FEDERAL BAR ASSOCIATION
of the Western District of Washington
NEWS NEWS NEWS NEWS
VOL. 26 NO. 2 FALL 2003

JUDGE BARBARA JACOBS ROTHSTEIN TAKES THE REINS AT THE FEDERAL JUDICIAL CENTER

PRESIDENT'S MESSAGE

IMPROVING LEGAL REPRESENTATION FOR THE POOR

We all know that the needs of Washington's poor people for legal representation in civil matters are not being met. The Washington State Bar Association estimates that low-income persons experience more than 400,000 instances of unmet legal needs each year in this state. Moreover, over the past decade and more, funding cuts at the national level have weakened programs that provide civil legal aid to the poor.

In 2002, then-President Jim Smith established the Task Force on the Availability of Legal Services for Low-Income Litigants in Federal Court to explore the nature of this problem and what might be done about it. The Task Force, led by Michele Gammer, issued its report at our October quarterly Board of Trustees meeting. The report identifies significant gaps in the availability of civil representation for the poor in federal cases in our District. The report's findings tell me that a dearth of advocates to provide assistance in significant civil disputes is undercutting some of the fundamental assumptions behind our adversarial legal system.

The Task Force made a series of recommendations for addressing this problem. Those recommendations include:

- Recruiting more attorneys to participate in the Pro Bono Panel. For nearly 20 years, our Association's Pro Bono Committee has maintained this Pro Bono Panel of volunteer attorneys who screen litigants' requests for appointment of counsel in civil rights and prisoner cases, and has recruited attorneys willing to accept court appointment in cases that pass through the screening process.
- Recruiting more attorneys to participate in the bankruptcy assistance program and other pro bono projects.
- Expanding the existing Pro Bono Panel program, including by having the Pro Bono Committee consider augmenting the categories of cases that can be assigned to panel attorneys to include social security appeals and other matters in which pro se filings have increased.
- Enhancing the availability of mediation as an option in cases involving pro se litigants.

In response to the Task Force's report, the Board has asked the Pro Bono Committee to begin coordinating all of the Association's pro bono efforts, and to draft a work plan for implementing many of the Task Force's recommendations. The Board will also work to increase Pro Bono Committee membership, in order to provide support for the Committee's new tasks and to refresh the ranks of those involved in the Pro Bono Panel. We hope to receive a proposed work plan and take additional actions to implement various Task Force recommendations at our quarterly meeting in January 2004.

I would like to extend the Association's thanks to the members of the Task Force, who include a number of prominent local practitioners and Janet Bubnis of the Clerk's office, for their contributions in creating the Task Force's report. In particular, Michele Gammer provided her usual exemplary and persistent leadership, and Scott Collins authored a detailed and compelling memo that provided significant raw material for the report. I ask the Association's members to support efforts to implement Task Force recommendations, so that we can move closer to having a federal civil legal system that lives up to its ideals with regard to equal representation for the poor. When the phone call comes asking you to pitch in, please make your reaction a quick "yes."

Finally, I wanted to note that Judge Thomas S. Zilly will be taking senior status next year. While the passage of time inevitably brings changes, the good news is that we don't need to fear missing Judge Zilly's presence on the bench, since he will continue with a full caseload for some time. Still, it does make me feel older.

Thank you for your support for the Association's activities this year. I look forward to seeing you at our Annual CLE and Dinner on December 10.

Kevin D. Swan

FEDERAL BAR ASSOCIATION
of the Western District of Washington
NEWS NEWS NEWS NEWS

In this issue:

On the cover: The Thurgood Marshall Federal Judiciary Building in Washington, D.C., home of the Federal Judicial Center. Photograph by Jeff Goldberg of Esto Photographics.

The Federal Bar Association News is a semi-annual publication of the Federal Bar Association of the Western District of Washington. Comments and proposed articles should be addressed to:

Duncan Manville
Riddell Williams P.S.
1001 Fourth Avenue Plaza, Suite 4500
Seattle, WA 98154-1065
(206) 624-3600

BON VOYAGE AND HURRY BACK: JUDGE BARBARA JACOBS ROTHSTEIN HEADS TO D.C.

By Daniel H. Royalty
Preston Gates & Ellis L.L.P.

We are lucky to have Judge Barbara Jacobs Rothstein in the Western District. Or rather, we *were* lucky. Judge Rothstein recently moved to Washington, D.C., to serve as Director of the Federal Judicial Center. We can hope that she will promptly return to the Western District when she steps down as the Center's director. If she is as keen and conscientious in her direction of the Center as she has been on the bench, though, we shouldn't be surprised if Judge Rothstein is asked to stick around D.C. for a while longer.

FROM BRIGHTON TO ALKI

Judge Rothstein was a Brooklyn public school kid. She grew up on Pembroke Street near Brighton Beach, attending P.S. 195, P.S. 225, and Lincoln High School. Even after she toured the Ivy League, getting a bachelor's in philosophy from Cornell and her law degree from Harvard, Judge Rothstein went back to her Brooklyn roots. She married Ted Rothstein, a Brooklynite who just happened to have attended the same public schools as the Judge.

It is Ted whom we have to thank for bringing Judge Rothstein to Seattle. After graduating from Harvard, Judge Rothstein joined the Boston law firm of Widett & Kruger as an associate. Ted, while in residency at the University of Washington Hospital, wooed the Judge and convinced her to join him in Seattle. The two married shortly thereafter.

