American Bar Foundation JUITIA

Volume 1984 • Spring • Number 2

ARTICLES

Rayman L. Solomon

The Politics of Appointment and the Federal Courts' Role in Regulating America: U.S. Courts of Appeals Judgeships from T.R. to F.D.R.

Kermit L. Hall

Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850–1920

Robert A. Kagan, Bobby D. Infelise, and Robert R. Detlefsen

American State Supreme Court Justices, 1900–1970

RESEARCH NOTE

Herbert M. Kritzer

The Dimensions of Lawyer-Client Relations: Notes Toward a Theory and a Field Study

REVIEW ESSAYS

Susan S. Silbey on Who Speaks for the Consumer?

Janet S. Lindgren and John Henry Schlegel on Thinking About Statutes

Robert M. Hayden on Rules, Processes, and Interpretations

Michael E. Parrish on Cold War Justice Revisited

RETROSPECTIVE

Ronald J. Fiscus on Studying The Brethren

BOOK NOTES



American Bar Foundation

BOARD OF DIRECTORS

F. Wm. McCalpin, *President*, of the California Bar Randolph W. Thrower, *Vice-President*, of the Missouri Bar Francis A. Allen, *Secretary*, University of Michigan Law School L. Clair Nelson, *Treasurer*, of the District of Columbia Bar

H. William Allen, of the Arkansas Bar Gerhard Casper, University of Chicago Law School Hon. Ruth Bader Ginsburg, United States Court of Appeals, District of Columbia Seth M. Hufstedler, of the California Bar Hon. Vincent L. McKusick, Supreme Judicial Court, Portland, Maine Robert W. Meserve, of the Massachusetts Bar David S. Ruder, Northwestern University Law School Wm. Reece Smith, Jr., of the Florida Bar Mark H. Tuohey III, of the District of Columbia Bar

ex officio:

John C. Shepherd, President, American Bar Association
William W. Falsgraf, President-Elect, American Bar Association
Allen E. Brennecke, Chairman, House of Delegates, American Bar Association
L. Clair Nelson, Treasurer, American Bar Association
Kenneth J. Burns, Jr., President, American Bar Endowment
Carole Kamin Bellows, Chairman, The Fellows of the American Bar Foundation
Hon. William H. Erickson, Vice-Chairman, The Fellows of the American Bar Foundation
Joseph E. Gallagher, Secretary, The Fellows of the American Bar Foundation

ADMINISTRATION

John P. Heinz, Executive Director
Barbara A. Curran, Associate Executive Director
Joanne Martin, Assistant Executive Director
Benjamin S. Jones, Accounting Officer and Office Manager
Bette H. Sikes, Director of Publications
Olavi Maru, Librarian

PROJECT DIRECTORS

Lori B. Andrews, J.D., Yale Law School
Samuel Jan Brakel, J.D., University of Chicago
Barbara A. Curran, LL.B., University of Connecticut;
LL.M., Yale Law School
Stephen Daniels, Ph.D., University of Wisconsin
Thomas Y. Davies, J.D., Ph.D., Northwestern University
Benjamin S. DuVal, Jr., LL.B., Yale Law School
William A. Geller, J.D., University of Chicago
Janet A. Gilboy, Ph.D., Northwestern University
Terence C. Halliday, Ph.D., University of Chicago
Robert Hayden, J.D., Ph.D., State University of New
York at Buffalo
John P. Heinz, LL.B., Yale Law School
Wayne A. Kerstetter, J.D., University of Chicago

Joanne Martin, J.D., Loyola University
Olavi Maru, A.B., University of Chicago
Robert L. Nelson, J.D., Ph.D., Northwestern
University
Werner Pfennigstorf, Dr. jur., Habil., University of
Hamburg; M.C.L., University of Michigan
Bette H. Sikes, B.A., College of Wooster
Kent W. Smith, Ph.D., Harvard University
Rayman L. Solomon, J.D., University of Chicago
James A. Sprowl, J.D., University of Michigan
Eric H. Steele, J.D., Harvard Law School
William A. Thomas, Ph.D., University of
Minnesota; J.D., University of Tennessee

Dorothy Linder Maddi, B.A., Brooklyn College

VISITING SCHOLAR

S.J.D., University of Wisconsin

Spencer L. Kimball, B.C.L., Oxford University;

Fred DuBow, Ph.D., Northwestern University
Associate Professor of Criminal Justice and Sociology, University of Illinois at Chicago; Center for Research in Crime and Justice, University of Illinois at Chicago

