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The William B. Lockhart Lecture*

Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation

Shirley S. Abrahamson**

Robert L. Hughes***

In Margaret Landon's novel *Anna and the King of Siam*,¹ the King hires Anna, a young English widow, to teach the

* This Essay is an expanded and annotated version of the William B. Lockhart Lecture Justice Abrahamson delivered at the University of Minnesota Law School on March 29, 1990. The Lockhart Lecture Series honors former University of Minnesota Law School Dean William B. Lockhart.

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In preparation for the lecture and publication, the authors communicated by telephone and mail with numerous state officials, including attorneys general, legislators, legislative staff, and judges, seeking information about formal and informal mechanisms for discourse between the judicial and legislative branches about statutes. This Essay does not attempt to present an exhaustive survey of legislative-judicial relations and legislative oversight mechanisms in the 50 states. We attempt only to highlight states' experiences. State officials were very generous in their responses. Sometimes one person characterized the roles of his or her office or another state office differently from another person. We have tried to characterize the states as we understood the responses to our questions. If there are errors in our interpretation of a state's practice, they should be attributed to the authors, not to our correspondents. Michael J. Remington, Counsel, House Committee on the Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, and Robert A. Katzmann, President, the Governance Institute and Visiting Fellow, The Brookings Institution, were kind enough to read an earlier version of this text and offer suggestions. We want to thank all our correspondents, too numerous to name, for their assistance. Special thanks to Wisconsin State Senators Thomas M. Barrett, Brian B. Burke, and Fred Risser, who have served on the Wisconsin Law Revision Committee, and Attorney Janice Baldwin, Senior Staff Attorney of the Wisconsin Legislative Council, who staffs the Committee, for discussing the workings of the Wisconsin Law Revision Committee with us and giving us their insights. Diana Cook did her usual masterful job in preparing this manuscript for publication.

1. M. LANDON, *ANNA AND THE KING OF SIAM* (1944).

many royal children of his many royal wives. Rodgers and Hammerstein successfully recast the story of the clash of the diverse cultures of Anna and the autocratic King into the musical *The King and I*. In the musical version, after a gala reception and while absorbed in the strange Occidental custom of a man dancing with his arm around a woman's waist, the King persuades Anna to teach him the English dance that accompanies her song "Shall We Dance?"² The scene and the song suggest that, despite their conspicuous differences, the two have enough in common to learn from each other and work together with a single purpose.

We propose to examine the relations between two different partners — the judiciary and the legislature — and attempts to increase cooperation between these two cultures in the statutory world in which we live. Statutes are now the predominant music to the ears of law professionals; resolution of many, if not most, cases today involves statutes.³ Yet the working relationship between the legislature and the judiciary in efforts with respect to statutes hardly compares with two dancers' graceful movements to the lyrical notes of Broadway.

Commentators have long recognized that each branch stands, in Judge Cardozo's words, in "proud and silent isola-

2. Shall We Dance?

We've just been introduced
 I do not know you well
 But when the music started
 Something drew me to your side.
 So many men and girls are in each other's arms
 It made me think we might be
 Similarly occupied.
 Shall we dance?
 On a bright cloud of music shall we fly?
 Shall we dance?
 Shall we then say "good night" and mean "goodbye"?
 Or perchance,
 When the last little star has left the sky,
 Shall we still be together
 With our arms around each other
 And shall you be my new romance?
 On the clear understanding
 That this kind of thing can happen
 Shall we dance?
 Shall we dance? Shall we dance?

R. RODGERS & O. HAMMERSTEIN, *THE KING & I*, act II, scene IV, at 120-21 (1951).

3. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 380; Traynor, *Statutes Revolving in Common-Law Orbits*, 17 CATH. U.L. REV. 401, 402 (1968).

tion" from the other.⁴ Judge Abner Mikva has written that the problem with drafting statutes and with statutory construction "as often as not is the unawareness that the legislative branch and the judicial branch have of each other's game rules."⁵ Hence, in spite of the shared responsibility for the quality of statutes, the judiciary and the legislature rarely move together with a sense of common purpose. Judges and legislators have different institutional concerns regarding statutes, resulting in a working relationship that could be described as atonal, if not dissonant.

4. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 125 (1921). Judge Frank Coffin has described the courts and the legislature as standing aloof from one another. Coffin, *The Federal Number 86: On Relations Between the Judiciary and Congress*, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 21, 25 (R. Katzmann ed. 1988) [hereinafter JUDGES AND LEGISLATORS].

5. Mikva, *Reading and Writing Statutes*, 28 S. TEX. L.J. 181, 183 (1986); see also Mikva, *supra* note 3, at 384-85 (suggesting that Congress and judges should agree on canons of interpretation). The National Conference of Commissioners on Uniform State Laws adopted a Model Statutory Construction Act that was enacted in three states. 14 U.L.A. 387 (1990). The Federal Courts Study Committee, an advisory committee established by Congress to study reform of the federal courts, suggested in its Report dated April 2, 1990, that Congress should consider a "checklist" for legislative staff to use in reviewing proposed legislation for technical problems to avoid statutory interpretation problems. A checklist could be used by drafters to remind them to include the following items in their review of legislation, items the court must frequently furnish in litigation about statutes:

- the appropriate statute of limitation;
- whether a private cause of action is contemplated;
- whether pre-emption of state law is intended;
- the definition of key terms;
- the *mens rea* requirement in criminal statutes;
- severability;
- whether a proposed bill would repeal or otherwise circumscribe, displace, impair, or change the meaning of existing federal legislation;
- whether state courts are to have jurisdiction and, if so, whether an action would be removable to federal court;
- the types of relief available;
- whether retroactive applicability is intended;
- the conditions for any award of attorney's fees authorized;
- whether exhaustion of administrative remedies is a prerequisite to any civil action authorized;
- the conditions and procedures relating to personal jurisdiction over persons incurring obligations under the proposed legislation;
- the viability of private arbitration and other dispute resolution agreements under enforcement and relief provisions; and
- whether any administrative proceedings provided for are to be formal or informal.

REPORT OF THE FEDERAL COURT STUDY COMMITTEE 91 (Apr. 2, 1990) [hereinafter FEDERAL COURT REPORT].

Increasingly, calls are heard for better understanding between judges and legislators, for judges and legislators to learn about each other's institutional cultures to improve the quality of statutes for the public good.⁶ Many recent calls for improvement in institutional structures affecting legislative-judicial relations have their genesis in Judge Cardozo's proposal in 1921 to create a "Ministry of Justice" to mediate between the two branches of government. Composed of members of the judiciary, the legislature, law schools, and the bar, the Ministry would study the law and recommend changes. "The spaces between the planets," wrote Cardozo, "will at last be bridged."⁷

At the federal level, recent calls for mediating or facilitating institutions to improve the quality of statutes have been more modest in scope than the Cardozoan model. Drawing on the work of Judge Henry Friendly,⁸ Judge Ruth Bader Ginsburg and others have suggested that Congress establish a legislative statutory revision committee composed of members of the House and Senate as well as retired members of the judiciary to take a second look at statutes to remedy ambiguities and imperfections that the courts and legal critics uncover. The

6. Justice Abrahamson participated in a Workshop on Problems of Communication Between the Judicial and Legislative Branches sponsored by The Governance Institute, May 16, 1989, in Washington, D.C.; see JUDGES AND LEGISLATORS, *supra* note 4 (a collection of essays that discuss the institutional comity that should exist between judges and legislators); Panel II — Congress and the Judiciary: An Inquiry into Problems of Statutory Construction and Revision, in Proceedings of the Forty-ninth Judicial Conference of the District of Columbia (May 22-24, 1988), *reprinted in* 124 F.R.D. 241, 312-35 (1989) (panel discussion included, *inter alia*, a Congressman, a Federal Circuit Judge, and the General Counsel of the U.S. House of Representatives); H. Solomon, Legislative-Judicial Relations: Seeking a New Partnership: Phase I Final Report and Agenda for Future Action (National Center for State Courts, 1989); Ridge & Friesen, *Legislative-Judicial Relations: Seeking a New Partnership, Conference Report*, 14 ST. CT. J. 19 (1990); National Center for State Courts, Conference Summary Report, *Legislative-Judicial Relations: Seeking a New Partnership* (Oct. 1-3, 1989) (Denver Conference) [hereinafter Conference Summary]; Blue, *Legislators & Judges: Mending the Rift*, ST. LEGISLATURES 34 (Mar. 1991).

7. Cardozo, *supra* note 4, at 125; see also Pound, *Anachronisms in the Law*, 3 J. AM. JUDICATURE SOC'Y 142, 146 (1920) [hereinafter Pound, *Anachronisms*] (proposing a ministry of justice); Pound, *A Ministry of Justice: A New Role for the Law School*, 38 A.B.A. J. 637 (1952) [hereinafter Pound, *Ministry*] (proposing that law school faculties serve as a ministry of justice). The ministry of justice was to be a continuing body harmonizing the common law and legislation. States adopted the concept, changing Pound's ministry of justice to law revision commissions.

8. Friendly, *The Gap in Lawmaking — Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787 (1963).

committee would "hear and initiate action on pleas for a clear statement of what Congress meant or in any event what it means now."⁹ In Judge Ginsburg's view, federal statutes in need of repair involve "issues that have little or no political significance in the partisan sense," thus making congressional action a routine endeavor.¹⁰ Judge Ginsburg concludes that "a second view," set in motion by judicial decisions, could advance the coherence of federal law more effectively than a new set of courts.¹¹

9. Ginsburg & Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1433 (1987).

10. Ginsburg, *A Plea for Legislative Review*, 60 S. CAL. L. REV. 995, 1013 (1987) (citing Justice Stevens). These calls for a federal legislative oversight mechanism are generally proposed for noncontroversial areas involving "the petty tinkering of the legal system which is necessary to keep it in running order." Pound, *Anachronisms*, *supra* note 7, at 145. Ginsburg and Huber direct their ameliorative efforts to "[s]tatutory prescriptions in need of repair . . . [with] little or no political significance in the partisan sense. A new standing committee could serve as a gap filler; its business would be to examine court decisions construing federal statutes and to draft bills to resolve actual or potential conflicts." Ginsburg & Huber, *supra* note 9, at 1431-32 (citations omitted).

For a description of the ambiguities, glitches, gaps, and serious problems in statutes Congress might reexamine, see F. Coffin, Remarks at the Proceedings of the Forty-ninth Judicial Conference of the District of Columbia Circuit (May 22-24, 1988), *reprinted in* 124 F.R.D. 241, 318-21 (1989).

11. Ginsburg, *supra* note 10, at 1017. Judge Ruth Bader Ginsburg and others suggest a legislative solution rather than a judicial solution to the problem of conflicting judicial interpretations of federal statutes by federal courts of appeal. In response to the suggestion that Congress create another level of federal courts to resolve such conflicts, they contend Congress itself can resolve the conflict. See Ginsburg & Huber, *supra* note 9, at 1433 (citations omitted). For other judges making similar proposals, see Ginsburg & Huber, *supra* note 9, at 1431 (Justice Stevens); Ginsburg, *supra* note 10, at 1016 n.142 (Justice Douglas); Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 183 (1982); Feinberg, *Foreword — A National Court of Appeals?*, 42 BROOKLYN L. REV. 611, 627 (1975); Handler, *What To Do with the Supreme Court's Burgeoning Calendars?*, 5 CARDOZO L. REV. 249, 275-76 (1984).

The mechanisms for exchange of information between the courts and legislatures on questions of statutory interpretation include "a second look at laws" Committee of Congress; a group of law professors to perform the same function as such a committee; a National Law Foundation, an informal group in the Administrative Office of the U.S. Courts at the Federal Judicial Center to direct problems to the proper source for correction; and an entity to collate and distribute suggestions by judges to the Speaker of the House and President of the Senate for referral to appropriate congressional committees. See F. Coffin, *supra* note 10; see also R. Katzmann, Remarks at the Proceedings of the Forty-ninth Judicial Conference of the District of Columbia Circuit (May 22-24, 1988), *reprinted in* 124 F.R.D. 322, 325-26 (1989) (proposing low visibility mechanism to facilitate communication between legislature and judiciary); Coffin, *Grace Under Pressure: A Call for Judicial Self-Help*, 50 OHIO ST. L.J. 399, 403 (1989) (advocating judges reporting statutory problems to legislative

Our goal in this Essay is to step back from the debate at the federal level and explore how state judges and state legislators appear to influence each other in the common enterprise of interpreting, applying, and improving statutes. True to their Brandeisian role in the federal system,¹² the states offer a wealth of material about the interaction between the two branches of government. We shall address three questions: How do state judges interact with legislators to improve statutes through their published opinions? What mechanisms has the legislature created to respond to judicial opinions and to facilitate discourse between the two branches regarding the impact and quality of statutes? Is there a role judges should play in the legislative process beyond their published opinions to improve the legislative product? Judges and legislators might ask one another, Shall we dance? On a bright cloud of *statutes* shall we fly?¹³

I. JUDGES' INTERACTION WITH LEGISLATORS IN PUBLISHED OPINIONS

The resolution of disputes through judicial interpretation of statutes is the step in legislative-judicial relations that judges, lawyers, law faculty, and law students know best. In

decisionmakers); Oakes, *Judges on Judging: Grace Notes on 'Grace Under Pressure,'* 50 OHIO ST. L.J. 701, 714-15 (1989) (judges should report statutory problems to legislators); Weis, *The Federal Courts Study Committee Begins Its Work,* 21 ST. MARY'S L.J. 15, 20-21 (1989) (calling for exchange of information between courts and Congress about ambiguities and deficiencies in legislative drafting).

Former Congressman Robert Kastenmeier, Judge Judith N. Keep, President Rex Lee, Congressman Carlos J. Moorhead, and Judge Richard A. Posner have all called for institutional reforms in both the legislative and judicial branches to enable the judiciary and Congress to interact intelligently. They concluded that, at the very least, the Federal Courts Study Committee should have recommended that an entity be created within the Congress modeled on the Office of Technology Assessment to serve three distinct functions [including] . . . to call to the attention of the Congress decisions by the courts and the executive branch that have important consequences on the courts or the Congress; and . . . to facilitate communications between the branches by providing a contact point for judges and other officials.

FEDERAL COURT REPORT, *supra* note 5, at 92-93.

12. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

13. See *supra* note 2 ("Shall we dance? On a bright cloud of music shall we fly?").

the last few years, academic interest in statutory interpretation has resurged.¹⁴ The recent literature builds on theories of statutory interpretation enunciated in the first half of this century,¹⁵ reflects the debates of the 1970s and 1980s on federal constitutional interpretation (culminating in the Bork hearings), and embodies law and economics, institutional process and public choice theory, and republicanism.¹⁶

14. Perhaps the seminal works in the modern resurgence in interest in the interpretation of statutes are J. HURST, *DEALING WITH STATUTES* (1982); G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982), and G. GILMORE, *THE AGES OF AMERICAN LAW* (1977).