Upon arriving in Seattle, Judge Rothstein interviewed with the "usual suspect" list of private law firms. But even Judge Dwyer, at the time still a practicing attorney, could not convince her to remain in private practice. Instead, she signed on with the newly formed Consumer Protection Division of the Washington State Office of the Attorney General. She established a storefront office in the Central District. Although she was initially the office's only lawyer, the office quickly grew to meet its mission of providing representation and advice to low-income residents. One of Judge Rothstein's notable successes during her time with the Consumer Protection Division was the Attorney General's win in *State of Washington v. Ralph Williams' North West Chrysler Plymouth, Inc.*[1] That case laid important groundwork for application of the newly-enacted Washington Consumer Protection Act.

ON THE BENCH

In 1977, Judge Rothstein decided to run for one of five newly-created King County Superior Court positions. Her campaign was cut short by *Fain v. Chapman*,[2] which held that the new judges had to be appointed by the Governor. Regardless, by that time she had caught the attention of Governor Dixy Lee Ray, who appointed her to one of the new judgeships.

Judge Rothstein barely had time to warm the Superior Court bench before her name was submitted by Senator Henry "Scoop" Jackson for one of the newly created judgeships in the U.S. District Court for the Western District of Washington. She was nominated by President Carter, breezed through her confirmation hearing, and assumed the Article III judgeship in early 1980.

Judge Rothstein has since presided over many high-profile cases. She was the first District Court judge to consider the federal statute banning flag burning, which she struck down as unconstitutional in *United States v. Haggerty*.[3] In *Watkins v. United States Army*,[4] she ruled that the Army could not prevent a sergeant from re-enlisting because of his admitted homosexuality. And in *Compassion in Dying v. Washington*,[5] she held that Washington's ban on assisted suicide violated the U.S.

Constitution. That case garnered a great deal of national attention, and ended with the Supreme Court overturning an en banc Ninth Circuit opinion that had affirmed Judge Rothstein's decision.

The national legal community has taken note of Judge Rothstein's judicial acumen. In 1993, near the end of her tenure as Chief Judge of the Western District, she was rumored to be on President Clinton's short list to fill the position of retiring Justice Byron White. That appointment ultimately went to Justice Ruth Bader Ginsburg.

Keeping Jurors Engaged

But high-profile trials and national attention have not blinded Judge Rothstein to the smaller issues. She has shown particular interest in keeping jurors engaged at trial. For example, in *United States v. Olano*,[6] a complex savings and loan fraud case, Judge Rothstein permitted alternate jurors to sit in on jury deliberations. She noted to counsel that such a courtesy "keeps people from feeling they've sat here for three months and get just kind of kicked out." Although the jury verdict was overturned by the Ninth Circuit, which held that this courtesy was "inherently prejudicial," the verdict was reinstated by the Supreme Court.

In Judge Rothstein's experience, juries only need proper care and nurturing to render a sound verdict:

Most jurors love jury duty. They find it a great experience. They take their responsibility very seriously. Sometimes they're dealing with people's lives, fortunes, and they know it. I think it's our job to make sure that they can get the best information and understanding they can, and we shouldn't let the complexities of the legal system get in the way of that. It's our Constitution that says we should have jury trials. It's our job to make sure it works properly. There are always going to be bizarre jury verdicts, but they shouldn't come from a lack of understanding.

Judge Rothstein is proud that the judges of the Western District have been "quietly implementing" improvements to help jurors understand the cases before them. One of those improvements is providing written instructions to the jury. "When I first came on the bench," Judge Rothstein says, "there were judges in parts of the country who still weren't using written jury instructions. I don't think you can expect twelve lay people to remember all that." She also recognizes that some ways to aid juror understanding are still being hashed out:

Especially as cases get more complex, I've had jurors take notes and the next step is allowing the jurors to ask questions. Well, there are ways. Other judges have had concerns, and I have had concerns, but then what you do is not say no. You try to figure out a way to meet those concerns. Obviously, if you let a juror stand up and ask a question in the middle of trial it's nothing but trouble. But you can have jurors submit the questions in writing. Then you and the attorneys can decide whether you'll answer them or not.

Judge Rothstein notes that, with time, judges are able to recognize "little things that make the jurors' lives easier." "Jurors are very easy to read if you've done it for 25 years," says Judge Rothstein. "For example, you can see kind of a perplexed look come over the jurors' faces, and you can say, 'Doctor, could you please explain what you mean by that term?'"

The Federal Judicial Center

Judge Rothstein now finds herself back in the national limelight. Her name was recently submitted for a judicial position of national prominence: the Director of the Federal Judicial Center. The Center's Board, which is responsible for appointing the Director, is chaired by Chief Justice William Rehnquist. Judge Rothstein was nominated by the Board and assumed the directorship in the fall of 2003.

Judge Rothstein is the ninth Director of the Center since it was established by Congress in 1967, following in the footsteps of two circuit judges, four district court judges, and a law professor. Although perhaps not well known to practitioners, the Center plays an important role in maintaining and improving the federal court system. The Center's primary functions, defined by statute, are to provide orientation and continuing education to judges and other court personnel, and to study court operations, practices, and procedures.

Why would Judge Rothstein take a hiatus from controversial and high-profile trials to head the Center? She admits that "being a judge is really all I thought I'd ever be doing." But she looks forward to the opportunities that the national scope of the Center provides: "It gives one the chance to work on a national level and to have an influence." Judge Rothstein has had some experience with national judicial policy setting, having served as a member of the Judicial Conference Committee on Federal-State Jurisdiction. She notes that one of the Center's primary functions is teaching. "I like teaching," she says. "I've always liked teaching, and I've been very involved in the Center's educational programs."

It also helps that the Center has settled comfortably into its judicial role. Judge Rothstein describes the Center as "a beautifully functioning organization." It does indeed appear to be a well-oiled machine: in 2002 it provided almost 700

Text continued on page 13

NINTH CIRCUIT TASK FORCE TO STUDY FEDERAL SENTENCING GUIDELINES

By Dan R. Dubitzky and Alan Zarky
Dubitzky & Zarky, P.S.

