. 92-1239 (U.S.). For a summary of the oral argument, *see* 62 U.S.L.W. 3329. [Ed. Note: In April, the Court issued its decision and did apply *Batson* to gender-based strikes. J.E.B. v. Alabama *ex rel* T.B., 114 S. Ct. 1419 (1994).]

[14] *See* Craig v. Boren, 429 U.S. 190 (1976). In *Taylor v. Louisiana*, the Court held that males had standing to object to the systematic exclusion of women. 419 U.S. 522 (1975).

cluding gender under the *Batson* rule.[15] If gender is included, however, the incidence of peremptory challenge contests under *Batson* could increase dramatically; every potential juror who is struck is either male or female. Chaos may result.

THE FUTURE

In a case out of the Fifth Circuit, an unpublished opinion, the court refused to abolish peremptory strikes on equal protection grounds or to deviate from the mechanism established in *Batson*. The question that went to the Supreme Court was whether peremptory strikes should be abolished. The Court refused to review the case, but the possibility remains that the issue will be taken up in the future. Justice Marshall wrote a concurrence in *Batson* in which he argued that peremptory challenges should be eliminated altogether because it's too easy for someone to make up a nondiscriminatory reason for the exercise of a peremptory challenge and therefore the *Batson* mechanism could not give adequate protection.[16] In the *J.E.B.* case, Justice Blackmun asked two or three of the speakers whether they thought *Batson* had been wrongly decided. They said no and argued only whether *Batson* should be applied to gender, but the person representing the state said that perhaps the way to cure the problem was to change the method of exercising peremptory challenges or even to do away with them altogether. The issue has been raised.

We must also watch the state courts, not only the Supreme Court, for efforts to abolish peremptory challenges because each state has its own constitution, and possibly some divergence in interpreting the federal Constitution. At least one intermediate appellate court panel has done away with peremptory challenges—a panel of the court of criminal appeals of Oklahoma in the case of *Moore v. Oklahoma*, another unpublished opinion. That case is now on appeal and will be decided by the highest court in Oklahoma's criminal court system. I don't know what the result will be, but there is a growing danger that peremptory challenges will die.

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[15] Two years ago, the Ninth Circuit applied *Batson* to gender, but other circuits refused to do so. United States v. De Gross, 960 F.2d 1433 (9th Cir. 1992); United States v. Broussard, 987 F.2d 215 (5th Cir. 1993); United States v. Nichols, 937 F.2d 1257 (7th Cir. 1991); United States v. Hamilton, 850 F.2d 1038 (4th Cir. 1988). [Ed. Note: As mentioned in note 13, *supra*, the Supreme Court has now held that the *Batson* principle applies to gender-based strikes.]

[16] Batson v. Kentucky, 476 U.S. 79, 105-07 (1986) (Marshall, J., concurring).

II. THE PERSECUTION OF THE PEREMPTORY CHALLENGE

Herald Price Fahringer*

The Sixth Amendment guarantees to all persons accused of a crime the right to a trial by an impartial jury. The principal way impartiality is achieved is through a system of challenges exercised during voir dire. A challenge may be asserted either for cause or peremptorily. A judge may grant a challenge for cause when a juror has a state of mind likely to preclude him or her from rendering an impartial verdict based on the evidence adduced at the trial.

On the other hand, no specific reason need be assigned for a peremptory challenge, and the court *must* excuse a person so challenged. The peremptory challenge "allow[s] [the] parties to exclude a given number of persons who otherwise would satisfy the requirements for service on the petit jury."[1] Peremptory challenges are essential to ensure that a jury is purged of known or suspected prejudices. If the forces of prejudice and bias that afflict so many jurors called into service today are to be confronted effectively, it is imperative that the parties have a full complement of peremptory challenges.

One of the most serious threats to the integrity of the jury system in this nation is the movement to either eliminate the peremptory challenge or reduce the number of challenges afforded the parties in both civil and criminal trials.[2] Although this issue has attracted growing scholarly attention, it has gone largely unnoticed by most of the practicing bar. It should be a matter of considerable concern to trial lawyers everywhere.

HARROWING IMPLICATIONS

The plan to reduce or eliminate peremptory challenges in criminal and civil cases is harrowing in its implications. It radically threatens our deepest assumptions about a person's meaningful right to an impartial jury trial. Any coherent

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[1] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991).

[2] For instance, in New York, a task force entitled the "Jury Project" has recommended that peremptory challenges be reduced in class *A* felonies from 20 to 15; in class *B* and *C* felonies from 15 to 10; and in class *D* and *E* felonies from 10 to 7. The Jury Project, Report to the Chief Judge of the State of New York 67 (March 31, 1994). The task force has also urged that the number of peremptory challenges in civil cases be limited to three per "side" rather than three for each "party." *Id.* at 70. These recommendations have been passed on to the New York state legislature for adoption.

examination of this issue requires a brief review of the evolution of the peremptory challenge.

The peremptory challenge has a long and esteemed pedigree, stretching back over 200 years of English common law and even into Roman times.[3] The use of peremptory challenges in this country dates as far back as the founding of the Republic, and its common-law origins here go back even farther.[4] Although no constitutional right to a peremptory challenge exists, there has always existed a widely held belief that it is an indispensable part of trial by jury. The basic intuition underlying the peremptory challenge is simple and was eloquently expressed by Blackstone over one hundred years ago:

> [The peremptory challenge is] a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous. This is grounded on two reasons. As everyone must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is, that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike.[5]

Every trial lawyer knows that the exercise of a peremptory challenge is often without logic and frequently based on feelings and instincts. Ours is a human system, and there are signs and symptoms that a lawyer can see in jurors that cannot—and perhaps should not—be articulated. These indicators tell us that a particular individual is not right for a given case. For example, there are qualified jurors whose life experiences are such, by virtue of age, education, intellect, or other circumstances, that they are in a poor position to analyze a sophisticated defense or a plaintiff's complex theory of liability. The only way such a juror can be effectively removed from the jury is peremptorily.