15. See Chaffee, *The Disorderly Conduct of Words*, 41 COLUM. L. REV. 381 (1941); Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370 (1947); Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407 (1950); DeSloovere, *The Equity and Reason of a Statute*, 21 CORNELL L.Q. 591 (1936); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947); Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1899); Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443 (1899); Horack, *The Disintegration of Statutory Construction*, 24 IND. L.J. 335 (1949); Horack, *Cooperative Action for Improved Statutory Interpretation*, 3 VAND. L. REV. 382 (1950); Landis, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930); Llewellyn, *A Realistic Jurisprudence: The Next Step*, 30 COLUM. L. REV. 431 (1930); Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules of Canons about How Statutes Are to be Construed*, 3 VAND. L. REV. 395 (1950); Phelps, *Factors Influencing Judges in Interpreting Statutes*, 3 VAND. L. REV. 456 (1950); Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908); Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388 (1942).

16. For a history of statutory analysis, see Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799 (1985). For recent scholarship, see R. DICKERSON, *INTERPRETATION AND APPLICATION OF STATUTES* (1975); W. ESKRIDGE & P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND CREATION OF PUBLIC POLICY* (1987); R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* ch. 9 (1985); Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair*, 32 RUTGERS L. REV. 676 (1979); Abraham, *Three Fallacies of Interpretation: A Comment on Precedent and Judicial Decision*, 23 ARIZ. L. REV. 771 (1981); Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); Cohen, *Legisprudence: Problems and Agenda*, 11 HOFSTRA L. REV. 1163 (1983); Dickerson, *Statutes and Constitutions in an Age of Common Law*, 48 U. PITT. L. REV. 773 (1987); Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422 (1988); Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385 (1984); Epstein, *The Pitfalls of Interpretation*, 7 HARV. J.L. & PUB. POL'Y 101 (1984); Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); Eskridge, *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988); Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989); Eskridge & Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 701-25 (1987); Eskridge & Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); Farber, *Legal Prag-*

The new scholarship usually examines federal statutes, opinions of the United States Supreme Court, and theories of statutory interpretation (especially the use of legislative history) that Supreme Court Justices espouse.¹⁷ Scholars postu-

mism and the Constitution, 72 MINN. L. REV. 1331 (1988); Farber, *Statutory Interpretation, Legislative Inaction, and Civil Rights*, 87 MICH. L. REV. 1 (1988); Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987); Farber & Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988); Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Henschen, *Statutory Interpretations of the Supreme Court*, 11 AM. POL. Q. 441 (1983); Hetzel, *Instilling Legislative Interpretation Skills in the Classroom and the Courtroom*, 48 U. PITT. L. REV. 663 (1987); Kernochan, *Statutory Interpretation: An Outline of Method*, 333 DALHOUSIE L.J. 6 (1972); Lane, *Legislative Process and Its Judicial Renderings: A Study in Contrast*, 48 U. PITT. L. REV. 639 (1987); Macey, *Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986); Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1 (1988); Marshall, "Let Congress Do It": *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177 (1989); Moglen & Pierce, *Sunstein's New Canons: Choosing the Fictions of Statutory Interpretation*, 57 U. CHI. L. REV. 1203 (1990); Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151 (1981); Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985); Pierce, *Introduction, Symposium: The Legislative Process*, 11 HOFSTRA L. REV. 1119 (1983); Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541 (1988); Posner, *Statutory Interpretation — in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983); Posner, *Legislation and Its Interpretation: A Primer*, 68 NEB. L. REV. 431 (1989); Rogers, *Judicial Reinterpretation of Statutes: The Example of Baseball and the Antitrust Laws*, 14 HOUS. L. REV. 611 (1977); Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369 (1989); Schwartz, *Justice, Expediency, and Beauty*, 136 U. PA. L. REV. 141 (1987); Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1 (1990); Sneed, *The Art of Statutory Interpretation*, 62 TEX. L. REV. 665 (1983); Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 COLUM. L. REV. 427 (1989); Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989); Sunstein, *Principles, Not Fictions*, 57 U. CHI. L. REV. 1247 (1990); Thomas, *Statutory Construction Where Legislation Is Viewed as a Legal Institution*, 3 HARV. J. ON LEGIS. 191 (1966); Williams, *Statutory Construction in Connecticut: An Overview and Analysis*, 62 CONN. B.J. 307 (1988); Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982).

17. Much energy has been devoted to the exploration of the use of federal legislative history. See, e.g., OFFICE OF LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE, REPORT TO THE ATTORNEY GENERAL, USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION (1989); Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125 (1983); Mikva, *supra* note 3, at 380; Mikva, *supra* note 5, at 181; Starr, *Observations about the Use of Legislative History*, 1987 DUKE L.J. 371, 375.

The need for and the use of available legislative history has also been extensively discussed at the state level. See, e.g., Allison & Hambleton, *Research*

late the factors influencing Supreme Court decisions and expound on the factors that should influence decisions. Academicians explore anew, with beneficial results, the old war-horses of interpretation: textualism, literalism, plain meaning, original intent, purpose, contextualism, canons of construction, pre- and post-enactment legislative history, imaginative reconstruction, counter-majoritarianism, statutory stare decisis, and dynamic interpretation.

This emerging scholarship is important reading for judges and lawyers, who too often merely intone the canons of construction and resort to manipulable, mechanical rules in statutory interpretation.¹⁸ Interpreting ambiguous statutes is not easy. Judges and lawyers must strive for better interpretive skills and thoughtful analysis.

The emphasis and scope of the new academic research, however, concern us. To a large extent, academic analyses and debate continue to focus on the judge's interpretation of the text of the legislative enactment to resolve a particular case.¹⁹ Enormous energy is spent studying courts and judicial opinions

in *Texas Legislative History*, 1984 TEX. B.J. 314 (1984); Divilbiss, *The Need for Comprehensive Legislative History in Missouri*, 36 J. MO. B. 520 (1980); Rhodes & Seereiter, *The Search for Intent: Aids to Statutory Construction in Florida — An Update*, 13 FLA. ST. U.L. REV. 485 (1985); Smith, *Legislative Intent: In Search of the Holy Grail*, 53 CAL. ST. B.J. 294 (1978); Wang, *Legislative History in Washington*, 7 U. PUGET SOUND L. REV. 571 (1984); Wendt, *Researching Illinois Legislative Histories — A Practical Guide*, 1982 S. ILL. U.L.J. 601 (1982); White, *Sources of Legislative Intent in California*, 3 PAC. L.J. 63 (1972); Comment, *Statutory Interpretation — The Need for Improved Legislative Records in Missouri*, 38 MO. L. REV. 84 (1973); Comment, *Evaluating Oregon Legislative History: Tailoring an Approach to the Legislative Process*, 61 OR. L. REV. 421 (1982); Comment, *The Use of Extrinsic Aids in Determining Legislative Intent in California: The Need for Standardized Criteria*, 12 PAC. L.J. 189 (1980); WISCONSIN LEGISLATIVE REFERENCE BUREAU, AN INTRODUCTION TO LEGISLATIVE HISTORY RESEARCH IN WISCONSIN (Brief 90-6, June 1990). Legislative history is generally less available for the state legislatures than for Congress. In Wisconsin, a resolution directing the legislative reference bureau and the legislative council to study the feasibility and advisability of creating a public records center for legislative records did not pass. S. J. Res. 46, 1989-90 Leg.

18. Llewellyn, *supra* note 15, at 401-06. For a humorous treatment of judicial canons of construction and interpretation of a statute, see Buchmeyer, *Judicial Logic: Birds and Ponies*, 46 TEX. B.J. 1345 (1982).

19. Commentators have noted that statutory analysis continues to be taught in the law schools with primary emphasis on the case law — the judicial perspective of the legislative process. For a critique of this scholarship and approach, see, e.g., Eskridge & Frickey, *supra* note 16, at 700-01; Hetzel, *supra* note 16; Posner, *supra* note 16, at 801-05; Williams, *Statutory Law in Legal Education: Still Second Class After All These Years*, 35 MERCER L. REV. 803, 813-19 (1984). For a discussion of the state legislature as an institution, see Rosen-

as if the essence of the legal system is what courts do. Legal scholars usually ask how the judge should interpret the text or what the judge's role is when the statutory language is vague — deliberately or unintentionally — or the statute is antiquated. The continuing emphasis on cases and judicial analysis ignores broader, and perhaps more fundamental, issues that reach beyond the confines of a particular case or code section. Commentators in legal publications give little scholarly attention to the legislature or the legislative process, except for legislative history, or the legislative products, the statutes themselves.

In contrast to the academic focus on judicial interpretation of statutes, much statutory interpretation takes place outside the courtroom. Statutory interpretation takes place in the attorney's office in advising clients, in administrative agencies in enforcing statutes, and in business offices in making business decisions. In each of these nonjudicial forums, statutes are regularly construed by readers other than judges. In these forums, statutes obtain their transformative power as they interact with social, cultural, and economic problems. Courts must be properly understood, then, not as isolated bodies interpreting and applying statutes in the particular disputes before them, but acting instead within "a continuum of institutional processes . . . often interacting in subtle and perhaps not always conscious ways to influence the behavior of other processes."²⁰

Recognition that judges operate in a complex world extending beyond the confines of the courtroom may change some of the questions about judicial opinions. Instead of concentrating on the judicial doctrines of statutory interpretation, commentators may ask whether or how the court's interpretation of the statute should stimulate or create the need for further legislative action and whether the court's interpretation suggests new avenues for legislative change. In this broader institutional context, a court has an interest in both the quality of its interpretations and the quality of statutes in general. A court's opinion interpreting a statute may affect the legislative process and energize a legislative response.

For example, when the California Supreme Court construed a state statute to allow municipalities to regulate the use of pesticides, forces mobilized and the legislature overturned

thal, *The State of State Legislatures: An Overview*, 11 HOFSTRA L. REV. 1185 (1983).

20. Katzmann, *The Underlying Concerns*, in JUDGES AND LEGISLATORS, *supra* note 4, at 12.

the court decision three weeks later.²¹ In another instance, the Wisconsin legislature reacted quickly after the media drew attention to a Wisconsin Supreme Court opinion interpreting the rape shield statute as permitting the admission of certain evidence relating to a rape victim's prior sexual conduct.²²

This type of prompt legislative reaction to judicial interpretation is probably the exception, however, not the rule. Legislative reexamination of a statute probably depends on whether the decision attracts adequate attention and creates sufficient demands on the legislative process to build another majority for a new enactment. Legislative action will probably occur when the decision has received media attention, when one or more legislators or legislative committees become interested in the subject, when there is near unanimity that the court decision is wrong, when a powerful interest group or governmental agency is affected by the decision and seeks legislative relief, or when the decision arouses passionate response among various constituencies. Controversial decisions tend to engender dialogue between the courts and the legislature.

When interpreting statutes and deciding cases, should courts consider how the legislature will react? Some suggest, for example, that courts should — where the statutory language admits of different interpretations — interpret the statute in favor of those who do not have effective access to the legislative political process to obtain legislative reconsideration of judicial interpretation. Recognizing the difficulty in reaching political consensus in the legislature, should the courts decide issues when they have the opportunity to do so because the leg-

21. The court's decision in *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 683 P.2d 1150, 204 Cal. Rptr. 897 (1984), was overturned by 1984 Cal. Stat. 1386. The legislature stated:

It is the intent of the Legislature by this act to overturn the holding of *People ex rel. George Deukmejian v. County of Mendocino, et al.*, and to reassert the Legislature's intention that matters relating to economic poisons are of a statewide interest and concern and are to be administered on a statewide basis by the state unless specific exceptions are made in state legislation for local administration.

Id. § 3.

The Colorado legislature, COLO. REV. STAT. § 26-1-126.5 (1989), expressly rejected an interpretation of a statute in the Colorado Supreme Court decision entitled *Colorado Dep't of Social Services v. Board of County Comm'rs*, 697 P.2d 1, 23 (Colo. 1985).

22. For the judicial and legislative history of this interpretation, see *State v. Gavigan*, 111 Wis. 2d 150, 156-59, 330 N.W.2d 571, 575-76 (1983); *State v. Vonesh*, 135 Wis. 2d 477, 485-87, 401 N.W.2d 170, 174-75 (Ct. App. 1986); Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 874 & n.532 (1986).

islature may not, for political reasons, be able to act?²³ Judicial recognition that an audience exists beyond the litigants and the courts raises important questions regarding the court's appropriate role in influencing the legislative process.

Should the courts use their opinions as a vehicle to draw legislative attention to statutory deficiencies? As mentioned previously, courts are concerned about the clarity, coherence,

23. In *In re Guardianship of Eberhardy*, 102 Wis. 2d 539, 307 N.W.2d 881 (1981), a majority of the Wisconsin Supreme Court concluded that, in the absence of specific statutory authorization, state courts should not order the sterilization of a mentally disabled 19-year-old woman. *Id.* at 578-79, 307 N.W.2d at 899. One member, in concurrence, argued that "[s]uch authority should be granted only after a thorough consideration of the moral, medical, psychological and ethical, as well as the legal, implications of sterilization and its after-effects. The only proper forum for such a grant of authority is the legislature." *Id.* at 585, 307 N.W.2d at 902 (Coffey, J., concurring). One dissenter castigated the majority, arguing that it failed to address the issue:

Two thousand years ago a judge . . . sensing the political winds ("willing to content the people" as the ancient word puts it), washed his hands and said to the people: "See ye to it." . . . Today, the majority of this Court . . . turns to the legislature, the "representatives of the people," and says in effect, "you see to it." Washing its hands and turning the demand for justice over to the legislature demeans this court, denigrates its role, and makes a mockery of its powers.

The majority cannot be unaware that the legislature will do nothing about this matter. In today's political atmosphere, few, if any, state legislators would sponsor or support sterilization legislation.

Id. at 593, 307 N.W.2d at 906 (Day, J., dissenting). The Justice concluded that "[m]aybe some day, even in Wisconsin, those with power to do justice will not ask for the wash basin." *Id.* at 604, 307 N.W.2d at 911 (Day, J., dissenting). A second dissenter argued:

I believe my colleague . . . is correct in his dissent that legislative action on this issue is unlikely. Apart from any aversion legislators may have to addressing a controversial question, there is the added practical problem of the press of legislative business. . . . I am prepared to assume that even if legislative action were taken, it would [establish guidelines for sterilization].

Id. at 605, 307 N.W.2d at 911 (Callow, J., dissenting).

