The Role of Courts in a Democratic Society
Middle School (7th-8th grade) Social Studies Unit

Funded by the Historical Society for the Courts of the State of New York
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Reading Materials

Table of Contents

Queen v. Dudley and Stephens (December 9, 1884)

INDICTMENT for the murder of Richard Parker on the high seas within the jurisdiction of the Admiralty.

At the trial before Huddleston, B., at the Devon and Cornwall Winter Assizes, November 7, 1884, the jury, at the suggestion of the learned judge, found the facts of the case in a special verdict which stated "that on July 5, 1884, the prisoners, Thomas Dudley and Edward Stephens, with one Brooks, all able-bodied English seamen, and the deceased also an English boy, between seventeen and eighteen years of age, the crew of an English yacht, a registered English vessel, were cast away in a storm on the high seas 1600 miles from the Cape of Good Hope, and were compelled to put into an open boat belonging to the said yacht. That in this boat they had no supply of water and no supply of food, except two 11b. tins of turnips, and for three days they had nothing else to subsist upon. That on the fourth day they caught a small turtle, upon which they subsisted for a few days, and this was the only food they had up to the twentieth day when the act now in question was committed. That on the twelfth day the remains of the turtle were entirely consumed, and for the next eight days they had nothing to eat. That they had no fresh water, except such rain as they from time to time caught in their oilskin capes. That the boat was drifting on the ocean, and was probably more than 1000 miles away from land. That on the eighteenth day, when they had been seven days without food and five without water, the prisoners spoke to Brooks as to what should be done if no succour came, and suggested that some one should be sacrificed to save the rest, but Brooks dissented, and the boy, to whom they were understood to refer, was not consulted. That on the 24th of July, the day before the act now in question, the prisoner Dudley proposed to Stephens and Brooks that lots should be cast who should be put to death to save the rest, but Brooks refused to consent, and it was not put to the boy, and in point of fact there was no drawing of lots. That on that day the prisoners spoke of their having families, and suggested it would be better to kill the boy that their lives should be saved, and Dudley proposed that if there was no vessel in sight by the morrow morning the boy should be killed. That next day, the 25th of July, no vessel appearing, Dudley told Brooks that he had better go and have a sleep, and made signs to Stephens and Brooks that the boy had better be killed. The prisoner Stephens agreed to the act, but Brooks dissented from it. That the boy was then lying at the bottom of the boat quite helpless, and extremely weakened by famine and by drinking sea water, and unable to make any resistance, nor did he ever assent to his being killed. The prisoner Dudley offered a prayer asking forgiveness for them all if either of them should be tempted to commit a rash act, and that their souls might be saved. That Dudley, with the assent of Stephens, went to the boy, and telling him that his time was come, put a knife into his throat and killed him then and there; that the three men fed upon the body and blood of the boy for four days; that on the fourth day after the act had been committed the boat was picked up by a passing vessel, and the prisoners were rescued, still alive, but in the lowest state of prostration. That they were carried to the port of Falmouth, and committed for trial at Exeter. That if the men had not fed upon the body of the boy they would probably not have survived to be so picked up and rescued, but would within the four days have died of famine. That the boy, being in a much weaker condition, was likely to have died before them. That at the time of the act in question there was no sail in sight, nor any reasonable prospect of relief. That under these circumstances there appeared to the prisoners every probability that unless they then fed or very soon fed upon the boy or one of themselves they would die of starvation. That there was no appreciable chance of saving life except by killing some one for the others to eat. That assuming any necessity to kill anybody, there was no greater necessity for killing the boy than any of the other three men." But whether upon the whole matter by the jurors found the killing of Richard Parker by Dudley and Stephens be felony and murder the jurors are ignorant, and pray the advice of the Court thereupon, and if upon the whole matter the Court shall be of opinion that the killing of Richard Parker be felony and murder, then the jurors say that Dudley and Stephens were each guilty of felony and murder as alleged in the indictment."

Plato, *Republic*, Book 1
Thrasymachus on Justice

Glaucon and the rest of the company joined in my request, and Thrasymachus, as any one might see, was in reality eager to speak; for he thought that he had an excellent answer, and would distinguish himself….

Listen, then, he said; I proclaim that justice is nothing else than the interest of the stronger. And now why do you not praise me? But of course you won't.

Let me first understand you, I [Socrates] replied. Justice, as you say, is the interest of the stronger. What, Thrasymachus, is the meaning of this? You cannot mean to say that because Polydamas, the boxer, is stronger than we are, and finds the eating of beef conducive to his bodily strength, that to eat beef is therefore equally for our good who are weaker than he is, and right and just for us?

That's abominable of you, Socrates; you take the words in the sense which is most damaging to the argument.

Not at all, my good sir, I said; I am trying to understand them; and I wish that you would be a little clearer.

Well, he said, have you never heard that forms of government differ; there are tyrannies, and there are democracies, and there are aristocracies?

Yes, I know.

And the government is the ruling power in each state?

Certainly.

And the different forms of government make laws democratical, aristocratical, tyrannical, with a view to their several interests; and these laws, which are made by them for their own interests, are the justice which they deliver to their subjects, and him who transgresses them they punish as a breaker of the law, and unjust. And that is what I mean when I say that in all states there is the same principle of justice, which is the interest of the government; and as the government must be supposed to have power, the only reasonable conclusion is, that everywhere there is one principle of justice, which is the interest of the stronger….

Thrasymachus, when he had thus spoken, having, like a bath-man, deluged our ears with his words, had a mind to go away. But the company would not let him; they insisted that he should remain and defend his position.

Plato, *Republic*, Book 4
Socrates Answers the Question: What is Justice?

If we are asked to determine which of these four qualities by its presence contributes most to the excellence of the State, whether the agreement of rulers and subjects, or the preservation in the soldiers of the opinion which the law ordains about the true nature of dangers, or wisdom and watchfulness in the rulers, or whether this other which I am mentioning, and which is found in children and women, slave and freeman, artisan, ruler, subject, --the quality, I mean, of every one doing his own work, and not being a busybody, would claim the palm --the question is not so easily answered.

Certainly, he replied, there would be a difficulty in saying which.
Then the power of each individual in the State to do his own work appears to compete with the other political virtues, wisdom, temperance, courage.

Yes, he said.
And the virtue which enters into this competition is justice?
Exactly.
Let us look at the question from another point of view: Are not the rulers in a State those to whom you would entrust the office of determining suits at law?

Certainly.
And are suits decided on any other ground but that a man may neither take what is another's, nor be deprived of what is his own?

Yes; that is their principle.
Which is a just principle?
Yes.
Then on this view also justice will be admitted to be the having and doing what is a man's own, and belongs to him?

Very true.
Think, now, and say whether you agree with me or not. Suppose a carpenter to be doing the business of a cobbler, or a cobbler of a carpenter; and suppose them to exchange their implements or their duties, or the same person to be doing the work of both, or whatever be the change; do you think that any great harm would result to the State?

Not much.
But when the cobbler or any other man whom nature designed to be a trader, having his heart lifted up by wealth or strength or the number of his followers, or any like advantage, attempts to force his way into the class of warriors, or a warrior into that of legislators and guardians, for which he is unfitted, and either to take the implements or the duties of the other; or when one man is trader, legislator, and warrior all in one, then I think you will agree with me in saying that this interchange and this meddling of one with another is the ruin of the State.

Most true.
Seeing then, I said, that there are three distinct classes, any meddling of one with another, or the change of one into another, is the greatest harm to the State, and may be most justly termed evil-doing?

Precisely.
And the greatest degree of evil-doing to one's own city would be termed by you injustice?

Certainly.
This then is injustice; and on the other hand when the trader, the auxiliary, and the guardian each do their own business, that is justice, and will make the city just.

