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A Judicial Philosophy: People-Oriented Justice

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A JUDICIAL PHILOSOPHY: PEOPLE-ORIENTED JUSTICE

*Justice Larry V. Starcher**

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I. INTRODUCTION

I have served the state of West Virginia from the bench for almost thirty-two years, and I expect 2008 to be my last year of full-time judicial service. The *West Virginia Law Review* has graciously agreed to publish this article in which I attempt to describe my judicial philosophy.

The article begins with a summary of my personal and professional life, the true source of most of my judicial philosophy. Then I review some of the opinions that I have authored, with quotations that reflect my views. (I have found that my separate opinions tend to present the most succinct expressions of my views, unmediated by the constraints that are present when I am writing for the Court.¹) Finally, I attempt to extract a few common themes that have per-

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¹ Many of the quotations from opinions used in this article have portions of sentences or entire paragraphs omitted. In the interest of readability, these omissions are *not* noted. This ar-

meated my judicial work. I hope that the reader will find value in this article; for me, it has been enlightening to take this look back at my life in the law.²

II. PERSONAL AND PROFESSIONAL HISTORY

I was born on September 25, 1942, down a dirt road in an old farmhouse in west central West Virginia. My twenty-two-year-old mother, Susie Starcher, lived in the farmhouse with my three-and-a-half-year-old brother and my fifteen-month old sister. My father, Earline "Dick" Starcher, age twenty-four, was working in Ohio in a defense plant. He had failed his army physical—diabetes—a legacy he left to me.

My paternal grandparents lived "up the creek" from our house and Grandma Starcher checked on my mother daily while my mother was pregnant with me. But my arrival came unexpectedly one evening when no one was around to help. Grandma had been there earlier in the day, and she came again the next day. I once asked my mother, "What did you do until Grandma came?" Her response was, "What do you think I did; I cleaned you up!" No electricity, no indoor plumbing, water from a well in the yard, heated on a wood-burning stove, and a self-delivered newborn. Never tell me that women are the "weaker sex!"

We were a close-knit family with my father's parents nearby, and my mother's family only five miles up a dirt road. Our home was just across a creek from the family cemetery. Next to the cemetery was a small one-room church building that hosted Sunday School, occasional church services with a minister, funerals, old-fashioned "shape note singing" sessions, and summer Sunday picnics in the field where the church stood and cows pastured.

By the time I was one year old, my dad had returned from Ohio and moved the family "into town," the small Roane County seat of Spencer. We were a "poor" family, and needed every penny just to get by (Mom eventually had seven children). When Dad died in 1978 at the age of 59, his salary as a common laborer had barely passed the \$10,000 per year mark.

In our family, there were no such things as shopping trips, vacations, or recreation for which one would have to pay. For us, "eating out" was going to the store, buying a loaf of bread and a pack of bologna, and stopping at a roadside table. As a special treat, after Sunday School "us kids" might be treated to a nickel popsicle purchased at a filling station—always split in half, of course, so that one popsicle served two kids. However, large gardens, canning over

ticle uses the mark "****" to separate quotations that are taken from different opinions—not to indicate omissions within quotations.

² The initial draft of this article was compiled by my Senior Law Clerk, Thomas W. Rodd, Esq., aided by West Virginia University College of Law student Stephen E. Altizer. It would be impossible to acknowledge and give credit to the many colleagues, friends, students, lawyers, judges, and others who have been a part of the activities that I describe in this article. I thank and appreciate every one of them.

1,000 quarts of food annually, hunting, and milking two cows kept us well fed. Mom stretched the few food dollars and always set a full table. Mom was so “tight” that I have often said she would “skin a gnat to save the tallow.”

As youngsters, all of the kids in my family had to work. I began delivering papers when I was seven years old, and was working at the A&P grocery store by the time I was a senior in high school. One of the reasons that I tend to be pro-union is because when I worked at the A&P thirty-two hours a week as a member of a union, I earned more than my father at his forty-hours-a-week non-union job.