Should the court choose a particular solution in the hope of fostering legislative action? In 1977, the Texas Supreme Court observed that Texas's modified comparative negligence rule governed only cases sounding in negligence. *General Motors v. Simmons*, 558 S.W.2d 855, 862 (Tex. 1977). Other tort cases were controlled by older statutes requiring a pro rata allocation among joint tortfeasors. *Id.* The court invited further legislative study. *Id.* at 863. Four years later, the legislature responded, but its attempts to adopt comparative fault in strict liability cases failed on the floor of the senate. Sanders & Joyce, "Off to the Races": *The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207, 286 (1990). The court then chose, in 1984, to adopt pure comparative fault in liability cases not sounding in negligence. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 429 (Tex. 1984). That second case is generally credited with creating the political momentum necessary to pass a comparative responsibility rule that is now the law in Texas. Sanders & Joyce, *supra*, at 286.

and responsiveness of statutes. "Bad law breeds unnecessarily hard cases."²⁴

Some courts have attempted to alert the legislature to a problem in the statutes without advising the legislature of the court's policy preferences in repairing the statute. The Minnesota Revisor of Statutes made this point expressly when he reported to the legislature that although the Minnesota Supreme Court will readily criticize a statute, it is reluctant to offer specific suggestions for change. The Revisor's report commented: "Perhaps this is as it should be."²⁵ For example, in a 1987 worker's compensation case, the Minnesota Supreme Court wrote that the appeal procedures were a trap for the unwary and that "[i]t would seem the situation deserves some review and revision [by the legislature]."²⁶

The highest courts of New York and Illinois have also recently followed this approach. In a New York Court of Appeals decision voiding the natural parents' consent to an adoption and returning the adopted child to the natural parents, Judge Judith Kaye, writing for the court, advised the legislature that it should take another look at the adoption laws. Judge Kaye wrote:

[W]e note that the [legislative] reforms . . . were motivated by the Legislature's concern that controversy and uncertainty overhung adoptions [W]e believe it would be highly desirable for the Legislature to examine [the statute] in the light of 13 years' experience, for it appears that the well-founded concerns that engendered the law are not yet dispelled.²⁷

An Illinois Supreme Court opinion suggested that the legislature consider the conflict created by structured settlements in personal injury cases and the Hospital Lien Act.²⁸

In these cases, the courts were merely alerting the legislature to a problem. Judges are divided on the propriety of sug-

24. Ginsburg & Huber, *supra* note 9, at 1417.

25. MINNESOTA REVISOR OF STATUTES, REPORT CONCERNING CERTAIN OPINIONS OF THE SUPREME COURT 2 (Nov. 1988) [hereinafter MINNESOTA REPORT].

26. *Bjerga v. Maslin Transp. & Carriers Ins. Co.*, 400 N.W.2d 99, 100 (Minn. 1987). The Minnesota Revisor of Statutes called the opinion to the legislature's attention. See MINNESOTA REPORT, *supra* note 25, at 6.

27. *In re Sarah K.*, 66 N.Y. 2d 223, 242, 487 N.E.2d 241, 251 (1985).

28. *In re Estate of Cooper*, 125 Ill. 2d 363, 370, 532 N.E.2d 236, 239 (1988). The Illinois Legislative Reference Bureau included this case in its Annual Review of Reported Decisions, which is required by statute. See ILLINOIS LEGISLATIVE REFERENCE BUREAU, ANNUAL REVIEW OF THE REPORTED DECISIONS OF THE FEDERAL COURTS, THE ILLINOIS SUPREME COURT AND ILLINOIS APPEALS COURT vi, 72 (1989).

gesting policy to the legislature. In a product liability case, Justice Coffey, writing for himself and two members of the Wisconsin Supreme Court, recommended that the legislature consider making the statute of limitations run from the date the defective product was manufactured rather than from the date of injury.²⁹ Four justices disassociated themselves from this suggestion saying:

It is presumptuous for this court, which does not and cannot have the benefit of public hearings and constituent expression of opinion, to "commend" *sua sponte* any specific change in the applicable period of limitations. It is enough for us to note that the determination of a period of limitations in respect to products liability presents a substantial problem, worthy of the legislature's consideration.³⁰

Although opinions frequently call for legislative action, judges' influence on statutory change is largely unmeasured.³¹ Even if the legislature responds, judges are often unaware of the legislation.³² While judges might learn about legislative reaction to court decisions on controversial issues, they know little about legislative reaction to opinions in low-profile cases that propose changes in or ask for assistance interpreting statutes.

As calls increase for institutional mechanisms to mediate between the legislature and the courts, the effectiveness of judicial attempts to improve the quality of statutes through dialogue in written opinions has to be carefully studied. Opinions

29. *Kozlowski v. John E. Smith's Sons Co.*, 87 Wis. 2d 882, 903-04, 275 N.W.2d 915, 924-25 (1979).

30. *Id.* at 904-05, 275 N.W.2d at 927 (Heffernan, Day, Abrahamson & Callow, JJ., concurring).

31. For discussion of congressional responses to United States Supreme Court opinions interpreting federal statutes, see W. MURPHY, *CONGRESS AND THE COURT* (1962); C. PRITCHETT, *CONGRESS VERSUS THE SUPREME COURT, 1957-60* (1961); Hellman, *Case Selection in the Burger Court: A Preliminary Inquiry*, 60 NOTRE DAME L. REV. 947 (1985); Henschen, *supra* note 16; Stumpf, *Congressional Response to Supreme Court Rulings: The Interaction of Law and Politics*, 14 J. PUB. L. 377 (1965); Note, *Congressional Reversal of Supreme Court Decisions: 1945-57*, 71 HARV. L. REV. 1324 (1958). There appears to be little congressional response to court of appeals decisions.

32. The communications gap makes it difficult for the judiciary to keep abreast of statutory changes. N.Y. Times, Oct. 10, 1987, at A31, col. 3. Congressional staff believe it would be useful if courts could be informed of the actions taken, if any, by Congress in response to judicial decisions interpreting statutes. R. Katzmann, *supra* note 11, at 325. Former Judge Kenneth W. Starr took a different view: "It is nice to know, but from our standpoint, we do not need to know what specific action Congress takes on a particular case once that case leaves our court." K. Starr, Remarks at the Proceedings of the Forty-ninth Judicial Conference of the District of Columbia Circuit (May 22-24, 1988), *reprinted in* 124 F.R.D. 241, 334 (1989).

may be ineffective in stimulating legislative change partly because few judges understand the legislative process or the mechanisms the legislature uses to monitor judicial opinions.³³ Judges and scholars have generally ignored legislative reaction to judicial decisions in unemotional, low-profile cases. If the courts attempt to improve the legislative product by engaging the legislature in a discourse, courts must identify and communicate with the persons and entities who are capable of stimulating legislative response to court opinions interpreting statutes. Like a good dancer, the judge must know his or her partner and the dance floor.

II. LEGISLATIVE DISCOURSE WITH THE COURTS REGARDING STATUTES

We now shift our vantage point from the courts to the legislature. How does the legislature view the courts and judicial opinions interpreting statutes? Do legislators even read judicial opinions? Are there audiences or forums a court should attempt to address through a judicial opinion?

In their effort to modernize, clarify, or correct the common law and statutes, many state legislatures have developed one or more institutional mechanisms to take a second look at statutes in light of court decisions. Unfortunately, even as judges and scholars call for congressional oversight committees, the states' experiences with similar institutions remain unexplored.

The majority of the states have mechanisms — some formally established by statute, many informal — for monitoring judicial opinions interpreting statutes. In several states, there are a number of oversight mechanisms in place serving different constituencies both within and outside state government. The names of the entities and their powers differ from state to state. As one might expect, state efforts are simultaneously similar and different. The mechanisms reflect the political and legal cultures in which they exist.

We shall set forth some of the major actors and structural

33. For example, Judge Ginsburg reports that, although created 12 years earlier, she first became aware of the House of Representatives Office of Law Revision Counsel while working on her lecture on legislative oversight. Ginsburg, *supra* note 10, at 1015. Justice Abrahamson became aware of the Wisconsin Law Revision Committee, the legislative oversight mechanism in Wisconsin, several years after it was established in 1979. She had not examined any of its reports on Wisconsin cases before working on this lecture.

components that exist in the states to help the legislature review statutes in light of judicial decisions.

A. EXECUTIVE OVERSIGHT MECHANISMS ASSISTING THE LEGISLATURE

In many states the office of the attorney general monitors judicial opinions to some extent to determine the need for legislative reform. This role takes several forms, depending in large part on the statutory provisions for oversight, the litigation responsibility of the office and the interests of the individual attorney general.

In a few states a statute directs the attorney general to examine judicial decisions to determine their effect on state statutes and to suggest legislative action.³⁴ In Oklahoma the attorney general is responsible for reporting to the legislature on judicial decisions that declare statutes unconstitutional.³⁵ In South Carolina the attorney general is responsible for reporting on the proper and efficient administration of criminal law, which includes monitoring court decisions.³⁶

The North Carolina statutes give the attorney general a significant role in legislative revision. The Division of Legislative Drafting and Codification of Statutes is part of North Carolina's Department of Justice. At the request of the governor, state officials, and members of the General Assembly, the Division prepares bills for presentation to the legislature.³⁷ The Di-

34. See, e.g., ALASKA STAT. § 44.23.020(b)(6)(B) (1989) (attorney general shall "make a report to the legislature, through the governor, at each regular legislative session . . . on needed legislation or amendments to existing law"); FLA. STAT. ANN. § 16.05 (West 1990) (attorney general shall make a written report to the governor before the convening of the legislature "as to the effect and operation of the acts of the last previous session, the decisions of the courts thereon . . . with such suggestions as in his opinion the public interest may demand . . ."). In contrast, several attorneys general wrote that the office plays little or no role in suggesting legislation to address court decisions. Many attorneys general also issue opinions to state officers and agencies interpreting statutes. Some states' legislative oversight mechanisms examine not only judicial decisions, but opinions of the attorney general.

35. OKLA. STAT. ANN. tit. 74, § 20a (West 1988). Although many of our respondents discuss the legislature's mechanisms for dealing with judicial decisions declaring a statute unconstitutional, we have not included this subject in this article. The attorney general's office, the legislative support agencies, and the legislature itself appear to have more mechanisms to handle cases declaring statutes unconstitutional than to handle decisions interpreting or criticizing statutes.

36. S.C. CODE ANN. § 1-7-140 (Law. Co-op 1986).

37. N.C. GEN. STAT. § 114-9(1) (1987).

vision maintains a system of continuous statutory research and correction to keep the statutes "as clear, as concise and as complete as possible" and to reduce to a minimum "the amount of construction and interpretation of the statutes required of the courts."³⁸

In most states the attorney general communicates informally — without a statutory mandate — with the legislative and executive branches about court decisions. Many attorneys general monitor court opinions as part of their criminal case load or as part of their work advising and representing state agencies in litigation.³⁹ The legal work of the office furnishes a good, practical basis for evaluating and recommending statutory changes. In a substantial number of states, state agencies, whether represented by the attorney general or by house counsel, monitor judicial decisions affecting the agency's work and communicate with the legislature directly or through the attorney general.⁴⁰

B. LEGISLATIVE STAFF OVERSIGHT MECHANISMS

Several state legislatures have established formal mechanisms — revisors of statutes, staff counsel, and legislative drafting and research agencies — to inform their committees of judicial opinions interpreting statutes, and many state legislatures have the benefit of informal processes.⁴¹

A revisor of statutes is legislatively created in many states and is typically mandated to study, compare, and analyze the statutes and report to each regular session of the legislature,

38. *Id.* Letter from Floyd M. Lewis, Ass't Attorney General, Revisor of Statutes, North Carolina Dep't of Justice, to the Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (May 16, 1990) (on file with authors) [hereinafter Lewis Letter]. According to Lewis, there is no formal means of monitoring court decisions; court decisions are brought to the attention of the Department's Legislative Liaison and to attorneys who represent specific subject matter areas in Department. Usually legislative changes in response to court decisions occur only in areas of capital punishment, criminal evidence, and patient abuse. *Id.*

39. Connecticut, Delaware, Georgia, Hawaii, Idaho, Indiana, Kentucky, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, and Wyoming.

40. Colorado, Florida, Georgia, Hawaii, Maine, Mississippi, Montana, Nebraska, New Hampshire, New York, Oklahoma, Pennsylvania, Texas, and Virginia.

41. States reporting no formal case screening and reporting oversight process include Arizona, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Pennsylvania, Utah, Vermont, Virginia, and Wyoming.

calling particular attention to errors, duplications, and conflicts in the statutes, along with recommendations for corrections.⁴² The roles of many revisors of statutes and legislative support agencies are limited to clarification of the statutes and improvement of the technical quality of statutes without changing the substance of the statute. This technical role includes a minimum of oversight of judicial opinions. Technical corrections not involving substantive modifications are ordinarily incorporated in a single correction bill, which the legislature usually then adopts.⁴³

On the other hand, some statutes require revisors of statutes, legislative support agencies, legislative counsels, legislative councils, legislative reference bureaus, and statutory revision committees to report to the legislature regarding statutes that they believe have been declared unconstitutional or otherwise affected by judicial decisions. These reports take a variety of forms.⁴⁴

In Montana, the Code Commissioner must submit a report

42. See, e.g., COLO. REV. STAT. §§ 2-3-703, 2-5-104 (1980); HAW. REV. STAT. § 23G-2D (1985); KAN. STAT. ANN. § 46-1211 (1986); MINN. STAT. § 3C.04(4) (1990); MISS. CODE ANN. § 7-5-11 (1972); NEV. REV. STAT. ANN. § 220.080 (Michie 1986).

In North Carolina the revisor of the statutes is a member of the Attorney General's staff. N.C. GEN. STAT. § 114-9.1 (1987). See Lewis Letter, *supra* note 38. Although the Nebraska statute requires the revisor to report to the legislative council (composed of all the members of the legislature) about "defects in the Constitution and laws of Nebraska," NEB. REV. STAT. § 49-702 (1988), it has not been the revisor's practice to cover court decisions construing statutes. Letter from Joanne M. Pepperl, Nebraska Revisor of Statutes, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (May 11, 1990) (on file with authors) [hereinafter Pepperl Letter].

43. Some legislative support agencies reported that they discover the cases when they prepare annotations to the statutes, and that one means of presenting the cases to the legislature is in the preparation of the annotations.

44. For example, the Code Reviser of the State of Washington reports to the "Statute Law Committee," WASH. REV. CODE ANN. §§ 1.08.001, 1.08.025 (1988), with recommendations for bills to correct statutes. The Committee approves or rejects each recommendation. After approval, the correction bills are submitted to the legislature for enactment; the majority are enacted. The Arkansas Code Revision Commission is required to make studies of the statutes and judicial decisions to identify deficiencies "which contribute to indefiniteness of interpretation of the purpose of those laws or the legislative intent thereof." ARK. STAT. ANN. § 1-2-303(c)(1)(D) (1987). The Commission is rather new at this task, but in 1989 it proposed § 11, Act 821 of 1989, which rewrote ARK. STAT. ANN. § 27-14-806(a) (1987) on recording liens in light of *Union Nat'l Bank v. Hooper*, 295 Ark. 83, 746 S.W. 2d 550 (1988). Letter from Vincent C. Henderson II, Executive Director, Arkansas Code Revision Commission, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (May 22, 1990) (on file with authors).

to the legislative council indicating the Commissioner's recommendations for legislation to eliminate archaic or outdated laws, eliminate redundant wording of laws, clarify existing laws and correct errors and inconsistencies within the laws.⁴⁵ The report cites judicial decisions and recommends a solution. The legislative council then distributes the report to all legislators.⁴⁶ Any legislator can call on the Commissioner to have any item in the report drafted in the form of a bill;⁴⁷ individual legislators request most items in the report as bills.⁴⁸

The Illinois Legislative Reference Bureau reviews all reported decisions of federal courts and the Illinois appellate courts that affect the interpretation of statutes; it reports the results of its research to the General Assembly by October 1 of each year. The report recommends any necessary technical corrections in the laws to comply with the decisions and "may point out where substantive issues arise, without making any judgment thereon."⁴⁹ The last report, dated December 21, 1989, is a 137-page description of cases by subject matter containing no suggestions for statutory revision.