American Bar Foundation Tesearch Journal

ARTICLES	
Rayman L. Solomon The Politics of Appointment and the Federal Courts' Role in Regulating America: U.S. Courts of Appeals Judgeships from T.R. to F.D.R.	285
Kermit L. Hall Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850–1920	345
Robert A. Kagan, Bobby D. Infelise, and Robert R. Detlefsen American State Supreme Court Justices, 1900–1970	371
RESEARCH NOTE	
Herbert M. Kritzer Research Note: The Dimensions of Lawyer-Client Relations: Notes Toward a Theory and a Field Study	409
REVIEW ESSAYS	
Susan S. Silbey Review Essay: Who Speaks for the Consumer? Nader's No Access to Law and Best's When Consumers Complain	429
Janet S. Lindgren and John Henry Schlegel Review Essay: Thinking About Statutes: Hurst, Calabresi, Twining and Miers	458
Robert M. Hayden Review Essay: Rules, Processes, and Interpretations: Geertz, Comaroff, and Roberts	469
Michael E. Parrish Review Essay: Cold War Justice Revisited: Radosh & Milton and Major on the Rosenberg and Oppenheimer Cases	479
RETROSPECTIVE	
Ronald J. Fiscus Retrospective: Studying The Brethren: The Legal-Realist Bias of Investigative Journalism	487
BOOK NOTES	504

Volume 1984 • Spring • Number 2

Publication Policy

The role of the American Bar Foundation is to create and disseminate knowledge about law and the workings of the legal profession and legal institutions. With that purpose in mind, the American Bar Foundation Research Journal invites the submission of unsolicited articles and research notes by lawyers, legal academics, social scientists, and other scholars. The Research Journal publishes articles on the legal profession, the provision of legal services, the operation of legal institutions, trends and policy developments in the law, and related topics. Recognizing that a variety of disciplines and approaches can contribute to knowledge of the legal system, the Research Journal strives to be multidisciplinary and publishes empirical, doctrinal, and theoretical analyses.

Articles appearing in the Research Journal have been accepted for publication in accordance with this policy. The analyses, conclusions, and opinions expressed are those of the authors and not those of the American Bar Foundation, its officers and directors, research staff, or others associated with the Foundation's work.

Manuscript Evaluation: To ensure informed publication decisions, the Research Journal employs a refereed publication process. Articles and research notes that the Editor deems potentially appropriate for the Research Journal are normally evaluated by two or more reviewers chosen on the basis of their familiarity with the subject matter and the research methods. Manuscripts produced by scholars affiliated with the Foundation are evaluated by the same process as outside manuscripts and are not accorded priority in publication.

Submission of Manuscripts: Manuscripts submitted to the Research Journal should be typed double spaced and be accompanied by an abstract of not more than 150 words. Because it is preferred that an author's identity not be disclosed when a manuscript is sent to reviewers, the author's name, credentials, institutional affiliation, and any acknowledgments should appear only on the cover sheet or other separate pages.

To avoid placing unnecessary burdens on reviewers, the Editor requests that manuscripts be submitted only if the author is committed to publication in the Research Journal if the manuscript is accepted. If a manuscript is submitted that is under consideration by another journal, that fact should be disclosed to the Editor at the time of submission. The Editor will make publication decisions promptly, usually about two months after submission.

Editing of Accepted Manuscripts: All manuscripts accepted for publication will be edited for style by the Research Journal's professional editorial staff in consultation with the author. The editorial staff also checks citations. Authors of articles see both edited manuscript and galleys.

Reprints to Authors: Without charge, the Research Journal provides authors of articles with 50 reprints of each published article or research note and 5 copies of the issue in which it appears; to authors of review essays and book reviews, 25 reprints and 1 copy of the issue.

Republication Rights: The Foundation will normally permit authors to republish or use their manuscripts after publication in the Research Journal, but the Research Journal will have the right to first publication of edited manuscripts. The Research Journal will retain the right to republish manuscripts as reprints or as part of any reproduction of the issue or volume in which they appear, by any means, including without limit electronic means or microfilm.

Comments and Responses: comments on or responses to articles or reviews in the form of brief, scholarly statements will be published at the discretion of the editor or review section editor.

Send article or research note manuscripts to:

Thomas Y. Davies, Editor American Bar Foundation 750 N. Lake Shore Drive Chicago, IL 60611 (312) 988-6400

Send inquiries regarding review essays or book reviews to:

> Howard S. Erlanger ABF Research Journal University of Wisconsin Law School Madison, WI 53706 (608) 262-2244

Second-class postage paid at Chicago, Illinois.

* * * * * * * * * * * * * * *

The American Bar Foundation Research Journal (ISSN: 0361-9486) is published quarterly. The annual subscription rate is \$20.00; two years, \$38.00; three years, \$53.00. Overseas subscribers add \$6.00 per year. Single copies, \$5.50. Reprints of single articles are available (with quantity discounts available for orders of 10 or more): \$2.00 for an article up to 49 pages; \$2.50 for an article from 50 to 99 pages; \$3.25 for an article over 100 pages.