JURORS TODAY ARE OVERBURDENED WITH PREJUDICES

What must be taken into account today, in any discussion of peremptory challenges, is the alarming increase in prejudices that pose a constant threat to the integrity of jury verdicts. The disruptive forces of unemployment, overcrowding, growing economic disorder, class conflicts, and social despair have combined to polarize our society. It seems that hate, not hope, springs eternal

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[3] J. PETTINGAL, AN ENQUIRY INTO THE USE AND PRACTICE OF JURIES AMONG THE GREEKS AND ROMANS (1769).
[4] *See* Holland v. Illinois, 493 U.S. 474, 481 (1990).
[5] 4 W. BLACKSTONE, COMMENTARIES *353.

in our new world. And when hatred establishes itself as habit, it passes beyond the power of reason to understand it or of words to explain it. Simply put, as times grow worse, prejudices deepen. And sadly, some of these prejudices have gained a high gloss of plausibility.

Moreover, as crime in major cities becomes more rampant and ruthless, fear is slowly paralyzing the public. There are people in our cities who walk with death every day. Jurors caught in the grip of these forces and held hostage to these fears are filing into our courts overburdened with prejudices that can easily wreck a criminal or civil trial. Because challenges for cause cannot effectively cope with this serious problem, the only practical instrument available for removing these critical prejudices from jury panels is the peremptory strike.

"AND MAKE NO MISTAKE ABOUT IT: THERE REALLY IS NO SUBSTITUTE FOR THE PEREMPTORY."

In his dissent in *J.E.B. v. Alabama ex rel. T.B.*,[6] Justice Scalia declared, with considerable candor, "And make no mistake about it: there really is no substitute for the peremptory." Challenges for cause will not solve the problem of jury prejudice because most jurors are reluctant to acknowledge their biases. No matter how hard lawyers try to uncover prejudice, many jurors will disavow it. Research in social psychology has established that the behavior and attitudes of jurors are influenced by the ceremonial flavor of the selection process.[7] Under the circumstances of uncertainty and unfamiliarity that exist in a courtroom, jurors become very sensitive to "social comparison information," i.e., signs from other people around them indicating the appropriateness of their behavior, attitudes and feelings.[8]

Thus, during voir dire, jurors may attempt to answer in what they think is a socially appropriate manner instead of being honest. Opinions expressed in public often differ from opinions expressed in private.[9] Even the most conscientious jurors' ability to express their feelings candidly, particularly on sensitive or controversial issues, is inhibited by a need to appear acceptable to other jurors. As the "right" or socially correct responses become clear during voir dire, answers from jurors become less and less reliable. In a word, jurors quickly learn the art of pretense and become shamelessly eager to please.

Experienced trial lawyers can often detect this lack of candor and can recognize deep-seated prejudices that remain unspoken. Seasoned attorneys can

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[6] 114 S. Ct. 1419, 1438 (1994) (Scalia, J., dissenting).
[7] *See, e.g.*, W. MISCHEL, PERSONALITY AND ASSESSMENT (1968); Sarbin, *Contextualism: A World View for Modern Psychology*, in NEBRASKA SYMPOSIUM ON MOTIVATIONS (J. Cole 1976).
[8] *See* Festinger, *A Theory of Social Comparison Processes*, 7 HUMAN RELATIONS 117 (1954); S. SCHACHTER, THE PSYCHOLOGY OF AFFILIATION (1959).
[9] *See* A. P. HARE, HANDBOOK OF SMALL GROUP RESEARCH (1962), and studies cited therein.

sense an undertone of hostility in expressions and movements that are illegible to others. Without the peremptory challenge, these antagonisms will remain on the jury and may ultimately taint the verdict.

Even on the few occasions when biases *are* unmasked during voir dire, peremptory challenges may yet be needed. Often jurors will try to convince the court and counsel that their beliefs can be set aside. However, pledges of fairness in the courtroom are alluring but unreliable. Such assurances are inherently suspect. The plain fact is that most of the pronounced prejudices that afflict many jurors today are incorrigible. The only effective way to dispose of them is through the use of a peremptory challenge.

We pause here to acknowledge that, in the real world, absolute impartiality is rarely, if ever, achieved. Nevertheless, whatever degree of neutrality is obtained is achieved through both sides being empowered to remove a sufficient number of objectionable jurors without explanation. If nothing else, we gain the *appearance* of impartiality, and appearances are important.

Furthermore, the peremptory challenge provides the litigant with a feeling of participation in the jury selection process. As Blackstone so aptly pointed out, it gives a party the right to remove from the jury those persons against whom he or she has a prejudice. Put another way, it provides the party with an unqualified choice in who will decided his or her fate. The exercise of this prerogative furnishes the litigant with a sense of direct participation in the process and helps to keep jury selection democratic.

BATSON DOES NOT REQUIRE THAT PEREMPTORY CHALLENGES BE EITHER ELIMINATED OR REDUCED

Nothing stated here is incompatible with the rule that peremptory challenges cannot be used to displace jurors based solely on their race or gender. The Supreme Court's recent inoculation of peremptory challenges against use in a racially discriminatory way, in *Batson v. Kentucky*,[10] does not support their abolition. In the wake of *Batson*, a few people have urged that the peremptory challenge's inherent potential for corrupting the selection process by

[10] 476 U.S. 79 (1986). In *Batson*, the Supreme Court held that the discriminatory exercise of peremptory challenges by the prosecutor against members of the defendant's racial class violated equal protection. In *Powers v. Ohio*, 499 U.S. 400 (1991), the Court held that a white defendant has standing to assert the right of black jurors not to be removed from a jury on racial grounds. In *Edmonson v. Leesville Concrete Co,* 500 U.S. 614 (1991), the Court extended *Batson* to civil cases. In *Georgia v. McCollum*, 112 S. Ct. 2348 (1992), the Court held that the *Batson* principle, which prohibits the prosecution from exercising discriminatory peremptory challenges, applies equally to defense counsel. And finally, in *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994), the Court held that intentional discrimination on the basis of gender in the use of peremptory challenges violates the equal protection clause.

excluding jurors on racial grounds requires its elimination entirely.[11] Although this argument is well-intentioned, it is fundamentally flawed.