The Minnesota Revisor of Statutes makes a "report to the legislature every other year of any statutory changes recommended or discussed or statutory deficiencies noted in any opinion of the supreme court of Minnesota."⁵⁰ In November 1988, the Minnesota Revisor reported on fewer than ten cases. He recently stopped making recommendations to the legislature,

45. MONT. CODE ANN. § 1-11-204(3) (1989).

46. The report for the 1989 legislative session listed 15 proposals for legislative action.

47. The introductory paragraph of the report submitted to legislators for the 1989 legislative session states:

One of the duties of the Code Commissioner is to prepare a report indicating recommendations for legislation. The Code Commissioner Bill has traditionally contained only nonsubstantive material necessary to correct errors and inconsistencies in the Montana Code Annotated. I have determined that the following items require the determination of substantive questions, and are therefore not proper for inclusion in the Code Commissioner Bill. Traditionally this list has been given to the Judiciary Committees after the session has convened; however due to the time constraints involved, that procedure did not work well. The following items are recommended for legislative action. Please contact me . . . if you would like to submit a bill drafting request on any item.

Report on suggested legislation prepared by Gregory J. Petesch, Montana Code Commissioner, sent to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (May 1, 1990) (on file with authors).

48. *Id.*

49. ILL. REV. STAT. ch. 63, ¶ 29.5 (1985).

50. MINN. STAT. § 3C.04(3) (1990).

concluding that the "legislature has shown a reluctance to accept the suggestions for change accompanying the [revisor's] report for the last two reporting periods. The Legislature appears to have rightfully believed that, in almost every instance, more than one possible solution to a statutory problem is feasible. It is mainly for these reasons that no recommendations for legislation accompany this report."⁵¹

A number of states have developed more formal inter-agency systems for legislative oversight that directly involve legislators in the process of statutory review in light of judicial decisions. For example, Alaska's Legislative Council, a permanent interim committee and service agency of the legislature composed solely of legislators, is a well-established mechanism for monitoring state court decisions affecting the Alaska statutes.⁵² The Council annually examines published opinions of state and federal courts and submits "a comprehensive report of annual examination with recommendations" to each member of the legislature at the start of the regular session.⁵³ The report analyzes cases to determine whether the courts properly implemented the legislative purposes of the statute, expressed dissatisfaction with state statutes, or indicated unclear or ambiguous statutes.⁵⁴

In one case, the Alaska Supreme Court concluded that reckless driving and negligent driving were lesser-included offenses of driving while intoxicated. The Alaska Legislative Council recommended that the legislature review the statute because the court's opinion was long and very technical, raising complex policy questions that courts face in frequently occurring prosecutions.⁵⁵

After the Alaska Court of Appeals determined penalties for violations of the fishery laws by reading the fishery laws in conjunction with the statutes imposing fines for misdemeanors, the Legislative Council reported to the legislators that "the court [of appeals] engaged in measurable rewriting of the stat-

51. MINNESOTA REPORT, *supra* note 25, at 2.

52. ALASKA STAT. §§ 24.20.010, 24.20.020 (1988). The central legal, administrative and research staff of the legislature is organized under the legislative council. Letter from David R. Dierdorff, Revisor of Statutes, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (Apr. 28, 1990) (on file with authors) [hereinafter Dierdorff Letter].

53. ALASKA STAT. § 24.20.065(b) (1985).

54. ALASKA STAT. § 24.20.065(a) (1985).

55. ALASKA LEGISLATIVE AFFAIRS AGENCY, A REPORT TO THE SIXTEENTH STATE LEGISLATURE EXAMINING COURT DECISIONS AND OPINIONS OF THE ATTORNEY GENERAL CONSTRUING ALASKA STATUTES 30-32 (Nov. 1989).

ute to achieve the result achieved. While the result is probably consistent with apparent legislative intent, [legislative] review is recommended."⁵⁶

If the legislative response will involve a significant policy decision, an Alaskan legislator or committee will introduce a bill in response to the court decision. If the response will involve merely a technical correction of a statute, the technical response or clarification is included in the annual revisor's bill, which the Revisor of Statutes prepares and which the legislative council introduces.⁵⁷

A number of other states also have formal systems for involving legislators in the process of statutory revision in response to judicial decisions. In 1979, Wisconsin created its Law Revision Committee — a statutory committee of the Legislative Council, composed solely of legislators — to consider judicial decisions referred by the Revisor of Statutes.⁵⁸ The Revisor of Statutes informs the committee of those reported decisions of any federal district court or any state or federal appellate court in which Wisconsin statutes or session laws "are stated to be in conflict, ambiguous, anachronistic, unconstitutional or otherwise in need of revision."⁵⁹ After the Revisor notifies the Committee of the decisions, the staff of the Legislative Council provides the Committee with a discussion paper analyzing each decision and the statute involved.⁶⁰ The discussion paper also recommends several alternative courses of action in regard to each decision, such as that the Committee take no action and allow the court interpretation to stand; that the Committee propose amending the statute consistent with the court decision; that the Committee propose amending the statute to overturn the court decision; that the Committee refer the case to the standing committee with jurisdiction over the subject matter so that the standing committee can decide what to do; or that the Committee refer the case to the Judicial Council or

56. *Id.* at 39-40.

57. Dierdorff Letter, *supra* note 52. The Revisor is a member of the legal services staff of the legislative council. *Id.*

58. WIS. STAT. § 13.83(1)(c) 1. (1987-88).

59. WIS. STAT. § 13.93(2)(d) (1987-88).

60. The 1989 paper discussed 15 decisions of the Wisconsin Supreme Court, Wisconsin Court of Appeals, and the federal Court of Appeals of the Seventh Circuit. The paper was divided into five subject matters: criminal law, financial institutions and commerce, procedural and civil law, and general government and government employees. WISCONSIN LEGISLATIVE COUNCIL, LAW REVISION COMMITTEE: CASE AND OPINION REVIEW, DISCUSSION PAPER 89-1 (Mar. 29, 1989).

some other entity for its study and comment.⁶¹ When the Wisconsin Law Revision Committee concludes that the court interpretation appears to be consistent with the legislative intent, it generally recommends that no action be taken. If the Committee concludes that the interpretation appears controversial or inconsistent with legislative intent, it may refer the matter to a standing legislative committee. The Committee itself may also develop and introduce legislation directly into the legislature.⁶² The Wisconsin Law Revision Committee ordinarily proposes a bill only when the matter is technical and noncontroversial. The staff advises the Committee on its successes and failures on the bills the Committee introduces in the legislative session; the staff does not report on the matters the Committee refers to the standing committees or other entities.

A statute requires the Oregon Law Improvement Committee — composed of legislators, law school academics, the cochairpersons of the Legislative Counsel Committee, and designees of the State Bar and the Attorney General — to conduct a continuous, substantive law revision program.⁶³ Staff attorneys of the Legislative Counsel Committee assist the Law Improvement Committee by examining the published opinions of the Oregon Supreme Court, Court of Appeals, and Tax Court to discover and report to the Law Improvement Committee “any statutory defects, anachronisms or omissions mentioned therein.”⁶⁴ The staff attorneys prepare case analyses for the Committee’s review⁶⁵ and, at the request of the Law Improvement Committee, legislative proposals.⁶⁶ The staff attorneys also examine suggestions and changes proposed by interested persons and bring such suggestions and proposals to the attention of the Law Improvement Committee.⁶⁷

Legislation directs the South Dakota Legislative Research Council, composed solely of legislators, to make an annual report to the legislature on state and federal court decisions which have sought to interpret the legislative intent of various South

61. WISCONSIN LEGISLATIVE COUNCIL, LAW REVISION COMMITTEE: CASE AND OPINION REVIEW, DISCUSSION PAPER 85-2, at 6-8 (June 6, 1985).

62. WIS. STAT. § 13.83 (1)(c)5. (1987-88).

63. OR. REV. STAT. § 173.315 (1985).

64. OR. REV. STAT. § 173.335(2)(b) (1985).

65. Letter from Thomas G. Clifford, Legislative Counsel, Oregon Legislative Counsel Committee, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (May 10, 1990) (on file with authors) [hereinafter Clifford Letter].

66. OR. REV. STAT. § 173.335(2)(a) (1985).

67. OR. REV. STAT. § 173.335(2)(c) (1985).

Dakota statutes. The report may include recommendations for corrective action if it is determined that the opinion of the court may be adverse to what was intended by the legislature or if the court's opinion has identified an appropriate area for legislative action.⁶⁸

The Executive Board of the Council has the power to review state and federal court opinions and make recommendations, and it has assigned this task to its Supreme Court Opinion Review Subcommittee.⁶⁹ The Staff Attorney of the Legislative Research Council analyzes the decisions for the Supreme Court Opinion Review Subcommittee, which meets to discuss the opinions and request draft bills. The Staff Attorney describes the process as "relatively informal."⁷⁰

Although several states have formal mechanisms for legislative oversight, many states do not. Several correspondents advised us that their states were exploring the creation of formal mechanisms for monitoring state court decisions.⁷¹ In states lacking formal processes, legislative support agencies frequently serve as *informal* clearinghouses for the distribution of judicial opinions to legislators' legislative committees, and legislative staff interested in a particular subject area.⁷² Maine pro-

68. S.D. CODIFIED LAWS ANN. § 2-9-1.1 (Supp. 1990).

69. S.D. CODIFIED LAWS ANN. § 2-9-4(8) (1985). Letter from Doug Decker, Staff Attorney, South Dakota Legislative Research Council, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (May 3, 1990) (on file with authors) [hereinafter Decker Letter]; Memorandum from Doug Decker, Staff Attorney, South Dakota Legislative Research Council, to Members of the Supreme Court Opinion Review Subcommittee (Mar. 10, 1989) (on file with authors).

70. See *supra* note 69.

71. In May 1990, Hawaii and Iowa were looking into establishing a mechanism for monitoring state court decisions. Letter from Henry Awana, Assistant Director for Revision of Statutes, Hawaii Legislative Reference Bureau, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (Apr. 30, 1990) (on file with authors); Letter from Paulee Lipsman, Director, Democratic Research Staff, Iowa House of Representatives, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (May 2, 1990) (on file with authors).

The Maryland Revisor of Statutes wrote that the Department of Legislative Reference "has been interested in undertaking a closer review of court decisions that affect statutes . . ." Letter from William G. Somerville, Revisor of Statutes, Maryland Department of Legislative Reference, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (June 11, 1990) (on file with authors). Janet Ancel, Vermont Legislative Counsel of the Legislative Council, wrote that she sees a need for this kind of oversight, but her office does not have adequate staff to carry it out and no sufficient interest exists among legislators. Letter from Janet Ancel to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (June 1, 1990) (on file with authors).

72. The Colorado Office of Legislative Legal Services receives decisions of the Colorado Supreme Court and the Court of Appeals on a weekly basis. The

vides an example. Legislative staff there often bring court

staff reads the opinions and makes copies available to members of the General Assembly, but the office does not have a regularized procedure for informing the General Assembly of court decisions. Letter from Charles W. Pike, Revisor of Statutes, Colorado Committee on Legal Services, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (May 14, 1990) (on file with authors). The Assistant to the President of the Florida State Senate reads slip opinions and brings them to the attention of legislators. Telephone conversation with D. Stephen Kahn, Assistant to the President of the Florida State Senate (May 3, 1990).

The Office of Legislative Counsel of the Georgia Legislative Services Committee reviews advance sheets of court decisions and occasionally will bring suggested changes to the attention of legislators in particularly compelling circumstances, but this action is not pursuant to a formally established program. Letter from Sewell R. Brumby, Legislative Counsel, Office of Georgia Legislative Counsel, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (May 2, 1990) (on file with authors); Letter from James W. Mullins, Research Office, Georgia House of Representatives, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (May 30, 1990) (on file with authors). The legislative attorneys of the Indiana Legislative Services Agency keep abreast of judicial developments in their respective subject areas, but cases are not routinely brought to the attention of legislators. Letter from Arden R. Chilcote, Executive Director, Indiana Legislative Services Agency, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (May 1, 1990) (on file with authors).

Staff of both the Kansas Legislative Research Department and the Revisor's Office often inform legislators of federal and state court decisions that affect state laws. Letter from Richard W. Ryan, Director, Kansas Legislative Research Department, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (Apr. 17, 1990) (on file with authors).

The Kentucky Legislative Research Commission regularly reviews judicial decisions interpreting statutes and informally reports the decisions to committee chairs. Telephone conversation with John M. Spangler, Revisor of Statutes, Kentucky Legislative Research Commission (Apr. 27, 1990).

As a matter of office practice the Nebraska Revisor of Statutes circulates copies of all Nebraska Supreme Court cases to all drafters in the office. Copies of the case are also circulated to the committee counsels of the various legislative committees. Pepperl Letter, *supra* note 42.

The Nevada Legislative Counsel tracks state and federal court decisions without difficulty because there are few decisions, local attorneys often call the office to point out the cases, and the office prepares annotations for the statutes. "If the change required is substantive, we will bring the issue to the attention of one of the standing committees on judiciary, so that the committee can request a bill to address the problem." Letter from Lorne J. Malkiewich, Legislative Counsel, Nevada Legislative Counsel Bureau, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (May 17, 1990) (on file with authors).

The Revisor of Statutes (part of the North Carolina Department of Justice) identifies and reports court decisions to the North Carolina General Statutes Commission for review for legislative proposals. Lewis Letter, *supra* note 38.

The North Dakota Legislative Council staff reviews court decisions and calls them to the attention of the interim Judiciary Committee. Individuals and organizations communicate their concerns about statutes to the Council

decisions to the attention of legislative committees, individual

for referral to the Judiciary Committee. Letter from John D. Olsrud, North Dakota Legislative Council, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (May 2, 1990) (on file with authors).

The legal staffs of the Oklahoma House and Senate monitor decisions and notify the chair of the standing committee having jurisdiction over the subject matter involved. Letter from Vicki Miles-LaGrange, Chair, Senate Judiciary Committee, Oklahoma State Senate, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (May 17, 1990) (on file with authors) [hereinafter Miles-LaGrange Letter].

The Oregon Legislative Counsel's Office asks the legal staff of the appellate courts to notify it of cases discussing lack of clarity, confusion, etc. "Sometimes they do." Memorandum from Thomas G. Clifford, Oregon Legislative Counsel's Office, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (undated, received May 1990) (on file with authors).

Pennsylvania legislative personnel keep informed through advance sheets. Letter from Kathleen Eakin, Counsel, Pennsylvania Senate Judiciary Committee, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (May 7, 1990) (on file with authors) [hereinafter Eakin Letter]. Each of the four Pennsylvania legislative caucuses employs legal counsel; one of their functions is to monitor court decisions that impact on Pennsylvania's statutes. Letter from Clancy Myer, Parliamentarian, Pennsylvania House of Representatives, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (May 2, 1990) (on file with authors).

The Utah Office of Legislative Research and General Counsel is responsible by statute for making "recommendations for the revision, clarification, classification" of the statutes and "to develop proposed legislation to effectuate the recommendations." The process of monitoring court cases is informal. When staff attorneys become aware of cases, they bring them to legislators' attention and prepare legislation based on legislators' responses. Letter from M. Gay Taylor, Utah Office of Legislative Research and General Counsel, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (May 3, 1990) (on file with authors).

