

FOUR BIG, DUMB TRENDS AFFECTING STATE COURTS

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The richness of this law review's annual survey issue rests in the assessments of developing substantive law described by scholars from our profession's three leading elements: practitioners, judges, and law faculty. Our task as lawyers in considering and re-considering statutes, common law, and constitutions in the course of working through new issues and new facts is the great intellectual challenge of being a lawyer.

Still, the debate over "what the law is" or "what the law should be" occurs against a larger backdrop of a changing society and evolving legal structures. On many days, our profession aspires to focus on close analytical work, lifting up the most elegant examples of jurisprudence. On other days, we proclaim ourselves fans of simplicity. In considering the courts, the profession, as institutions, this Article takes the latter course. I adopt here one of the strategies of a friend who has built a remarkably successful career in the investment business, Gregory C. Donaldson of Evansville, Indiana. This splendid run has flowed from a variety of analytical approaches. For a time, at least, he fashioned some of his recommendations to clients from research under a theory he called "big, dumb trends." He focused on forces that are transforming society at the most macro level, trends that are right in front of us and quite obvious to all, but which have implications most of us have not thought through yet. There are at least four such trends with important implications for American courts.

I. THE IDEAL OF IMPARTIALITY

The first big, dumb trend is one of great consequence, one that places us at risk of losing something valuable: the ideal of judicial impartiality. The defenders of impartiality are far too often losing against lawsuits that seek to obliterate the rules protecting judicial neutrality from damage in the course of judicial campaigns. These cases have the potential to carry the nation back to a time when too many places chose judges by putting the campaign contribution bucket out on the porch (or on the back row of the courtroom) to see who came along with the most money. Throughout much of the twentieth century, the legal profession advanced with substantial success a variety of tools aimed at sustaining courts as fair tribunals.¹ Now, there is a renewed debate about

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1. Canon 30 admonished that:

A candidate for judicial position should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusion of law on disputed issues to secure class support, and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination.

whether courts and judges are simply politics by another means, or by contrast, whether they are places where dispute resolution occurs according to a minimum of force and a maximum of reason.² Those are two very different ideas.

This competition of opposing ideals is hardly confined to state court settings. When Judge David Hamilton appeared before the judiciary committee of the U.S. Senate in the spring of 2009 for his confirmation hearing for the U.S. Court of Appeals for the Seventh Circuit, the Senators posed merely four questions.³ But the nominee appearing just before Judge Hamilton, a district judge from Maryland whom President Obama nominated for the Fourth Circuit, became the feature story of the day by virtue of a grilling from Senator Russ Feingold. The theme of the Feingold inquiry was illustrated by a thread that ran: Are you somebody we ought to confirm, in light of the fact that you once served on the board of directors of the Foundation for Research on Economics and the Environment?⁴

While holding judicial office he should decline nomination to any other place which might reasonably tend to create a suspicion or criticism that the proper performance of his judicial duties is prejudiced or prevented thereby.

If a judge becomes a candidate for any office, he should refrain from all conduct which might tend to arouse reasonable suspicion that he is using the power or prestige of his judicial position to promote his candidacy or the success of his party.

See REPORT OF THE FORTY-SEVENTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 768 (1924) (Canon 30).

2. See Curt Anderson, *States, Congress Wrestle with Judicial Bias Rules*, ASSOCIATED PRESS, Feb. 19, 2010, available at <http://abcnews.go.com/US/wireStory?id=9884470>; Robert Barnes, *Court Ties Campaign Largess to Judicial Bias*, WASH. POST, June 9, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/08/AR2009060801366.html>; Brian Witte, *O'Connor: Campaign Ruling a Concern in Judge Races*, ASSOCIATED PRESS, Mar. 4, 2010, available at <http://www democrats.com/oconnor-campaign-ruling-concern-judge-races>; Ann Woolner, *Ask No Promises of These Political Candidates*, BLOOMBERG NEWS, Sept. 1, 2006, available at http://www.bloombergnews.com/apps/news?pid=20601039&sid=avGtpem_bVR4&refer=home.