Ninth Circuit Chief Judge Mary M. Schroeder has announced plans for a task force to study the Federal Sentencing Guidelines. The task force, which will be organized in the next few months, will include judges, prosecutors, defense lawyers, probation and pre-trial officers, legal researchers, penal system representatives, and others. Chief Judge Schroeder has encouraged legal and other professionals with expertise in the area of sentencing guidelines to contact her through the Office of the Circuit Executive at (415) 556-2000. She says the Circuit hopes to coordinate its effort with that of the American Law Institute, which has begun a study aimed at assisting state sentencing guideline commissions.

Chief Judge Schroeder's comments have not been limited to announcing the creation of the task force. According to a recent Ninth Circuit press release, "[t]he chief judge bluntly told . . . more than 400 lawyers and judges present [at a meeting of the Northern California chapter of the Federal Bar Association] that federal sentencing guidelines and mandatory minimums do not work well, and that incarceration costs up to 10 times more than supervised release." "'With luck, we can get a few things fixed in the short run,' Judge Schroeder said. 'But more importantly, for the long run we can educate Congress and the general public about the importance of rethinking our whole federal sentencing system.'"

By way of background, for the last 17 years federal sentencing has been governed by guidelines that are adopted by the U.S. Sentencing Commission and that become law unless overruled by Congress. Sentencing ranges are based on a variety of factors involving the nature of the offense of conviction and related conduct, and the defendant's criminal history. Judges may sentence outside the range only if grounds for departure exist. Departure is expressly prohibited on certain grounds, specifically authorized on a few narrow grounds, and otherwise allowed if there are circumstances of a nature not sufficiently accounted for by the Guidelines.

Initially the appellate courts found little room in the Guidelines for departures beyond those that the Guidelines specifically authorized. But in *Koon v. United States*,[1] the U.S. Supreme Court confirmed that the district courts have fairly broad discretion to depart from the Guidelines based on certain "aggravating or mitigating circumstances of a kind or degree not adequately taken into consideration by the Commission." Thereafter district courts had far more flexibility to tailor individual sentences to particular facts, avoiding the harshness that many think can arise from a rigid application of the Guidelines.

In the view of many defense counsel, as well as many prosecutors, it is essential that the judge closest to the facts of a case have the ability to respond to unique circumstances in sentencing the offender. Some in the Justice Department and Congress, however, have been incensed by what they see as unduly lenient sentencing by particular judges. As a result, a number of recent federal laws have circumscribed judicial discretion in federal sentencing. The task force announced by Chief Judge Schroeder is just one of many judicial responses to those laws. Several Supreme Court justices, including Chief Justice William Rehnquist, have also testified or spoken out against mandatory minimum sentences and some of the other Congressional restrictions on the sentences that courts may impose.

The newest of the federal laws limiting judicial discretion in federal sentencing is the Feeney Amendment to the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act, known as the PROTECT Act. The Feeney Amendment has raised the ire of the defense bar and some judges to a greater extent that many earlier enactments. That may be due in part to the fact that Congress passed the Amendment without consulting with either the judiciary or the Sentencing Commission. But objections to the Amendment have not been limited to deficiencies in the legislative process by which it came into existence. In opposing the bill, Chief Justice Rehnquist stated that it would "do severe harm to the basic structure of the Sentencing Guidelines System and . . . seriously impair the ability of courts to impose just and reasonable sentences."

Some of the Feeney Amendment's provisions relate only to child-abduction

and sex-offense cases. Others apply more generally, including provisions:

- Requiring de novo appellate review of all departures from the Sentencing Guidelines.
- Precluding judges from awarding a sentence reduction for "extraordinary acceptance of responsibility" unless the government requests the reduction by motion.
- Prohibiting downward departures based on new grounds after remand.
- Increasing the requirements already imposed on judges who depart from the Guidelines to report the details of every departure, and giving the U.S. Department of Justice access to Sentencing Commission data files that identify each judge's departure practices.
- Requiring DOJ to report downward departures to the U.S. House and Senate Judiciary Committees or issue new policies and procedures relating to DOJ's opposition to and appeal of downward departures (DOJ has opted for the latter approach).
- Directing the Sentencing Commission to amend the Guidelines and related policy statements "to ensure that the incidence of downward departures are substantially reduced." The Commission has already responded to this directive by issuing new Guidelines that ban certain departures (including departures for unusual acceptance of responsibility or an unusually minor role in the offense) and significantly limit others (including departures for aberrant behavior).

The specific limitations that the Feeney Amendment has imposed on judicial discretion in child-abduction and sex-offense cases have generated less controversy, presumably because of the types of offenses involved. The Amendment not only limits or prohibits particular departures from the Guidelines in such cases, but also directly amends the Guidelines and prohibits the Sentencing Commission from ever altering the revised text. These changes are potentially more far-reaching than the more general changes to the Guidelines, since they could become a model for later, more universal revisions.

U.S. Attorney General John Ashcroft has issued a memorandum to all federal prosecutors requiring them to "litigate vigorously" to implement the policies of the PROTECT Act, and report to DOJ all sentencing departures of a particular magnitude or type. The memorandum also states that, except in cases involving cooperation of defendants with the government, government acquiescence in downward departures shall be "rare."

Senator Edward Kennedy has characterized the reporting requirement instituted by Attorney General Ashcroft as requiring all prosecutors "to participate in the establishment of a blacklist of judges who impose lesser sentences than those recommended by the sentencing guidelines." Similarly, some have criticized the Feeney Amendment's reporting obligations as a Congressional attempt to intimidate judges who are inclined to grant departures. (Last Spring, Congress threatened to subpoena the records of U.S. District Judge James Rosenbaum of Minnesota, who had testified against tightening guidelines on minor drug offenders and had imposed some drug sentences that were criticized as having been too lenient.)