The Virginia Division of Legislative Services is not directly responsible for monitoring state court decisions and recommending statutory revision but frequently performs this function on an informal basis, "either in the course of advising standing committee chairmen of significant issues in advance of the legislative session or while engaged in research activities for a legislative study committee or an individual legislator." Letter from Mary P. Devine, Staff Attorney, Virginia Division of Legislative Services, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (June 29, 1990) (on file with authors).

In Washington, the role of monitoring court decisions that may require modification of statutory provisions has fallen primarily to the staffs of the standing legislative committees. Letter from Roderick N. McAulay, Counsel, Washington State Senate Law and Justice Committee, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (May 8, 1990) (on file with authors).

The staff attorney of the West Virginia Legislative Services informally reviews cases and may notify the chairs of standing legislative committees or may open a bill request file to correct or clarify statute. Letter from Joanna I. Tabit, West Virginia Ass't Attorney General, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (June 8, 1990) (on file with authors);

legislators, and the chairs of the Joint Standing Committee on the Judiciary. Individual legislators may then introduce bills to amend the statutes.⁷³

C. LAW REVISION COMMISSIONS AND LAW INSTITUTES ASSISTING THE LEGISLATURE

Several states have established permanent entities — generally called law revision commissions or law institutes — charged with studying and proposing revisions of the statutes. Law revision commissions have their roots in the codification movement at the turn of the century. In their modern form, they respond to Judge (later Justice) Cardozo's⁷⁴ and Dean Pound's call for a ministry of justice.⁷⁵ The New York Law Revision Commission, formed in 1934, proclaims itself to be the oldest continuous agency in the world devoted to law reform through legislation.⁷⁶

Telephone conversation with Randy Elkins of West Virginia Legislative Services (May 11, 1990).

73. Letter from Cheryl Ring, Principal Analyst, Maine Committee on Audit and Program Review, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (May 2, 1990) (on file with authors); Letter from Julie S. Jones, Principal Analyst, Maine Committee on Housing and Economic Development, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (May 1, 1990) (on file with authors).

74. Cardozo, *supra* note 4.

75. Pound, *Anachronisms*, *supra* note 7. The Public Law Research Institute at Hastings College of Law prepares memoranda on topics submitted by officials in state government.

The Institute is not directed primarily towards policy analysis nor the drafting of legislation; its function is to answer the legal inquiry put to us with full professional competence. Very often these inquiries will deal with some recent Court decision and its possible effect on existing practices and doctrines. . . . The services of the Institute do not duplicate the work of the legislative analyst or legislative counsel at Sacramento. Our function, as I see it, is to focus the total resources of our library and its excellent staff together with our students' efforts in assisting California State Government. The work is excellent training for our students, and the State, I suspect, is encouraged at the rare sight of consultants themselves paying for the privilege of consulting!

Letter from Julian H. Levi, Professor of Law, University of California, Hastings College of Law, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (May 2, 1990) (on file with authors).

76. NEW YORK LAW REVISION COMMISSION REPORT FOR 1989 No. 65, at 2 (1989) [hereinafter NEW YORK REPORT]. For commentary on law revision commissions, see, e.g., Barnes, *The Law Revision Commission of Canada*, 2 DALHOUSIE L.J. 62 (1975); Bowker, *Alberta's Institute of Law Research and Reform*, 11 CAN. B.J. 341 (1968); Fins, *The Illinois Law Revision Commission*, 29 DE PAUL L. REV. 443 (1980); Friedland, *The Work of the Law Reform Commission of Canada*, 6 L.S.C.U. GAZ. 58 (1972); Gosse, *Canadian Law Reform Agen-*

The commissions are usually composed of representatives of the legislative, judicial, and executive branches of government, law schools and bar associations, and public members. Statutes generally authorize them to work in four areas: (1) examination of the common law, statutes, and current judicial decisions of the state to discover defects and anachronisms in the law and recommend needed reforms; (2) consideration of proposed changes in the law recommended by the American Law Institute, the commissioners for the promotion of uniformity of legislation in the United States, bar associations, or any other learned bodies; (3) consideration of suggestions from judges, justices, public officials, lawyers, and the general public regarding defects and anachronisms in the law; and (4) consideration of changes in the law necessary to modify or eliminate antiquated, inequitable rules of law and to bring the civil and criminal law of the state into harmony with modern conditions.⁷⁷

Law revision commissions generally engage in major revisions of specific areas of law rather than monitor individual judicial decisions. In this revision function, the commissions

cies, 1 J. CAN. B. ASSN. 1 (1970); Linde, *Law Revision in Oregon*, 20 WILLAMETTE L. REV. 211 (1984); MacDonald, *Organization for Law Reform*, 31 ALA. LAW. 33 (1970); MacDonald, *Legal Research Translated into Legislative Action*, 48 CORNELL L.Q. 401 (1963); MacDonald, *The New York Law Revision Commission: The Past and the Future*, 13 ST. LOUIS U.L.J. 258 (1968); Paul & Clapp, *Legal Research and Legal Development: The Role of a New Jersey Law Institute*, 28 RUTGERS L. REV. 1053 (1975); Selinger, *The West Virginia Law Institute: Uniting the Legal Community to Modernize State Law*, 91 W. VA. L. REV. 211 (1989); Skene, *The Nova Scotia Law Reform Advisory Commission: An Early Appraisal*, 2 DALHOUSIE L.J. 201 (1975); Smith, *The Role of the Louisiana State Law Institute in Law Improvement and Reform*, 16 LA. L. REV. 689 (1956); Steck, *California Legislation: Sources Unlimited*, 6 PAC. L.J. 537, 549-51 (1975); Zengel, *Civil Code Revision in Louisiana*, 54 TUL. L. REV. 942 (1980); Note, *A Survey of the District of Columbia Law Revision Commission*, 34 CATH. U.L. REV. 1309 (1985); Note, *The Law Revision Commission*, 3 HARV. J. ON LEGIS. 361 (1966) (bibliography on law revision commissions). For proposals for a federal law revision commission see Keefe, *Twenty-Nine Distinct Damnations of the Federal Practice — And a National Ministry of Justice*, 7 VAND. L. REV. 636 (1954).

77. See, e.g., ALA. CODE §§ 29-8-1 to -5 (1989); ALASKA STAT. § 24.20.075 (1985); CAL. CODE §§ 10300-10340 (West 1980); CONN. GEN. STAT. ANN. §§ 2-85 to -88 (West 1988); FLA. STAT. ANN. §§ 13.90-988 (West 1990); LA. REV. STAT. ANN. §§ 24:201-24:208 (West 1989); MICH. COMP. LAWS ANN. §§ 4.1401-1403 (West Supp. 1990); N.J. STAT. ANN. §§ 1:12A-8 to -9 (West Supp. 1990); N.Y. LEGIS. LAW §§ 70-72 (McKinney 1952); WASH. REV. CODE ANN. §§ 1.30.010 to .060.

In Tennessee, the Law Revision Commission's responsibilities were transferred to the Office of Legal Services for the General Assembly. TENN. CODE ANN. §§ 3-12-101 to -108 (1985 & Supp. 1990).

incidentally perform an oversight function.⁷⁸ Some law revision commissions, however, expressly undertake an oversight function by monitoring individual opinions.⁷⁹ For example, the Michigan Law Revision Commission relies on its members, the academic legal community, the general legal community, and others to keep it informed of important judicial decisions.⁸⁰ Members of the Commission have discussed changing their procedures to enable the Commission to take an even more active role in proposing legislation in response to court decisions.⁸¹

D. STATUTORILY MANDATED JUDICIAL OVERSIGHT MECHANISMS TO ASSIST THE LEGISLATURE

In a few states a statute or the constitution imposes an official oversight function on the judiciary. The courts notify the legislature formally — that is, apart from the text of the judicial decision — of inconsistencies or anachronisms in the law. A statute imposes on the Mississippi Supreme Court justices the “extra duty” of making a special study of existing laws and reporting to each regular session of the legislature those constructive suggestions they may deem necessary for the improvement of the administration of justice. The statute also imposes on the chancery and circuit court judges the “extra duty” of making a special study of existing laws relating to trial courts and reporting to the supreme court constructive suggestions for the improvement of justice, which the supreme court shall recommend to the legislature.⁸² According to the Mississippi

78. The New Jersey Law Revision Commission's project to amend the Administrative Procedure Act was suggested by the opinion in *DiMaria v. Board of Trustees of the Pub. Employees' Retirement Sys.*, 225 N.J. Super. 341, 349, 542 A.2d 498, 502 (App. Div. 1988). See NEW JERSEY LAW REVISION COMMISSION, 1989 ANNUAL REPORT 5 (Feb. 1, 1990) [hereinafter NEW JERSEY REPORT].

79. The New York Law Revision Commission appears to review appellate decisions and study their impact. See NEW YORK REPORT, *supra* note 76, at 19; see also *supra* note 26 and accompanying text (discussing study of state law on extra-judicial consent forms in adoption).

80. Michigan has no formal process for identifying court decisions that comment on Michigan laws. Letter from Gary Brian Gulliver, Director of Legal Research, Michigan Legislative Service Bureau, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (May 15, 1990) (on file with authors) [hereinafter Gulliver Letter].

81. *Id.*

82. MISS. CODE ANN. § 25-3-35 (Supp. 1990). The extra duty is tied to salary. The statute provides:

For such extra services each Justice, from and after July 1, 1989, shall receive a sum sufficient when added to the present salaries of said Justices to aggregate Seventy-seven Thousand Dollars (\$77,000.00) for the Chief Justice, Seventy-six Thousand Four Hundred Dollars

Court Administrator, the study has centered on the court's monitoring of proposed legislation with input to relevant legislative committees concerning the likely impact of particular legislation on the operation of the courts.⁸³

The Idaho Constitution provides that state district judges shall report in writing to the supreme court by July 1 each year noting "such defects or omissions in the laws as their knowledge and experience may suggest."⁸⁴ The chief justice records the observations of the trial bench and those of the supreme court in an annual written report. The chief justice's annual report is relatively brief,⁸⁵ and it "tends to focus on mechanical,

(\$76,400.00) for the Presiding Justice, and Seventy-five Thousand Eight Hundred Dollars (\$75,800.00) for Associate Justices, per annum. As each existing term expires and the above-captioned salaries become effective in due course, the extra duties and compensation provided for shall cease.

Id.

83. Letter from Amy Whitten, Counsel and Court Administrator, Mississippi Supreme Court, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (Mar. 8, 1991) (on file with authors) [hereinafter Whitten Letter]. Ms. Whitten further advised us: "[T]he Supreme Court collects information on those opinions released which contain language highlighting needs in particular areas of the law. This information is provided on request to the judiciary committees of both the Senate and the House of Representatives." *Id.*

Most supreme courts have power to promulgate rules governing pleading and practice. The power may be exclusive of the legislature or exercised concurrently with the legislature. Judicial rule making can be a form of dialogue between the two branches, a method for judicial remedying of statutes and a source of tension. *See, e.g.*, WIS. STAT. § 752.12 (1989-90). For discussions of judicial rule making and pleading and practice, see C. GRAU, JUDICIAL RULEMAKING: ADMINISTRATION, ACCESS AND ACCOUNTABILITY (1978); D. PUGH, C. KORBAGES, J. ALFINI & C. GRAU, JUDICIAL RULEMAKING: A COMPENDIUM (1984); Ashman, *Measuring the Judicial Rule-Making Power*, 59 JUDICATURE 215 (1975); Grau, *Who Rules the Courts?: The Issue of Access to the Rulemaking Process*, 62 JUDICATURE 428 (1979); Kay, *The Rule-Making Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV. 1, 28 (1975); Levin & Amsterdam, *Legislative Control over Judicial Rulemaking: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1 (1958); Sunderland, *Implementing the Rule-Making Power*, 25 N.Y.U. L. REV. 27 (1950); Note, *Exclusive Judicial Power to Regulate Appellate Practice and Procedure — People v. Cox*, 30 DE PAUL L. REV. 969 (1981); Note, *Judicial v. Legislative Power in Kentucky: A "Comity" of Errors*, 71 KY. L.J. 829 (1983); Note, *An Inevitable Clash of Power? Determining the Proper Role of the Legislature in the Administration of Justice*, 22 S.D.L. REV. 387 (1977).

84. IDAHO CONST. art. V, § 25.

85. The 1988 Report suggested changes in the following areas: juvenile sentencing statutes, penalties for juvenile alcohol and tobacco possession, interest rates on judgments under the new tort reform act; notice by mail in change of name actions; allowing temporary driving privileges to attend DWI treatment programs; clarify maximum penalty for crimes against nature; and

housekeeping measures."⁸⁶ The chief justice forwards the report to the governor, who transmits it to the legislature with his annual message.

The chief justice of the Illinois Supreme Court submits an annual report to the General Assembly, which each member of the house and the senate receives pursuant to article VI, section 17 of the Illinois Constitution. The constitution states that "[t]he Supreme Court shall provide by rule for an annual judicial conference to consider the work of the courts and to suggest improvements in the administration of justice and shall report thereon annually in writing to the General Assembly not later than January 31." The Supreme Court's Annual Report to the Illinois General Assembly included thirteen new legislative recommendations.⁸⁷ One recommendation referred to the Supreme Court's decision in *In re Estate of Longeway*,⁸⁸ a case involving the guardian's power to refuse artificial sustenance on behalf of a ward. In the opinion the court stated that certain guidelines should be followed "until [there is] legislative action directing otherwise."⁸⁹ The chief justice's report to the legislature, echoing the concerns of the court's opinion and the dissenting opinions, noted that "[t]he legislature is in a better position than are the courts to resolve the sensitive issues presented in cases of this kind, and the Court, like most other courts that have pondered these issues, 'invite[s] the legislature to address this problem.'"⁹⁰

remove conflicts concerning time limits on appeals or motions for new trial. IDAHO CHIEF JUSTICE 1988 ANNUAL REPORT (Nov. 9, 1988).

86. Letter from John J. McMahon, Chief Deputy, Idaho Attorney General, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (May 14, 1990) (on file with authors).

87. ILLINOIS SUPREME COURT 1990 ANNUAL REPORT pt. 2 (legislative recommendations) [hereinafter ILLINOIS ANNUAL REPORT].

88. 133 Ill. 2d 33, 549 N.E.2d 292 (1989).

89. *Id.* at 55, 549 N.E.2d at 302.

90. ILLINOIS ANNUAL REPORT, *supra* note 87, at 1-2 (citation omitted). The Chief Justice's Annual Report also addresses statutory issues not related to particular decisions, such as state funding of the courts. Cognizant of legislative-judicial relations, the Chief Justice explained the court's role in his cover letter as follows:

In making the suggestions contained in this and in prior reports, the Supreme Court is fully cognizant of the respective roles of the General Assembly and the courts, and does not intend to intrude upon the prerogatives of the General Assembly in determining what legislation should be enacted. It is gratifying, however, to note that the General Assembly over the years has acted to implement many of the suggestions made by the Court. I respectfully submit that the attached suggestions merit the consideration of the General Assembly.

