State–Federal Judicial Observer

NEWS AND COMMENTARY OF INTEREST TO THE STATE AND FEDERAL JUDICIARY

A joint publication of the Federal Judicial Center and the National Center for State Courts • Number 5 • March 1994

State and Federal Judges Express Concern over New Legislation; Crime Bills, Other Proposals May Affect Traditional Federalism

by James G. Apple

State and federal judges at the winter meeting of the U.S. Judicial Conference Committee on Federal–State Jurisdiction in Washington, D.C., expressed deep concern about certain crime legislation pending in the Congress, the alarming trend of the federalization of crime in general, the federalization of state crime in particular, and the potential destructive effects of these developments on the whole structure of judicial federalism in the United States.

The specific subject of concern was the Violent Crime Control and Law Enforcement Act of 1993 (S. 1607), which was passed overwhelmingly by the U.S. Senate last November.

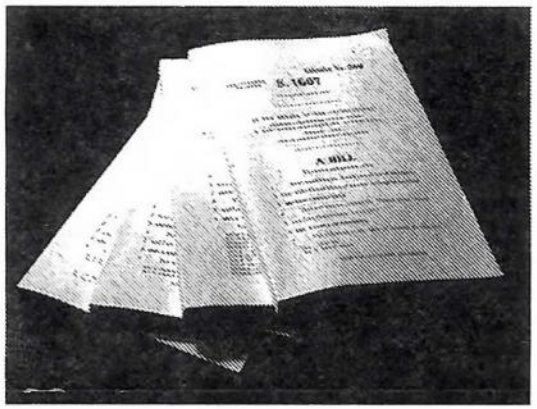
The bill would create 135 new federal crimes, many of which are already covered in the same or a similar form by state criminal laws. It would also extend the death penalty to over 50 crimes. As of late January of this year, the U.S. House of Representatives had passed 10 new crime-related bills, including a modified version of S. 1607 (H.R. 3355).

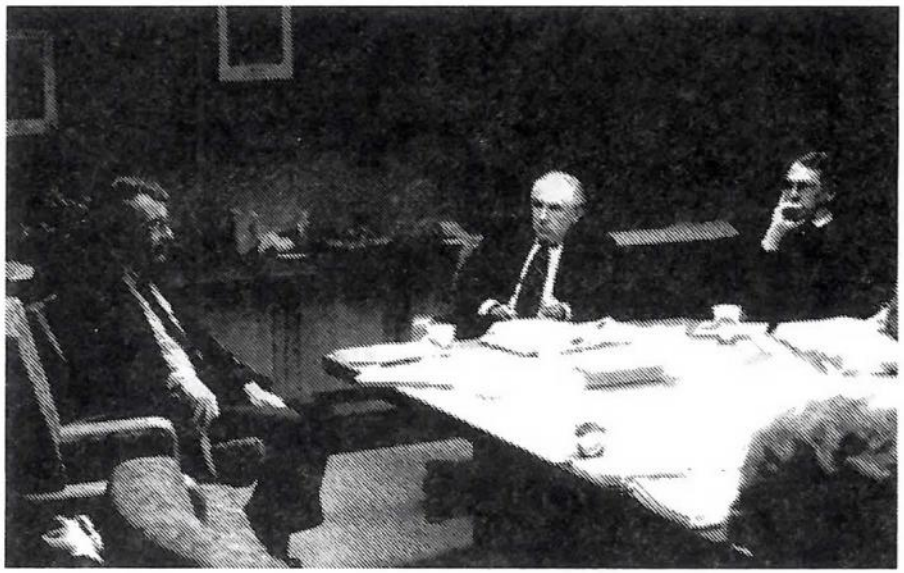
The crime bill contains provisions that would federalize traditional state offenses, including those relating to homicides involving firearms (with death penalty), criminal street gangs, drive-by shootings, and carjackings involving firearms.

"Issues raised in this bill are of profound significance to the judiciary," said one member of the committee.

The committee heard from then-Deputy Attorney General Philip Heymann, who presented views of the U.S. Department of Justice on the proposed legislation.

During the ensuing discussions, members of the committee said that the new legislation may have adverse effects on the operations of the federal courts. One member cited as a simple but important example the difficulty of getting prisoners to court because of reduced staff in the U.S. Marshals Service, a situation that can significantly impair the ability of judges to speedily and efficiently conduct arraignments and criminal trials.





The U.S. Judicial Conference Committee on Federal–State Jurisdiction met in Washington, D.C., in January. The primary focus of the meeting was the increasing federalization of crime. The committee heard comments from Philip Heymann, then-U.S. Deputy Attorney General, about the crime bills pending in the Congress. From left: Mr. Heymann; Judge Stanley Marcus (U.S.S.D. Fla.), chair of the committee; and Professor John B. Oakley, U. Cal. Davis School of Law, reporter for the committee.