Many defense attorneys fear that, as judicial discretion to depart from the Sentencing Guidelines is eroded by the Feeney Amendment and other laws, defendants will only be able to obtain reduced sentences by cooperating with the government. But departures for "substantial assistance" may only be given on a prosecutor's motion. Removing most sentencing discretion from judges and leaving it with prosecutors could significantly shift the balance of power between prosecutors and defense attorneys.

One proposed response to the Feeney Amendment is the Judicial Use of Discretion to Guarantee Equity in Sentencing Act of 2003, known as the JUDGES Act, which is pending in the Senate as S.1086 and in the House as H.R. 2213. These companion bills would repeal many of the sentencing provisions in the PROTECT Act. The Judicial Conference, the national governing body for the federal courts, has announced its support for the JUDGES Act.

In the view of many defense attorneys, until recently the discretion that individual federal prosecutors could exercise in structuring plea agreements provided some relief from the strictures of the Sentencing Guidelines. On September 22, however, Attorney General Ashcroft issued a memorandum that may severely limit the ability of local prosecutors to tailor plea agreements to unusual facts. The memorandum generally requires prosecutors to charge, whether for trial or for a plea, "the most serious, readily provable offense or offenses that are supported by the facts of the case." "Most serious" means the offense that generates the longest sentence.

Text continued on page 13

WHAT THE PUBLIC DOESN'T KNOW *CAN* HURT

By the Honorable Mary Alice Theiler
United States Magistrate Judge, Western District of Washington
Executive Committee, Council on Public Legal Education

To a casual observer, Americans would appear to be experts in the law. The popularity of John Grisham novels, Court TV, and the ever-expanding "Law and Order" franchise suggests a familiarity with the legal process unequaled in any other country. In reality, however, while many non-lawyers may have strong opinions about some of the more sensationalist cases covered in the media, they have little understanding of how laws are made and changed, the difference between criminal and civil law, or the concept of judicial independence.

Americans' superficial understanding of the law is due largely to a historical shift in where we get information-from the schools to the mass media. According to the Carnegie Corporation's recent report, *The Civic Mission of Schools*, most students are now lucky to encounter one civics class during their K-12 career, compared to the two or three that were common until the 1960s. Other research has shown that both knowledge of and participation in law and government has steadily declined over the past few decades. At the same time, sensational, inaccurate, and apparently alienating representations of the legal system have been on the rise in popular entertainment.

A cynical lawyer or politician might see this increase in public ignorance as a boon: the less non-lawyers know, the less they'll interfere. But in many respects we are suffering the opposite result: unconstitutional initiative measures on state ballots, the vilification of judges whose opinions are unpopular yet legally sound, and the advocacy of changes to the law that profoundly diminish basic legal rights. Even more common (and perhaps more troubling) is the fact that lack of both money and information precludes many from accessing the legal system to address their serious problems in health, housing, education, and personal safety. Ignorance on all these levels breeds a lack of respect for the legal system and the inability to effectively exercise rights and fulfill responsibilities. The public's lack of confidence in the legal system should concern all members of the bar and the judiciary.

The solution, of course, is education-not only of schoolchildren, but of the public as a whole. The Council on Public Legal Education and the other local and national organizations that are undertaking this effort deserve the support of the bar and bench.

In the area of youth education, ongoing projects range from annual events such as Law Week, in which judges and lawyers visit classrooms in May of every year; to semester- or year-long programs like Street Law, in which law students

Volunteers in the Kitsap County Youth Court program conduct a mock hearing as part of their training

pair with high school teachers to educate students about their legal rights and responsibilities and about how the system works. Other well-respected programs operating in Washington include We the People, which fosters civic engagement among students; and Youth Court, in which teens serve as the jury for other teens who have admitted responsibility for minor criminal, traffic, or school-rule infractions.

All of these programs use lawyers and judges as volunteers. A list of volunteer opportunities to further public legal education in the State of Washington may be requested from Pam Inglesby, Public Legal Education Manager at the Washington State Bar Association (email pami@wsba.org; telephone 206-727-8226).

In the classroom, subjects that are not mandated to be assessed on a statewide basis receive much less attention than subjects such as reading, writing, math, and science. While state law currently requires assessment of key civics concepts, efforts are underway in the legislature to eliminate funding for such assessment. Members of the bar and judiciary concerned about this situation are encouraged to discuss the issue with their state legislators, and to voice their opinions on the op-ed pages of their local newspapers.

Education must be ongoing, of course, as most people find themselves in need of information about the law or government at many points in their lives. While awash in legal drama, the mass media offer little in the way of practical information. (One notable exception is KING 5 TV's weekly "Legally Speaking" segment on its Thursday evening news.) General and practical information about the law is increasingly available on the Internet, from state and national organizations such as the Washington Office of the Attorney General, the U.S. Supreme Court, the Northwest Justice Project, and the American Civil Liberties Union. But research has shown that people are overwhelmed by the amount of data available on the Internet and need help separating the wheat from the chaff.

To address this problem, the Council on Public Legal Education is creating a "gateway" public information Web site at www.lawforwa.org, which will provide the people of Washington with links to reliable, up-to-date information on the law and government. Volunteer lawyers will be needed to help update the Web site on a regular basis. Please get in touch with Pam Inglesby (contact information above) to find out how you can participate in this program.