I agree with you.
We will not, I said, be over-positive as yet; but if, on trial, this conception of justice be verified in the individual as well as in the State, there will be no longer any room for doubt; if it be not verified, we must have a fresh enquiry. First let us complete the old investigation, which we began, as you remember, under the impression that, if we could previously examine justice on the larger scale, there would be less difficulty in discerning her in the individual. That larger example appeared to be the State, and accordingly we constructed as good a one as we could, knowing well that in the good State justice would be found. Let the discovery which we made be now applied to the individual --if they agree, we shall be satisfied; or, if there be a difference in the individual, we will come back to the State and have another trial of the theory. The friction of the two when rubbed together may possibly strike a light in which justice will shine forth, and the vision which is then revealed we will fix in our souls.

John Locke, Second Treatise of Government

Sec. 13. To this strange doctrine, viz. That in the state of nature every one has the executive power of the law of nature, I doubt not but it will be objected, that it is unreasonable for men to be judges in their own cases, that selflove will make men partial to themselves and their friends: and on the other side, that ill nature, passion and revenge will carry them too far in punishing others; and hence nothing but confusion and disorder will follow, and that therefore God hath certainly appointed government to restrain the partiality and violence of men. I easily grant, that civil government is the proper remedy for the inconveniencies of the state of nature, which must certainly be great, where men may be judges in their own case, since it is easy to be imagined, that he who was so unjust as to do his brother an injury, will scarce be so just as to condemn himself for it: but I shall desire those who make this objection, to remember, that absolute monarchs are but men; and if government is to be the remedy of those evils, which necessarily follow from men's being judges in their own cases, and the state of nature is therefore not to be endured, I desire to know what kind of government that is, and how much better it is than the state of nature, where one man, commanding a multitude, has the liberty to be judge in his own case, and may do to all his subjects whatever he pleases, without the least liberty to any one to question or controul those who execute his pleasure and in whatsoever he doth, whether led by reason, mistake or passion, must be submitted to. Much better it is in the state of nature, wherein men are not bound to submit to the unjust will of another. And if he that judges, judges amiss in his own, or any other case, he is answerable for it to the rest of mankind.

Sec. 19. And here we have the plain difference between the state of nature and the state of war, which however some men have confounded, are as far distant, as a state of peace, good will, mutual assistance and preservation, and a state of enmity, malice, violence and mutual destruction, are one from another. Men living together according to reason, without a common superior on earth, with authority to judge between them, is properly the state of nature. But force, or a declared design of force, upon the person of another, where there is no common superior on earth to appeal to for relief, is the state of war: … Thus a thief, whom I cannot harm, but by appeal to the law, for having stolen all that I am worth, I may kill, when he sets on me to rob me but of my horse or coat; because the law, which was made for my preservation, where it cannot interpose to secure my life from present force, which, if lost, is capable of no reparation, permits me my own defence, and the right of war, a liberty to kill the aggressor, because the aggressor allows not time to appeal to our common judge, nor the decision of the law, for remedy in a case where the mischief may be irreparable. Want of a common judge with authority, puts all men in a state of nature: force without right, upon a man's person, makes a state of war, both where there is, and is not, a common judge.

The Federalist No. 78
Saturday, June 14, 1788
[Alexander Hamilton]

To the People of the State of New York:
WE PROCEED now to an examination of the judiciary department of the proposed government.

In unfolding the defects of the existing Confederation, the utility and necessity of a federal judicature have been clearly pointed out. It is the less necessary to recapitulate the considerations there urged, as the propriety of the institution in the abstract is not disputed; the only questions which have been raised being relative to the manner of constituting it, and to its extent.…

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.

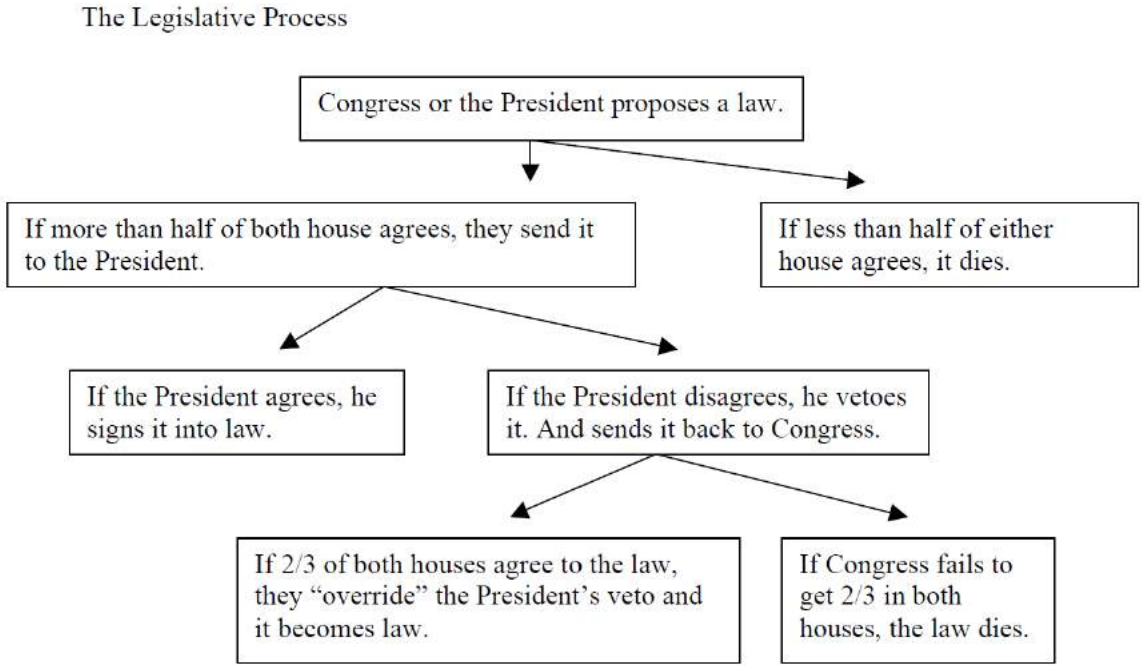
The complete independence of the courts of justice is peculiarly essential in a limited Constitution.

The American system of government

The three branches at the national level:

- Legislative: Congress, made up of two houses, the House of Representatives (proportional by population, which means big states have many and small states have few; members serve 2 year terms) and the Senate (each state gets 2; members serve 6 year terms).
    - Responsible for making laws.
- Executive: The head of the Executive Branch is the President (serves 4 year terms; may only serve 2 consecutive terms)
    - Responsible for making sure that the laws are followed
- Judicial: Highest court is the Supreme Court (9 in total; serve for life; members nominated by the President, but the Senate has the right to accept or reject the nominee)
    - Responsible for determining whether or not someone has violated a law and for determining whether or not Congress's laws follow the Constitution (which means they can strike down a law if it is unconstitutional).

The national, or federal, government has certain powers (such as conducting war and coining money) outlined by the U.S. Constitution, while the 50 states each have their own state governments (with state legislative, executive, and judicial branches) that conduct state business and is responsible to that state's constitution. This system of individual state governments with certain but limited powers tied together under a national government with certain but limited powers is known as federalism.



THE CONSTITUTION OF THE UNITED STATES (excerpts)

Preamble: We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

…

Article III.

Section. 1.

The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;-- between a State and Citizens of Another State,--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

MARBURY v. MADISON, 5 U.S. 137 (1803)

5 U.S. 137 (Cranch)

WILLIAM MARBURY
v.
JAMES MADISON, Secretary of State of the United States.

February Term, 1803

Mr. Chief Justice MARSHALL delivered the opinion of the court.

….

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

Constitution of the State of New York

ARTICLE VI

Judiciary

[Unified court system; organization; process]

Section 1. a. There shall be a unified court system for the state. The state-wide courts shall consist of the court of appeals, the supreme court including the appellate divisions thereof, the court of claims, the county court, the surrogate's court and the family court, as hereinafter provided. The legislature shall establish in and for the city of New York, as part of the unified court system for the state, a single, city-wide court of civil jurisdiction and a single, city-wide court of criminal jurisdiction, as hereinafter provided, and may upon the request of the mayor and the local legislative body of the city of New York, merge the two courts into one city-wide court of both civil and criminal jurisdiction. The unified court system for the state shall also include the district, town, city and village courts outside the city of New York, as hereinafter provided.