3. Republican Senator Tom Coburn of Oklahoma said his office would submit about twenty questions for the record. Senator Coburn also asked Judge Hamilton about judges' use of international law and Judge Hamilton's statement that judges' jobs are to write footnotes to the Constitution. Judge Hamilton was also asked what he would miss about being a district judge and pro bono work. Hearing of the Judiciary Comm. on the Nominations of Andre M. Davis, to Be U.S. Cir. Judge for the Fourth Cir.; Thomas E. Perez, to Be Ass't Att'y Gen., Civ. Rights Div., Dep't of Justice; David F. Hamilton, to Be U.S. Cir. Judge for the Seventh Cir. Before the S. Comm. on the Judiciary, 111th Cong. (Apr. 21, 2009), available at *Capitol Hill Hearing*, FED. NEWS SERV., May 1, 2009.

4. See *id.* "It seems pretty clear to me that joining the board of an organization like FREE is actually a much more significant indication of your involvement with the organization and poses, in my mind, very different ethical questions." *Obama Pick for Appeals Court Faces Tough Questioning*, ASSOCIATED PRESS, Apr. 29, 2009, available at <http://www.foxnews.com/politics/>

Senator Feingold's unstated message was: Are you somebody who will decide cases the way I would decide them, or not? This approach bore a strong similarity to Senator Edward Kennedy's 2006 pronouncement on judicial confirmation during the Bush Administration,⁵ and to Senator Chuck Schumer's flat declaration at the end of the Supreme Court's 2007 term that failing to mount a successful filibuster of Justice Samuel Alito's nomination to the Supreme Court stood as one of his "greatest failings."⁶ He charged that Justice Alito and Chief Justice John G. Roberts, Jr. had reneged on their promises to respect precedent (by which he appeared to mean by not voting with the liberals), and urged that the Senate should presume any future nominees to be unsuitable.⁷

That judicial nominees should make promises to the Senate about the Constitution is a striking idea for a good many reasons, because of course the authors of the Bill of Rights designed it to protect the American public *from* the Senate. The notion that a judicial nominee can obtain confirmation only when the Senate finds what the nominee has to say about the Bill of Rights congruent with its own is deeply problematic.

Why there should be any dispute at all over the principle of impartiality is hard to fathom. Throughout history, the role of judges has been to serve as neutral arbiters of disputes.⁸ Inherent in this role is the ideal that judges will shed any preconceptions or opinions of how a matter should be decided before hearing the parties' presentations of fact and law. It is vital to public confidence in the judicial branch that the law play no favorites.

I have thought of two reasons why this ideal is now in dispute. One is that, at a fairly high level of statistical reliability, on high profile questions like the death penalty and abortion, judges in fact often do what they were hired to do.⁹

2009/04/29/obama-pick-appeals-court-faces-tough-questioning. Usually called just FREE, the Foundation for Research on Economics and the Environment enterprise offers seminars on free-market environmentalism to federal judges and others. See FREE, <http://www.free-eco.org> (last visited May 6, 2010).

5. "The result has been the confirmation of two justices, John G. Roberts Jr. and Samuel A. Alito Jr., whose voting record on the court reflects not the neutral, modest judicial philosophy they promised the Judiciary Committee, but an activist's embrace of the administration's political and ideological agenda." Edward M. Kennedy, *Roberts and Alito Misled Us*, WASH. POST, July 30, 2006, at B01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/28/AR2006072801489.html>.

6. Posting of Paul Kane to Capitol Briefing, http://voices.washingtonpost.com/capitol-briefing/2007/07/schumer_regrets_no_alito_filib.html (July 27, 2007 17:57 EST).

7. *Id.*

8. For a historical discussion of the historical evolution of judicial impartiality, see Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059 (1996).

9. Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1135-37, 1149-51 (1997) (citing various cases, in the face of public outcry, where judges have determined death penalty and abortion cases with unpopular results even when facing retention votes and

Another reason is that part of the country's intellectual class has decided that impartiality is a sham that must be exposed as a cover under which liberal judges ratchet the laws to the left and then demand that conservative judges leave it in place "as precedent."

A new ongoing example illustrating both these causes is gay marriage.¹⁰ Or to take a different field, if in fact the contours of corporate liability for drug warnings will not be made in Congress, the Pennsylvania legislature, nor the Food and Drug Administration, but instead at the supreme courts of Illinois or Wisconsin, then voters decide they should do what they can to affect the outcomes, just as they would have if the real forum was the legislative or executive branch. In the end, this produces a judiciary that behaves like the political branches of the government. It would be a great loss to the American experiment.