During my high school years, the traits of empathy, compassion, and concern for others began to emerge as a strong part of my personality. As president of my 4-H club, I learned the value of sharing knowledge. As editor of our yearbook and president of my senior class, I learned how to build bridges of friendship and be a leader. As president of our Baptist Youth Fellowship, I added a Christian perspective to my worldview.

In the spring of 1960, I became the first member of my family to graduate from high school.³ In the fall, I headed to Morgantown to become a college student at West Virginia University. I made good grades, joined the Beta Theta Pi fraternity, found a part-time job, and was elected president of Helvetia, the Sophomore Men’s Honorary. During the summer of 1961 I returned home and worked as a laborer for the State Road Commission. By this time I was beginning to express an interest in politics, and I talked about going to law school. Many of my fellow State Road workers kindly called me “Governor” or “Lawyer.”

The summer of 1963 was a “high” for me. West Virginia Secretary of State Joe Burdette helped me get a job as a visitors’ guide in our State Capitol. It was West Virginia’s Centennial year, and President John F. Kennedy was to speak at the State Capitol on June 20, 1963, our State’s hundredth birthday. I was assigned to meet the President’s party as it entered the Capitol, take them to a well-guarded elevator, and then to the speakers’ platform area. I remember President Kennedy, on arrival at the Capitol, immediately asking me for the location of “the head” —which I showed him.

While working in the State Capitol, I made several African American friends—a new experience for me, as there were no African Americans in my home county and few at WVU. With these friends, in August of 1963, I found myself in Washington, D.C. in a sea of humanity looking toward the Lincoln Memorial and listening to Reverend Martin Luther King, Jr. deliver his famous speech. My commitment to equality for all persons, regardless of race, became pressed into my very being, and I have not since wavered from that commitment.

³ My older brother earned his G.E.D. in the military and my older sister graduated from high school at age 35 with one of her daughters.

During the summer of 1963, Secretary of State Burdette also asked if I would like to work in his 1964 primary re-election effort. I was eager to do so; therefore, I loaded up on courses—twenty-one hours in the first semester of my senior year—so that I could drop out of school the second semester and work in the campaign. Then I could return to summer school and take sufficient hours to graduate and begin law school immediately thereafter. The campaign was my first State-wide election. It was an educational experience that had a personal payoff that I reaped many years later.

I graduated at the end of summer school in 1964, and promptly started law school at WVU. During my first year I worked as a janitor at the WVU Hospital on weekends and holidays. The summer following my first year, I worked on heavy construction at the Fort Martin power plant. I joined Laborers' Local 379; this was my second membership in a union. One day on this job I worked twenty-three hours straight—a good paycheck that week! I developed a strong affinity for proud, hard-working union members and a better understanding of “organized labor” —jurisdictional disputes and all!

In 1966, while attending law school, I took a job at West Virginia University as a Contract Auditor (business manager) for the Office of International Programs. After graduating from law school in 1967, I remained at WVU, where I became an Assistant to the Vice-President for Off-Campus Education. In my new job I continued to oversee the International Programs work, and I took on additional responsibilities. I helped develop continuing education programs for a number of disciplines, and did legal-related chores for the central WVU staff. I enjoyed university administration, and explored the possibility of acquiring a doctorate degree, thinking I might like a career in higher education administration. But my desire to “be a lawyer” kept nagging at me.

In 1969 I ran for Morgantown City Council, losing a close race (but I was able to win the next year). Also in 1969, after helping a WVU Law School assistant dean write a grant proposal for a six-county rural legal services program, I applied and was hired for the directorship of the program. In April of 1969 I became the first Director of the North Central West Virginia Legal Aid Society.

I served as Director until early 1976. Our office was aggressive. We litigated consumer issues, welfare rights, black lung claims, and social security disability cases, to name a few. We sued public officials and fraudulent home remodelers, and made quite a name for ourselves—good to some, the opposite to others.

We fought our battles in both federal and state courts, always litigating for the “little guy” and the disadvantaged. As an advocate for lower-income people, I traveled through the region “pandering my wares like a huckster in the market place,” —so said a complaint filed against me with the U.S. Civil Service Commission. There was some truth to that charge.