Court Authority and Structure

Cases start in the trial courts. Though the vast majority of cases are decided at the trial court level, occasionally parties appeal the decision. Most appeals are initially heard in the intermediate appellate courts, which review the decisions of lower courts to make certain that the law was properly applied. In New York the court of last resort is the **Court of Appeals**.

Listed below and on pages 5 through 7 are brief descriptions of the various types of trial and appellate courts comprising the New York state court system.

THE TRIAL COURTS

TRIAL COURTS OF LIMITED JURISDICTION IN NEW YORK CITY

The Civil Court of the City of New York decides lawsuits involving claims of up to $25,000. The Civil Court includes a small claims part for the informal resolution of cases involving amounts of up to $5,000, and a housing part for landlord-tenant and housing violation proceedings. The court also handles other civil matters referred by the Supreme Court *(see page 5 for Supreme Court description)*.

New York City Civil Court judges are elected to 10-year terms. Housing Part judges are appointed by the Chief Administrative Judge to five-year terms.

The Criminal Court of the City of New York handles misdemeanors (generally, crimes punishable by fine or imprisonment of up to one year) and lesser offenses. Criminal Court judges also conduct arraignments (initial court appearances following arrest) and preliminary hearings in felony cases (generally, more serious offenses punishable by imprisonment of more than one year).

New York City Criminal Court judges are appointed by the Mayor of New York City to 10-year terms.

TRIAL COURTS OF LIMITED JURISDICTION OUTSIDE NEW YORK CITY

District Courts, located in Nassau County and the five western towns of Suffolk County, arraign felonies and handle misdemeanors and lesser offenses as well as civil lawsuits involving claims of up to $15,000.

District Court judges are elected to six-year terms.

City Courts arraign felonies and handle misdemeanors and lesser offenses as well as civil lawsuits involving claims of up to $15,000. Some City Courts have small claims parts for the informal disposition of matters involving claims of up to $5,000 and/or housing parts to handle landlord-tenant matters and housing violations.

City Court judges are either elected or appointed, depending upon the particular city. Full-time City Court judges serve 10-year terms, while part-time City Court judges serve six-year terms.

Town and Village Courts handle misdemeanors and lesser offenses. Although the County Courts try felony cases, town and village justices first arraign defendants in Town and Village Court. Town and Village Courts also hear civil lawsuits involving claims of up to $15,000 (including small claims cases of up to $3,000).

Town and village justices are elected to four-year terms. The majority are not attorneys; in order to serve as a town or village justice a non-attorney must successfully complete a certification course and participate in ongoing judicial education.

TRIAL COURTS OF SUPERIOR JURISDICTION

The Supreme Court, a statewide court, generally hears cases outside the authority of the lower courts such as civil matters beyond the monetary limits of the lower courts' jurisdiction, divorce, separation and annulment proceedings, and criminal prosecutions of felonies.

County Courts, located in each county outside New York City, handle criminal prosecutions of felonies and misdemeanors committed within the county, although in practice most misdemeanor offenses are handled by lower courts. County Courts also have limited jurisdiction over civil lawsuits, generally involving claims of up to $25,000.

County Court judges are elected to 10-year terms. In smaller counties, the County Court judge may also function as the Family Court judge or Surrogate or both.

Family Courts, located in every county of the state, hear matters involving children and families, including adoption, guardianship, foster care approval and review, juvenile delinquency, family violence, child abuse and neglect, and child support, custody and visitation.

Family Court judges outside New York City are elected to 10-year terms, while those serving in New York City are appointed to 10-year terms by the Mayor of New York City.

Surrogate's Courts, located in every county of the state, hear cases involving the affairs of the deceased, including the validity of wills and the administration of estates. These courts are also authorized to handle adoptions.

Surrogate's Court judges are elected to 10-year terms in each county outside New York City and to 14-year terms in all New York City counties.

The Court of Claims is a statewide court with exclusive authority over lawsuits involving monetary claims against the State of New York. The Court of Claims also has jurisdiction over lawsuits against certain state-related entities such as the New York State Thruway, the City University of New York and the New York State Power Authority (claims for the appropriation of real property only).

The Court hears cases at several locations around the state. Cases are heard without juries. Court of Claims judges are appointed by the Governor, with the advice and consent of the state Senate, to nine-year terms.

THE APPELLATE COURTS

Intermediate Appellate Courts

Appellate Terms of the Supreme Court in the **First and Second Departments** *(see map on pages 2-3 for the court system's judicial departments)* hear appeals of decisions in cases originating in the New York City Civil and Criminal Courts. In the **Second Department**, the Appellate Terms also hear appeals of decisions in cases originating in the District, City, and Town and Village Courts. The **County Courts in the Third and Fourth Departments** — although primarily trial courts — hear appeals of decisions in cases originating in the City Courts and Town and Village Courts.

Justices of the Appellate Terms are designated by the Chief Administrative Judge and selected from the Supreme Court.

There are four **Appellate Divisions of the Supreme Court,** one in each judicial department *(see map on pages 2-3 outlining the court system's judicial departments)*. The Appellate Divisions hear appeals of decisions in civil and criminal cases from the trial courts as well as civil appeals from the Appellate Terms and County Courts.

Presiding and Associate Justices of each Appellate Division are designated by the Governor, selected from the Supreme Court. The Presiding Justice serves for the remaining length of his or her term of office, while Associate Justices are designated for five-year terms or the remainder of their unexpired terms of office if less than five years.

The **Court of Appeals,** New York's highest court, hears both civil and criminal cases on appeal from the state's intermediate appellate courts, and in some instances from the state's trial courts. In most cases, the court's authority is limited to the review of questions of law. Decisions of the Court of Appeals are final (cannot be appealed further), except that the United States Supreme Court may review cases involving questions of federal law or the United States Constitution.

The Court of Appeals also presides over appeals of decisions reached by the state Commission on Judicial Conduct, which is responsible for reviewing allegations of misconduct brought against judges. In addition, the Court is responsible for establishing rules governing the admission of attorneys to the New York State bar.

The Court of Appeals consists of the Chief Judge and six Associate Judges appointed by the Governor, with the advice and consent of the state Senate, to 14-year terms. Five members of the court constitute a quorum, and the agreement of four members is required for a decision.

Blind Justice

Text of John Roberts' opening statement

(AP) Text of John Roberts' opening statement before the Senate Judiciary Committee, as transcribed by CQ Transcriptions:

ROBERTS: Thank you very much, Mr. Chairman, Senator Leahy and members of the committee.

Let me begin by thank Senators Lugar and Warner and Bayh for their warm and generous introductions. And let me reiterate my thanks to the president for nominating me.

I'm humbled by his confidence and, if confirmed, I will do everything I can to be worthy of the high trust he has placed in me.

Let me also thank you, Mr. Chairman, and the members of the committee for the many courtesies you've extended to me and my family over the past eight weeks.

I'm particularly grateful that members have been so accommodating in meeting with me personally. I have found those meetings very useful in better understanding the concerns of the committee as the committee undertakes its constitutional responsibility of advice and consent.

I know that I would not be here today were it not for the sacrifices and help over the years of my family, who you met earlier today, friends, mentors, teachers and colleagues — many of whom are here today.

Last week one of those mentors and friends, Chief Justice William Rehnquist, was laid to rest. I talked last week with the nurses who helped care for him over the past year, and I was glad to hear from them that he was not a particularly good patient. He chafed at the limitations they tried to impose.

His dedication to duty over the past year was an inspiration to me and, I know, to many others.

I will miss him.

My personal appreciation that I owe a great debt to others reinforces my view that a certain humility should characterize the judicial role.

Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules; they apply them.

The role of an umpire and a judge is critical. They make sure everybody plays by the rules.

But it is a limited role. Nobody ever went to a ball game to see the

umpire.

Judges have to have the humility to recognize that they operate within a system of precedent, shaped by other judges equally striving to live up to the judicial oath.

And judges have to have the modesty to be open in the decisional process to the considered views of their colleagues on the bench.

Mr. Chairman, when I worked in the Department of Justice, in the office of the solicitor general, it was my job to argue cases for the United States before the Supreme court.