In addition to launching the lawforwa Web site, the Council on Public Legal Education is working to support the teaching of civics in our schools, to improve the amount and quality of information available to people involved in the justice system, and to help coordinate the many entities that see public legal education as part of their mission. To learn more about the Council and about how you can assist us in promoting public understanding of the law, civil rights, and civil responsibilities, please visit our Web site at www.plecouncil.org.

Students at Lincoln High School in Tacoma prepare to defend their "client" against a murder charge as part of Seattle University Law School's Street Law program

U.S. SUPREME COURT TO DECIDE LANDMARK FREE-EXERCISE CASE

By Duncan Manville
Riddell Williams P.S.

On December 2, 2003 the U.S. Supreme Court will hear oral argument in *Locke v. Davey*. The narrow question presented in *Locke* is whether the Free Exercise Clause of the First Amendment to the U.S. Constitution requires the State of Washington to make college scholarships available to pursue a course of study in theology if the State provides scholarships for secular instruction. More broadly, *Locke* could determine the fate of government-funded school-voucher programs in a majority of states.

The scholarship program at issue in *Locke* is the Washington Promise Scholarship program, which Governor Gary Locke created in 1999 to facilitate college attendance by lower-income high school students achieving certain standards of academic excellence. The program is administered by the Washington Higher Education Coordinating Board (HECB), a State agency. Students qualifying for Promise Scholarships may apply their Scholarship funds to tuition at public institutions authorized by the Legislature and to private institutions (including religious colleges) accredited by a nationally-recognized accrediting body. The Scholarship was worth $1,125 for the 1999-2000 academic year, and $1,542 for 2000-2001.

Joshua Davey was selected as a Scholarship recipient in August 1999. He enrolled at Northwest College, a Christian institution with an educational philosophy grounded in the belief that the Bible represents the divine communication of truth. Mr. Davey declared a double major in Pastoral Ministries and Business Management and Administration.

In October 1999 the HECB notified financial aid administrators throughout the State that students pursuing theology degrees would not be eligible to receive Scholarship funds. The HECB's decision was based on RCW 28B.10.814, which states that "[n]o aid shall be awarded to any student who is pursuing a degree in theology." That statute was enacted to ensure compliance with language in article I, section 11 of the Washington State Constitution providing that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." The Washington Supreme Court has held that art. I, § 11 provides for greater separation of church and state than the U.S. Constitution's First Amendment, which declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1] Over 30 state constitutions contain no-funding clauses similar to that embodied in art. I, § 11.[2]

Opponents of these clauses frequently refer to them as "Blaine Amendments," because many were enacted around the same time as Congressman James G. Blaine's unsuccessful 1875 sponsorship of an amendment to the U.S. Constitution that would have barred the states from establishing a religion or funding religious institutions.[3] (It would take the U.S. Supreme Court another 72 years to make the Establishment Clause applicable to the states through the Due Process Clause of the Fourteenth Amendment.[4]) Congressman Blaine's attempt is widely viewed as having been motivated in part by a desire to undermine a burgeoning Catholic school system that was supported in many states by public funds.

Washington's Constitution was drafted and ratified in 1889. Present-day supporters of the no-funding principle embodied in art. I, § 11 and many other state constitutions (some of which date from the early 1800s) argue that the no-funding principle was not the product of anti-Catholic bias, but was grounded in concepts of religious liberty that developed prior to and independently of the rise of Catholic parochial schooling.[5] Those concepts are reflected in language elsewhere in art. I, § 1 providing that "[a]bsolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion."

After the HECB advised Northwest College that students majoring in theology were ineligible for Promise Scholarships, the school determined that Mr. Davey was pursuing a theology degree and declined to certify him as eligible for the Promise Scholarship program. Mr. Davey gave up his Scholarship, but continued to pursue his declared major. (He has since decided not to become a minister; this fall he enrolled at Harvard Law School.)

Mr. Davey filed suit in the U.S. District Court for the Western District of Washington, naming as defendants Governor Locke and various officials of the HECB. The lawsuit raised two important questions that had been left unresolved by *Zelman v. Simmons-Harris*,[6] the U.S. Supreme Court's 2002 decision upholding a school-voucher program implemented by the State of Ohio. The Court held in *Zelman* that the First Amendment's Establishment Clause did not prohibit Ohio from giving low-income families tuition aid in the form of vouchers that could be used at private schools, including schools with a religious affiliation.[7] The Court did *not* address whether the Free Exercise Clause would *require* state and local governments to fund religious instruction as part of a program that made public funds available for use at private institutions.

Zelman also did not discuss the interplay between state no-funding provisions and the First Amendment. Because so many state constitutions contain restrictive language similar to that found in Wash. Const. art. I, § 11, if the Supreme Court were to hold that the Free Exercise Clause requires state and local governments to fund religious as well as secular instruction, the viability of school-voucher programs in a majority of states (including Washington) would likely turn on whether those states could nevertheless decline to fund religious instruction based on state constitutional limitations.

The courts are split on how the foregoing issues should be resolved. In *Witters v. Comm'n for the Blind*, the Washington Supreme Court held that state funding for a course of study designed to prepare a student for a career as a pastor was prohibited by art. I, § 11 and was not required by the First Amendment's Free Exercise Clause.[8] In Mr. Davey's case, Judge Barbara Jacobs Rothstein granted summary judgment in favor of the HECB, but a divided panel of the Ninth Circuit Court of Appeals reversed.