Another judge commented such a class of offenders. The new legislation requires prosecution of 13-year-old and older juveniles as adults in certain crimes involving firearms.

The members of the committee also advocated Justice Department support for the State Justice Institute in the President's budget. "The SJI has been in danger of extinction," remarked a state supreme court

The committee also heard reports on other federal legislation that would potentially affect state and federal courts, including the violence against women legislation, the Religious Freedom Restoration bill, the Product Liability Fairness bill, the Freedom of Access to Clinic Entrances bill, and proposed changes in the handling of habeas corpus petitions.

Crime bills have proliferated in the current U.S. Congress: The House of Representatives has passed 10 such bills. The Violent Crime Control And Law Enforcement Act of 1993, S. 1607, passed the Senate overwhelmingly in November of last year. The legislation would create 135 new federal crimes.

that federal courts, unlike state courts, would be unequipped to handle juvenile crimes included in the bill because of the lack of physical facilities and personnel necessary for the social and probationary services required for justice, "because the administration perceives it as serving no federal purpose. But it does serve a federal purpose. By promoting good state–federal relations, it benefits both systems."

The meeting was chaired by U.S. District Judge Stanley Marcus (S.D. Fla.). Four state supreme court justices, as well as eight other federal judges, are members of the committee. ❑

FJC Publication Details Debate over Judicial Federalism, Increased Federalization of Crime

"Federalization" of the administration of justice has become a buzzword of the 1990s. Have recent legislation and Justice Department prosecutorial policies unnecessarily eroded the proper role of the federal courts? Or is the federal forum uniquely capable of dealing with pressing national problems such as drugs, crime, and violence?

Answers to these questions vary greatly, and these conflicting views and their underlying premises are examined in a new Federal Judicial Center monograph, *On the Federalization of the Administration of Civil and Criminal Justice*, by Center Director Judge William W Schwarzer and Deputy Director Russell R. Wheeler.

The monograph analyzes arguments in support of and in opposition to such propositions as: Does the Constitution dictate a limited role for the federal courts? Do the policy reasons underlying federalism argue for a restricted role? Does expanded jurisdiction subvert the appropriate role of the federal courts or threaten their quality and competence? Is there a principled basis for defining the federal courts' role?

The last part of the monograph provides suggestions for "resolving the dilemma of federalization," including a proposal for "guidelines to preserve the limited role of the federal courts."

This concluding section suggests that although a substantive consensus on the role of the federal courts may be elusive, practical considerations may be available to guide legislators and policy makers in preserving the unique role of the federal courts, consistent with national interests.

Copies of the monograph may be obtained from Information Services, Federal Judicial Center, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, D.C. 20002-8003, phone (202) 273-4153.

Second California Capital Case Symposium Scheduled for April in Los Angeles

A second California Capital Case Symposium for state and federal judges, a follow-up to the initial one held in October 1992 in San Francisco, will be held in Los Angeles at the InterContinental Hotel on April 8, 1994.

The one-day symposium will include discussions on recent developments in federal and state habeas corpus law, procedures for resolving federal constitutional questions in state trial courts, common errors requiring a grant of federal habeas review, and problems of competent counsel and investigation resources for collateral attacks on state court judgments.

Interested judges should contact Mr. Mark Mendenhall, Assistant Circuit Executive, Office of the Circuit Executive, U.S. Courts for the Ninth Circuit, 121 Spear St., Suite 204, P.O. Box 193846, San Francisco, CA 94119-3846, telephone (415) 744-6150, fax (415) 744-6179.

Joint State–Federal Task Forces Study Problems of Gender Bias in Courts

Three states in the U.S. Ninth Circuit have been pursuing the improvement of state–federal judicial relationships through the establishment of joint task forces to study gender bias in the courts.

In Alaska, Chief Justice Daniel A. Moore, Jr. (Alaska Sup. Ct.) and Chief U.S. District Judge H. Russel Holland (D. Alaska) announced last November the formation of a joint state–federal task force to address problems of gender equity in the two court systems. Judge Karen Hunt (Alaska Superior Ct.) and U.S. District Judge James K. Singleton (D. Alaska) will co-chair the task force, which will report to the Alaska State–Federal Judicial Council on a plan for gender fairness to be implemented in both court systems.

The state and federal court systems in Montana are supporting the work of the state bar of Montana in promoting gender fairness. The Montana Supreme Court created a Gender Fairness Task Force in 1990, and its work was carried forward by the President's Commission on Women in the Profession, a standing committee of the state bar. In addition, the Federal Practice Section of the state bar, with the cooperation of lawyer representatives appointed by the state's federal judges, presented two seminars for lawyers on gender fairness and are developing a gender fairness survey of all 2,000 lawyers in Montana.