I always found it very moving to stand before the justices and say, "I speak for my country."

But it was after I left the department and began arguing cases against the United States that I fully appreciated the importance of the Supreme Court and our constitutional system.

Here was the United States, the most powerful entity in the world, aligned against my client. And yet, all I had to do was convince the court that I was right on the law and the government was wrong and all that power and might would recede in deference to the rule of law.

That is a remarkable thing.

It is what we mean when we say that we are a government of laws and not of men. It is that rule of law that protects the rights and liberties of all Americans. It is the envy of the world. Because without the rule of law, any rights are meaningless.

President Ronald Reagan used to speak of the Soviet constitution, and he noted that it purported to grant wonderful rights of all sorts to people. But those rights were empty promises, because that system did not have an independent judiciary to uphold the rule of law and enforce those rights. We do, because of the wisdom of our founders and the sacrifices of our heroes over the generations to make their vision a reality.

Mr. Chairman, I come before the committee with no agenda. I have no platform. Judges are not politicians who can promise to do certain things in exchange for votes.

I have no agenda, but I do have a commitment. If I am confirmed, I will confront every case with an open mind. I will fully and fairly analyze the legal arguments that are presented. I will be open to the considered views of my colleagues on the bench. And I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability. And I will remember that it's my job to call balls and strikes and not to pitch or bat.

Senators Lugar and Bayh talked of my boyhood back home in Indiana. I think all of us retain, from the days of our youth, certain enduring images. For me those images are of the endless fields of Indiana, stretching to the horizon, punctuated only by an isolated silo or a barn. And as I grew older, those endless fields came to represent for me the limitless possibilities of our great land.

Growing up, I never imagined that I would be here, in this historic room, nominated to be the chief justice. But now that I am here, I recall those endless fields with their promise of infinite possibilities, and that memory inspires in me a very profound commitment.

If I am confirmed, I will be vigilant to protect the independence and integrity of the Supreme Court, and I will work to ensure that it upholds

the rule of law and safeguards those liberties that make this land one of endless possibilities for all Americans.

Thank you, Mr. Chairman.

Thank you, members of the committee.

I look forward to your questions.

END

Find this article at:
http://www.usatoday.com/news/washington/2005-09-12-roberts-fulltext_x.htm

THE WALL STREET JOURNAL.
WSJ.com

OPINION | JUNE 2, 2009

Why Obama Voted Against Roberts

'He has used his formidable skills on behalf of the strong in opposition to the weak.'

The following is from then-Sen. Barack Obama's floor statement explaining why he would vote against confirming Supreme Court Chief Justice John Roberts (September 2005):

. . . [T]he decision with respect to Judge Roberts' nomination has not been an easy one for me to make. As some of you know, I have not only argued cases before appellate courts but for 10 years was a member of the University of Chicago Law School faculty and taught courses in constitutional law. Part of the culture of the University of Chicago Law School faculty is to maintain a sense of collegiality between those people who hold different views. What engenders respect is not the particular outcome that a legal scholar arrives at but, rather, the intellectual rigor and honesty with which he or she arrives at a decision.

Given that background, I am sorely tempted to vote for Judge Roberts based on my study of his resume, his conduct during the hearings, and a conversation I had with him yesterday afternoon. There is absolutely no doubt in my mind Judge Roberts is qualified to sit on the highest court in the land. Moreover, he seems to have the comportment and the temperament that makes for a good judge. He is humble, he is personally decent, and he appears to be respectful of different points of view.

It is absolutely clear to me that Judge Roberts truly loves the law. He couldn't have achieved his excellent record as an advocate before the Supreme Court without that passion for the law, and it became apparent to me in our conversation that he does, in fact, deeply respect the basic precepts that go into deciding 95% of the cases that come before the federal court -- adherence to precedence, a certain modesty in reading statutes and constitutional text, a respect for procedural regularity, and an impartiality in presiding over the adversarial system. All of these characteristics make me want to vote for Judge Roberts.

The problem I face -- a problem that has been voiced by some of my other colleagues, both those who are voting for Mr. Roberts and those who are voting against Mr. Roberts -- is that while adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95% of the cases that come before a court, so that both a Scalia and a Ginsburg will arrive at the same place most of the time on those 95% of the cases -- what matters on the Supreme Court is those 5% of cases that are truly difficult.

In those cases, adherence to precedent and rules of construction and interpretation will only get you through the 25th mile of the marathon. That last mile can only be determined on the basis of one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy.

In those 5% of hard cases, the constitutional text will not be directly on point. The language of the statute will not be perfectly clear. Legal process alone will not lead you to a rule of decision. In those circumstances, your decisions about whether affirmative action is an appropriate response to the history of discrimination in this

country, or whether a general right of privacy encompasses a more specific right of women to control their reproductive decisions, or whether the Commerce Clause empowers Congress to speak on those issues of broad national concern that may be only tangentially related to what is easily defined as interstate commerce, whether a person who is disabled has the right to be accommodated so they can work alongside those who are nondisabled -- in those difficult cases, the critical ingredient is supplied by what is in the judge's heart.

I talked to Judge Roberts about this. Judge Roberts confessed that, unlike maybe professional politicians, it is not easy for him to talk about his values and his deeper feelings. That is not how he is trained. He did say he doesn't like bullies and has always viewed the law as a way of evening out the playing field between the strong and the weak.

I was impressed with that statement because I view the law in much the same way. The problem I had is that when I examined Judge Roberts' record and history of public service, it is my personal estimation that he has far more often used his formidable skills on behalf of the strong in opposition to the weak. In his work in the White House and the Solicitor General's Office, he seemed to have consistently sided with those who were dismissive of efforts to eradicate the remnants of racial discrimination in our political process. In these same positions, he seemed dismissive of the concerns that it is harder to make it in this world and in this economy when you are a woman rather than a man.

I want to take Judge Roberts at his word that he doesn't like bullies and he sees the law and the court as a means of evening the playing field between the strong and the weak. But given the gravity of the position to which he will undoubtedly ascend and the gravity of the decisions in which he will undoubtedly participate during his tenure on the court, I ultimately have to give more weight to his deeds and the overarching political philosophy that he appears to have shared with those in power than to the assuring words that he provided me in our meeting.

The bottom line is this: I will be voting against John Roberts' nomination. . . .

Printed in The Wall Street Journal, page A21

O'Connor against judicial elections

09/13/2011
Financial News & Daily Record

by Joe Wilhelm Jr., Staff Writer

Former U.S. Supreme Court Judge Sandra Day O'Connor said Monday that Floridians should vote to eliminate popular elections for the judiciary the next time the issue appears on the ballot.

"Close to 20 states in the United States elect their judges in state elections. No other nation in the world elects its judges," said O'Connor.

The issue was discussed during "A Conversation about Judicial Reform," the inaugural event for the Allen L. Poucher Legal Education Series at the University of Florida.

When asked what she thought was the biggest challenge facing the judiciary, O'Connor talked about popular election of judges.

"We didn't start that way. When our states formed, every one of them had a system like the federal one, appointment by the governor and maybe some confirmation process," she said.

"Through the years, a populist movement rose, starting with Georgia and extending to other states. A number of states changed to popular election of judges and that has remained true today," said O'Connor.

O'Connor cited a problem with it.

"It does not work well because it requires raising money for campaigns. You know who gives the money, the very people, either clients or lawyers, who are most apt to appear before the judge," said O'Connor.

"It's a terrible way to operate and it's embarrassing that our country is the only country to do that. When I tell people from other countries about it, they are appropriately shocked," she said.

"As citizens, do what you can to preserve all three branches of government. I care very much about the judicial branch. We have been blessed with having fair, qualified and independent judges, by and large," said O'Connor.

"You are less apt to have that if they are popularly elected, so if you have a chance in Florida to get rid of popular elections for judges, you probably will have your chance, next time support it," she said.

You Get the Judges You Pay For

New York Times
April 17, 2011

By ERWIN CHEMERINSKY and JAMES J. SAMPLE

LEGAL elites must come to terms with a reality driven by the grass-roots electorate: judicial elections are here to stay. Given this reality, we should focus on balancing important First Amendment rights to financially support campaigns with due process concerns about fair trials.