Letter from Chief Justice Thomas J. Moran, Illinois Sup. Ct., to Hon. Michael

In addition to these formal judicial oversight mechanisms established by law, some courts and judges communicate in other ways with legislators.

E. OBSERVATIONS ABOUT OVERSIGHT MECHANISMS

Before we discuss other means of judicial-legislative communication, let us offer eight observations concerning formal and informal processes enabling legislatures to give statutes a second look after a judicial decision.

First, the net cast by a formal, legislatively created oversight agency can miss judicial opinions that may be of legislative interest. When the oversight committee has a legislative mandate, the committee may search rigidly for opinions that use language that fits its mandate. If the judicial opinion does not chant the magic words, it may be ignored. A court that wants to capture the attention of the oversight committee must be familiar with the work of the committee and target the court's concerns and comments regarding statutory interpretation to that committee.⁹¹ Thus, an opinion of the New Jersey Superior Court specifically mentioned the Law Revision Commission and recommended that the Commission consider amending the Administrative Procedure Act.⁹² The Commission examined the case and drafted proposed legislation.⁹³ In another case, the Appellate Division of the Supreme Court of New York criticized the morass of statutory provisions limiting the time in which the plaintiff may commence a wrongful death action. The court's opinion expressly called attention to the situation by naming the New York Law Revision Commission.⁹⁴ The Commission took up the issue.⁹⁵

Some courts have concluded that words in a published opinion are not sufficient to bring about needed statutory re-

J. Madigan, Speaker, Illinois House of Representatives, and Hon. Philip J. Rock, President, Illinois Senate (Jan. 26, 1990).

91. For example, the Wisconsin Revisor of Statutes did not report the *Eberhardy* decision, *supra* note 23, to the Wisconsin Law Revision Committee because the statute requires only a report on cases that comment on existing statutes. The *Eberhardy* decision called for legislative action on a topic not then covered by statute.

92. *DiMaria v. Board of Trustees of the Pub. Employees' Retirement Sys.*, 225 N.J. Super. 341, 349, 542 A.2d 498, 502 (App. Div. 1988).

93. NEW JERSEY REPORT, *supra* note 78.

94. *Melendez v. Manhattan and Bronx Surface Transit Operating Auth.*, 137 A.D.2d 390, 395, 529 N.Y.S.2d 95, 100 (App. Div. 1988).

95. NEW YORK REPORT, *supra* note 76, at 6-9.

form, because legislators typically do not read advance sheets.⁹⁶ This consideration led the Louisiana Supreme Court to include in one opinion an instruction to the clerk of the court "to send a copy of this opinion to each law reform body."⁹⁷

At the federal level, the Governance Institute and the United States Court of Appeals for the District of Columbia Circuit are seeking to bridge the gap between the published opinion and needed statutory reform. They selected fifteen cases involving technical statutory gaps to attempt to determine how Congress examines judicial decisions identifying problems in legislation.⁹⁸ They found that Congress was not likely to clarify the gaps raised in these cases because it was unaware that the problems existed; specifically, in twelve of the fifteen cases the responsible congressional committee did not know of the court decisions.⁹⁹ Their goal, therefore, is to create a low visibility mechanism to transmit opinions or judicial suggestions directly to relevant congressional committees.¹⁰⁰

Second, judges, legislators, and lawyers generally are not familiar with the legislative oversight mechanisms in their states. Perhaps this is because these mechanisms are relatively new and their reports are not circulated widely.¹⁰¹ On the

96. Judge Mikva has noted that "[w]hile it is true . . . that a majority of the members of Congress are lawyers, they have not kept up-to-date on recent legal developments. In fact, most Supreme Court opinions never come to the attention of Congress." Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C.L. REV. 587, 609 (1983) (citations omitted). In the same vein, Judge Mikva has written that "[m]embers of Congress do not even closely follow cases directly involving or interpreting statutes that they have sponsored or in which they have an interest." Mikva, *Reading and Writing Statutes*, 48 U. PITT. L. REV. 627, 630 (1987).

97. *In re J.M.P.*, 528 So. 2d 1002, 1017 (La. 1988). The court criticized a private adoption statute and recommended "to each judicial and legislative reform body that this problem be addressed and that remedial legislation and court rule changes be proposed as soon as possible." *Id.*

98. R. Katzmann, *supra* note 11, at 323.

99. *Id.*

100. Prepared statement of Robert A. Katzmann, President, The Governance Institute & Visiting Fellow, The Brookings Institution, to be given before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the House Committee on the Judiciary, 6-8 (Apr. 19, 1990) (on file with authors); R. Katzmann, *supra* note 11, at 322-26. Concern was expressed at the D.C. Judicial Conference whether federal judges across the country would cooperate in sending their opinions interpreting statutes to a central office. "Gathering the information in the first instance is perhaps one of the most important tasks." See F. Coffin, *supra* note 10, at 321.

101. For example, the opinions of the Wisconsin appellate courts began mentioning matters to the Wisconsin Law Revision Committee relatively recently and then infrequently.

other hand, the oversight committees may be relatively unknown because legislators themselves, as well as legislative observers, do not view the committees as important in the legislative process.

Third, determining to what extent the oversight entities succeed in getting the legislature to act is difficult. Law revision commissions that undertake major statutory reforms generally track their success rates in the legislature. In 1989, the California Law Revision Commission reported that the legislature accepted six of the seven bills introduced to implement commission recommendations.¹⁰² Other formal and informal legislative oversight mechanisms dealing with legislative responses to isolated court decisions generally do not keep such records.¹⁰³

102. CALIFORNIA LAW REVISION COMMISSION 1989 ANNUAL REPORT 187 (1989).

103. We asked our correspondents to furnish information about their experiences, specific cases or legislation, rates of success and any observations they had concerning legislative responses to court decisions that construe statutes. The mechanisms are perceived as having varying degrees of influence. See also *supra* note 108 (other responses).

Connecticut

"The Attorney General's Office has been generally successful in obtaining . . . clarifying amendments." Letter from Clarine Nardi Riddle, Conn. Attorney General, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (May 23, 1990) (on file with authors) [hereinafter Riddle Letter].

Minnesota

"There isn't much in the way of legislation coming out of the report [of the Revisor of Statutes to the Minnesota legislature]. I think that is because most legislators feel the courts have been correct and no change in a statute to overcome the decision is required." Letter from Steven C. Cross, Minnesota Revisor of Statutes, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (May 4, 1990) (on file with authors).

Mississippi

"Although there is no official method to ensure appropriate action, it has been my experience that, when necessary, legislative reaction to court decisions affecting our statutes has never been wanting." Letter from T.C. Ward, Director, Mississippi Senate Legislative Services, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (May 1, 1990) (on file with authors).

Nevada

"Our informal system seems to work very effectively. It is my opinion that our informal system remains effective because although we are one of the fastest growing states, Nevada remains one of the smallest with a total population of slightly in excess of one million residents." Letter from Brian McKay, Nevada Attorney General, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (June 11, 1990) (on file with authors).

North Carolina

"It has been my experience as Revisor of Statutes that legislative propos-

Fourth, the success of legislative oversight committees in acting on suggestions in judicial opinions depends on the membership of the committee. Legislative oversight entities that have key legislative leaders as members or that refer legislative proposals to committees on which members of the oversight committee sit probably have a better chance of getting their legislation adopted.¹⁰⁴

als recommended by the General Statutes Commission pursuant to court decisions have been generally successful in the legislative process." Lewis Letter, *supra* note 38.

Oregon

Of course, the legislature does not always adopt legislation proposed by the Law Improvement Committee or by our office. Overall, however, I believe that both the committee and the Department of Justice have a reasonable rate of success with law reform proposals. Court decisions suggesting a need for statutory change certainly are not ignored, and the problems with statutes highlighted by those decisions frequently are corrected.

Letter from Donald C. Arnold, Chief Counsel, General Counsel Division, Oregon Department of Justice, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (May 16, 1990) (on file with authors).

Virginia

In summary, there is no centralized mechanism established to review state court decisions and consider the necessity for legislative changes as a result of those decisions. . . . There are no plans for any changes in this system. The people who are most directly affected by court decisions are able to evaluate the necessity for a legislative response and they have the opportunity to make their recommendations to the General Assembly. In this sense, the system is successful. While it is for the General Assembly to determine whether or not the proposed change should be adopted, the affected agencies at least have the opportunity to present their concerns to the General Assembly.

Letter from Peter R. Messitt, Virginia Ass't Attorney General, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (May 29, 1990) (on file with authors).

104. "The only change the [Michigan Law] Commission is likely to make in response to that problem [of increasing the Commission's role in proposing legislation in response to court decisions] is to get the legislative commissioners more actively involved with the Commission's work and to better publicize the Commission and its work." Gulliver Letter, *supra* note 80. According to the California Law Revision Commission:

The Commission has as members a Senator and an Assemblyman who serve on the Commission because they are interested in law reform. These legislators author the Commission bills and appear before the committees and on the floor to explain the bills and obtain their enactment. This dedication to the law reform effort is equally as important as the work that precedes it.

Memorandum from California Law Revision Commission 6 (Mar. 23, 1979) (analysis of activities of the Law Revision Commission). The Oregon Legislative Counsel suggested that a good system for legislative oversight would be to utilize existing legislative statutory authority to create advisory committees of legislators and nonlegislators to undertake special projects, including statutory

Fifth, oversight entities that have the power to draft legislative proposals that can be introduced in the legislature are more effective than those that do not. Legislative proposals in bill form are essential if a law is to be enacted. Reports on individual cases probably have little impact unless they are accompanied by specific statutory recommendations.

Sixth, legislative-judicial relations depend on the legal and political culture of the state and on who is on the dance floor at any given time. Personal relations and tensions between the two branches at any given time may play as significant a role as institutional structures.

Seventh, the institutional limitations of legislatures and the political dynamics necessary to ensure the passage of a bill may make adoption or modification of judicial interpretations of statutes difficult for the legislature.¹⁰⁵ A South Dakota correspondent commented that the legislative results of the state's "relatively informal" process "are mixed."

If the solution is obvious and noncontroversial, the committee generally will recommend legislation suggested by the court's opinion. However, if the subject of the opinion is controversial, or the competing interests are politically active and well represented, the committee will let the parties directly affected by the opinion propose the corrective legislation. If the opinion deals with a subject that for one reason or another does not interest the Legislature, nothing will be proposed or a recommendation will be rejected.¹⁰⁶

A correspondent commented about the Michigan Law Revision Commission's experience with legislative oversight of court decisions as follows:

One of the problems the Commission encounters in bringing about changes in the law to reflect new court decisions is one that is likely the case in most jurisdictions. Often the necessary changes are not of enough significance to produce legislative action, given the heavy legislative agenda, or are of such significance that the Legislature does

revision, that legislators think necessary. "The principal advantage of this system is that the sequence is correct. First, a problem is defined by or for a legislative group. Then an advisory committee with members having relevant experience is appointed by legislators to study the problem and make recommendations." Letter from Thomas G. Clifford, Oregon Legislative Counsel's Office, to Hon. Dick Springer and Hon. Jan Wyers, Oregon State Senators (Mar. 2, 1988) (on file with authors).

105. An ongoing problem with legislative oversight entities is to have members of the entities effectively lobby the measures through the legislative session. Clifford Letter, *supra* note 65.

106. Decker Letter, *supra* note 69. "Frequently, a decision does not generate enough interest to pass a bill through both houses of the General Assembly, or the decision may affect two groups with conflicting interests." Eakin Letter, *supra* note 72.

not wait for a formal Commission recommendation. In that latter instance, the resulting legislation is usually the result of so much compromise that the Legislature is not likely to later alter it even in the face of a Commission recommendation.¹⁰⁷

Thus, whether the legislative oversight entity may effectively rectify problems it identifies without the assistance of political forces such as interested government agencies or political forces outside of government remains unclear.¹⁰⁸

107. Gulliver Letter, *supra* note 80.

108. Dean Pound reported that "recommendations of the New York Commission have not been taken up by the legislature as they deserve to be," indicating that political dynamics may be more critical than institutional shortcomings in preventing the adoption of corrective language to clear up gaps or ambiguities in statutes. Dean Pound described private lobbying groups as "the most numerous, continuously acting and continuously effective" influence on legislation. Pound, *Ministry*, *supra* note 7, at 640. Comments from other states include:

Colorado

"Primary legislative impetus to correct court opinions com[es] from competing private forces." Letter from Richard H. Forman, Solicitor General, Colorado Dept. of Law, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (May 14, 1990) (on file with authors).

Connecticut

Except for the Connecticut Law Revision Commission annual report, the review of court decisions and their relevance to state statutes is fairly informal. . . . The present informal system seems to work. The affected group, be it a state agency, the plaintiff's or defendant's bar, or legal services, can articulate the need for any statutory amendment before the General Assembly.

Riddle Letter, *supra* note 103.

Ohio

There clearly has been, in many instances, a direct cause-and-effect relationship between decisions of the Supreme Court of Ohio and amendments by the Ohio General Assembly to statutory provisions. . . . [T]he need for amendment is usually brought to the attention of the Ohio General Assembly through one of two channels. The first of these channels is through the various bar associations in Ohio. . . . As I would anticipate is also the case in most other states, another common mechanism through which requests for legislative change are presented is through those persons or groups whose particular interests have been affected by the judicial decision.

Letter from Shawn H. Nau, Ohio Ass't Attorney General, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (May 15, 1990) (on file with authors).

Oklahoma

"Unfortunately, neither of these monitoring activities [of the House and Senate legal staffs] usually results in the adoption of legislation unless the statute in question is of substantial or general public concern." Miles-LaGrange Letter, *supra* note 72.

Pennsylvania

"The informal mechanism for oversight is part of the legislative process. Decisions of state or federal courts may give tremendous impetus to passage of a law, but it is usually through observations by a staff counsel, or an affected

Our final observation is that a rich array of data exists in the states, ready for study, to determine the feasibility and effectiveness of legislative oversight and to understand and evaluate the role in the legislative process of judicial decisions interpreting statutes. If the states want to improve their own legislative products, they can begin by undertaking studies based on the existing data.

III. THE ROLE OF JUDGES IN THE LEGISLATIVE PROCESS

We began by asking whether judicial decisions that interpret statutes influence legislative policy. We then explored institutions that monitor court decisions for the legislature. We now return to the judge and explore the role, if any, of a judge in influencing legislative policy outside the channel of judicial decisionmaking. In other words, should judges attempt to influence legislative policy by techniques other than writing judicial decisions?

As our survey of second-look mechanisms suggests, the judiciary has several formal, public means of communicating with the legislature. In addition to the reports described earlier, in many states the chief justice delivers a state of the judiciary address¹⁰⁹ or testifies before the legislature about the court budget.¹¹⁰ In several states the supreme court gives advisory opinions to the legislature.¹¹¹ Judges serve on law reform commissions, bar association and other committees, or task forces studying and proposing reforms in the law.¹¹² Judges thus par-

agency or constituency that legislation will result." Letter from Ernest D. Preate, Jr., Pennsylvania Attorney General, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (May 22, 1990) (on file with authors).