Judge Rothstein concluded in her summary judgment order that the HECB's policy was compelled by art. I, § 11 and did not violate the Free Exercise Clause.[9] In reaching the latter conclusion, Judge Rothstein relied primarily on *Lyng v. Northwest Indian Cemetery Prot. Assoc.*, which held that the Free Exercise Clause did not bar the federal government from conducting logging and road-building activities in National Forest land traditionally used by Native American tribes for religious purposes;[10] and *Regan v. Taxation with Representation*, which held that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny."[11] According to the Supreme Court, the logging and road-building activities at issue in *Lyng* "ha[d] no tendency to coerce individuals into acting contrary to their religious beliefs," and thus the government did not have to provide a compelling justification for its actions.[12] "The crucial word in the constitutional text," the Supreme Court noted, "is 'prohibit': 'For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'"[13]

Lyng and *Regan*, Judge Rothstein said, stood for the proposition that "while a citizen may not be unduly prohibited from practicing his religion, he may not demand that the government pay for those religious pursuits."[14] Because the HECB had not prohibited Mr. Davey from pursuing his degree in Pastoral Ministries, it had not violated the Free Exercise Clause. The HECB was not required to pay for Mr. Davey's religious education.

The Ninth Circuit majority (Judges Pamela Ann Rymer and Ronald M. Gould) assumed without deciding that RCW 28B.10.814 and Wash. Const. art. I, § 11 prohibited the HECB from awarding Mr. Davey public funds to pursue his theology degree. But the majority invalidated the HECB's policy under the Free Exercise Clause.[15] The policy, the majority concluded, was not neutral and was discriminatory on its face because it treated differently those who chose to major in theology.[16] Two U.S. Supreme Court cases in particular were found to be on point. The first was *McDaniel v. Paty*, which struck down based on the Free Exercise Clause a Tennessee State Constitutional provision disqualifying ministers from serving as legislators.[17] According to the *Davey* majority, *McDaniel* stood for the proposition that "[a] state law may not offer a benefit to all (there, to hold a public position; here, to hold a Promise Scholarship), but exclude some on the basis of religion (there, ministers; here, would-be ministers)."[18]

The second case relied on by the *Davey* majority was *Rosenberger v. Rector and Visitors of Univ. of Va.*, which sustained a free-speech challenge to the State of Virginia's refusal to fund the printing of a newspaper published by a religious student organization.[19] The majority reasoned that RCW 28B.10.814, art. I, § 11, and the Virginia policy all impermissibly suppressed religious ideas: "The bottom line is that the government may limit the scope of a program that it will fund, but once it opens a neutral "forum" (fiscal or physical), with secular criteria, the benefits may not be denied on account of religion."[20]

The Ninth Circuit concluded that because the HECB's policy was discriminatory, it was subject to strict scrutiny under *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[21]

The policy could not survive strict scrutiny because the HECB did not have a compelling interest in refusing to award Promise Scholarships to students who might use them to pursue pastoral studies.[22]

Judge M. Margaret McKeown dissented. Also bypassing the issue of whether art. I, § 11 required the HECB to refrain from funding Mr. Davey's theology studies, she framed the dispositive question as being whether the U.S. Constitution permitted the HECB to decline to fund such studies as part of its Promise Scholarship program.[23] She concluded that the HECB had "assiduously avoided violating the first tenet of the Religion Clauses, and in doing so ha[d] not overstepped the bounds of the latter."[24]

The HECB, Judge McKeown found, had neither prohibited Mr. Davey from freely exercising his religion, nor substantially burdened Mr. Davey's religious freedom such that strict scrutiny was warranted.[25] Mr. Davey's concerns were "not so weighty" as those at issue in *McDaniel*.[26] As for *Rosenberger*, it was a free speech case involving a funding decision that had "directly affected the vehicle of a viewpoint's dissemination, i.e., an actual publication," thereby raising the specter of the government's driving certain ideas from the marketplace.[27] There was no danger that the HECB's decision not to fund Mr. Davey's pastoral studies would preclude Mr. Davey from being exposed to Northwest College's Christian viewpoint.[28]

More on point, Judge McKeown reasoned, were *Maher v. Roe*,[29] and *Harris v. McRae*.[30] In *Maher*, the U.S. Supreme Court upheld a Connecticut regulation limiting state Medicaid benefits for first-trimester abortions to abortions that are "medically necessary." According to the Supreme Court, the regulation did not constitute an unduly burdensome interference with the right to choose because "[a]n indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there."[31] Employing similar logic in *Harris*, the Supreme Court upheld a federal law restricting federal funding for certain medically-necessary abortions.[32]

As in *Maher* and *Harris*, Judge McKeown reasoned, while "the State of Washington may have made the pursuit of a non-theology degree more attractive by virtue of the scholarship award, [it] has not 'burdened' Davey by making the pursuit of his chosen degree any more difficult than it would have been in the absence of this funding."[33] The HECB's policy of refusing to fund pastoral studies was justified by the State's "strong prophylactic interest in steering clear of endorsing or supporting religion through direct funding of religious pursuits."[34]

One of the more interesting issues peripherally in play in *Locke* is the tension between the Supreme Court's recent opinions supporting the federalism prerogatives of the states and its decisions (including *Zelman*) requiring states to exhibit neutrality in matters of religion. Those considerations converged in *Zelman*, with the Supreme Court upholding the State of Ohio's right to implement a neutral school-voucher program. Justice Clarence Thomas concurred specially to express the view that "in the context of the Establishment Clause, it may well be that state action should be evaluated on different terms than similar action by the Federal Government. 'States, while bound to observe strict neutrality, should be freer to experiment with involvement [in religion]-on a neutral basis-than the Federal Government.'"[35] *Locke* appears to place the Supreme Court's recent federalism and First Amendment rulings in conflict, prompting Judge McKeown to observe in her dissent that the federalism concerns cited by Justice Thomas should not "represent a one way street when it comes time for a state to decide whether to enter into the ill-defined terrain of the Establishment Clause's jurisprudence."[36]

Those are some of the legal arguments at the heart of the *Locke* case. They are, of course, not the only ones that have been advanced in support of and in opposition to the HECB's no-funding policy. The dozens of briefs that have been filed in the Supreme Court by the *Locke* parties and their aligned amici contain innumerable contentions-legal, historical, and philosophical-that the Supreme Court will have to grapple with as it moves toward resolution of this case. However the Supreme Court rules, its decision will likely have profound implications both for the relationship between church and state, and for the future of public and private education in this country. Look for a characteristically-splintered opinion in about June 2004.