In Hawaii, Associate Justice Robert G. Klein (Haw. Sup. Ct.) has appointed U.S. Magistrate Judge Francis I. Yamashita (D. Haw.), a former state judge, as the federal representative on the Hawaii Supreme Court's Permanent Committee on Gender and Other Fairness, created in 1989. The permanent committee was merged last year with the gender fairness committee of the Hawaii State Bar Association. The committee has developed and conducted sexual harassment training for state judges. In addition, a subcommittee on rules of professional conduct has proposed a rule prohibiting attorneys from engaging in discriminatory behavior based on race, sex, or religion.

The U.S. Ninth Circuit is embarking on a study of the effects of ethnicity, race, and religion on the federal courts and will seek to work cooperatively with state task forces addressing the same issues. The judicial conference of that circuit pioneered efforts to study gender bias in the courts with the creation in 1990 of a gender bias task force, which produced a comprehensive study, *The Effects of Gender in the Federal Courts*, in 1993. ❑

Inside . . .

U.S. Fourth Circuit Committee Plans Regional State–Federal Conference

A committee of state and federal judges from the states of the U.S. Fourth Circuit met in Richmond, Va., on January 21, 1994, to begin planning for a regional conference on state–federal judicial relationships for the circuit.

The conference will be held in Williamsburg, Va., November 14–15, 1994.

The committee adopted the following four goals for the conference:

1. To focus on how to organize and sustain an effective state–federal judicial council;

2. To examine areas of conflict and opportunities for cooperation, and identify potential problems in state–federal judicial relationships;

3. To identify specific areas and techniques for administration and litigation coordination and cooperation; and

4. To consider strategies for improving understanding between legislators and the judiciary.

The conference will be attended by judges, court administrators, and academic representatives from within the circuit, which comprises Virginia, Maryland, West Virginia, North Carolina, and South Carolina. The Chief Justice of each state, five state judges, five federal judges (trial and appellate), and one court administrator from each of the five states in the circuit will be invited.

Judge Johanna L. Fitzpatrick (Va. Ct. App.) and Judge William L. Osteen (U.S. M.D. N.C.) were elected co-chairs of the planning committee. Chief Justice Harry L. Carrico (Va. Sup. Ct.) opened the meeting and welcomed the attendees.

Other members of the committee are Judge W. T. Brotherton, Jr. (W. Va. Sup. Ct. App.), Judge L. Henry McKellar (S.C. 5th Cir. Ct.), Judge J. Harvie Wilkinson III (U.S. 4th Cir.), Judge Paul V. Niemeyer (U.S. 4th Cir.), Beatrice P. Monahan, senior planning analyst (Va. Sup. Ct.), and Samuel W. Phillips, circuit executive (U.S. 4th Cir.).

The Williamsburg conference will be funded by a grant from the State Justice Institute. It will be a follow-up to the National Conference on State–Federal Judicial Relationships held in Orlando, Fla., in April 1992. ❑

State, Federal Judges Attend California Conferences on Settlement Processes

Two conferences for state and federal judges on the settlement process in litigation were held in Northern California in May and October of 1993. The two-day conferences in San Francisco and Oakland, respectively, were sponsored by the Association of Business Trial Lawyers.

Arthur J. Shartsis of San Francisco, president of the sponsoring organization, said the purpose of the conferences was "to increase the skill of judges in conducting settlement proceedings."

N.D. Cal.) to promote the two programs.

Each meeting began with a panel discussion by lawyers on "What Lawyers Want from the Settlement Process." The program included sessions on judicial perspectives on effective settlement techniques, strategies to promote settlements, and mock settlement conference demonstrations.

Handout material for those attending the conferences included a series of "settlement process discussion points," a list of 24 questions that commonly arise about the

OBITER DICTUM

On Windshields and Rearview Mirrors, Layer Cakes, Parkinson's Disease, and Judicial Federalism

by Professor Daniel J. Meador,
James Monroe Professor of Law,
University of Virginia Law School

(This column has been adapted from informal remarks made by Professor Meador at the Western Regional Conference on State–Federal Judicial Relationships in June 1993, in Stevenson, Wash.)

Recently, I was at a gathering where a stockbroker made a talk. He told the audience, "I want you to look through the windshield and not in the rearview mirror." There is a good deal of wisdom in that request. However, in the matter of judicial federalism, we do not want to neglect the value of our past. The rearview mirror tells us where we have been, what is behind us, and what our past is. To know where we are now, we can look out of the side window. In the court business, the view through the windshield is quite obscure. There is a lot of fog and mist there. The only way to hope to know what lies ahead for the courts is by looking in that rearview mirror to see where we have been and out the side window to see where we are.

