Briefcases

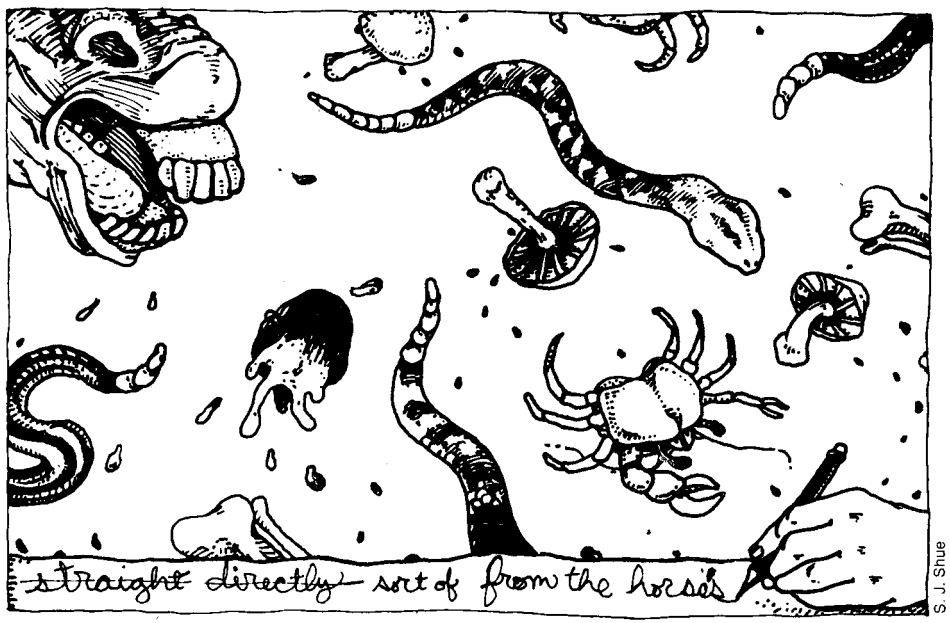
Don't Believe All You Read Department

By Harvey Silverglate

Because the judiciary has for so long cultivated a position remote from the rest of society and enshrouded itself in deep mystery, the public has scant access to reliable information about what courts and judges are doing and thinking.

The daily press hardly helps. Reports of trials, as well as of written court opinions, often leave participants in those cases, including lawyers and judges, wondering if the reporter is writing about the same case. And when it comes to courthouse gossip of a more personal or subjective nature, reports tend to be even less reliable, frequently reflecting nothing more than the untutored biases of either the anonymous sources (who usually have an unrevealed axe to grind) or of the reporters and commentators themselves. The danger inherent, for example, in attributing views to judges is that even if the reporter is totally wrong, history and tradition dictate, rightly or wrongly, that judges should not respond publicly to charges or reports as to their views or actions. This being the case, whatever a reporter says a judge believes goes uncontradicted.

Consider *Globe* political writer David Farrell. He often writes court news and coordinates the *Globe*'s unsigned "Short Circuits" gossip column in the Focus section of the Sunday *Globe*. In last Sunday's *Globe*, a "Short Circuits" item with a clear Farrell imprint reported that Massachusetts Supreme Judicial Court Associate Justice Ruth I. Abrams was under possible consideration to fill the still vacant seat on the United States Court of Appeals for the First Judicial Circuit, which is the New England branch of the second highest court in the federal judicial system, just below the US Supreme Court. With the obvious intent of trying to scuttle an Abrams candidacy for the Court of Appeals, Farrell reported that "the elevation of Justice Abrams to the federal appeals court would be welcomed by Chief Justice Hennessey and some of her other associates on the SJC who have had problems with her." Attributing the stories to "insiders at the high court," Farrell went on to report authoritatively that Justice Abrams "is behind in some of her opinions" and that she "has not lived up to the advance notices she received at the time former Governor Michael Dukakis elevated her to the SJC from the Superior Court."



S. J. Shue

Farrell has an unsettling habit of speaking ex cathedra when he is talking about lawyers and judges. But as one who is familiar with many of the lawyers and judges about whom he writes, I frequently have trouble believing that he has ever bothered to observe the work and work product of the targets of his off-the-cuff evaluations. The Farrell report on Justice Abrams is a case in point. In the first place, SJC Chief Justice Edward F. Hennessey is simply too discreet a judge to ever complain that a member of his court is behind in opinion writing. Some judges are faster writers and some are slower. Writing speed is no indication of a judge's quality. (Supreme Court Justice William Rehnquist, hardly a model judge, is reputed to be a very fast legal writer. Big deal!) The fact of life on appellate courts is simply that the fast writers tend to write more opinions, while the slow writers tend to write fewer. Overall, it is the quality of the mind of the judge, and the clarity of the writing that the judge does do, that are most important. In these areas, Justice Abrams is first-rate.