An institution with such a long and venerable history should not be demolished merely because a few lawyers have misused the peremptory challenge in a discriminatory manner—any more than a lawyer's misuse of cross-examination would be cause for its elimination. The wide dimensions of the peremptory challenge and the respect it has received over the years are due in large measure to the important place it occupies in our adversary system. Thus, the critical need is for a realistic assessment of the peremptory challenge's potential for abuse weighed against its well-recognized value for reducing jury prejudice. Experience has shown that the danger of debasing the selection process is minimal compared to the benefits of lessening prejudice on a jury. Thus, the argument against the peremptory challenge is built on a faulty premise that substantially undermines the validity of its ultimate conclusion.

For example, one group of commentators who are Assistant U.S. Attorneys observed that in the vast majority of cases tried, the question of improperly exercised peremptories does not even arise, and, accordingly, there is no extra litigative cost. When it does arise, a *Batson* claim usually is dismissed by the judge immediately because the defense has failed to establish a prima facie case for believing that any improper challenge has been exercised. According to these authors, "Typically *Batson* hearings are a five-to-fifteen-minute interlude during the jury selection process."[12] Moreover, on the rare occasion when a peremptory challenge is abused, the abuse can be easily remedied by invoking the corrective measures so carefully formulated in *Batson*.

Casting out the peremptory challenge with the bath water of such a small

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[11] The late Justice Thurgood Marshall's concurring opinion in *Batson*, perhaps more than anything else, has ignited the controversy over the peremptory challenge and instigated the insurrection against it. He urged that the peremptory challenge should be eliminated because its potential for misuse taints the whole selection process. Batson v. Kentucky, 476 U.S. 79, 107 (1985) (Marshall, J., concurring). Three judges on the New York Court of Appeals have adopted Justice Marshall's position and, in a concurring opinion, have recommended that the New York legislature reexamine the status of peremptory challenges with a view toward abolishing them. People v. Bolling, 79 N.Y.2d 317, 328-31, 591 N.E.2d 1136, 1143-46, 582 N.Y.S.2d 950, 957-60 (1992) (Bellacosa, J., concurring).

Some members of the academic community, following in Justice Marshall's path, have also questioned the viability of the peremptory challenge in light of *Batson*. Note, *Fourteenth Amendment—Peremptory Challenges—The Equal Protection Clause of the Fourteenth Amendment Prohibits a Criminal Defendant's Exercise of Racially Discriminatory Peremptory Challenges—Georgia v. McCollum, 112 S. Ct. 2348 (1992)*, 23 SETON HALL L. REV. 1160 (1993); Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369 (1992); Comment, *Constitutional Law: The Challenge to the Challenge—Will Peremptory Challenges Survive the Race-Neutral Rule? [Edmonson v. Leesville Concrete Company, Inc., 111 S. Ct. 2077 (1991)]*, 31 WASHBURN L.J. 606 (1992); Mirsky, *Peremptory Challenges Needlessly Abuse Jurors*, Nat'l L.J., Nov. 21, 1994, at A21; Curriden, *The Death of the Peremptory Challenge*, 80 A.B.A. J. 62 (Jan. 1994). Although these commentators are privileged and intellectual, in the writer's view they lack an understanding of the everyday practicalities of jury selection.

[12] Helland, Light & Richards, *An Asymmetrical Approach to the Problem of Peremptories: A Rebuttal*, 30 CRIM. L. BULL. 242, 243 (1994).

number of cases would be a terrible mistake. Reducing the number of peremptory challenges to counteract a situation that might arise in less than five percent of the cases tried is unthinkable. In the other ninety-five percent of the cases litigated, the orthodox use of peremptory challenges provides a valuable and legitimate means of minimizing prejudice on jury panels. Furthermore, it is now apparent that the *Batson* doctrine has crested and will not be expanded beyond race and gender.[13] This, in itself, limits the risk of the selection process being degraded. To summarize: Since the risk of corrupting the selection process through the misuse of peremptory challenges is minimal, the primary argument for its abolition is drastically undercut.

THE REDUCTION OF PEREMPTORY CHALLENGES WILL HARM DEFENDANTS MUCH MORE THAN THE PROSECUTION

One of the most cherished policies of our nation is affording those accused of crime a fair trial. The reduction of peremptory challenges will harm defendants in criminal cases far more than the prosecution. This is because the defendant in a criminal case has a much greater need for peremptory challenges than does the state. It is generally acknowledged that the prosecution in most criminal cases has a decided advantage over the defendant. Studies have shown that a preponderance of jurors come to court bearing beliefs that are far more antagonistic to the defendant than to the state. A number of states have acknowledged this disparity of prejudice by allowing the defendant a larger ration of peremptory challenges than the prosecution.[14]

Years ago, the National Jury Project, an organization that conducted some of the most authoritative research in the field of jury dynamics, found that two-thirds of the jurors were unsympathetic to the defendant. Their studies

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[13] On May 23, 1994, the Supreme Court declined to hear the case of *Davis v. Minnesota*, which presented the issue of whether *Batson* should be extended to religious bias. 114 S. Ct. 2120; *see* State v. Davis, 504 N.W.2d 767 (Minn. 1993). *See also* United States v. Cresta, 825 F.2d 538 (1st Cir. 1987), *cert. denied*, 486 U.S. 1042 (1988) (young adults not a cognizable group for *Batson* purposes); United States v. Jackson, 983 F.2d 757 (7th Cir. 1993) (same); United States v. Villarreal, 963 F.2d 725 (5th Cir. 1992) (challenge of jurors whose political belief was opposed to capital punishment did not violate *Batson*); Brown v. Dixon, 891 F.2d 490 (4th Cir 1989) (same); United States v. Angiulo, 847 F.2d 956 (1st Cir. 1988) (Italian-Americans not a cognizable group for *Batson* purposes); Murchu v. United States, 926 F.2d 50 (1st Cir. 1991) (Irish-Americans not a cognizable group under *Batson*); State v. Spitler, 75 Ohio App. 3d 341, 599 N.E.2d 408 (1991) (homosexuals not a cognizable group for *Batson* purposes). *See generally* Annotation, *Use of Peremptory Challenges to Exclude Ethnic and Racial Groups, Other Than Black Americans, From Criminal Jury—Post-Batson Federal Cases*, 110 A.L.R. FED. 690 (1992).