In 39 states, at least some judges are elected. Voters rarely know much, if anything, about the candidates, making illusory the democratic benefits of such elections. Ideally, judges should decide cases based on the law, not to please the voters. But, as Justice Otto Kaus of the California Supreme Court once remarked about the effect of politics on judges' decisions: "You cannot forget the fact that you have a crocodile in your bathtub. You keep wondering whether you're letting yourself be influenced, and you do not know."

The need to run multimillion-dollar campaigns to win election to the court in much of the country renders the crocodile ever more menacing.

For more than a quarter of a century, voters have rejected efforts to move from an elective to an appointive bench. Last year, despite a campaign led by Sandra Day O'Connor, Nevada voters became the latest to reject such a change.

Scholars, judges and advocates who find intellectual comfort in seeking to eliminate judicial elections are indulging a luxury that America's courts can no longer afford. Instead they should focus on incremental changes to what Justice O'Connor bluntly calls the "wrong" of "cash in the courtroom."

More than 7 in 10 Americans believe campaign cash influences judicial decisions. Nearly half of state court judges agree. Never before has there been so much cash in the courts. Measured only by direct contributions to candidates for state high courts, campaign fund-raising more than doubled in a decade.

Rigorous recusal rules are an important step, but merely disqualifying a judge on occasion is insufficient. The most obvious solution is to limit spending in judicial races. States with elected judges should restrict how much can be contributed to a candidate for judicial office or even spent to get someone elected.

States should restrict contributions and expenditures in judicial races to preserve impartiality. Such restrictions are the only way to balance the right to spend to get candidates elected, and the due process right to fair trials.

Erwin Chemerinsky is the dean of the law school at the University of California, Irvine. James J. Sample is an associate professor of law at Hofstra.

Elected v. Appointed Judge: Which Selection Process is Best
By Marnie Brown
(http://depts.washington.edu/constday/_resources/Brown-Marnie1%20_Y_.pdf)

Advantages of Elected Judges

One advantage to electing judges is it insures that judges are loyal to the people. Being a judge is a very important job because a judge must interpret the laws of the land both fairly and firmly. Since a judicial position has power, prestige, and influence, judges should be elected. This ensures that the judges ultimately answer to the people they serve, not to the appointer. Elections expose the beliefs of each judicial candidate and allow the voters to make informed decisions. It is idealistic and naïve to believe that any judge is politically neutral. Every judge will have some political leaning. It is better that the public knows about these political leanings, rather than the process of appointment concealing the judges' political viewpoints. Some advocates for the election of judges also argue that it was the founding fathers' intent to have the people keep the judiciary branch in check. Thomas Jefferson declared "the exemption of the judges from that [elections] is quite dangerous enough. I know no safe depository of the ultimate powers of the society but the people themselves…" (Barton). Jefferson, among other founding fathers, favored the election of judges periodically for then the people could hold judges accountable for their decisions. Judges know when they make politically biased decisions. The election of judges would keep them honest, fair, and impartial. Jefferson also believed that "It [was] necessary to introduce the people into every department of government…" (Barton) and if you appoint judges rather than elect them, you take away the people's participation in the judicial branch of government.

Disadvantages of Elected Judges

One disadvantage of electing judges is that people cannot always tell which candidate would be the better judge. The judiciary should be comprised of the best legal scholars to correctly interpret and apply the law. Judges should be appointed based upon their legal training, education, and experience. In an election, the public could not distinguish between two candidates, except on largely irrelevant matters of presentation and politics. Therefore, the voters cannot necessarily select the best judge for the position. The voters would select the best politician. A judge's capability to interpret and decide the law should not be performed by the best politician, but by the person with the best legal education, training, and experience. Another concern of advocates against elections is the corruption and influence election campaign contributions have on a judge's impartiality. Fundraising in state Supreme Court elections alone has doubled to more than $200 million since the year 2000 (State Judges Should Be Appointed, Not Elected). Elected judges are not necessarily more qualified than their opponents, but instead the elected judges are the ones with the most campaign money. Furthermore, once a judge has won an election, the judge becomes indebted to the corporations and/or unions that contributed to his or her campaign. In fact, a recent study done by Tulane comparative law professor, Vernon Palmer, showed "an unusually high correlation between campaign contributions and decisions in favor of contributors" (Election Verses Appointment of Judges). The study found that in 47 percent of the cases reviewed by the Louisiana State Supreme Court, there was at least one donor before the court who had contributed to a justice's campaign (Election Verses Appointment of Judges). The study found that Supreme Court justices voted for their contributor's position 65 percent of the time (Election Verses Appointment of Judges). For example in the study, a Justice Catherine D. Kimball was 30 percent more likely to vote for a defendant with each additional $1,000 donation, while a Justice John L. Weimer was 300 percent more likely to do so (Election Verses Appointment of Judges). From this study, one could conclude that it was the donation, not the facts of the case, which accounted for the judges' decisions.

THE WALL STREET JOURNAL.
WSJ.com

NY judges won't handle big campaign donors' cases

Associated Press JUNE 28, 2011, 3:03 P.M. ET

ALBANY, N.Y. — Citing growing concern over the escalating influence of money in judicial elections, New York's Administrative Board of the Courts is prohibiting case assignments to elected judges involving their big campaign contributors.

Judicial officials said Tuesday that New York is the first state to systematically address the issue of money in judicial elections through administrative actions. Many of the donors to candidates running for judgeships are lawyers who practice in those courts.

"If we don't have our neutrality, if we don't have our impartiality, we have nothing," said New York Chief Judge Jonathan Lippman. Litigants should have confidence coming into court that they'll get "a fair shake," he said.

The administrative board's final rules, which apply to nearly 1,000 elected judges statewide, take effect July 15 and apply to donations after that. There are exceptions for emergencies. They also give opposing parties in a case the opportunity to waive a judge's disqualification. The board, which considered public comments on the proposal, consists of Lippman and the presiding justices of the state's four Appellate Divisions.

The rules prohibit assigning cases to a judge who has received $2,500 or more in contributions within the previous two years from any lawyer or party in the case. The threshold is $3,500 from multiple plaintiffs, or defendants, or from an attorney and his law firm.

Currently, judges have an ethical duty to remain unaware of donors and stay impartial or recuse themselves from cases.

New York is the first state to address the issue administratively, though California last year passed legislation that sets similar restrictions, said William Raftery, researcher at the National Center for State Courts. Alabama lawmakers passed a similar measure, but it has not yet taken effect, and about 20 other states have considered the issue, he said.

New York candidates are already required to report campaign donations to the state Board of Elections. Judicial officials plan to create a computer application to use that information and automatically screen case assignments, which are generally done randomly subject to the oversight of administrative judges.

"This rule takes important steps toward protecting the integrity of the judicial process while avoiding judges being forced to address recusal motions regarding contributions to their campaigns," said Roger Maldonado, who chairs the New York City Bar Association's Council on Judicial Administration.

New York court officials cited the U.S. Supreme Court's 2009 ruling that a justice on West Virginia's top court should have recused himself from a case involving coal company executives who gave him large campaign donations, noting such contributions can create "a serious risk of actual bias."

NEW YORK STATE

PROBLEM-SOLVING COURTS

www.nycourts.gov/courts/problem_solving/

NEW YORK STATE PROBLEM-SOLVING COURTS

NEW YORK STATE

PROBLEM-SOLVING COURTS

Problem-Solving Courts look to the issues that bring litigants into the justice system and seek to implement new approaches, including judicial monitoring and the incorporation of community resources. This comprehensive approach increases offender accountability, enhances community safety and improves outcomes while protecting the rights of all litigants.

Hon. Judy Harris Kluger, Deputy Chief Administrative Judge for Court Operations and Planning, is responsible for implementation and oversight of all Problem-Solving Courts in New York State.

