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Jerry K. Beatty

RECONSIDERATION OF THE EVIDENCE: A REBUTTAL

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INTRODUCTION

I welcome Mr. Schneider's thoughtful comments on my article. In his critique, the author draws two conclusions which are of particular interest. The original article was presented as "an effort to determine the magnitude of state court evasion of Court mandates."[1] Mr. Schneider feels this goal was not accomplished because of an "unrealistically restricted" definition of evasion.

The author also questions the study's finding "that most state courts of last resort have an admirable record of compliance."[2] It is Mr. Schneider's view that state court evasion of Supreme Court mandates is a "rather widespread" practice.

The criticisms noted above suggest that the conclusions one reaches in a study of this type will greatly depend on how the term "evasion" is defined. The remainder of this rebuttal, therefore, will be devoted to a delineation of the criteria for evasion used in my original study, followed by a discussion of the rationale behind the criteria so employed.

STATE COURT EVASION DEFINED

Initially it should be noted that my study took cognizance of various strategems by which state courts may evade the letter or intent of a Supreme Court mandate. It was recognized that state courts may: (1) construe the state law to conform with minimal constitutional standards, (2) narrowly interpret the dictum of Supreme Court precedents, (3) require precisely parallel fact situations, (4) refuse to expand logically the rulings of the High Court to closely related areas, and (5) decline to permit an appeal because of a violation of procedural rules.[3] For purposes of the study, however, genuine state court evasion was restricted to instances in which the United States Supreme Court *twice* accepted an appeal, issued a mandate, and overruled a judgment of a state supreme court.[4] As an additional safeguard, a finding of evasion

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1. Beatty, *State Court Evasion of United States Supreme Court Mandates During the Last Decade of the Warren Court*, 6 VAL. U.L. REV. 260, 285 (1972).
2. *Id.* at 284.
3. *Id.* at 261 n.3.
4. *Id.* at 263.

was conditioned upon the clarity of the Supreme Court's original mandate.[5]

A slightly less rigorous definition of quasi-evasion was employed to classify state decisions in which

> at least one state court justice and this writer discovered meaningful discrepancies between the Supreme Court mandate and the subsequent state court decision. While, unlike the evasion decisions, the Supreme Court never considered these cases again following the initial remands, these adverse state court decisions at least suggest less than full compliance with the Supreme Court's implicit directions.[6]

Since the Supreme Court did not later reverse these decisions, they were not categorized as truly evasive.

As noted earlier, state courts have several methods available by which they may ignore, delay, deviate from, or give only partial compliance to mandates of the United States Supreme Court. The purpose of the study, however, was to focus on instances where evasion was clear and intentional. Consequently, evasion was found only when a seemingly unambiguous Supreme Court mandate was evaded directly and deliberately by the state supreme court and the High Court remedied the evasion in a subsequent review.

Rationale of Definition Adopted

Regardless of the definition of evasion one employs, it seems clear that a certain amount of subjectivity will necessarily be involved in its application. This factor is naturally magnified as the definition becomes more expansive and encompassing. Consequently, the definition described above is based on the premise that the validity of a study is enhanced when this element is kept within reasonable bounds. Mr. Schneider is, therefore, correct when he observes that the definition does not include the actions of "state courts not directly involved in the litigation." Furthermore, it is instructive to note that even when the Supreme Court accepts a state case and reverses and remands or vacates and remands, deliberate evasion is not necessarily indicated.

Cases may be remanded for a number of reasons. Many are reversed because the state court failed to provide a fair trial, refused to rule on constitutional issues raised, or was ambiguous in its interpreta-

5. *Id.*
6. *Id.* at 275 (footnotes omitted).

tion. Frequently a case will be remanded for a new trial on the merits, or the Court may instruct the state court to hear the case again, taking into account supervening state legislation. Moreover, issues presented in the second trial may differ substantially from those originating from the initial appeal. With the facts and legal issues already shaped by lower court judges, the Supreme Court usually returns most cases to the state courts for final disposition. It should also be noted that the vague remand formula, "proceedings not inconsistent with this opinion," gives state court judges significant discretion.

While I agree that a more inclusive study of state court deviation is long overdue, I am not convinced that my "restrictive" view of evasion is "unrealistic." When making a charge of clear and deliberate evasion, I would rather rely upon criteria based upon the direct review of state court decisions by the nine Justices of the United States Supreme Court than the more subjective interpretations of lay judges using varying definitions of "evasion." Granted, other instances of delay and noncompliance may occur; but lacking the concrete empirical data of direct Supreme Court review or interview data, deliberate evasion will be difficult to substantiate. Rarely are Supreme Court decisions so precise and unequivocal that all reasonable judges can agree as to their interpretation and application.

My original conclusion that *most* state supreme courts have an "admirable" record of compliance is best defended by citing my own findings. Research indicated that while the Supreme Court reversed and remanded or vacated and remanded 337 of the 560 state court cases decided by it during the last decade of the Warren Court, in only 54 of the 199 cases resulting in further litigation did the Court remand fail to reverse the state court decision.[7] Most importantly, in only eight of the 560 cases (1.4 percent) did the Court feel compelled to correct the state court for refusing to comply with its initial command.[8]

CONCLUSION

I would like to commend Mr. Schneider for presenting an excellent statement of an important gap in judicial research. I agree that if we desire to learn the full scope of state court deviation it will be necessary to compare and contrast each and every decision of the state courts with those handed down by the Supreme Court. Ideally, the aggregate data should be supplemented with information derived from personal inter-

7. *Id.* at 262.
8. *Id.* at 285.

views in which state and federal judges would be asked to explain the lack of uniformity.

It is clear that only through careful measurement of the many variables which influence judicial decision-making can we conclude authoritatively that a specific state court action represents an intentional defiance of a clear and definite Supreme Court mandate. This is the task for future research.

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