II. THE AGING OF THE BABY BOOM

A second big, dumb trend is the baby boom tidal wave. When the Baby Boomers were five or ten years old, they filled the nation's grade schools to overflowing and prompted massive construction programs and an expansion of the teaching profession. When these same citizens are all sixty or seventy, both nursing homes and courtrooms will likewise be reeling under the pressure of certain expanding dockets. There are ways in which the courts interact with citizens who are towards the end of life, including people in nursing homes for whom there is no known relative. The host of things that happen at the end of life includes estate administration and guardianship. As a committee of the Indiana Judicial Conference recently observed:

The substantial expansion in the number of seniors and the concomitant increase in the number of deaths, increased time will be spent by Indiana Courts on matters arising from the transfer of property due to death. With increase in non-probate forms of wealth transference, the issues formerly addressed in probate proceedings will be raised in litigation related to trusts and property disputes. Increased litigation can be expected as the number of deaths increase due to the disappointed expectations of heirs and expectant beneficiaries and frustrated creditors.¹¹

pointing out that public education about what courts do, and a strong unified defense of the court by the local members of the bar help judges' maintain judicial independence).

10. The connection between gay rights litigation and the strategies of campaign consultants has been an especially interesting part of this development. See RANDALL T. SHEPARD, *Second Wind for the State Bill of Rights*, in *THE BILL OF RIGHTS IN MODERN AMERICA* 241, 251–52 (David J. Bodenhamer & James W. Ely, Jr. eds., 2d ed. 2008).

11. INDIANA JUDICIAL CENTER PROBATE COMMITTEE, *THE GRAY & THE BLACK: AN EXAMINATION OF THE IMPACT OF AN AGING POPULATION ON THE JUDICIARY AND HOW THE NEEDS OF AN AGING POPULATION MAY BE MET BY THE JUDICIARY* (2008) (on file with the author).

The American court system is not well prepared for this onrushing mass of human drama that is about to wash over it. This will largely happen in state court and not in federal court. We need a great deal more investigation in this field of our work and healthy commitments of imagination. In the places where that is undertaken, most notably and recently in Arizona, the resulting revelations are unhappy ones, but they can lead to important reforms.¹² I am glad to say that the Indiana Judicial Conference is at work devising initiatives in this field.

III. YET ANOTHER BUDGET CRISIS

A third big dumb trend is what I will call here the decennial budget crisis. The current "Great Recession" represents my third budget crisis as a supreme court justice, deeper than the other two to be sure. The remarkable feature of the collective reactions to the current crisis has been how predictable they have been. One could haul out the speeches and the articles that judges, court administrators, and the rest of the legal profession prepared during the Carter recession (or those from the early 1990s), change the names and the numbers, and readily recognize that the vocabulary of 2010 is largely the same.

We have spoken about the impact of recession on America's courts by emphasizing judicial independence, by worrying about the role of governors in shaping court requests to the legislative branch, by heralding "the Constitution." The solutions we propose at these moments of fiscal distress have likewise not improved much. They tend not to feature general inventiveness. What gets cut first? How many lay-offs will there be? We repeat to ourselves and others that we must protect those processes that represent our constitutional obligations. What that often means is we cancel civil jury trials and conduct criminal trials regardless of the severity of the offenses. This means spending time trying misdemeanors, while the citizens who have been injured in products liability cases stand in line hoping for compensation. We take for granted that the Constitution requires us to give priority to the criminal cases, and thus we push the rest of the litigation to one side.

A change in vocabulary during these regular crises might make a difference, but it will take a huge leap for the American court system to rethink what we do and how we talk about what we are doing if the cause of justice is to be sustained in the third decennial budget crisis. In a few places, bench and bar leaders have developed new dialogues. In Minnesota, the chief justice organized the Coalition to Preserve the Justice System, a group that included representatives like police

12. Arizona's first examination of court supervision of probate activity, propelled by "highly publicized cases of mismanagement and financial exploitation of incapacitated and protect persons," led to a statewide program under which fiduciaries must be certified. FIDUCIARY ADVISORY COMMITTEE TO THE ARIZONA JUDICIAL COUNCIL, FINAL REPORT 1 (2001); Chief Justice Rebecca White Berch of Arizona has ordered a review of probate "everything from how the vulnerable are being protected to how much they're being charged for that protection," Laurie Roberts, *Review of Probate Court Ordered*, ARIZ. REPUBLIC, Mar. 26, 2010, at B1, available at <http://www.azcentral.com/arizonarepublic/local/articles/2010/03/25/20100325roberts0326.html>.

and prosecutors. It spelled out what would cease to occur if severe cuts were pushed through (like not trying traffic cases or shoplifting).¹³ The Iowa Supreme Court issued a list of furlough days when the courts would close altogether,¹⁴ and the chief justice outlined in a speech to the legislature which court services would no longer be provided (assistance to people without lawyers) and what the effects of shrinking trial time would be (even more plea bargains).¹⁵

IV. COMMUNICATING WITH THE PUBLIC

That leads to the fourth obvious trend: the sea change in information. It but recites the obvious to say that the American court system is way behind other institutions in society on this score.