[14] The defendant is given more peremptory challenges than the prosecutor in eleven states: Alaska, Arkansas, Georgia, Kentucky, Maryland, Michigan, Minnesota, New Mexico, South Carolina, Tennessee, and West Virginia. J. VAN DYKE, JURY SELECTION PROCEDURES 282-83 (1977). The policy of providing more peremptory challenges to a defendant in a criminal case is also reflected in rule 24 of the Federal Rules of Criminal Procedure, which allows a defendant ten peremptory challenges to the government's six.

showed that twenty-five percent of the people selected for jury duty believed that an accused person was guilty simply because a charge had been made, and more than thirty-six percent believed that it was the defendant's responsibility to prove his or her innocence rather than the state's burden to prove the case.

We must assume that the public's deep skepticism regarding defendants has reached an even higher level today. As a consequence, a greater burden rests upon the defense to remove biased jurors. The reduction of the number of peremptory challenges would punish the defense far more than the prosecution and impose an additional handicap on the defendant.

EFFICIENCY ARGUMENTS

Finally, those who advocate reducing the number of peremptory challenges argue that it will save costs and expedite trials. During times inhospitable to delay, public officials must constantly negotiate the tensions between time-consuming procedural safeguards and ways to administer justice more efficiently. To be sure, the exercise of peremptory challenges does delay the selection process moderately and calls into service more jurors. But these small inefficiencies and costs seem parochial compared to a person's right to a jury free from prejudice. Since selecting an impartial jury is one of the most important aspects of any criminal trial, this critical safeguard should not be sacrificed for a small measure of economy.

I know of no active trial lawyer, in either the civil or criminal field, who favors the elimination of peremptory challenges.[15] This uniform resistance is not born of some sentimental impulse but is based upon the recognition that the frightening prejudices that afflict jurors today cannot be effectively confronted without the aid of these preemptive powers.

CONCLUSION

A fair determination of an individual's guilt or innocence is achieved, in large measure, through a jury system that is designed to protect an accused from the arbitrary exercise of power by the government. For the jury system to succeed, juries must be impartial. Therefore, the traditional means of obtaining impartiality through the exercise of peremptory challenges must be left intact. It is as simple as that. Such an important safeguard should not be forfeited for expediency or because of an unfounded fear that its misuse may

[15] For instance, even the District Attorney's Association of New York opposes the reduction of peremptory challenges in criminal cases. N.Y.L.J., Apr. 9, 1994, at 2, col. 3. Certainly, this position, coming as it does from such a formidable group, lends force to the arguments presented here.

defile the selection process. Now is not the time to tamper with the peremptory challenge when prejudices among jurors are so rampant. Without adequate peremptory challenges, fair trials in this country will be seriously jeopardized. And that we cannot abide.

COMPLEX LITIGATION: THEN, NOW, IN THE FUTURE†

Seymour Kurland*

For more than thirty years, I have practiced what is today called "complex" litigation. In the early 1960s, it was called an "important" case, involving a major client and somewhat more than $100,000. Ordinarily, I was on the defense side. When a complaint came in, we immediately ascertained service and our time to respond, and reviewed it for jurisdictional and venue problems. We met with the client and key fact witnesses after reviewing essential documents such as contracts, reports, and relevant correspondence. After this meeting, we decided whether motions were in order and which documents and depositions we would initially want from the plaintiff. Priority of discovery, extensions of time, and other mechanics were worked out amicably in most cases with opposing counsel, whom we usually knew. Indeed, most cases were local.

Within a month or so, we knew enough to evaluate our case for settlement or trial purposes. We met again with the client, reviewed the case, and gave our recommendations. If the law or facts were unclear, and the case did not involve business policy or personal principle, we were usually told to try to settle.

Most cases settled within six months, although some intractable and egotistical lawyers who turn each case into a personal confrontation and self-evaluation would wait until the eve of trial to get serious about negotiations. However, no defense lawyer I knew ever "worked a case for fees" before settling. And to this day, I don't know a respectable plaintiff's lawyer who doesn't want to settle as soon as he has a reasonable "fix" on his case.

Now

Then came the litigation explosion of the last twenty-five years, which has brought staggering changes to the practice of law: a tremendous increase in commercial litigation; government enforcement of the antitrust and securities laws, and the private civil litigation on its heels; the new class action and multidistrict rules and consumers' taking advantage of them; and the tremendous expansion of individual rights and their vindication in the courtroom. Cases are national and even international in scope, involving numerous parties, many

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millions of dollars, and teams of lawyers. Indeed, all of this has led to the grouping of many claims into liability classes and to the gross adjustment of wrongs.

As a profession, we have concluded that it is professionally irresponsible to come to grips with a case simply by examining key documents, checking the legal principles, interviewing our clients and key witnesses, and taking a handful of depositions. Instead, lawyer teams on both sides are formed (with considerable time spent on legal politics). The lawyers first consider favorable jurisdictions and the possibility of preemptive suits. Consolidation and multi-district treatment follow. The merits may be stayed until the class action issues are determined, which often involves intensive class action discovery and hired industry experts to give what in fact has become unnecessary analyses. Nevertheless, this remains a standard practice.