The view to the rear presents a picture of American federalism and the American judiciary that is radically different from what we have today. We have undergone a transformation of immense proportions. At

The trend toward the federalization of

way. We have seen it for centuries in England—the practice was incorporated into the inns of court, where barristers and judges all dined together. A candidate for call to the bar in England is still required to take so many dinners each quarter in the inns of court. There is something about sitting down and eating together that is fundamental to establishing and fostering relationships.

The second idea of importance is the bringing in of persons from outside the judiciary for council meetings. Inviting legislators and lawyers, especially litigating lawyers, to participate seems to me another excellent idea.

I would also stress a suggestion that Judge J. Clifford Wallace (U.S. 9th Cir.) has made: the need for involvement of legal academics. They have been missing too long from this field. There are relatively few American law professors who pay much attention to state–federal judicial relationships. That interest needs to be developed, and there are affirmative steps that can be taken to accomplish it. Deans of law schools can be contacted and requested to identify someone on the faculty who would take an interest in this subject. If there is no one already there, the dean should be asked to encourage such an interest, preferably among younger faculty members who might take it on as a long-term career subject. Such persons could be brought to periodic meetings and dinners

settlement proceedings.

Approximately 30 state and federal judges attended each conference.

The conferences resulted from the efforts of then Chief Judge Edward Stern of San Francisco (Cal. Sup. Ct.), who became concerned with the crowded conditions of the civil calendar in his court. Judge Stern found in making inquiries of colleagues that "many felt that conducting settlement conferences was not a role for judges or that they were not good at the process."

Judge Stern wanted to institute a "vigorous settlement program" but saw that an educational effort was needed. He joined with Chief Judge Felix Henderson (U.S. questions that commonly arise about the judicial role in settlements.

Typical of such questions were "What is the most significant factor in producing an effective settlement conference?"; "How can a settlement judge bridge the gap between litigants who are at extremes in their settlement postures?"; and "Should the settlement judge suggest in private meetings with counsel or their clients what concessions should be made?"

Judge Stern reported that "reactions to the conferences were highly favorable." The sessions "assisted the judges in dealing with settlement problems and the settlement process." ❑

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a joint publication of the
Federal Judicial Center and the National Center for State Courts

Published in the Interjudicial Affairs Office, Federal Judicial Center, One Columbus Circle, N.E., Washington, DC 20002-8003

A note to our readers

The *State–Federal Judicial Observer* welcomes comments on articles appearing in it and ideas for topics for future issues. The *Observer* will consider for publication short articles and manuscripts on subjects of interest to state and federal judges. Letters, comments, and articles should be submitted to Interjudicial Affairs Office, Federal Judicial Center, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, DC 20002-8003.

mense proportions. At the Orlando conference on state–federal judicial relationships in April 1992, Gene Flango from the National Center for State Courts said that the old analogy used in talking about American federalism was a layer cake. On the bottom layer there was local government, the middle layer was the state government, and the top layer was the federal government. He said that analogy no longer works. The analogy now is that of a marble cake, or even a fruit cake.

American law, both criminal and civil, could be irreversible. It may be that we are headed toward an increasing nationalization of law, accompanied eventually by a national police force.

All of the steps taken to address the problems that come out of this tangled, interconnected state–federal system can be subsumed into two broad categories. One would be steps that we can take to adjust to and ameliorate the situation under the existing structural, jurisdictional, and substantive arrangements. The other is steps to change those arrangements. These latter steps, by their nature, are long range and very difficult.

Four Cs and Two Ds

For the first category, at Orlando we got the three Cs—coordination, cooperation, collaboration. There is, however, a fourth C—communication. To me that is the fundamental C. Without communication, the other three will never come to pass. In addition, U.S. Supreme Court Justice Sandra Day O'Connor has given us two Ds to add to that list—dialogue and dependence.

I want to underscore two ideas to highlight the importance of the four Cs and two Ds, both relating to state–federal judicial councils. The first relates to a development in the Western District of Washington, where state and federal judges and others periodically gather for dinner, whether they are a part of council meetings or separate occasions. That is an excellent idea. There is something deep in the human makeup related to the breaking of bread together; an institutional practice that goes back a long meetings and dinners and engaged to work on the issues and problems of judicial federalism.

To say that our legal order and the American judiciary are seriously ill would be putting it too strongly. But it is safe to say that they are suffering from debilitating problems of various sorts. They are not in a robust state of health because of this federal–state complication. The four Cs and two Ds are steps used to ameliorate symptoms of this affliction.

Medical Analogy

There is an interesting and useful analogy to this situation in the medical field. What I see in the state–federal scene today is something like Parkinson's disease. Parkinson's disease causes tremors in the arms and legs and certain muscular dysfunctions. That is very much what we have in the American judiciary, both state and federal.

The medical field has developed quite sophisticated medicines for dealing with the symptoms, suppressing them. It has not yet developed any cure for the disease.

Likewise, with judicial federalism we discuss steps to ameliorate the stresses, to make life more livable, more functional—but we are not getting at the disease itself.