Problem-Solving Courts in New York State include: Integrated Domestic Violence Courts, Domestic Violence Courts, Drug Treatment Courts, Mental Health Courts, Sex Offense Courts, Youthful Offender Domestic Violence Courts and Community Courts.

Hallmarks of all Problem-Solving Courts include a dedicated judge who, along with court staff, is trained in issues unique to that court type; increased engagement with litigants; and close coordination between the Problem-Solving Court and outside groups, including prosecutors, defense attorneys, civil attorneys, law guardians, service providers, victim services organizations and law enforcement, as well as other courts in the county and state.

NEW YORK STATE PROBLEM-SOLVING COURTS

Community Courts

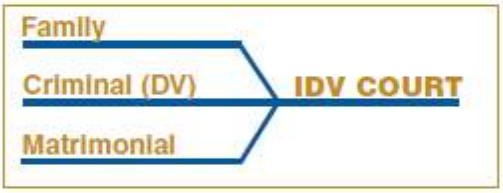
Community Courts combine conventional punishments with alternative sanctions and on-site treatment and training in an effort to break the "revolving door" cycle of crime. They are a collaboration of traditionally separate entities, including citizens, criminal justice agencies, businesses, local civic organizations, government entities and social service providers, resulting in neighborhood-focused problem solving.

Many Community Courts house an array of non-traditional programs, such as mediation, job training and placement, drug treatment and homeless outreach, all of which are rigorously monitored by the court in order to address problems that often underlie criminal behavior. Services specifically targeted for youth include job readiness, substance abuse, HIV prevention and tutoring and mentor programs.

NEW YORK STATE PROBLEM-SOLVING COURTS

Integrated Domestic Violence Courts

Integrated Domestic Violence ("IDV") Courts serve families by allowing a single judge to hear multiple case types - criminal, family and matrimonial - which relate to one family where the underlying issue is domestic violence. Dedicated



to the "one family – one judge" model, IDV Courts respond to a historic problem in the court system, where domestic violence victims and their families traditionally had to appear in different courts before multiple judges, often located in different parts of a county, to address their legal issues. By connecting one judge with one family, IDV Courts aim to provide more informed judicial decision-making and greater consistency in court orders, while reducing the number of court appearances. In addition, these courts facilitate access to enhanced services for litigants and help to ensure offender accountability.

Sex Offense Courts

Sex Offense Courts handle eligible criminal cases where the defendant has been charged with a sex offense. These courts seek to enhance public safety through monitoring offenders on probation supervision, providing consistent and swift intervention and enhancing offender accountability. Sex Offense Courts work with probation departments to encourage the use of a combination of intensive supervision, treatment and behavioral verification to control offending behavior.

Sex Offense Court Judges and Staff coordinate with all relevant stakeholders, such as prosecutors, departments of probation, defense attorneys and victim service agencies to ensure a uniform approach to the management of eligible sex offense cases and to promote the development and use of best practices.

NEW YORK STATE PROBLEM-SOLVING COURTS

Domestic Violence Courts

Domestic Violence ("DV") Courts adjudicate criminal offenses involving intimate partners. Domestic Violence Courts have been developed as part of the justice system's coordinated response to domestic violence. Dedicated to enhancing safety and offender accountability, DV Courts facilitate access to needed services, ensure intensive judicial monitoring and promote increased coordination among the courts, community stakeholders and service providers.

Youthful Offender Domestic Violence ("YODV") Courts handle exclusively those domestic violence cases involving defendants aged 16 through 19. Like in all DV Courts, the presiding judge in a YODV Court is trained in the dynamics of domestic violence and in addition is sensitive to the characteristics of the population of adolescent defendants. YODV Courts work closely with providers of mandated programs geared toward young offenders and the distinct issues they face.

NEW YORK STATE PROBLEM-SOLVING COURTS

Drug Treatment Courts

Drug Treatment Courts provide court-mandated substance abuse treatment to non-violent addicted offenders, as well as to juveniles and to parents charged in Family Court child neglect cases, in an effort to end the cycle of addiction and recidivism. What distinguishes Drug Courts is their uniquely collaborative approach to treatment: upon voluntary entry into court-supervised programs, appropriate non-violent addicted offenders become part of an intervention process. This process involves coordination between defense attorneys, prosecutors, treatment and education providers and law enforcement officials. Rules of participation are defined clearly in a contract agreed upon by the defendant, the defendant's attorney, the district attorney and the court.

NEW YORK STATE PROBLEM-SOLVING COURTS

Mental Health Courts

The goal of Mental Health Courts is to link defendants to treatment when mental illness is the underlying cause of their criminal activity. These courts build on the Drug Court model by seeking to break the cycle of criminal behavior through treatment. Mental Health Courts facilitate access to psychological services, provide intensive judicial monitoring and promote collaboration among the court, community stakeholders, local mental health departments, mental health service providers and social service providers.

American Bar Association, "Principles for Juries and Jury Trials" (2005) excerpts

GENERAL PRINCIPLES

PRINCIPLE 1– THE RIGHT TO JURY TRIAL SHALL BE PRESERVED

PRINCIPLE 2 – CITIZENS HAVE THE RIGHT TO PARTICIPATE IN JURY SERVICE AND THEIR SERVICE SHOULD BE FACILITATED

A. All persons should be eligible for jury service except those who:
1. Are less than eighteen years of age; or
2. Are not citizens of the United States; or
3. Are not residents of the jurisdiction in which they have been summoned to serve; or
4. Are not able to communicate in the English language and the court is unable to provide a satisfactory interpreter; or
5. Have been convicted of a felony and are in actual confinement or on probation, parole or other court supervision.

B. Eligibility for jury service should not be denied or limited on the basis of race, national origin, gender, age, religious belief, income, occupation, disability, sexual orientation, or any other factor that discriminates against a cognizable group in the jurisdiction other than those set forth in A. above.

PRINCIPLE 3 – JURIES SHOULD HAVE 12 MEMBERS

PRINCIPLE 4 – JURY DECISIONS SHOULD BE UNANIMOUS

PRINCIPLE 5 – IT IS THE DUTY OF THE COURTS TO ENFORCE AND PROTECT THE RIGHTS TO JURY TRIAL AND JURY SERVICE

A. The responsibility for administration of the jury system should be vested exclusively in the judicial branch of government.

PRINCIPLE 6 – COURTS SHOULD EDUCATE JURORS REGARDING THE ESSENTIAL ASPECTS OF A JURY TRIAL

PRINCIPLE 7 – COURTS SHOULD PROTECT JUROR PRIVACY INSOFAR AS CONSISTENT WITH THE REQUIREMENTS OF JUSTICE AND THE PUBLIC INTEREST

PRINCIPLE 8 -- INDIVIDUALS SELECTED TO SERVE ON A JURY HAVE AN ONGOING INTEREST IN COMPLETING THEIR SERVICE

During trial and deliberations, a juror should be removed only for a compelling reason. The determination that a juror should be removed should be made by the court, on the record, after an appropriate hearing.

New York State Criminal Jury Instructions (excerpt)

Role of Court and Jury

During these instructions, I will not summarize the evidence. If necessary, I may refer to portions of the evidence to explain the law that relates to it. My reference to evidence, or my failure to refer to evidence, expresses no opinion about the truthfulness, accuracy, or importance of any particular evidence. In fact, nothing I have said [and no questions I have asked] in the course of this trial (was/were) meant to suggest that I have an opinion about this case. If you have formed an impression that I do have an opinion, you must put it out of your mind and disregard it.

[The level of my voice or intonation may vary during these instructions. If I do that, it is done to help you understand these instructions. It is not done to communicate any opinion about the law or the facts of the case or of whether the defendant is guilty or not guilty.]

It is not my responsibility to judge the evidence here. It is yours. You and you alone are the judges of the facts, and you and you alone are responsible for deciding whether the defendant is guilty or not guilty.

Sentence

In your deliberations, you may not consider or speculate about matters relating to sentence or punishment. If there is a verdict of guilty, it will be my responsibility to impose an appropriate sentence.[10]

2

Evidence

When you judge the facts you are to consider only the evidence.