Litigation on the merits is then divided into stages: preliminary discovery, preliminary motions and subsequent merits discovery, which involves document identification and production, indexing and organizing with up-to-date computer equipment, providing CD-ROM disks, standard imaging, picturizing, multiple coding, scanning and text file consideration of documents and witness kits, preparation binders and document depositions. Brilliant young attorneys, with issue-spotting skills honed by law school exams, draft sets of interrogatories seeking all information of any conceivable relevance to the lawsuit—all of which are to be ultimately summarized in a brief little binder for use by the amazing senior partner in his devastating courtroom examinations (usually conducted by intuition).

Finally, after perhaps a year, the first depositions of lower echelon people are taken, and the questioning proceeds step-by-step up the corporate ladder to the commander-in-chief, who for the first time actually tunes in to the case and becomes outraged at the entire proceeding.

During all of this, there are meetings and conference calls, and more meetings and conference calls, and still more meetings and conference calls.

I have been consistently involved in such cases, mostly as a plaintiffs' lawyer in antitrust and as a defense lawyer in securities litigation. It's my experience that well over ninety-five percent of these cases are settled, a statistic confirmed by countless studies. The central issue in virtually all such litigation is not whether, but how and when the suit can best be settled.

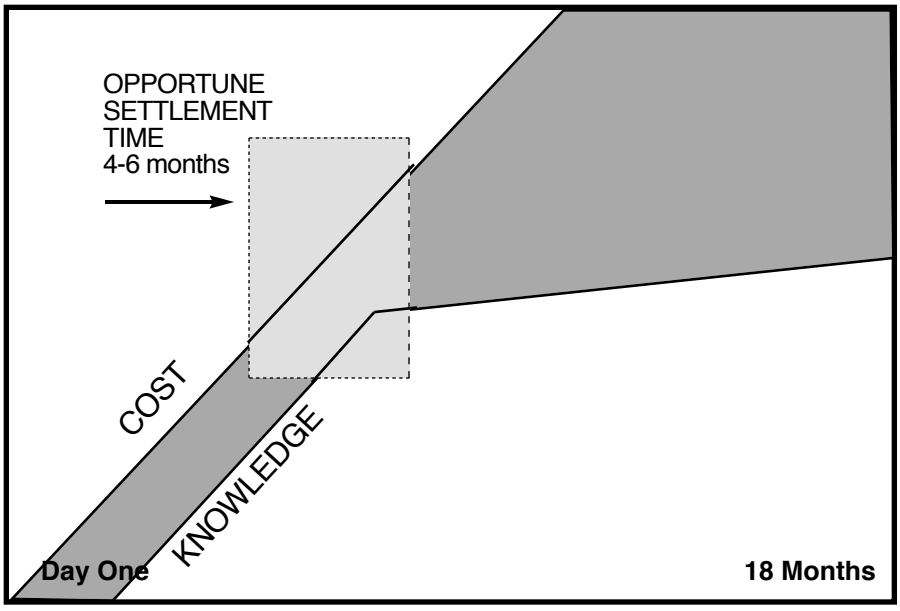
Every good lawyer I have ever worked with, or against, knows the appropriate settlement range within six months after a case has started. Despite all the puffing and posturing, the only real dispute is whether the case will settle on the high or low side of that relatively narrow dollar range. How can this be, when the actual work in the case is so time consuming and laden with documents, interrogatories, computer analyses, reports, depositions, and summary judgment motions?

It's because the core facts and issues of law in virtually all cases are not that complicated. And, for purposes of settlement, that core knowledge is sufficient to act responsibly. In this respect, settlement is not much different from twenty-five years ago. Trial preparation is a completely different affair, however, involving intensive work to discover and present evidence to convince, anticipate, and refute. But trial preparation goes far beyond what's necessary to appraise a case intelligently and advise a client judgmentally. If settlement is the goal, the time to do it is when both sides know enough about the facts and law to make informed responsible judgments on the merits of the case, and the costs and risks of trial. The parties can evaluate these factors against a recommended and achievable settlement sum.

I emphasize the words "informed responsible judgment" because there is never total knowledge of any human situation, no ultimate truth waiting to be discovered, and no end to seemingly meaningful legal and factual research. The crucial question for the lawyer is, "When do you know enough to evaluate and advise 'responsibly'?"

Isn't this the essence of what we are trained, paid, and required to do as professionals? We are not hired to turn a handful of key facts into rooms full of documents at costs that well exceed the amount in dispute.

The accompanying chart illustrates in simplified form the pattern of a typical complex case as it proceeds from inception to trial; it compares the knowl-



edge acquired as the case progresses to the cost of obtaining that knowledge. I have shown this chart to experienced trial lawyers, judges, and even institutional clients, all of whom smile and agree it's an accurate short-hand picture of the economics of these cases.

The chart shows that the learning curve is steepest, and the client is getting the most value for its money, in the first four to six months of the lawsuit. It is then that the case is new, important and exciting, and the lawyers feel the greatest need to learn and control the situation. At the end of this initial period, the lawyer should be sufficiently informed to evaluate the case and advise on an appropriate settlement position.

After this start-up period, the case usually falls into a discovery routine controlled by younger lawyers focused on their individual piece of the litigation. Partners become involved in motions, conferences, and discovery disputes, which eventually become ends in themselves.

Lawyers hate to part with documents that hurt their case and tend to resist such discovery until the last moment. But in most cases, even these last-minute discoveries do not change the gist of the case.

The learning curve flattens out, while legal fees continue to mount. Litigation becomes a game played for settlement position, which continues until a few months before trial when the bosses become involved again, reality returns, and the parties agree to a settlement that could have been consummated a year ago.

So why do we practice trial law this way? Is it a matter of greed, laziness, habit, or just plain ineptitude? Not in my opinion. I submit it mostly has to do with the psychology of the major players involved.

1. Top management naturally views these cases as major corporate events, involving both the reputation and financial well-being of their companies. The initial reaction of today's president or chief executive officer is often emotional and aggressive: "We are going to fight this thing. Take it all the way!" Cost and settlement are not relevant at this time, as the case is seen as a matter of principle to be vindicated. Indeed, if outside counsel even mentions settlement, they may be considered weak, without the will necessary to fight to the finish or at least to wear down the other side to a reasonable settlement.