---

[1] See *Witters v. Comm'n for the Blind*, 112 Wn.2d 363, 370 (1989).

[2] See Gia Fonte, Note, Zelman v. Simmons-Harris: Authorizing School Vouchers, Education's Winning Lottery Ticket, 34 Loy. U. Chi. L.J. 479, 497 n.120 (2003).

[3] *Id.*

[4] See *Everson v. Bd. of Educ. of Tp. of Ewing*, 330 U.S. 1, 5, 15 (1947).

[5] *See, e.g., Locke v. Davey*, No. 02-1315, Brief Amicus Curiae of Historians and Law Scholars on Behalf of Petitioners Gary Locke, et al. (available at http://pewforum.org/school-vouchers/locke/Historians.pdf).

[6] 536 U.S. 639 (2002).

[7] *Id*. at 662-663.

[8] 112 Wn.2d at 368, 370.

[9] *See Davey v. Locke*, No. C00-61R, Order Denying Plaintiff's and Granting Defendants' Motion for Summary Judgment (Oct. 5, 2000) (available at http://www.becketfund.org/litigate/DaveyDistCourtOrder.pdf).

[10] 485 U.S. 439, 441-42 (1988).

[11] 461 U.S. 540, 549 (1983).

[12] *Id*. at 450-51.

[13] *Id*. at 451 (*quoting Sherbert v. Verner*, 374 U.S. 398, 412 (1963)).

[14] *Davey v. Locke*, No. C00-61R, Order Denying Plaintiff's and Granting Defendants' Motion for Summary Judgment at 11.

[15] *See Davey v. Locke*, 299 F.3d 748 (9th Cir. 2002).

[16] *Id*. at 753.

[17] 435 U.S. 618 (1978) (*discussed in Davey*, 299 F.3d at 753-54).

[18] *Davey*, 299 F.3d at 754.

[19] 515 U.S. 819 (1995) (*discussed in Davey*, 299 F.3d at 755-56).

[20] *Davey*, 299 F.3d at 756.

[21] *Id*. at 753, 757-58 (*discussing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (city ordinances effectively prohibiting only animal sacrifice as practiced by Santeria religion violated Free Exercise Clause)).

[22] *Id*. at 760.

[23] *Id*. at 761 (McKeown, J., dissenting).

[24] *Id*.

[25] *Id*. at 761, 763-64 (*quoting Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 883 (1990) (only "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest")).

[26] *Id*. at 763.

[27] *Id*. at 766-67.

[28] *Id*. at 767.

[29] 432 U.S. 464 (1977) (*discussed in Davey*, 299 F.3d at 764-65 (McKeown, J., dissenting)).

[30] 448 U.S. 297 (1980) (*discussed in Davey*, 299 F.3d at 764-65 (McKeown, J., dissenting)).

[31] 432 U.S. at 474.

[32] 448 U.S. at 316.

[33] *Davey*, 299 F.3d at 765 (McKeown, J., dissenting).

[34] *Id*. at 766.

[35] *Zelman*, 536 U.S. at 678-79 (Thomas, J., concurring) (*quoting Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 699 (1970) (Harlan, J., concurring)) (alteration by Justice Thomas).

[36] *Davey*, 299 F.3d at 768 (McKeown, J., dissenting).

Judge Rothstein

Continued from Page 5

educational programs to some 27,000 court personnel, worked on 45 major research projects, and hosted briefings for over 500 foreign judges and officials representing 81 countries.

When asked what she plans to change at the Center, Judge Rothstein modestly defers to the Center's faculty: "They are very, very, competent researchers running competent programs, so I am not going to walk in there and change things." If her distinguished judicial career is any indication, though, she will certainly leave her mark.

[1] 87 Wn.2d 298 (1976).

[2] 89 Wn.2d 48 (1977).

[3] 731 F. Supp. 415 (W.D. Wash.), *aff'd*, 496 U.S. 310 (1990).

[4] 551 F. Supp. 212 (W.D. Wash. 1983), *aff'd en banc*, 875 F.2d 699 (9th Cir. 1998).

[5] 850 F. Supp. 1454 (W.D. Wash. 1994), *rev'd*, 49 F.3d 586 (9th Cir. 1995), *rev'd en banc*, 79 F.3d 790 (9th Cir. 1996), *rev'd sub nom. Washington v. Glucksberg*, 521 U.S. 702 (1997).

934 F.2d 1425 (9th Cir. 1991), *rev'd*, 507 U.S. 725 (1993).

Ninth Circuit Task Force

Continued from Page 7

Although the Ashcroft plea-bargain memorandum is not directly a topic for the task force announced by Chief Judge Schroeder, it may well affect the overall impact of the Sentencing Guidelines and thus influence the Ninth Circuit task force's work.

The Ashcroft memorandum has predictably been criticized by the defense bar, but also by others. Mary Jo White, U.S. Attorney for Manhattan under President Clinton, has stated that "[a] check-the box analysis really does mask differences. Crimes are different, places are different, people are different. This really goes beyond what is efficient or fair."