The evidence in the case includes:
the testimony of the witnesses,
the exhibits that were received in evidence, [and]

[the stipulation(s) by the parties. (A stipulation is information the parties agree to present to the jury as evidence, without calling a witness to testify.)]

Testimony which was stricken from the record or to which an objection was sustained must be disregarded by you.

Exhibits that were received in evidence are available, upon your request, for your inspection and consideration.

Exhibits that were just seen during the trial, or marked for identification but not received in evidence, are not evidence, and are thus not available for your inspection and consideration.

But, testimony based on exhibits that were not received in evidence may be considered by you. It is just that the exhibit itself is not available for your inspection and consideration.

Presumption of Innocence

We now turn to the fundamental principles of our law that apply in all criminal trials–the presumption of innocence, the burden of proof, and the requirement of proof beyond a reasonable doubt.[14]

Throughout these proceedings, the defendant is presumed to be innocent.[15] As a result, you must find the defendant not guilty, unless, on the evidence presented at this trial, you conclude that the People have proven the defendant guilty beyond a reasonable doubt.[16]

[*NOTE: Add, if the defendant introduced evidence:*

In determining whether the People have satisfied their burden of proving the defendant's guilt beyond a reasonable doubt, you may consider all the evidence presented, whether by the People or by the defendant.[17] In doing so, however, remember that, even though the defendant introduced evidence, the burden of proof remains on the People.[18]]

[Defendant Did Not Testify

The fact that the defendant did not testify is not a factor from which any inference unfavorable to the defendant may be drawn.[19]]

Burden of Proof

(*in cases without an affirmative defense*)

The defendant is not required to prove that he/she is not guilty.[20] In fact, the defendant is not required to prove or disprove anything.[21] To the contrary, the People have the burden of proving the defendant guilty beyond a reasonable doubt.[22] That means, before you can find the defendant guilty of a crime, the People must prove beyond a reasonable doubt every element of the crime including that the defendant is the person who committed that crime.[23] The burden of proof never shifts from the People to the defendant.[24] If the People fail to satisfy their burden of proof, you must find the defendant not guilty.[25] If the People satisfy their burden of proof, you must find the defendant guilty. [26]

Reasonable Doubt

What does our law mean when it requires proof of guilt "beyond a reasonable doubt"?[27]

The law uses the term, "proof beyond a reasonable doubt," to tell you how convincing the evidence of guilt must be to permit a verdict of guilty.[28] The law recognizes that, in dealing with human affairs, there are very few things in this world that we know with absolute certainty. Therefore, the law does not require the People to prove a defendant guilty beyond all possible doubt.[29] On the other hand, it is not sufficient to prove that the defendant is probably guilty.[30] In a criminal case, the proof of guilt must be stronger than that.[31] It must be beyond a reasonable doubt.[32]

A reasonable doubt is an honest doubt of the defendant's guilt for which a reason exists based upon the nature and quality of the evidence.[33] It is an actual doubt, not an imaginary doubt.[34] It is a doubt that a reasonable person, acting in a matter of this importance, would be likely to entertain because of the evidence that was presented or because of the lack of convincing evidence.[35]

Proof of guilt beyond a reasonable doubt is proof that leaves you so firmly convinced [36] of the defendant's guilt that you have no reasonable doubt of the existence of any element of the crime or of the defendant's identity as the person who committed the crime.[37]

In determining whether or not the People have proven the

defendant's guilt beyond a reasonable doubt, you should be guided solely by a full and fair evaluation of the evidence. After carefully evaluating the evidence, each of you must decide whether or not that evidence convinces you beyond a reasonable doubt of the defendant's guilt.

Whatever your verdict may be, it must not rest upon baseless speculations.[38] Nor may it be influenced in any way by bias, prejudice, sympathy, or by a desire to bring an end to your deliberations or to avoid an unpleasant duty.[39]

If you are not convinced beyond a reasonable doubt that the defendant is guilty of a charged crime, you must find the defendant not guilty of that crime. If you are convinced beyond a reasonable doubt that the defendant is guilty of a charged crime, you must find the defendant guilty of that crime.[40]

New York Penal Article 125.25: Murder in the second degree (excerpt)

§ 125.25 Murder in the second degree.

A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime…

I. *Plessy v. Ferguson* (1896)

From the majority opinion by Justice Brown:

"A statute which implies merely a legal distinction between the white and colored races -- has no tendency to destroy the legal equality of the two races. ... The object of the Fourteenth Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. "

From the dissent by justice Harlan:

"Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. ... The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution."

II. *Brown v. Board of Education* (1954)

From the unanimous ruling, authored by Chief Justice Earl Warren:

“Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does... Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system... We conclude that, in the field of public education, the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.”

III. Herbert Wechsler, “Toward Neutral Principles of Constitutional Law,” *Harvard Law Review,* Vol. 73, No. 1. (Nov., 1959), pp. 1-35 (excerpts pp. 32-34).

“The problem inheres strictly in the reasoning of the opinion, an opinion which is often read with less fidelity by those who praise it than by those by whom it is condemned. The Court did not declare, as many wish it had, that the fourteenth amendment forbids all racial lines in legislation, though subsequent … decisions may, as I have said, now go that far. Rather, as Judge Hand observed, the separate-but-equal formula was not over- ruled ‘in form’ but was held to have ‘no place’ in public education on the ground that segregated schools are ‘inherently unequal,’ with deleterious effects upon the colored children in implying their inferiority, effects which retard their educational and

mental development. So, indeed, the district court had found as a fact in the Kansas case, a finding which the Supreme Court embraced, citing some further 'modern authority' in its support.

Does the validity of the decision turn then on the sufficiency of evidence or of judicial notice to sustain a finding that the separation harms the Negro children who may be involved?

For me, assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all. Its human and its constitutional dimensions lie entirely elsewhere, in the denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved. I think, and I hope not without foundation, that the Southern white also pays heavily for segregation, not only in the sense of guilt that he must carry but also in the benefits he is denied."

Parents Involved in Community Schools v. Seattle, 551 U.S. 701 (2007)

Case summary adapted from oyez.com:

The Seattle School District allowed students to apply to any high school in the District. Since certain schools often became oversubscribed when too many students chose them as their first choice, the District used a system of tiebreakers to decide which students would be admitted to the popular schools. The second most important tiebreaker was a racial factor intended to maintain racial diversity. If the racial demographics of any school's student body deviated by more than a predetermined number of percentage points from those of Seattle's total student population (approximately 40% white and 60% non-white), the racial tiebreaker went into effect. At a particular school either whites or non-whites could be favored for admission depending on which race would bring the racial balance closer to the goal.

A non-profit group, Parents Involved in Community Schools (Parents), sued the District, arguing that the racial tiebreaker violated the Equal Protection Clause of the Fourteenth Amendment as well as the Civil Rights Act of 1964 and Washington state law. A federal District Court dismissed the suit, upholding the tiebreaker. On appeal, a three-judge panel the U.S. Court of Appeals for the Ninth Circuit reversed.

Under the Supreme Court's precedents on racial classification in higher education, *Grutter v. Bollinger* and *Gratz v. Bollinger*, race-based classifications must be directed toward a "compelling government interest" and must be "narrowly tailored" to that interest. Applying these precedents to K-12 education, the Circuit Court found that the tiebreaker scheme was not narrowly tailored. The District then petitioned for an "en banc" ruling by a panel of 11 Ninth Circuit judges. The en banc panel came to the opposite conclusion and upheld the tiebreaker. The majority ruled that the District had a compelling interest in maintaining racial diversity. Applying a test from *Grutter*, the Circuit Court also ruled that the tiebreaker plan was narrowly tailored, because 1) the District did not employ quotas, 2) the District had considered race-neutral alternatives, 3) the plan caused no undue harm to races, and 4) the plan had an ending point. But by a 5-4 vote, the Supreme Court applied found the District's racial tiebreaker plan unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The Court acknowledged that it had previously held that racial diversity can be a compelling government interest in university admissions, but it ruled that "[t]he present cases are not governed by *Grutter*." Unlike the cases pertaining to higher education, the District's plan involved no individualized consideration of students, and it employed a very limited notion of diversity ("white" and "non-white"). The District's goal of preventing racial imbalance did not meet the Court's standards for a constitutionally legitimate use of race: The Court held that the District's tiebreaker plan was actually targeted toward demographic goals and not toward any demonstrable educational benefit from racial diversity. The District also failed to show that its objectives could not have been met with non-race-conscious means. In a separate opinion concurring in the judgment, Justice Kennedy agreed that the District's use of race was unconstitutional but stressed that public schools may sometimes consider race to ensure equal educational opportunity.