Especially where insurance companies are defendants, resistance to claims is a matter of commercial survival, but it doesn't have to be pursued blindly. More and more companies are appraising cases at earlier stages. If the claims are genuine and settlement is reasonable, they don't wait and incur high legal costs, simply to hang on to the outdated premise that later is always cheaper. Good cases will go all the way if they have to, and even lawyers who fear trial will not give a case away. Instead they will bring in additional trial counsel, or someone on plaintiff's team will always come forth.

2. In-house counsel and "at risk" executives who are responsible for creating or handling the controversy may not be especially eager for a fast resolution. Because their jobs are on the line, justifying their conduct is more important than money. Since any result other than complete victory may be perceived as their personal failure, they are often content to keep the matter out of sight and out of mind, as long as costs stay fairly reasonable and on budget.

3. Plaintiff's counsel, although always anxious to settle, may nevertheless view an early approach by defense counsel as a sign of weakness. Plaintiff's lawyers working on contingencies and advancing costs themselves may breathe a sigh of relief when the defense makes an early settlement offer, as it indicates that the case will ultimately be funded and that they won't lose completely. This is, indeed, a very strong reason against an early defense approach where a large complex case is entirely contingent and expensive.

4. Defense lawyers also may see an early approach as a sign of weakness. And, of course, they know that they are getting paid by the hour, which reduces the incentive for early settlement. So, the rationalization goes, fight hard, do what the middle management directs, and aim to please the person ultimately in charge, who will hire you again.

Is this the way we really want to practice our profession? For these reasons, it is clear that if settlement is to occur within the first four to six months, active judicial involvement is essential. Although judges would prefer to act simply as impartial and objective umpires, they must be more proactive to tame the expensive and time-consuming cases.

THE FUTURE

Both the bench and the bar must change their methods to adapt to the demands of complex litigation. Complex litigation forces changes in the lawyer-client relationship, such as in the development of alternative and flexible billing practices. It's hardly sensible to negotiate an overall fee agreement when a case first arrives and little is known about its nature and scope. It makes more sense during this initial period to start out at regular hourly rates and involve the key players at the outset. After four months, the lawyer and the client can re-evaluate the case. If settlement seems likely at that time, the existing fee arrangement can continue, but if the case won't settle, there are various alternatives:

1. If your side has a very strong case, then it may be just a matter of time before your adversary agrees to a reasonable settlement. In that situation, a reasonable fee for the next portion of the work can be worked out using lawyers at lower rates who will shepherd the case toward settlement or trial.

2. If it's a bad case for a lot of money and against very good lawyers on the other side, then the fee has to take account of the active involvement of senior lawyers.

3. If trial appears inevitable, then a fee arrangement may have different costs for different stages of pretrial and trial litigation.

4. Fees can also be negotiated to incorporate a contingency or bonus factor, up or down depending on the result, to motivate counsel and make them partners in the litigation.

There is no reason why the fee arrangement has to be set in stone at the beginning. It can be renegotiated at other relevant stages of the case, and a dollar cost for trial can best be estimated when it is close enough to do so sensibly. The main point is that lawyer and client must trust and respect each other and remain flexible and fair. It is this relationship that matters most and in which we have lost the most.

NEW COURT RULES

In December 1990, Congress enacted the Civil Justice Reform Act, which in substance requires federal district courts to create broad-based advisory groups that will adopt civil justice expense- and delay-reduction plans. The advisory group for the Eastern District of Pennsylvania, of which I am a member, has adopted a plan, which is already in operation. The portion of the plan dealing with complex litigation is set forth in Section VIII.[1]

These provisions are designed to streamline litigation and to focus the parties on settlement early in the case. At an early pretrial conference, the parties agree to the "core" discovery, which is to occur within the first four months of the case. This discovery is designed to uncover the key facts necessary to enable the parties to evaluate their case for settlement. At the end of the period, both sides submit brief pre-conference statements that identify their claims and defense with the evidentiary support obtained by the "core" discovery.

The purpose of the statements is to enable the judicial officer conducting the follow-up settlement conference to make an informed contribution to the process. Being informed does not mean reading reams of motion papers and briefs. It means getting a good fix on the case based on experience and with the help of responsible lawyers. It is also important that top corporate officers or others with full settlement authority be available to participate in this conference. Their presence in the courthouse, before a judge with complete

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[1] *See* Special Treatment of Complex and "Other Appropriate" Cases in Report of the Advisory Group of the United States District Court for the Eastern District of Pennsylvania Appointed Under the Civil Justice Reform Act of 1990, pages 72-77; *see also* new local federal rules Sections 3.01-3.03.

power, may awaken a sense of reality, humility, and responsiveness not present in a home office suite encased in the accoutrements of business success.

An intensive, serious negotiation session in this atmosphere will indeed work wonders, especially if the judge makes clear that this is the moment of decision and not simply the first in a series of meetings. Lawyers and clients must understand that if settlement is not achieved, they will face a discovery cutoff and a firm trial date. If these steps are followed, experience in this district has shown that any complex case can be readied for trial within eighteen months.

To be responsible to the profession and to their clients, lawyers must work diligently to control the costs and delays of complex litigation. If we cannot achieve this goal, litigators will increasingly find themselves losing out to alternative dispute resolution techniques that are coming more and more into fashion.

Retired senior judges like Frank McGarr of the U.S. District Court in Chicago, Griffin Bell of Atlanta, and Arlin Adams of the Third Circuit have more than full plates of work, being brought into complex cases, listening to both sides, and then evaluating and settling them.

Indeed, in the final analysis, the juries are doing the same thing—sifting the key evidence, exercising sound judgment, and making the same determination that lawyers could and should have made years earlier.

If we don't reform soon, the damage could be irreparable. What a loss to all of us, simply because we couldn't be responsible to our institutions!