Where, then, did Farrell get his information? Who are these anonymous "insiders at the high court"? An educated guess is that some disgruntled prosecutor had Farrell's ear and was pouring out invective against Abrams. When she was appointed by Dukakis, Abrams had a very stern "law-and-order" reputation, having spent most of her professional life in prosecutors' offices and having been far from a defendant's patsy when she was on the Superior Court. Recently, however, she has become more and more sensitive to government and prosecutorial abuse and misconduct. This is not to say that she is no longer a stern "law-and-order" judge, for she is still as tough as ever; but she has been showing less and less patience with some of the outrageous conduct of some unprincipled prosecutors, and she is not shy about showing her displeasure in a case where such conduct is found. Also, increasingly Abrams has been found on the dissenting side of the court, in disagreement with the majority of her fellow justices. (Just this month, for example, she disagreed with the majority of the court that declared constitutional the proposed statute imposing a minimum, mandatory twenty-five-year prison sentence for persons caught with illicit drugs valued at $25,000 or more "on the street," discussed later in this article. Joining her in dissent was Justice Paul Liacos, who has been a Farrell target from time to time.)

But judges who are out of step with the majority of their court, particularly with respect to their views on legal issues, can hardly be faulted. Dissent has a long and glorious judicial history. In the United States Supreme Court, some famous and eloquent dissents by such giants as the late Justice Hugo Black or retired Justice William O. Douglas later came to be adopted as the majority views, demonstrating the original dissenter's foresight. Until the last ten years or so, dissents on the SJC were very rare, looked upon by the court's members as a sign of weakness. Now they are seen positively by the justices, as a sign of their intellectual vigor and independence.

Farrell should stop listening to his sources, and should start attending open court sessions at the SJC and reading Justice Abrams's opinions. He should talk to a wider range of lawyers who appear before that court, and should stop taking too seriously the gossip, conjecture, and bias that it is so easy for a reporter to get from prosecutors and others with vested interests.

It is particularly dangerous for him to

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report such gossip so seriously that he does not even qualify the categorical statement that Justice Abram's departure from the SJC *"would be welcomed"* by other members of that court. After all, despite his previous errors, probably there are *Globe* readers who still believe that what Farrell says is true.

Bias in the Courts (Continued)

This column reported recently that Frank Barbour, an employee of the office of the clerk of the Superior Criminal Court for Suffolk County, had filed a precedent-shattering lawsuit in which he asked the state's highest court, the Supreme Judicial Court (SJC), to enjoin Edward V. Keating, the clerk, from promoting four white male relatives of state politicians, rather than promoting Barbour, a black, who had more experience in the office than any of the four.

Barbour's contentions have won the day, at least for now. Earlier this month, SJC Justice Benjamin Kaplan, while making it clear that he was not ruling on the merits of Barbour's discrimination claim, nevertheless ruled that until the SJC orders otherwise, the clerk should leave vacant one of the four positions. Kaplan ordered further that the white men given the other three available promotions would hold those positions only temporarily, until the judicial committee that is currently drafting equal opportunity and affirmative action standards has completed its work, and until permanent selections can be made on the basis of the standards thus promulgated. Thus, Barbour will have an equal shot at this fourth position, since no one else will be occupying it, and hence gaining experience on the job, while Barbour continues to litigate his claim. The most important aspect of his ruling, however, is the recognition that the state's highest court has power and responsibility, as the ultimate supervisor of the activities of the entire judicial system at all levels, to see to it that the courts live up to the same standards they expect of others.

Kaplan's ruling is likely to have a tremendous effect on the way court clerks' offices are staffed throughout the Commonwealth. These offices have been considered to be prime targets for politicians eager to reward their relatives and supporters with reasonably well paying state jobs involving no heavy lifting. As a result, the court system long has labored under the burden of a relatively large number of clerical personnel who simply cannot or will not perform at an acceptable level of proficiency. This has made it especially hard for the many employees and assistant clerks who take their jobs seriously and do a decent job.

Keating, himself an elected official, has a reputation as a conscientious and hard worker who is truly interested in improving the efficiency and performance of the courts. As one veteran observer who is close to Keating's office noted, "Keating is taking the rap for a situation that is common to every clerk's office in the state, and the blame rests essentially with the legislature."

There is some truth to this observation. A recent national study found widespread discrimination and lack of equal opportunity and affirmative action in judicial systems all over the country. The study embarrassed many judges and court administrators, who then found themselves in the uncomfortable position of having to tell litigants in court to "do what I say, not what I do." Besides, there are obviously enormous pressures placed on Keating and other clerks to give at least some jobs to persons recommended by legislators who are responsible for establishing court budgets. A parsimonious legislative allocation to a court can impose enormous hardships in the struggle to do justice despite crushing caseloads. Already this year, the legislature has been threatening to deprive Superior Court Chief Administrative Justice Arthur Mason's office of crucial funds needed for his staff to perform its duties under the court reform act. Clerks are in a bind: without adequate funds, the courts cannot operate; but without skilled personnel selected by merit on an equal opportunity basis, they cannot operate either.

This problem has the potential to cause a major showdown between the legislative and judicial branches. If the courts feel that they simply cannot operate with the choices offered by the legislature, some observers are speculating that the SJC might take drastic action to force the legislature to provide adequate funds to run the courts, with no strings attached.

The Barbour case thus might have brought into the open a problem that runs much deeper than the single question of whether Frank Barbour is more qualified than the other four candidates for promotion. The whole relationship between two branches of government, and the future ability of the legislature to continue playing selfish games with the quality of justice in this state, have become involved. Each side has formidable weapons at its disposal, but it is in the public interest that the problem be resolved without full-scale war. ■