As with Parkinson's, as the years pass with only the medicines we have been talking about, the disease will progress. The patient often gets to the point where the tremors and muscular problems cannot be effectively suppressed by medicine. With judicial federalism, I foresee the day where the basic problems will go beyond our ability to deal with them through the ameliorating steps we have been discussing.

The basic disease, the basic problem of judicial federalism, stems from a combination of two circumstances. One is the coexistence of a comprehensive dual set of trial courts—one in the federal sphere and one

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Video Appearances Make Judicial Life Easier for State District Judge

by James G. Apple

Judge Daniel Fairfax O'Flaherty, who sits on the state district court in Alexandria, Va., has made the handling of criminal cases in his court much easier.

The vehicle for this improvement is a closed-circuit television system. Judge O'Flaherty uses the system to conduct "video arraignments" between the judge's chambers and the local detention center in misdemeanor cases.

Judge O'Flaherty learned of video arraignment procedures from a course he took at the National Judicial College in Reno, Nev.

The judge and the local prosecutor meet each morning during the week in his chambers' library, which contains the court's end of a two-way video monitoring system. The visible parts of the system include a console with video monitor and telephone. The other end of the system is in a ground-floor room at the Alexandria Detention Center two miles away.

Promptly at 8 a.m. the monitor is turned on and a room at the detention center with two empty chairs appears on the screen.

The accused are brought from their jail cells to the ground floor room at the detention center by a deputy sheriff and take seats in the chairs in front of the video monitor. Each accused is joined during the appearance by an attorney, usually a representative from the local public defender office.

The process of advising those recently arrested and accused of crimes begins.

Judge O'Flaherty and the prosecutor can see and hear the accused and the public defender. The accused and the public defender can likewise see and hear the judge and the prosecutor. The telephones on each console permit more private conversations securing/restraining, transporting, and escorting prisoners for arraignment from the jail to the courthouse and back again.

With the new system, there is no removal of the accused from the jail premises, no transportation to and from the courthouse with its attendant security risks and precautions, no transfer of the accused to a holding cell at the courthouse, and no transfer of the accused from a holding cell to the courtroom at the courthouse.

The old system consumed four hours each day, involving four deputy sheriffs and two vans.

The new procedure takes only 30 to 45 minutes each day and involves one deputy sheriff and no vans (but deputies and vans are still necessary for transfer of prisoners for other proceedings at the courthouse).

After using the system for over two years, Judge O'Flaherty is still enthusiastic about it.

"The biggest advantage," he says, "is security—not having to transfer the prisoners. That is the least secure time in the process. The new system completely eliminates the need for transportation."

Krista Boucher, a member of the local prosecutor's staff who regularly appears before Judge O'Flaherty, notes that "Jails are overcrowded. There are never enough deputies. The new system relieves the sheriff's deputies, drivers, and vans to do other tasks. Deputies are free to do more security work at the jail."

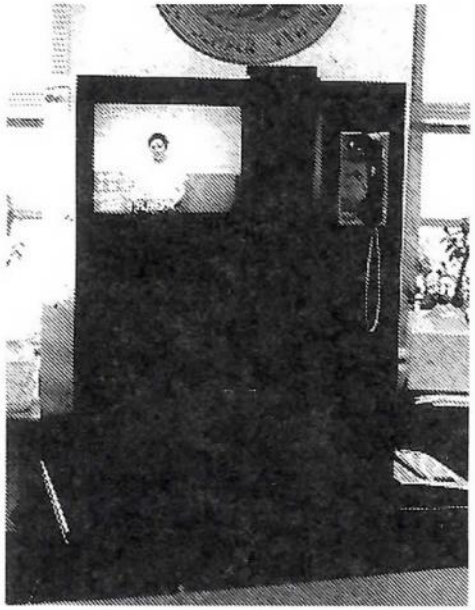
"The new system is more efficient," she added. Boucher also said that "the demeanor of prisoners is much better when arraignments are conducted electronically."

Her view that the process assists the prisoners is echoed by Melinda Douglas, director of the state public defender office in Alexandria.

"The accused," said Douglas, "does tend to be more relaxed, and the whole process of trials, the accused has a right to be physically present in the courtroom."

She feared that more extensive use of the electronic system would lead to a Assembly passed an enabling act that provides for personal appearances by two-way electronic video and audio communication and establishes standards for the procedure

Above: Alexandria City Prosecutor Krista Boucher joins District Judge Daniel O'Flaherty in the library of his chambers each morning at eight o'clock for arraignments using the two-way video system, which connects the judge's chambers with the Alexandria Detention Center two miles away.



Right: The console containing the video monitor for conducting "video arraignments" sits in the library of Judge O'Flaherty's chambers. The new procedure using the video monitoring system saves over three hours of deputy sheriff time each day, freeing them for other duties.

console permit more private conversations if needed.