LAW ENFORCEMENT IN TEXAS†

Ronald D. Krist*

Upon hearing the title of my talk, someone said, "You can't speak on that subject. There is no law enforcement in Texas." Well, there really is. Our peer groups, other state police agencies in the United States, consider us a premier state police organization; and we are. As a member of the commission that serves as an oversight committee for the Texas Department of Public Safety, I am very proud of the department.

Not that we're sinless. We've had abuses in the past, as all state organizations have, and we have some problems today. Just recently, we had a roadside arrest that escalated into a shooting. We commissioners spend a lot of time looking at tapes of incidents like that, to make some determination of whether the shooting was justifiable or whether the situation could have been handled a little differently. I am a different type of DPS official because, as we speak, I am in the middle of a suit against the Harris County Sheriff's Department for what I consider to be a bad shooting. Last week we got a guilty verdict on a deputy sheriff who had some sort of sexual fixation on a woman, continuously harassed her, then cooked up an illegal writ, broke into her house with some other officers at 1:00 in the morning, went to her bedroom, and shot her. I don't serve as a spokesman for the DPS and make sure everybody thinks we're good. My job on the DPS is to do what I think is right and try to make sure we have a responsible, civilized police organization.

By the way, at the first meeting I attended as a commissioner, I thought I was going to end up in trouble. Back in our drinking days, my brother and I used to frequent a gambling joint in Brazoria County, one of the counties adjacent to Houston. At my first commission meeting, one of the men reporting to us said, "We finally made a big gambling bust over in Brazoria County. We busted a guy we've been trying to get for years, and we have videotape." It was the place I used to go. I thought, "This can't be happening to me," and I said in a meek voice, "May I ask a question?" "Yes, Commissioner." I figured that was the last time they would refer to me that way. I asked, "How old is that videotape?" He said, "Six months." What a relief! Your past really can come back to haunt you!

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* Krist, Gunn, Weller, Neumann & Morrison, Houston, Texas; Commissioner, Texas Department of Public Safety (Chairman in 1994); Fellow, International Society of Barristers.

Let me tell you a little more about the commission and the Department of Public Safety. I am one of three commissioners. The other two are Republican appointees. One of them is Albert Alkek, a billionaire philanthropist and a very nice man. The other one is a fellow named Bob Holt. He was George Bush's number one national fundraiser and happens to come from west Texas, as I do. The Department of Public Safety, which we oversee, is divided into basically two groups: traffic law enforcement, which includes the highway patrol and licensing, and criminal law enforcement, which includes a narcotics service, an intelligence service, and a gubernatorial security service. Among the criminal law enforcement agencies, although it's a separate, autonomous body, is the Texas Rangers, limited by statute to a hundred people. They report only to the director, and the director reports only to the commission.

The Ranger service is the oldest continuous police organization in the country. The charge to its first members was this: "You will range the state of Texas . . . and monitor Indian activities." That's how they got the name Ranger. Walter Prescott Webb, the leading historian of the Texas Rangers, claims that there are probably 5,000 bodies in the Rio Grande River, placed there by Texas Rangers over a certain period of our history. There were abuses back then. A former governor, Ma Ferguson, got mad at the Rangers for their conduct toward her during an election and wanted to ruin them. She packed the organization with nothing but outlaws. There were thousands of them. But the Rangers do play a special part in Texas folklore and in the hearts of Texans, and it is a fine organization today.

The Rangers now are the elite of the Texas Department of Public Safety. Since there are only 100 of them, we can be pretty selective. Think about the filtering process. We had over 5,000 applicants for 300 slots in our last academy, to become regular DPS troopers. We have 2,500 troopers in all, which would mean 2,500 troopers out of about 25,000 (or more) applicants. Then we choose just 100 of the troopers to be Texas Rangers. The Rangers are highly intelligent, well-equipped, and sophisticated law enforcement officials.

During my watch on the commission, we have done some new things for which I take some credit. We have had the first black major and the first Hispanic major in the history of the Texas Department of Public Safety; major is the second highest rank. In the Ranger service, we have had the first Asian Rangers and increased to three black Rangers and five additional Hispanic Rangers.

The move that caused enormous controversy was the appointment of two female Rangers (and, whatever you do, don't call them "Rangerettes"). I remember how that came about. The Ranger service is broken into six different companies, with fifteen in each company. Each company is led by a captain and a lieutenant. In headquarters is the head captain, whom we call the commander

of the Ranger service, and another fellow who is the second in command. I got all of those captains on a private plane to go to a Ranger retirement party, and I said, "Guys, I've got to visit with you about something. I think the time has come, after 150 years, that we have female Rangers." That was a real tense moment. I thought those guys were going to beat the hell out of me. But lo and behold, we did get female Rangers—with no small measure of controversy. One famous macho Ranger even claimed to have resigned because of the addition of "unqualified" female Rangers. The truth is that he retired because he completed his thirty years of service.

One of my most interesting activities as a commissioner was a meeting with officials from the highway patrol and port authority in Mexico. We met in Juarez, Mexico, toured their facilities, and worked on some areas of cooperation. Their system of justice is a little different from ours. Their extradition methods are considerably different. Their means of extracting confessions are substantially different. You really have to see their interrogation rooms. They have solid black walls with psychedelic lights going around, and the chair that the person being questioned sits in looks like an electric chair. Some people have said that they do what they call the Pepsi challenge, where they submerge a guy in water and then spray Pepsi Cola up his nose when he comes up. That is supposed to be really painful. But the federal highway patrol and port authority is the best police organization in Mexico—it is stable and doesn't change with every president—and our meeting did a lot of good. We have increased our stolen car retrieval rate from forty cars a year to 500 in El Paso alone.