The Audit Bureau of Circulations reported this spring yet another substantial drop in newspaper circulation in the country.¹⁶ In what seemed like a symbolic event, the owners of *Editor & Publisher* shut it down as a printed magazine at the end of last year.¹⁷ *The Boston Globe* suffered among the most serious losses, and Sumner Redstone,¹⁸ interviewed on this point, said he thought there would be no

13. Jay Weiner, *Justice Community: Cutting Budgets for Courts, County Attorneys, and Defenders Is Dangerous*, MINN. POST, Jan. 14, 2009, available at http://www.minnpost.com/politicalagenda/2009/01/14/5856/justice_community_cutting_budgets_for_courts_county_attorneys_and_defenders_is_dangerous.

14. Press Release, Iowa Judicial Branch, State Budget Problems Prompt Unpaid Leave for Judges and Court State, and Temporary Court Closures (Nov. 10, 2009) (on file with author). "Iowans will have to settle for 'assembly line justice' because of state budget cuts that forced layoffs while the number of recession-related court cases grows." Grant Schulte, *Iowa's Chief Justice Decries 'Assembly Line Justice' in Wake of Cuts*, DES MOINES REG., Jan. 15, 2010, available at <http://m.desmoinesregister.com/news.jsp?key=585374&rc=ln>. See William M. Welch, *Court Budget Cuts Slow Swift Hand of Justice*, USA TODAY, Apr. 1, 2010, available at http://www.usatoday.com/news/nation/2010-03-31-court-cuts_N.htm.

15. Marsha Ternus, Chief Justice of the Iowa Supreme Court, 2010 State of the Judiciary, (Jan. 13, 2010), available at <http://www.iowacourts.gov/wfdata/frame9830-1152/file59.pdf>.

16. In the six months ending with March 2010, average daily paid circulation was down 8.7% from the previous year. Mark Fitzgerald, *Like Newspaper Revenue, the Decline in Circ Shows Signs of Slowing*, EDITOR & PUBLISHER, Apr. 26, 2010, available at http://www.editorandpublisher.com/eandp/news/article_display.jsp?vnu_content_id=1004086334. That this might be favorable news was due only to the fact that the decline in the previous six months was a little worse.

The Audit Bureau of Circulation reported that in six months ending September 20, 2009, sales fell by 10.6 percent on weekdays and 7.5 percent on Sundays from the period a year earlier. The industry was selling "about 44 million copies a day — fewer than at any time since the 1940's." Richard Perez-Pena, *U.S. Newspaper Circulation Falls 10%*, N.Y. TIMES, Oct. 27, 2009, at B3, available at <http://www.nytimes.com/2009/10/27/business/media/27audit.html>.

17. Frank Ahrens, *Editor & Publisher, Kirkus Reviews to Cease, Nielsen Is Shutting Down Magazine, Selling Others*, WASH. POST, Dec. 11, 2009, at A25, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/12/10/AR200912103868_pf.html.

18. Sumner Redstone is the majority owner of National Amusements, Inc. a privately owned

newspapers in ten years.¹⁹

In the midst of all that, our profession and Congress have committed time to debating whether it would be helpfully transparent for the U.S. Supreme Court to permit television cameras at its hearings.²⁰ And commentators spilt much ink recently when the Supreme Court countermanded a district judge's plan to broadcast the San Francisco trial about the constitutionality of a vote by Californians to overturn the California Supreme Court's ruling in favor of gay marriage.²¹ One can acknowledge that serious people conduct these debates and still hold that they are just not very important.

What is important and difficult for court people (most of whose leaders are at least fifty years old) is coming to grips with the fact that the newest generation procures its information in a dramatically new and different way. Court leaders understand intellectually that this is real but find it difficult to forge effective plans for dealing with it. I see this development as a race in which the most inventive will be well rewarded.