In each case, Judge O'Flaherty hears the nature of the charge from the prosecutor, advises the accused of the accusations, assigns the case for trial, and hears the recommendations and comments of the prosecutor and public defender regarding bail.

After each appearance, the accused is taken from the "arraignment room" at the detention center and either released on bail or returned to a jail cell.

This abbreviated, virtually risk-free procedure is quite different from the old process, which required preparing, searching, to be more relaxed, and the whole process is less traumatic. The new procedure is more reassuring to the accused because the public defender can go to the jail and have time for a personal, private conference with the accused before the appearance before the judge. That was not possible under the old system, when the accused was brought to the courthouse for an appearance in open court."

Douglas likes the system, but has reservations. "I have no objections to its use for the initial appearance of the accused before a judge," she said. "But for other procedures, such as taking pleas and the conduct electronic system would lead to a "depersonalization of the criminal justice process" and a potential "lack of dignity attending court procedures."

The cost of the system that was installed after a competitive bidding process was approximately $70,000. The fiber optics components of the system cost approximately $1,100 per month for telephone line fees.

One of the problems confronting Judge O'Flaherty when he sought to establish the system in Alexandria was the lack of specific statutory authority for "electronic appearances." In 1991, the Virginia General and establishes standards for the procedure (Va. Stat. § 19.2-3.1).

By contrast, the federal courts have not adopted video arraignments. The U.S. Ninth Circuit Court of Appeals ruled in *Valenzuela-Gonzales v. U.S. District Court*, 915 F.2d 1276 (1990), that Federal Rules of Criminal Procedure 10 and 43 provide protections that are broader than those provided by the Constitution, and as currently written preclude video arraignment.

A change in these rules that would make an exception for video arraignment has

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in the state sphere. This combines with the second circumstance—a large measure of concurrent jurisdiction. We wouldn't have our problems, even if we had two separate systems of trial courts, if we did not have a large amount of concurrent, duplicative jurisdiction. To get at the basic disease, we've got to do something about those two circumstances.

The duplicative jurisdiction problem in the criminal field has come about through the federalization of crime—the continued passage of acts by Congress making federal crimes out of conduct that is already a crime under state law. On the civil side, Congress passes statutes creating rights of action based on conduct already actionable under state law, and provides for concurrent state–federal trial jurisdiction.

Discouraging Experience

I had a discouraging experience in the spring of 1993. The Brookings Institution held an interbranch seminar on the administration of justice. A major topic was the federalization of crime. Judge Stanley Marcus (U.S. S.D. Fla.) spoke and listed the situations in which it is appropriate to create federal crimes. Judge William W Schwarzer (U.S. N.D. Cal. and director of the Federal Judicial Center) also lectured at that meeting. He likewise identified criteria by which Congress could determine when it is appropriate to create a federal crime. Both of those sets of factors and criteria were eminently sensible, rational, and based on principles consistent with our history and the nature of our federal union. During the break, I talked to a staff lawyer on the Senate Judiciary Committee. She said to me, "Those are really superb—they're excellent, they're rational, they're fine. The only problem is that they make no difference whatsoever to any senator who has to deal with this problem. You are simply talking past each other here. The senators are listening to something else. They are not thinking about this at all."

It is extremely discouraging to think that the national legislature is not thinking about matters of principle in rational sorts of ways. Yet I cannot deny that this is reality. The trend toward the federalization of American law, both criminal and civil, could be irreversible. It may be that we are headed toward an increasing nationalization of law, accompanied eventually by a national police force.

Although the situation is discouraging, we have to think about how to deal with the problem no matter how daunting the task. We can't simply abandon hope and throw in the towel.

Congress and Justice Department Should Be Involved

There is currently in existence an institution called the National Judicial Council of State and Federal Courts. It consists of state and federal judges. The creation of such a body may be a good beginning point, but by itself it can't do the job. As important as judges are in promoting judicial federalism, and in planning for it, judges cannot do the necessary tasks alone. We have to get the other major actors into the process—Congress and the Justice Department.

When I was in the Justice Department about 14 or 15 years ago, we tried to create something called the Federal Justice Council. It was to be a three-branch planning body, aimed primarily at the problems of the federal judiciary. The House and Senate, the judiciary, and the Justice Department were all to be represented. We thought we would get the White House involved through the Vice President's office. We could never negotiate the proposal through to a conclusion, and so the idea simply died on the vine. But it still has merit.

A state–federal justice council, nationwide in scope, could provide representation for the states and all three branches of the federal government. Such a high-level, respectable body, going even outside of government and having not only officials from state and federal realms on it from all three branches, but also highly respected individuals—maybe a former governor or two, a former United States senator or two, highly respected persons from industry, labor, professions outside the law, and others—could address these matters on principle.