I'd like to return to the Rangers and read something to you in their defense. I received this letter from a lawyer who represented one of the Branch Davidians: "As you are aware, I spent the last seven weeks of my life in trial representing one of the accused in the Branch Davidian matter. Almost 200 witnesses testified for the government. The ATF, FBI, and Texas Rangers made up the bulk of the prosecution's case. The difference in integrity and credibility and professionalism between the ATF and FBI versus that of the Texas Rangers is akin to the difference between a Yugo and a Mercedes. The federal agents distorted, manipulated or fabricated the truth. To a man the Rangers called a rose a rose and a spade a spade. The state of Texas should be rightfully proud of the conduct of the Texas Rangers throughout not only the investigation and siege but the trial as well. Of particular note was Texas Ranger Ray Cano, who was the case agent for the government and as such sat in court assisting the government throughout the trial. ATF agent Eric Evers identified one of the defendants, Livingston Fagan, as the individual who had pointed a weapon at him on February 28, 1993. During cross-examination Evers was

questioned about whether or not his identification of Fagan was based upon what occurred on February 28, 1993, or from seeing Fagan on television following his arrest. Evers went out of his way to assure the jury that there was no possibility that his identification was based upon anything other than his observations on February 28. At the noon recess Ray Cano provided Fagan's lawyer with the photographic array where Evers had previously identified Fagan but had made the notation next to Fagan's picture 'Not sure if identification is based on incident or from seeing suspect on television.' Keep in mind that the prosecutors had an absolute legal and ethical obligation to notify Fagan's counsel of such and failed to do so. Ranger Cano simply looked at Fagan's lawyer when handing him the array and said, 'What's right is right.' I've tried approximately 200 jury trials. I have seen law enforcement officers testify in everything from DWI trials to capital murder trials. Never have I seen a law enforcement officer risk damaging the prosecution's case and jeopardize his own upward mobility when the failure to do so would have gone undiscovered. Justice is not one-sided. Ranger Ray Cano obviously understands that. While I will certainly have many memories of this trial, seeing Cano do the right thing will be among the proudest memories."

That is something that the state of Texas, the Department of Public Safety, and the Ranger service should be proud of. In a highly publicized case, operating under a microscope, one of our Rangers had the courage to say something that was honest but detrimental to the prosecution's case. Courage comes in different forms, and bravery is manifest in ways other than staring down a bandit in a Seven-Eleven. I think Ray Cano showed a great deal of courage and integrity and honesty and fortitude, and he is going to be rewarded for it.

During the siege of the Branch Davidians, I was flown over to the compound in a DPS helicopter. We had our men manning the roadblocks, keeping people away, and we just went over to see what was happening. The Rangers had been invited by the ATF and the FBI to do the "post-crime reconstruction," if you will, and we had told them straight out that we would do it but we would not whitewash anything. We told them not to get us involved in it if they were later going to come by asking, with a wink and a nod, "What were your findings?" They agreed, so we were doing that work.

One funny thing happened. When I helicoptered in to observe, I talked to a trooper at a roadblock and asked whether anything was happening. He said, "No, but we've caught a lot of DWIs out here." I said, "You're joking. A lot of DWIs out here?" He answered, "These guys out here in the country have been used to driving around drunk for years, and no one ever stopped them. They just come right up to our roadblock. As a matter of fact, here comes one now." Sure enough, a guy drove up to the roadblock, drunker than a dog, and they ar-

rested him right there. I said, "Why, this is great. This is curb service. We don't have to spend any money at all."

Then the sad ending came. All of our reconstruction work was for naught because the place burned down and many people perished. Bob Holt and I went out the day after the disaster, and the memory of that is seared into my mind. I'll never forget it as long as I live. It was virtually a peek inside of hell. Bean cans that were still baking blew up every now and then and scared everyone to death. Charred remains were lying around with big blown out holes in what had been peoples' chests. There were constant admonitions by police officers to be careful where we stepped because the remains were carbonized and would disintegrate if we touched them. It was absolutely the worst thing I've ever seen. I had many sleepless nights after that, having seen carnage that should not be visited upon any human being.

As I was standing there, I had one of the weirdest experiences of my life. A piece of paper floated by and landed at my feet. I reached down and picked it up, with the thought that I would take it back with me, to have something from this horrible scene. I want to read to you from this piece of paper to give you some feel and sense of the surreal environment I was viewing. It was incredibly ironic. The paper was from the *Bible*, the book of Ezekiel, and it was captioned "Wicked Leaders." I could not read the burned paper well so I looked up the full passage later. It says:

> "And one has committed abomination with his neighbor's wife, and another has lewdly defiled his daughter-in-law. And another in you has humbled his sister, his father's daughter.
>
> "In you they have taken bribes to shed blood; you have taken interest and profits, and you have injured your neighbors for gain by oppression, and you have forgotten Me," declares the Lord God.
>
> "Behold, then, I smite My hand at your dishonest gain which you have acquired and at the bloodshed which is among you.
>
> . . .

[This is where my goosebumps got even bigger.]

> "As they gather silver and bronze and iron and lead and tin into the furnace to blow fire on it in order to melt it, so shall I gather you in My anger and in My wrath, and I shall lay you there and melt you.
>
> "And I shall gather you and blow on you with the fire of my wrath and you will be melted in the midst of it.
>
> "As silver is melted in the furnace, so will you be melted in the midst of it, and you will know that I, the Lord, have poured out my wrath on you.
>
> . . .
>
> "Thus I have poured out My indignation on them; I have consumed them

with the fire of My wrath; their way I have brought upon their heads," declares the Lord God.

I'd like to end this visit with you about Texas law enforcement and the Rangers with a reading of "The Ranger's Prayer" because it says in a simple way the feeling that I get from most of them.

THE RANGER'S PRAYER

O God, whose end is justice,
Whose strength is all our stay,
Be near and bless my mission
As I go forth today.
Let wisdom guide my actions,
Let courage fill my heart
And help me, Lord, in every hour
To do a Ranger's part.
Protect when danger threatens,
Sustain when trails are rough;
Help me to keep my standard high
And smile at each rebuff.
When night comes down upon me,
I pray thee, Lord, be nigh,
Whether on lonely scout, or camped,
Under the Texas sky.
Keep me, O God, in life
And when my days shall end,
Forgive my sins and take me in,
For Jesus' sake, Amen.

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