The deterioration of what is usually called the mainstream media or the traditional media has run right alongside development of a powerful role in the marketplace of ideas for two forms of communication that were previously at the margin. One newly stronger player is interest group journalism, where who is down and who is up is plain to see. The number of mainstream newspaper reporters accredited to cover the Congress has fallen twenty-five percent in ten years, and the overall total number of organizations with Capitol Hill credentials declined seventeen percent.²² Other people are taking their place: observers and writers who represent various voluntary associations and business enterprises that

media and entertainment company, which operates more than 1000 movies screens and owns controlling interest in CBS Corporation and Viacom. See National Amusements-Corporate, <http://www.nationalamusements.com/about/corporate/asp> (last visited May 6, 2010); Jenn Abelson, *Redstone Says He Relies on His Instinct*, BOSTON GLOBE, Sept. 19, 2007, at D3, available at http://www.boston.com/business/globe/articles/2007/09/19/redstone_says_he_relies_on_his_instinct.

19. Sue Zeidler & Gina Keating, *Redstone Says U.S. on Brink of Bull Market*, REUTERS, available at Apr. 29, 2009, <http://www.reuters.com/article/idUSTRE53S9C520090430>.

20. Posting of Tony Romm to Hillicon Valley, <http://thehill.com/blogs/hillicon-valley/technology/95171-senate-judiciary-committee-advances-legislation-to-compel-scotus-to-televisе-proceedings> (Apr. 29, 2010, 15:42 EST).

21. The U.S. Supreme Court was asked to stay a broadcast of a federal trial. Without expressing any view on whether trials should be broadcast, the Court determined the district court below did not follow appropriate procedures set forth in federal law before changing their rule to allow broadcasting. "Courts enforce the requirement of procedural regularity on others, and must follow those requirements themselves." *Hollingsworth v. Perry*, 130 S. Ct. 705, 706 (2010).

22. THE NEW WASHINGTON PRESS CORPS: AS MAINSTREAM MEDIA DECLINE, NICHE AND FOREIGN OUTLETS GROW 5-6 (Pew Research Center's Project for Excellence in Journalism 2009), available at http://www.journalism.org/sites/journalism.org/files/The_Washington_Press_Corps_Report_UPDATE.pdf.

are a ubiquitous part of American life.²³ This new army of communication (some of them benign and some of them not so benign) has come to the realization that it can be an effective alternative to the traditional news outlets.²⁴

If there is no effective Washington bureau of Cleveland's *The Plain Dealer*, Mothers Against Drunk Driving or the National Association of Manufacturers can fill that hole. Fill in the blank, and tune in with your BlackBerry at any hour you like.

The other rising form of information, relatively more important for the legal profession, is what might be called official journalism. Here is the real opportunity for courts to improve access to its message and its processes. It comes as little surprise that a recent study by the Pew Internet & American Life Project calculated that more than a third of Americans use the Internet to access government statistics or that forty percent have downloaded government forms.²⁵ Much more impressive was the fact that forty-eight percent of Internet users have looked to government websites for information about a public issue or policy.²⁶ Equally interesting is the finding that among people who use the Internet, whites, blacks, and Latinos are equally likely to use digital technology for accessing information from government.²⁷

This is the more important line of inquiry, not whether the U.S. Supreme Court is going to go on television. It is what the system as a whole can do by way of taking advantage of this decline in traditional journalism that is on our doorstep in ways that will help support the work and the values we are assigned to do.

CONCLUSION

Lawyers as a group are good observers of the larger landscape in which we work. We are not always so adroit at connecting society's trends to the individual cases or matters over which we toil day by day. Spending a little more time connecting these dots should help us improve both the system of justice and our own performance for clients and citizens.

23. Staff from U.S. niche publications has increased from twenty-five percent of the total Hill staff to thirty-eight percent in the last ten years. *Id.* at 6, 12.

24. Examples of the new Washington media are publications with names like CLIMATE WIRE, ENERGY TRADER, TRAFFIC WORLD, GOVERNMENT EXECUTIVE and FOOD CHEMICAL NEWS. *Id.* at 13.

25. AARON SMITH, GOVERNMENT ONLINE: THE INTERNET GIVES CITIZENS NEW PATHS TO GOVERNMENT SERVICES AND INFORMATION 4 (Pew Internet & American Life Project 2010), available at http://www.pewinternet.org/~media/Files/Reports/2010/PIP_Government_Online_2010.pdf.

26. *Id.* at 3.

27. *Id.* at 7-8.