From the plurality opinion by Chief Justice Roberts:

The parties and their amici debate which side is more faithful to the heritage of Brown [v. Board of Education (1954)], but the position of the plaintiffs in Brown was spelled out in their brief and could not have been clearer: “[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race.” What do the racial classifications at issue here do,

if not accord differential treatment on the basis of race? As counsel who appeared before thais court for the plaintiffs in Brown put it: "We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no state has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens."

There is no ambiguity in that statement. And it was that position that prevailed in this court, which emphasized in its remedial opinion that what was "[a]t stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis," and what was required was "determining admission to the public schools on a nonracial basis." What do the racial classifications do in these cases, if not determine admission to a public school on a racial basis?

Before Brown, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again — even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way "to achieve a system of determining admission to the public schools on a nonracial basis," is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.

From the dissenting opinion by Justice Breyer:

Finally, what of the hope and promise of Brown? For much of this nation's history, the races remained divided. It was not long ago that people of different races drank from separate fountains, rode on separate buses and studied in separate schools. In this court's finest hour, Brown v. Board of Education challenged this history and helped to change it. For Brown held out a promise. It was a promise embodied in three amendments designed to make citizens of slaves. It was the promise of true racial equality — not as a matter of fine words on paper, but as a matter of everyday life in the nation's cities and schools. It was about the nature of a democracy that must work for all Americans. It sought one law, one nation, one people, not simply as a matter of legal principle but in terms of how we actually live.

Not everyone welcomed this court's decision in Brown. Three years after that decision was handed down, the governor of Arkansas ordered state militia to block the doors of a white schoolhouse so that black children could not enter. The president of the United States dispatched the 101st Airborne Division to Little Rock, Ark., and federal troops were needed to enforce a desegregation decree.

Today, almost 50 years later, attitudes toward race in this nation have changed dramatically. Many parents, white and black alike, want their children to attend schools with children of different races. Indeed, the very school districts that once spurned integration now strive for it. The long history of their efforts reveals the complexities and difficulties they have faced. And in light of those challenges, they have asked us not to take from their hands the instruments they have used to rid their schools of racial segregation, instruments that they believe are needed to overcome the problems of cities divided by race and poverty. The plurality would decline their modest request.

The plurality is wrong to do so. The last half-century has witnessed great strides toward racial equality, but we have not yet realized the promise of Brown. To invalidate the plans under review is to

threaten the promise of Brown. The plurality's position, I fear, would break that promise. This is a decision that the court and the nation will come to regret.

Tinker v. Des Moines Independent School District (1969)

From the majority opinion by Justice Fortas:

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years …That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school, as well as out of school, are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle, but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.

From the dissent by Justice White:

While the record does not show that any of these armband students shouted, used profane language, or were violent in any manner, detailed testimony by some of them shows their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other nonprotesting students had better let them alone. There is also evidence that a teacher of mathematics had his lesson period practically "wrecked," chiefly by disputes with Mary Beth Tinker, who wore her armband for her "demonstration." Even a casual reading of the record shows that this armband did divert students' minds from their regular lessons. If the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary.

Change has been said to be truly the law of life, but sometimes the old and the tried and true are worth holding. The schools of this Nation have undoubtedly contributed to giving us tranquility and to making us a more law-abiding people. Uncontrolled and uncontrollable liberty is an enemy to

domestic peace. We cannot close our eyes to the fact that some of the country's greatest problems are crimes committed by the youth, too many of school age. School discipline, like parental discipline, is an integral and important part of training our children to be good citizens -- to be better citizens. Here a very small number of students have crisply and summarily [p525] refused to obey a school order designed to give pupils who want to learn the opportunity to do so. One does not need to be a prophet or the son of a prophet to know that, after the Court's holding today, some students in Iowa schools -- and, indeed, in all schools -- will be ready, able, and willing to defy their teachers on practically all orders. This is the more unfortunate for the schools since groups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins.

Turned loose with lawsuits for damages and injunctions against their teachers as they are here, it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools, rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils. This case, therefore, wholly without constitutional reasons, in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students. I, for one, am not fully persuaded that school pupils are wise enough, even with this Court's expert help from Washington, to run the 23,390 public school systems in our 50 States.

Hazelwood School District v. Kuhlmeier (1988)

From the majority opinion by Justice White:

Students in the public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

We have nonetheless recognized that the First Amendment rights of students in the public schools "are not automatically coextensive with the rights of adults in other settings." A school need not tolerate student speech that is inconsistent with its "basic educational mission," even though the government could not censor similar speech outside the school.

Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. A school must be able to set high standards for the student speech that is disseminated under its auspices - standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the "real" world - and may refuse to disseminate student speech that does not meet those standards. In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting.

... Principal Reynolds acted reasonably in requiring the deletion from the May 13 issue of Spectrum of the pregnancy article, the divorce article, and the remaining articles that were to appear on the same pages of the newspaper.

The initial paragraph of the pregnancy article declared that "[a]ll names have been changed to keep the identity of these girls a secret." The principal concluded that the students' anonymity was not adequately protected, however, given the other identifying information in the article and the small number of pregnant students at the school

The student who was quoted by name in the version of the divorce article seen by Principal Reynolds made comments sharply critical of her father. The principal could reasonably have concluded that an individual publicly identified as an inattentive parent - indeed, as one who chose "playing cards with the guys" over home and family - was entitled to an opportunity to defend himself as a matter of journalistic fairness.

In sum, we cannot reject as unreasonable Principal Reynolds' conclusion that neither the pregnancy article nor the divorce article was suitable for publication in Spectrum. Reynolds could reasonably have concluded that the students who had written and edited these articles had not sufficiently mastered those portions of the Journalism II curriculum that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals whose most intimate concerns are to be revealed in the newspaper, and "the legal, moral, and ethical restrictions imposed upon journalists within [a] school community" that includes adolescent subjects and readers. Finally, we conclude that the principal's decision to delete two pages of Spectrum, rather than to delete only the offending articles or to require that they be modified, was reasonable under the circumstances as he understood them. Accordingly, no violation of First Amendment rights occurred.

From the dissent by Justice Brennan:

When the young men and women of Hazelwood East High School registered for Journalism II, they expected a civics lesson. Spectrum, the newspaper they were to publish, "was not just a class exercise in which students learned to prepare papers and hone writing skills, it was a . . . forum established to give students an opportunity to express their views while gaining an appreciation of their rights and responsibilities under the First Amendment to the United States Constitution . . . ."

This case arose when the Hazelwood East administration breached its own promise, dashing its students' expectations. The school principal, without prior consultation or explanation, excised six articles - comprising two full pages - of the May 13, 1983, issue of Spectrum. He did so not because any of the articles would "materially and substantially interfere with the requirements of appropriate discipline," but simply because he considered two of the six "inappropriate, personal, sensitive, and unsuitable" for student consumption.

In my view the principal broke more than just a promise. He violated the First Amendment's prohibitions against censorship of any student expression that neither disrupts classwork nor invades the rights of others…

The Court opens its analysis in this case by purporting to reaffirm Tinker's time-tested proposition that public school students "do not `shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" That is an ironic introduction to an opinion that denudes high school students of much of the First Amendment protection that Tinker itself prescribed. Instead of "teach[ing] children to respect the diversity of ideas that is fundamental to the American system," and "that our Constitution is a living reality, not parchment preserved under glass," the Court today "teach[es] youth to discount important principles of our government as mere platitudes." The young men and women of Hazelwood East expected a civics lesson, but not the one the Court teaches them today.

I dissent.