Dealing with Matters on Principle

Is it too late to think we can deal with some matters on principle? If you read the correspondence and papers of those people who were involved in the formation of the union, for example, the correspondence between Madison and Jefferson and the other writings of that period, it becomes clear that the authors weren't concerned about votes, or money, or constituencies. They talked about the formation of a government in terms of principles, what made sense in light of history and human experience to form a workable, sensible government that would serve the people. We need to get back to thinking about state–federal issues in that way.

These issues ought to be very high on the judicial agenda for thought and action. Judges should try to devise some way to get at these matters in the long run. They need to think about the structure of American government and the appropriate state–federal allocations and functions so as to avoid an increasing dysfunction, with the costs associated with it, that may lead to consequences beyond our ability to adjust merely through the application of the four Cs and two Ds. ❑

Judicial Education Changes Direction; Humanities, Ethics and Values, Works of Literature, and Science Are Additions to Traditional Curricula

by James G. Apple

Education for both state and federal judges is changing direction.

Traditional programs deal with developments in statutory and case law, case management techniques, and such practical nuts-and-bolts subjects as evidence and procedure. These programs speak to a judge's professional skills and knowledge.

New programs feature great works of literature and philosophy, basic principles and new developments in science, political and cultural trends, lessons of history, and principles and values in ethics and religion. These speak to a judge's whole person and the pressures of judging one's fellow human beings.

Courses for State Judges

Massachusetts state judges at all levels are regularly exposed to important literary works in the Law and Literature program developed by Prof. Saul Touster of Brandeis University in Waltham, Mass. Since its introduction in Massachusetts over a decade ago, the Brandeis program has been offered to judges in more than 20 states and the District of Columbia. Similar programs reach federal judges in various forums.

These programs use such works of literature as *Billy Budd* by Herman Melville, *Noon Wine* by Katherine Anne Porter, *The Death of Ivan Ilyich* by Leo Tolstoy, *Jury of Her Peers* by Susan Keathing Glaspell, *Sonny's Blues* by James Baldwin, and *The Emancipator* by Ellen Gilchrist to serve as a basis for discussion of and insights into the problems of judging.

Texas judges have participated in a special program in Austin, also developed by Brandeis professors, designed specifically to acquaint judges, through the study of works of literature, with problems of cul-

Medina seminar for state and federal judges in science and the humanities at Princeton University. The first year of co-sponsorship brought over 100 applicants for the 20 spaces allotted for the federal judiciary.

The 1993 Medina seminar in June featured lectures and discussions on such diverse topics as "Humankind and the Universe," "Morality and Law," "Historic Preservation: Heritage and Values in the Melting Pot," "The First Amendment and Freedom of Religion," "Multiculturalism and Literature," and "Frontiers of Astrophysics."

Programs Started in 1980 Provide "Healthy Change"

This trend in judicial education had its genesis in 1980 when Justice Samuel E. Zoll, chief justice of the Massachusetts District Courts, observed the burnout of judges after years of handling large numbers of cases involving diverse human tragedies.

In looking for a way to resolve this problem, he fashioned a pilot seminar with Prof. Touster and Prof. Sanford M. Lottor, also of Brandeis University, titled "Doing Justice: Literary Texts, Humanistic Values, and the Work of Community Courts." This program was offered to all 168 judges of the 68 district courts across Massachusetts.

Justice Zoll has himself participated in the law and literature seminar. He described the experience as "enriching" and a "healthy change from the pragmatic world."

"The seminar is an antidote to the isolation of a judge," he said. "Judges have a very lonely existence. There is a high risk of them becoming very narrow. We need elevation."

"The seminar provides for a new kind of interchange between colleagues," he continued. "And it gives academics a chance to explain changes in society. Judges don't get

judges in focusing on the kinds of issues presented in these cases, and help prepare them."

Judges' evaluations of these types of seminars reflect their enthusiasm for this educational trend. Participants evaluating the 1993 Medina Seminar at Princeton unanimously gave it the highest rating of "4," a first for the Federal Judicial Center.

Kathy O'Leary, program attorney at the National Judicial College, said that the evaluations by the 22 state judges attending last year's law and literature seminar "may have set a record for the Judicial College." O'Leary reported that on a scale of 7.0, the participants' ratings averaged 6.7.

Five Benefits from Literary Study

In the winter 1992 edition of *Court Review,* Judge Barry R. Schaller (Conn. App. Ct.) listed five categories of benefits to be derived by judges from literary study:

"1. Broadening the judicial frame of reference, leading to the reduction or elimination of bias, prejudice, and stereotyping;

2. Deepening the understanding of human nature, as well as human events and their consequences as those factors bear on specific judicial functions, including drawing inferences, applying standards of proof, determining credibility, and improving the ability to interpret human behavior;

3. Developing a keen sense of the impact of judicial decisions on people, fostering an attitude of 'sympathy,' even affection, for the troubled people who pass through the courts;

4. Heightening understanding of the language that people speak; becoming perceptive about symbols, myths, and rituals present in everyday life, as in fiction; developing the ability to communicate clearly and effectively;

5. Assisting judges to self-understanding and to becoming more complete, mature, well-balanced individuals who, thereby, are better able to judge others fairly and accurately."