109. In about five states, the constitution or statutes require the chief justice to deliver a state of the judiciary address to the legislature; in about 25 states, the address is delivered to the legislature by invitation. National Center for State Courts, Conference Materials, Legislative and Judicial Relations: Seeking a New Partnership, table 5 (Oct. 1-3, 1989) (Denver Conference) [hereinafter Conference Materials]; see Moyer, *State of the Ohio Judiciary*, 51 OHIO ST. L.J. 269 (1990) (transcript of Chief Justice's address to the general assembly).

110. Memorandum, National Center for State Courts, Ref. No. RIS 86.013: Appearance of Chief Justice before the Legislature Regarding the Budget (Mar. 1986).

111. In about 12 states, the court gives the legislature advisory opinions on the constitutionality of proposed legislation. Conference Materials, *supra* note 109.

112. Several judges, for example, are members of the Louisiana Law Institute. LA. REV. STAT. ANN. § 24:202 (1990). In Connecticut, a Supreme Court

ticipate in the formulation of proposed legislative policy through these institutional mechanisms and yet refrain from direct contact with legislators in their legislative role — contact that might be viewed as political.

The question we address here concerns the individual and personal participation of judges in formulating and advocating enactment of substantive legislation, rather than participation through such intermediaries as a bar association or a court administrator approaching the legislature.¹¹³ We are concerned

Justice served on the Law Revision Commission but did not participate in the preparation of the Commission's Report reviewing judicial decisions. CONNECTICUT LAW REVISION COMMISSION NINTH ANNUAL REPORT 5 (1983). Judges Ruth Bader Ginsburg and Henry J. Friendly have suggested that a retired judge serve on the "second look Congressional Committee." A retired judge knows the problems of the judiciary but would not have to be concerned about sitting on cases involving statutes the judge has endorsed during enactment. Ginsburg, *supra* note 10, at 1016-17; Friendly, *supra* note 8, at 805. For a discussion of federal judges serving on executive or legislative commissions that report their findings, see L. FISHER, CONSTITUTIONAL DIALOGUES 157-59 (1988). For discussions of the potential conflict between the requirements of judicial impartiality and judges participating in the American Bar Association, which files amicus briefs and takes policy positions, see REPORT OF THE COMMISSION ON JUDICIAL PARTICIPATION IN THE AMERICAN BAR ASSOCIATION (Feb. 1991); the Indiana Commission on Judicial Qualifications issued Advisory Opinion No. 9-90 that "an Indiana judge may belong to the American Bar Association so long as the judge refrains from any participation in the Association's involvement in social, legal and political issues." 34 RES GESTAE 457 (Apr. 1991). For advisory opinions on judges' participation in bar associations, civic organizations and government boards and on judges' legislative and public activities, see *Civic Activities and Political Speech* in D. SOLOMON, THE DIGEST OF JUDICIAL ETHICS ADVISORY OPINIONS (1991). Canons 4(C)(2) & (3) of the *Model Code of Judicial Conduct* provides:

(2) A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice

(3) A judge may serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice . . . subject to the following limitations and the other requirements of this Code.

MODEL CODE OF JUDICIAL CONDUCT Canons 4(C)(2) & (3) (1990) [hereinafter MODEL JUDICIAL CODE].

For a chart showing state legislative-judicial mechanisms, see National Center for State Courts, Pre-Conference Survey Results, Legislative-Judicial Relations: Seeking a New Partnership, 35-36 (Oct. 1-3, 1989) (Denver Conference).

113. In many states the Administrative Office of the Supreme Court works closely with the legislature. The court administrator provides data to support legislative requests and testifies before committees. Many state court administrators supply judicial impact statements for the legislature. See Memorandum, National Center for State Courts, Ref. No. RIS 84.072: States that

with substantive public policy issues, not issues relating peculiarly to judicial administration,¹¹⁴ such as the budget of the ju-

Prepare Impact Statements to Accompany Proposed Legislation that Affects Courts (Aug. 1984). Administrators may also be involved in initiating legislation and negotiating changes in proposed legislation. See Memorandum, National Center for State Courts, Ref. No. RIS 84.115: The Role of the Administrative Office of the Courts in the Review and Initiation of Legislation (Jan. 1985).

The Administrative Offices of the California, New York, and Washington courts have a Legislative Office. In 1988 the Legislative Office of the California Courts

reviewed approximately 3,400 bills and measures and determined that about 700 of these were court-related. Court-related measures are closely followed through each step of the legislative process. About 260 of these court-related measures were enacted and signed by the Governor. The Legislative Office also completed its seventh annual court cost and revenue estimates for California trial courts, which are used to estimate the fiscal impact of court-related legislation.

2 CALIFORNIA JUDICIAL COUNCIL 1989 ANNUAL REPORT (1989). Other state courts have distinct legislative divisions or have personnel who review bills affecting judicial administration and respond to the legislature. As of 1985, Pennsylvania employed a full-time deputy court administrator as a legislative liaison. See M. Hendrickson, Lobbying by State Supreme Court Justices, Paper presented at the 1985 Annual Meeting of the Midwest Political Science Assoc., 47 (Apr. 17-20, 1985).

The Administrator of the Mississippi Supreme Court wrote: "Formal communication usually occurs between my office and the legislative entity involved, although our judicial canons allow an individual judge or justice to 'consult with an executive or legislative body or official . . . on matters concerning the administration of justice.' Canon 4(B), Code of Jud. Conduct." Whitten Letter, *supra* note 83. The Administrative Office of West Virginia Supreme Court of Appeals prepares reports to the Legislature outlining legislation that is necessary to comply with Court opinions. The judiciary develops a legislative agenda that is presented to the Legislature as a judicial program in the Chief Justice's State of the Judiciary Address. "This has proven to be a very effective process, and I would recommend it to other courts." Letter from Ted Philyaw, Admin. Dir. of the Courts, West Virginia Supreme Court of Appeals, to Hon. Shirley S. Abrahamson, Justice of the Wisconsin Supreme Court (June 21, 1990) (on file with authors).

The Judicial Conference of the state or the federal system may initiate, endorse, or promote legislation. See Linde, *Observations of a State Court Judge*, in JUDGES AND LEGISLATORS, *supra* note 4, at 124-25; Katzmann, *The Continuing Challenge*, in JUDGES AND LEGISLATORS, *supra* note 4, at 181; L. FISHER, *supra* note 112, at 156-57.

114. Former Justice Linde distinguishes between (1) legislation important to the institutional functioning of the court system; (2) legislation important to judges as a class of public servants; and (3) legislation involving matters of substantive or general public policy. Linde, *Observations of a State Court Judge*, in JUDGES AND LEGISLATORS, *supra* note 4, at 121. Although the line between the judicial administration (institutional functioning) and substantive or general public policy is blurred at times, we nevertheless draw the line for purposes of this Essay, recognizing that in some questions of judicial administration, judges may be a special interest group. Questions that arise in the area of judicial administration concerning legislative-judicial relations and

dicial system,¹¹⁵ judicial salaries and pensions, the creation of new courts or judgeships, and similar issues we label judicial administration.¹¹⁶

Substantive public policy legislation affects the judicial machinery and operation of the courts. Judges have come to believe that they could help the judicial system and the public if they had input before the statute was adopted.

judges' attempts to affect legislative policy may differ from questions in other public policy areas.

115. Justices lobby because the legislature controls the purse strings and passes legislation which deals directly with or affects the courts. West Virginia Supreme Court Chief Justice Neely wrote that he lobbies the legislature vigorously to secure resources for the court. He described his legislative activities as follows:

I spend an inordinate amount of my time with the legislature. I write to every legislator four times a year and maintain constant personal communication when the legislature is at the capitol. I entertain legislators at my house and spend evenings in suite 1105 of the Daniel Boone Hotel, where there is a legislative 'hospitality room' in progress all winter (and I do not even drink). Inevitably, courts do things which are offensive to the legislature, so judges must make up in personal rapport what they lose on the merits of issues. . . .

At the judges' conventions, my observations on practical legislative relations are received with the same enthusiasm that the bastard son is received at the reading of the will. Whenever I admit that a substantial portion of my January, February, and March is spent smoking and joking [with] the legislature, other judges stick up their noses because I insufficiently appreciate the pristine Olympian function of the judiciary. Nevertheless, I usually get my clerks, typewriters, and process servers without being too much of a whore in the bargain. (Anyway, I have four virgin colleagues.)

R. NEELY, *HOW COURTS GOVERN AMERICA* 146-47 (1981); see also Yarwood & Canon, *On the Supreme Court's Annual Trek to the Capitol*, 63 *JUDICATURE* 322 (1980) (anecdotes about the Justices' visits to the congressional appropriations committee to appeal for the Court's budget); L. FISHER, *supra* note 112, at 160-61 (Federal Judges Association lobbying for judicial salaries). *A Low-Budget High Court*, *N.Y. Times*, Mar. 1, 1991, at B9, col. 4 (Justices O'Connor and Scalia seek Senate approval of the Court's \$25 million budget request).

116. For a discussion of Congress's use of the budget powers to signal approval or disapproval of United States Supreme Court decisions and the relationship between congressional budget allocations and Supreme Court decisionmaking, see Toma, *Congressional Influence and the Supreme Court: The Budget as a Signaling Device*, 20 *J. LEGAL STUD.* 131 (1991). For discussions of state courts' inherent power to finance the judicial system and independence of the judiciary, see, e.g., Baar, *Judicial Activism in State Courts: The Inherent-Powers Doctrine*, in M. PORTER & G. TARR, *STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM* 84 (1982); Stern, *The Judiciary Is Failing to Protect the Courts*, 18 *JUDGES' J.* 16 (Winter 1979); Robertson & Brown, *The Judiciary's Inherent Power to Compel Funding: A Tale of Heating Stoves and Air Conditioners*, 20 *ST. MARY'S L.J.* 863 (1989); Brennan, *Judicial Fiscal Independence*, 23 *U. FLA. L. REV.* 277 (1971); Hazard, McNamara & Sentilles, *Court Finance and Unitary Budgeting*, 81 *YALE L.J.* 1286 (1972).

No clear models of the appropriate role of a judge's participation in the legislative process emerge from the scant published materials or from our own inquiries of jurists around the country. Little empirical information is available about how and to what extent state judges seek to influence legislative policy. In a 1985 study of lobbying by supreme court justices in Arizona, Minnesota, Mississippi, and Pennsylvania, Mary Hendrickson reported that differences exist from state to state in the forms, scope, and amount of lobbying.¹¹⁷ According to the study, factors that may determine judicial lobbying activities include the methods by which the states select supreme court justices, the amount of rulemaking authority of the highest state court, the workload of the justices, the regional representation of the justices, and the degree of tension between the legislature and the judiciary. Hendrickson observed that when relations are strained justices may attempt to make up for the tension by increasing communications with legislators and that strained relations encourage informal rather than formal channels of communication. Hendrickson concluded that "judges are closely attuned to legislative actions affecting courts and carefully implement their lobbying efforts to fit their political environment."¹¹⁸

In 1970 Henry Glick conducted a mail survey of state chief justices, legislative leaders, and presidents of state bar associations to investigate court involvement in state policy-making. He found that the most frequently used technique to make policy proposals outside the opinions was the personal conference between judges and legislators. Glick concluded that informal interactions have low visibility and no legal traditions or philosophies to legitimize them.¹¹⁹

Anxiety among legislators and judges about communica-

117. M. Hendrickson, *supra* note 113. We speak of judges generally here. There may be, however, different considerations for lobbying by trial judges and judges of the state's highest court.

118. *Id.*

119. Glick, *Policy-Making and State Supreme Courts: The Judiciary as an Interest Group*, 5 LAW & SOC'Y REV. 271, 274 (1970). Glick concluded that federal judges have used five strategies to influence legislative action: presenting views in a judicial decision; interpreting statutes restrictively with the intention of forcing congressional action; presenting policy preferences in dicta; using informal personal contacts for the exchange of views; and lobbying in a systematic and well-organized fashion to influence the votes of legislators on bills important to the court. *Id.* (citing W. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 123-55 (1964)). For discussions of lobbying efforts by federal judges, see, e.g., Winkle, *Judges as Lobbyists: Habeas Corpus Reform in the 1940's*, 68 JUDICATURE 263, 273 (1985); *Judges Spar at Hearing Over Powell Report*,

tions stems from uncertainty about the ethical, legal, and prudential boundaries. At a recent conference entitled "Legislative-Judicial Relations: Seeking a New Partnership," participants identified six obstacles to communications between the courts and the legislature: (1) ingrained negative attitudes toward each other's branches; (2) limited knowledge of each other's institutional roles and procedures; (3) lack of a designated judicial spokesperson; (4) conflict created by institutional checks and balances; (5) judicial caution in approaching the legislature; and (6) lack of clear guidelines for judicial participation.¹²⁰

Two of these obstacles — ingrained negative attitudes and limited knowledge of each other's institutional roles and procedures — might be rectified by educating members of the two branches of government.

Other impediments identified by conference participants, however, such as the conflict between the two branches created by institutional checks and balances and the absence of clear guidelines for judicial participation, suggest a need for judges, legislators, and the public at large to reflect on the ramifications of direct judicial participation in the legislative process. The positive and negative aspects of, and limitations on, judicial participation in substantive statutory reform should be an integral part of the dialogue between the two branches.

As they consider legislation, many legislators might welcome the advice and counsel of judges and regard the judges' experience as a helpful resource. Former United States Representative from Wisconsin Robert Kastenmeier has said that the testimony of judges who appear before Congress in their personal capacities is well received and is considered to improve the quality of the hearing process.¹²¹ Other legislators may be wary about judicial participation in the legislative process and may express resentment toward judges' incursion into the legislative domain.¹²²

NAT'L L.J., Nov. 20, 1989, at 5 [hereinafter *Powell Report*]; L. FISHER, *supra* note 112, at 153-61.

120. Ridge & Friesen, *Legislative-Judicial Relations: Seeking a New Partnership*, 14 ST. CT. J. 19, 20 (1990).

121. Kastenmeier & Remington, *A Judicious Legislator's Lexicon to the Federal Judiciary*, in JUDGES AND LEGISLATORS, *supra* note 4, at 54, 85.

122. After a member of the Wisconsin Revisor of Statutes Office commented at a Law Revision Committee Meeting that courts were occasionally referring to S. 13.92 (2)(b), which is the Revisor's directive to prepare the list of cases and opinions for the Law Revision Committee, Wisconsin State Senator Stitt commented that "although it does not yet appear to be a problem, he

A similar divergence of opinion exists among judges. For many judges and many members of the public at large, judicial participation in proposing legislative solutions and in commenting on substantive policy issues before the legislature seems an appropriate application of expertise acquired on the bench. Through their work resolving disputes, judges identify deficiencies in particular statutes and may recognize broader public policy problems that a statute seeks to address or regulate that stretch beyond the parameters of a particular case.