All notifications of change of address should include old and new address and be directed to: Foundation Publications, American Bar Foundation, 750 North Lake Shore Drive, Chicago, Illinois 60611.

American Bar Foundation Foundation FOURTHAL

(ISSN 0361-9486)

Editor

Thomas Y. Davies
Project Director
American Bar Foundation

Review Section Editor

Howard S. Erlanger Professor of Law and of Sociology University of Wisconsin

Managing Editor: Bette H. Sikes, Director of Publications, American Bar Foundation

EDITORIAL ADVISORY BOARD

1985

Alfred F. Conard, Henry M. Butzel Professor Emeritus, University of Michigan Law School John E. Coons, Professor of Law, University of California School of Law, Berkeley Herman Goldstein, Evjue-Bascom Professor in Law, University of Wisconsin Law School Herbert Jacob, Professor of Political Science, Northwestern University Peter Martin, Dean, Cornell Law School, Cornell University Charles J. Meyers, Partner, Gibson, Dunn & Crutcher, Denver, Colorado Murray L. Schwartz, Professor of Law, University of California School of Law, Los Angeles

1986

Richard L. Abel, Professor of Law, University of California School of Law, Los Angeles Carl A. Auerbach, Professor of Law, University of Minnesota Law School Milton Heumann, Professor of Political Science, Rutgers University Robert L. Rabin, Professor of Law, Stanford Law School, Stanford University Maurice Rosenberg, Harold R. Medina Professor of Procedural Jurisprudence, Columbia University School of Law Richard D. Schwartz, Ernest I. White Professor, Syracuse University College of Law

Jerome H. Skolnick, Professor of Law, Jurisprudence, and Social Policy, University of California School of Law, Berkeley

Robert B. Stevens, President, Haverford College

1987

David F. Cavers, Fessenden Professor of Law, Emeritus, Harvard University Law School Malcolm M. Feeley, Visiting Professor, University of California School of Law, Berkeley James Willard Hurst, Vilas Professor, Emeritus, University of Wisconsin Law School Norval Morris, Julius Kreeger Professor of Law and Criminology, University of Chicago Law School Nelson W. Polsby, Professor of Political Science, University of California, Berkeley Dietrich Rueschemeyer, Professor of Sociology, Brown University Rita J. Simon, Dean, School of Justice, American University

ex officio

John P. Heinz, Executive Director, American Bar Foundation, and Professor of Law and Urban Affairs, Northwestern University School of Law

Barbara A. Curran, Associate Executive Director, American Bar Foundation

Spencer L. Kimball, Founder and Former Editor of the *Research Journal*, Seymour Logan Professor of Law, University of Chicago Law School, and Project Director, American Bar Foundation

.An important reference for jurists and litigators_



Managing Complex Litigation: A Practical Guide to the Use of Special Masters

Wayne D. Brazil, Geoffrey C. Hazard, Jr., and Paul R. Rice

- * Authors present a full debriefing of their experiences in the federal government's antitrust action against AT&T
- * Lead attorney for AT&T evaluates lessons of general application from his experiences with the case
- * Presiding U.S. District Court Judge in the AT&T case cites the requisites for the successful use of special masters
- * Conclusions developed from empirical and qualitative studies of the civil discovery system present the pros and cons of using special masters
- * Eighteen appendixes provide samples, documents, and day-to-day schedules of the work of the special masters in the AT&T case

"The overview provided in this volume by Professor Wayne Brazil, and the dialogue between Professors Geoffrey Hazard and Paul Rice—who served as special masters in the AT&T litigation—and Robert McLean—who was a lead attorney for the defendant in that case—explore with intelligence, analytical skill, and practical insight the key issue of the kinds of responsibilities that should and should not be entrusted to special masters. Their essays make a very significant contribution to this field, and in the main I am in agreement not only with their analysis but also with their conclusions."

Judge Harold H. Greene, United States District Judge for the District of Columbia. Judge Greene was the presiding judge in *United States v. AT&T* and appointed Special Masters Geoffrey Hazard and Paul Rice to serve in that case.

Wayne D. Brazil is Professor of Law, Hastings College of the Law, University of California, San Francisco, and Affiliated Scholar, American Bar Foundation.

Geoffrey C. Hazard, Jr., is Nathan Baker Professor of Law, Yale Law School, and Professor of Law and Management and Deputy Dean of the Yale School of Organization and Management.

Robert D. McLean is an attorney with the firm of Sidley & Austin, Chicago. McLean was a lead attorney for the defendant in *United States v. AT&T*.

Paul R. Rice is Professor of Law, Washington College of Law, American University.

September xiii + 349 pages ISBN 0-910059-03-9 \$25.00*

*Include \$2.50 for shipping and handling

Order from: American Bar Foundation

Dissemination Department 750 North Lake Shore Drive Chicago, Illinois 60611