Mark Bartlett, First Assistant U.S. Attorney for the Western District of Washington, does not believe that the Ashcroft memorandum will significantly affect charging decisions in this District. He says the standard in the Ashcroft memorandum was first set forth in 1987 by U.S. Attorney General Dick Thornburgh, was modified only slightly by U.S. Attorney General Janet Reno, and has been the standard normally applied by the U.S. Attorney in this District for the last fifteen years. Some defense counsel, however, have pointed to plea agreements reached in this District that they believe would be prohibited under the Ashcroft memorandum but which benefited both the particular defendant and the public interest.

The controversy over federal sentencing will certainly continue to play out in Congress, among other forums. The task force announced by Chief Judge Schroeder will hopefully allow criminal practitioners to have input into the process by which sentencing ranges and policies are developed and implemented.

[1] 518 U.S. 81 (1996).

MARK YOUR CALENDAR NOW!

FEDERAL PRACTICE CLE ANNUAL RECEPTION AND DINNER

Sponsored by The Federal Bar Association of the Western District of Washington

WEDNESDAY – DECEMBER 10, 2003

The Fairmont Olympic Hotel, 411 University St., Seattle

CLE PROGRAM: 1:00 p.m. to 5:00 p.m.

ELECTRONIC CASE FILING: Have you been served?
ELECTRONIC DISCOVERY: Do you know the right questions? Do you have the right answers?
INNOCENCE, GUILT, AND EVIDENCE: A Panel Discussion on the Innocence Project

featuring: **BARRY C. SCHECK**

Practical and informative panel discussions featuring attorneys and Judges of the Western District

$125 per person ($100 public interest/government counsel)
4.0 CLE credits expected. For information contact:
Leslie Gesterling – 206-625-1801; assistant@montgomeryscarp.com

FOLLOWING THE CLE PROGRAM THE FEDERAL BAR ASSOCIATION WILL HOST ITS

ANNUAL HOLIDAY RECEPTION AND DINNER

The Fairmont Olympic Hotel, 411 University St., Seattle
Reception 5:30 p.m.; Dinner 7:00 p.m. $75 per person.

Guest Speaker: **THE HONORABLE MARIA CANTWELL, U.S. Senator**

Put .eps file registration form HERE (see attached .pdf file for edits that need to be made)

The Federal Bar Association of the Western District of Washington

Reply to: Federal Bar Association of the
Western District of Washington
P.O. Box 21006
Seattle, Washington 98111-3006
Telephone: (206) 624-9777
Website: *www.fba-wdwash.org*

2003 REGISTRATION FORM

Name: _____ WSBA #: _____
Firm/Office Name: _____
Address: _____
_____
E-Mail: _____
Telephone: _____ New Member? Check Here: ❑
Facsimile: _____ New Address? Check Here: ❑

Dues: *(make checks payable to the Federal Bar Association of the Western District of Washington)*

- ❑ **Payment for 2003 Annual Dues Made Previously**
- ❑ **$50 Annual Dues Payment Enclosed** (regular members who have been admitted to any state bar association (or the bar association of the District of Columbia, Puerto Rico, or any United States territory) for at least 10 years)
- ❑ **$40 Annual Dues Payment Enclosed** (regular members who have been admitted to any state bar association (or the bar association of the District of Columbia, Puerto Rico, or any United States territory) for at least 2 years but less than 10 years)
- ❑ **$40 Annual Dues Payment Enclosed** (regular members who, regardless of their date of admission to a bar association, in their capacity as lawyers are (1) public officers or employees, or (2) employed by non-profit, public interest entities)
- ❑ **$0 Annual Dues Payment Enclosed** (regular members who have been admitted to any state bar association (or the bar association of the District of Columbia, Puerto Rico, or any United States territory) for less than two years)

Committee(s) On Which You Wish To Serve (check all applicable):

- ❑ Admiralty
  Chair: James R. Woeppel (206-624-2650)
- ❑ Alternative Dispute Resolution
  Chair: Spencer Hall (206-292-5900)
- ❑ Appellate Practice
  Chairs: Sheryl Gordon McCloud (205-224-8777)
  Michael B. King (206-223-7046)
- ❑ Bankruptcy
  Chairs: Flint W. Murfitt (206-706-5599)
  J. Todd Tracy (206-447-7000)
- ❑ Bar Association Liaison
  Chair: James Kirkham (Kirk) Johns (206-624-6885)
- ❑ Continuing Legal Education
  Chairs: Andrew H. Salter (206-622-8484)
  Lori Feldman (206-839-0730)
- ❑ Court Services Liaison
  Chair: Lish Whitson (206-695-4380)
- ❑ Criminal Law
  Chairs: Dan Dubitzky (206-467-6709)
  Linda Severin (206-464-3939)
- ❑ Ethics and Practice
  Chairs: William J. Bender (206-623-6501)
  Allison S. Wallin
- ❑ Federal Appointments
  Chair: John Congalton (206-623-8300)
- ❑ Intellectual Property
  Chair: Warren J. Rheaume (206-447-0900)
- ❑ Local Rules
  Chair: Stuart Dunwoody (206-628-7649)
- ❑ Membership
  Chair: Corrie Yackulic (206-622-8000)
- ❑ Nominations
  Chair: Brian Kipnis (206-553-7970)
- ❑ Pro Bono
  Chairs: Valerie Hughes (206-583-8840)
- ❑ Website/Communications
  Chairs: Allison S. Wallin
  Duncan Manville (206-624-3600)

Important Note: Under the Association's bylaws, membership is open to everyone who is: (a) licensed to practice law by the Supreme Court of Washington and (b) a member in good standing of the Bar of the United States District Court for the Western District of Washington. By submitting this form to the Association, you confirm that you meet these criteria.

Federal Bar Association of the
Western District of Washington
P.O. Box 21006
Seattle, Washington 98111-3006

PRSRT STD
U.S. POSTAGE
PAID
SEATTLE, WA
PERMIT NO. 3466