Moreover, judges may be in a good position to influence the legislature because of their institutional position and personal access to the legislators. Former Oregon Supreme Court Justice Hans Linde concludes:

There are no insurmountable legal obstacles to useful interaction between judges and legislators in the development of good policies with respect to the judicial institution or to substantive law. What is important is to maintain clear distinctions as to whether a judge speaks for the institutional concerns of the judicial branch, for the personal interests of judges as a group, or as an individual citizen expressing his or her own policy views.¹²³

Other judges are wary of a legislative role for the judiciary.¹²⁴ Part of this hesitation is based on judges' view of their constitutional role. Some judges view separation of powers as constituting a barrier to judicial participation in influencing legislation. They see individual judges involved in legislative activities as walking violations of the separation of powers doctrine.¹²⁵

is concerned that the courts, particularly in dissents, may attempt to drive the legislative process." LAW REVISION COMMITTEE, WIS. LEGIS. COUNCIL, SUMMARY OF PROCEEDINGS 7 (Mar. 24, 1987).

123. Linde, *supra* note 113, at 128. For expressions of divergent views of the propriety of judges participating in substantive legislation, see Katzmann, *Summary of Proceedings*, in JUDGES AND LEGISLATORS, *supra* note 4, at 162-66, 169-70. See *supra* note 112.

124. Some judges, for example, express discomfort at even sending their opinions directly to Congress. "It seems to me . . . that goes beyond the province of the Article III function." Judge Starr would prefer for judges to send their opinions to an administrative apparatus of the judicial branch which could then send opinions on to Congress. K. Starr, *supra* note 32, at 333-34.

125. Former Justice Linde concludes that "'separation of power' is only a label for a sense of the fitness of things, not a legal obstacle to communication between judges and lawmakers." Linde, *supra* note 113, at 123. Former Dean of Harvard Law School Erwin Griswold concluded that congressional action required direct contact with a legislator and that there are "real barriers" to direct communication between judges and legislators. He would have intermediaries make the contacts. E. Griswold, Remarks at the Proceedings of the Forty-ninth Judicial Conference of the District of Columbia Circuit, *reprinted in* 124 F.R.D. 241, 334-35 (1989). For successful communication from

Part of the judicial hesitation may also be political; controversial decisions and disputes about the two branches' respective turfs engender institutional tension between the bench and the legislature. This tension may make judges wary of approaching the legislature.¹²⁶

Moreover, many judges are concerned that judicial participation in the legislative process, with its potential appearance of involvement in partisan politics, could tarnish the legitimacy of an independent judiciary. The public expects the courts to work above the tangle of partisan politics. Codes of judicial ethics often prohibit a judge from engaging in political activities.¹²⁷ Furthermore, if judges take positions on issues or suggest or draft statutory language, they may appear to have prejudged a later case raising similar issues or involving the very statute and have to disqualify themselves.¹²⁸ Remaining

judges to legislators through opinions and letters, see Kastenmeier & Remington, *supra* note 121, at 83. For discussions of the propriety of judges' legislative and extrajudicial activities, see, e.g., D'Alemberte, *Searching for the Limits of Judicial Free Speech*, 61 TUL. L. REV. 611 (1987); Lubet, *Judicial Ethics and Private Lives*, 79 NW. U.L. REV. 983 (1985); McKay, *The Judiciary and Nonjudicial Activities*, 9 LAW & CONTEMP. PROBS. 9 (1970); McKay, *Judges, The Code of Judicial Conduct and Nonjudicial Activities*, 1972 UTAH L. REV. 391; Nathanson, *The Extra-Judicial Activities of Supreme Court Justices: Where Should the Line Be Drawn* (Book Review), 78 NW. U.L. REV. 494 (1983); Westin, *Out-of-Court Commentary by United States Supreme Court Justices, 1790-1962: Of Free Speech and Judicial Lockjaw*, 62 COLUM. L. REV. 633 (1962); *Nonjudicial Activities of Supreme Court Justices and Other Federal Judges, Hearings on S. 1097 & S. 2109 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969). For a discussion of the Framers' debate of the role of federal judicial involvement in the creation of laws, see Barry, *The Council of Revision and the Limits of Judicial Power*, 56 U. CHI. L. REV. 235, 261 (1989). See *supra* notes 112, 123. We do not address the issue of judges' complying with statutes regulating lobbying activities.

126. The Chicago Tribune reported tension between the Illinois Supreme Court and the General Assembly growing from the court's refusal to allow the legislature to audit two agencies under the court's control regulating the attorneys. The newspaper reported that the court has quietly approached legislative leaders to attempt to quell growing legislative criticism of the court. Chi. Tribune, May 4, 1990, § II, at 1, col. 1. For discussions of sources of conflict between the legislature and court tending to influence the communication between the courts and the legislature, see M. Hendrickson, *supra* note 113, at 38-39, 42-43.

127. MODEL JUDICIAL CODE, *supra* note 112, Canon 5. Canon 5 is entitled: "a judge or judicial candidate shall refrain from inappropriate political activity."

128. At least one judge has concluded that his past political career as a legislator prevented him from participating in a pending case. As a legislator, State Senator William Bablitch was instrumental in drafting provisions of Wisconsin's campaign financing legislation. As a member of the Wisconsin

out of the political fray and out of controversial disputes about substantive law may serve to enhance the judiciary's independence, legitimacy, and impartiality. Finally, extrajudicial legislative activity might draw already busy judges away from their primary responsibility to hear and decide cases.

Questions about judges' lobbying are many; the answers are few. While the American Bar Association Code of Judicial Conduct views judges as being in a unique position to contrib-

Supreme Court, Justice Bablitch recused himself from a case evaluating the constitutionality of some of the financing law's key provisions when one of the parties made a motion for his disqualification. Justice Bablitch wrote:

I fear that the extensive advocacy use of my 1974 memorandum . . . has created the appearance that I could presently be an advocate of their position. At the very least, an impression has been created that I cannot review the issue impartially. I cannot continue to sit on the case under such circumstances.

Letter from Hon. W. Bablitch, Justice of the Wisconsin Supreme Court, to various interested parties (May 23, 1990) (on file with authors and in *Gard v. Wis. State Elections Board*, Wis. Supreme Court Case No. 90-0298-OA). For discussions of disqualification on the basis of judges' prior legislative experience, see *United States v. Alabama*, 828 F.2d 1532, 1538-46 (11th Cir. 1987) (per curiam), *cert. denied sub nom.* *Board of Trustees v. Auburn University*, 487 U.S. 1210 (1988); *Leaman v. Ohio Dep't of Mental Retardation & Developmental Disabilities*, 825 F.2d 946, 949-50 (6th Cir. 1987) (en banc), *cert. denied*, 487 U.S. 1204 (1988); *Limeco, Inc. v. Division of Lime*, 571 F. Supp. 710 (N.D. Miss. 1983); *In re Thomas W. Sullivan*, 283 Ala. 514, 523, 219 So. 2d 346, 353, *cert. denied*, 393 U.S. 826 (1969); *Department of Revenue v. Golder*, 322 So. 2d 1, 3-5 (Fla. 1975); *Norton v. Lyon Van & Storage Co.*, 9 Cal. App. 2d 199, 204, 49 P.2d 311, 313 (1935), *cert. denied*, 298 U.S. 662 (1936); *Newburyport Redevelopment Auth. v. Commonwealth*, 9 Mass. App. Ct. 206, 245, 401 N.E.2d 118, 144 (1980). Discussions of recusal or disqualification have most frequently arisen not in the context of prior legislative service, but when a judge has previously expressed an opinion on issues involved in pending litigation. See, e.g., J. SHAMAN, S. LUBET & J. ALFINI, *JUDICIAL CONDUCT AND ETHICS* § 12.10 at 377-79 (1990); *Laird v. Tatum*, 409 U.S. 824 (1972) (memorandum) (then Justice Rehnquist declined to recuse himself even though, as Justice Department attorney, he had given congressional testimony supporting the constitutionality of the very program at issue in the case). For discussions of judicial disqualification, see J. SHAMAN, S. LUBET, & J. ALFINI, *supra*, ch. 5 (1990); Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662 (1985); Burbank, *Procedural Rulemaking under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283 (1982); Fall, *Liljeberg v. Health Services Acquisition Corp.: The Supreme Court Encourages Disqualification of Federal Judges under Section 455(a)*, 1989 WIS. L. REV. 1033; Frank, *Disqualification of Judges*, 56 YALE L.J. 605 (1947); Frank, *Commentary on Disqualification of Judges — Canon 3C*, 1972 UTAH L. REV. 377; Hjelmfelt, *Statutory Disqualification of Federal Judges*, 30 U. KAN. L. REV. 255, 262-63 (1982); Kilgarin & Bruch, *Disqualification and Recusal of Judges*, 17 ST. MARY'S L.J. 723 (1981); Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237 (1987); Lewis, *Systematic Due Process: Procedural Concepts and the Problem of Recusal*, 38 U. KAN. L. REV. 381 (1990).

ute to the improvement of the law, the legal system and the administration of justice,¹²⁹ the Code does not provide clear-cut easy-to-apply rules governing judges' involvement or participation in the legislative process.

The 1972 American Bar Association Code of Judicial Conduct, which nearly all the states have adopted in some form, encourages judges to speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice so long as this activity "does not cast doubt on his [or her] capacity to decide impartially any issue that may come before him [or her]."¹³⁰ Canon 7 of the Code expressly permits a judge to engage in political activity on behalf of measures to improve the law, the legal system, and the administration of justice.¹³¹ According to the reporter for the ABA drafting committee, this provision was designed "to permit a judge to engage in projects directed at the drafting of legislation."¹³² The Canons expressly permit a judge to appear at a public hearing before a legislative body on these three topics, but if the judge wants to meet privately with legislators, the discussion is limited to "matters concerning the administration of justice."¹³³ Apparently, private consultation on issues of the

129. MODEL JUDICIAL CODE, *supra* note 112, Canon 4(B) and commentary; see *supra* notes 121-23 and *infra* notes 130-34 and accompanying text.

130. Canon 4(A) of the *Model Judicial Code* (1972) provides:

A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him:

A. He may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

MODEL JUDICIAL CODE, *supra* note 112, Canon 4(A); see *infra* note 133.

131. Canon 7(A)(4) of the *Model Judicial Code* (1972) provides: "A judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice." MODEL JUDICIAL CODE, *supra* note 112, Canon 7(A)(4).

132. E. W. THODE, REPORTER'S NOTES TO THE CODE OF JUDICIAL CONDUCT 76 (1973).

133. Canon 4(B) of the *Model Judicial Code* (1972) provides:

A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him:

...

B. He may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and he may otherwise consult

law and the legal system is impermissible.¹³⁴

A primary reason for limiting subjects on which judges may confer privately with legislators is that matters relating to judicial administration are less likely to result in litigation than other issues. The ABA drafting committee reasoned that judges' views on matters that might later be litigated should be expressed publicly so that litigants may be apprised of the judges' views and activities.¹³⁵

The recently adopted (August 1990) ABA Model Code of Judicial Conduct apparently does away with the distinction between public and private communications between judges and legislators and now prohibits any consultation between judges and legislators except on matters concerning the law, the legal system, or the administration of justice.¹³⁶

Some states have moved to restrict judges' participation in the legislative process to limited situations. For example, the New Jersey Supreme Court's 1987 Guidelines for Extrajudicial Activities allow judges to appear upon invitation before a legis-

with an executive or legislative body or official, but only on matters concerning the administration of justice.

. . . *Commentary:* As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that his time permits, he is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.

Extra-judicial activities are governed by Canon 5.

MODEL JUDICIAL CODE, *supra* note 112, Canon 4(B). The National Law Journal reported the Senate Judiciary Committee hearing on the Powell Committee Report on federal habeas corpus review of capital cases stating "Chief Judges of the federal circuits don't often appear as Senate witnesses and, even rarer, appear and stand divided." *Powell Report, supra* note 119, at 5.

134. *But see infra* text accompanying note 136.

135. E. W. THODE, *supra* note 132, at 76.

136. Canons 4(C)(1) and (3) of the *Model Judicial Code* (1990) provides:

C. Governmental, Civic or Charitable Activities.

(1) A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.

. . .

(3) A judge may serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice or of an educational, religious, charitable, fraternal or civic organization not conducted for profit.

MODEL JUDICIAL CODE, *supra* note 112, Canons 4(C)(1) & (3).

lative body to discuss matters concerning the law, legal system, and administration of justice when the judge has the permission of the Supreme Court, the hearing is public, the subject matter reasonably may be considered to merit the attention and comment of a judge as a judge and not merely as an individual, and the appearance will not involve the office in political controversy.¹³⁷

The generally accepted view is that judges should be concerned with legislative programs directly affecting themselves as judges and the operation of the judicial branch of government. No consensus exists regarding judges' role in the broader legislative process of substantive policy making. Lobbying activities acceptable in one state might not be acceptable in another. Different protocols may be necessary for different kinds of communications, depending on such factors as the nature of the issue; whether the communication is by individual judges, by the judicial conference, by the supreme court, or by the administrative office of the court; whether the court or legislature initiates the communication; and whether the communication is formal, open, and public or informal and closed.¹³⁸ Discussions of the role of the courts and individual judges in influencing legislative decisions must be free and open, leading to development of guidelines for interpersonal communication.¹³⁹

CONCLUSION

Simply put, the legislature's responsibility in the United States' system of government is to enact statutes. The court's responsibility is to interpret and apply the statutes to resolve disputes. Courts have recognized another responsibility, however, that of using their decisions to point out statutory deficiencies so that statutes may be more intelligible and cohesive,

137. NEW JERSEY SUPREME COURT GUIDELINES FOR EXTRAJUDICIAL ACTIVITIES 6 (1987). Justice Linde reports that the Judicial Conference in Oregon maintains that the judicial branch will not involve itself in substantive law legislation but permits individual judges to transmit their ideas to the legislature or take positions dissenting from those of the Judicial Conference. Linde, *supra* note 113, at 125.

138. One recommendation of the Denver Conference on Legislative-Judicial Relations was "to explore and develop guidelines for interbranch communication, in an attempt to remedy the communications gap between legislatures and courts." National Center for State Courts, Final Conference Report and Agenda for Future Action, Legislative-Judicial Relations: Seeking a New Partnership 5 (Oct. 1-3, 1990) (Denver Conference).

139. Conference Summary, *supra* note 6, at 16.

as well as more responsive to the conditions the legislature sought to address.

When the legislature does not respond to a written opinion, should judges increase their off-the-bench influence over the legislative process? As we have suggested, the role judges should play beyond their decisions and beyond the courtroom presents significant concerns. Will the active involvement of judges in legislative forums affect the judges' ability to resolve disputes from the bench?

A recurring theme sounded in judicial and legislative circles is the need to increase the level of dialogue between legislators and judges. In a world in which the judicial and legislative branches tend to go their separate ways, each having to live with the sometimes burdensome consequences of the other's action, cooperation and dialogue are always intoxicating music to the ear. Judges need to know how the legislature operates and how to evaluate legislative history for purposes of statutory interpretation, cooperation and dialogue are always intoxicating music to the ears. Judges need to know how to attract the attention of legislative revision committees in their written opinions. Conversely, legislators need to understand the conventions and canons of the judiciary and pay more attention to "low-profile" cases that point out a need for statutory reform. Given that judges and legislators share an interest in improving the laws and the administration of justice, should they work more closely together on this common enterprise? If so, how? We return to the question originally posed.

"Shall we dance?"

Without a hint of coquettishness, the answer today must be a resounding perhaps.