Program Is Inexpensive

The law and literature program is "relatively inexpensive," according to Lottor. Fees cover honoraria and travel expenses for the faculty conducting a seminar, and university administrative costs.

He also emphasizes that the program is not one of literature or literary criticism. "The texts serve as the basis for discussion," he says. "The seminar actually has two texts for each participant. One text is the literary text. The other is the life experiences of the individual judge." ❑

VIDEO, from page 3

been suggested by a committee of the U.S. Judicial Conference and disseminated for public comment.

In the meantime, the Federal Bureau of Prisons in cooperation with the U.S. Marshals Service and several individual federal courts have developed and are in the process of implementing video systems that will allow pretrial activities other than arraignment to be conducted by a video conferencing system.

Other cities around the country that have experimented with electronic arraignments are Las Vegas, Nev.; San Diego and San Bernadino, Cal.; Boise, Idaho; and Miami and Ocala, Fla.

Materials for state and federal judges interested in using electronic appearances are available from the National Center for State Courts in Williamsburg, Va., and from the Interjudicial Affairs Office of the Federal Judicial Center in Washington, D.C. ❑

works of literature, with problems of cultural diversity and gender attitudes, and how to deal with them.

The National Judicial College in Reno, Nev., has adapted its curriculum to accommodate judicial interest in the humanities by offering a second edition of the course "Great Issues in Law as Reflected in Literature." Last year, the college offered a six-day course that focused on three themes: the nature of justice and the role of law in society, in government, and in the administration of justice in individual cases; the professional, human, political, and social dimensions of judging; and the human and social implications of the exercise of power and responsibility. These themes were developed by studying works of literature.

New FJC Courses

In 1993, the Federal Judicial Center offered courses that departed from traditional judicial education subjects as part of a "traveling seminar series" for federal judges across the country. State judges were welcomed at these traveling seminars on a space-available basis. Two of the four programs dealt with "Law and Ethics" and "Handling Critical Issues in Bioethics."

In the "Law and Ethics" course, an experienced moderator, using the Socratic method, led judges in discussions of such topics as justice and power, justice and society, the nature of man, and man and society. The program used parts of great philosophical and political texts by Aristotle, Mill, Mencius, Niebuhr, and others.

In "Handling Critical Issues in Bioethics," a lecturer/discussion leader directed participants through an analysis of the application of principles of bioethics for the resolution of the legal and moral issues found in certain kinds of cases. Such cases involve medically assisted suicide, euthanasia, AIDS-related problems, genetic engineering, maternal/fetal questions, religious/medical concerns, and the human genome project.

The FJC is now in its third year of cosponsoring (with the Judiciary Leadership Development Council) the Harold R. explain changes in society. Judges don't get that in the courtroom. It also supplies some structure or basis for the kinds of decisions judges have to make in the real world."

As an example, Justice Zoll cited the value of Melville's *Billy Budd* and the issues in it relating to strict application of the law to ensure proper discipline versus the desirability of compassion and the need for a balanced view. He noted that in a community court there are many cases involving technical violations of the law where the question of intent is "cloudy." Such cases involve the same issues as presented in Melville's classic.

"Novels such as *Billy Budd*," said Justice Zoll, "raise the level of consciousness of the processes a judge should go through to arrive at a just disposition of a case. That kind of novel starts the mind probing and opens it up to more considerations in reaching a proper judgment."

New Addition to Judicial Education Will Continue

The views of Justice Zoll on the value of law and literature courses for judges are echoed by Denis Hauptly, director of the Judicial Education Division of the FJC, who says that these and similar programs are necessary to give judges "a chance to recharge their intellectual batteries." He sees this new addition to judicial education programs as a continuing one.

"There are two reasons why these kinds of programs will persist," he said. "The first is that, as judiciaries grow larger and are burdened with more cases, judges feel more isolated and anonymous. The situation is a prescription for judicial burnout, and these programs help combat that burnout."

The second reason is more critical. Hauptly noted that most judges experience in the course of a year at least one case that calls for the application of societal values.

"As society becomes more complex," he said, "value-laden cases will increase. There will be more cases that call for consideration of community values and the weighing and balancing of one right against another. Law and literature programs assist and to becoming more complete, mature,

State–Federal Judicial Observer
a joint publication of the Federal Judicial Center and the National Center for State Courts
Interjudicial Affairs Office
Federal Judicial Center
One Columbus Circle, N.E.
Washington, DC 20002-8003