In 1972, I ran for Sheriff and lost a close race. During those years I was active in Morgantown's First Presbyterian Church as a Sunday school teacher and youth leader, church school superintendent, chairman of the finance com-

mittee, deacon, and ruling elder. Our church youth activities included the normal camping and car-washes, but we also added the development of social conscience to our “activities curriculum.” My group of kids introduced to our church the distribution of Christmas food baskets for less advantaged families in our community—as my youth group had done when I was a high school student in Spencer. We also helped poor families with relocation efforts when they were displaced by the construction of Interstate 79 through the Morgantown area.

In 1975, several of the younger lawyers in Morgantown determined that our community needed a new circuit court judge, and started planning the electoral replacement of an older incumbent judge with a young upstart—me! I was thirty-three years old.

We put together a grass-roots campaign that involved over 300 volunteers. The “establishment” bar feared me as some kind of “legal aid radical,” and persuaded a politically well-connected attorney to run against me. But we captured over 59% of the primary election vote, and in the general election we won handily.

In November 1976, I was at that time the youngest person in the history of West Virginia to be elected to the office of circuit judge. As a new judge, I wanted to open the “mysteries” of our court system to the general public. Of particular concern to me were the victims of crime who were generally left in the dark as the system churned out its results. I was determined to see that (when possible) the victims’ interests were factored into the criminal disposition process.

I also was determined to explore and implement alternatives to costly incarceration. In most cases, neither the victim nor the community is served by removing the criminal actor from the community, especially when the crime is a less serious offense. Restitution for the victim is virtually eliminated when a criminal actor is incarcerated. So with lesser offenses, my efforts were directed to seeing that the criminal actor was able to repay the victim and the community for his/her wrongdoing. To this end, I consistently required defendants convicted of lesser crimes to perform real “community service” as part of the sentence.⁴

⁴ The assignments that were part of my criminal sentences included work at the Monongalia County Recycling Center; the local park system; local municipalities; Pricketts Fort State Park; county offices; Christian Help; planting and maintaining flowers at the entrances of our communities; painting the city pool; picking up trash; and so on.

Two projects to which I assigned a considerable number of probationers and jail inmates deserve particular note. They were the construction of the Monongalia County Magistrate and Family Law Master Court facilities, and the building of an old log barn at Pricketts Fort State Park.

For the new magistrate and family law master court facilities in Monongalia County, we created public court facilities that are worth in excess of \$700,000.00 at a cost of approximately \$230,000.00. I designed the facility, helped figure out a way to finance it, provided inmate labor, and worked on it myself. (A local moving company wanted over \$3,000.00 to move the offices

As a trial judge, I was an activist. When West Virginia prisons and jails were found to be overcrowded, the Supreme Court assigned me to resolve the issue. When tens of thousands of workers' asbestos cases were filed, the Supreme Court assigned me (and a few other judges) to unravel the mess, and to see that the workers got their day in court. In addition to the approximately 20,000 workers' asbestos cases that I tried as a trial judge, I also sat on the "State Buildings Asbestos Case" —probably the longest jury trial in state history, over six months.⁵ I have always felt strongly that the judiciary had something to offer and something to gain by being proactive in problem-solving. I worked with community leaders to identify appropriate court-community issues. Our office's probation staff convened public forums, involving representatives from local churches, schools, law enforcement, civic groups, and the public at large. University students working as interns for class credit at WVU assisted with organizing the meetings, prepared the handouts and materials, and often moderated panels.

We brought together stakeholders and experts to discuss such issues as juvenile justice, truancy, illegal drug use, sentencing, and mental health. Where there was demonstrated interest, we created task forces to address the problem positively. My personal role was to bring people together, and to use the "bully pulpit" of the court to motivate community leaders to action. Such initiatives in community involvement are rare in the judicial branch, which has historically been isolated in public discourse. There are risks whenever one reaches out to the larger community. But my experience is that familiarity does not breed contempt, but rather confidence and cooperation.

For many years I was an active participant in the Habitat for Humanity program. I have worked in Preston, Monongalia, Kanawha and Wayne Counties in West Virginia, and participated in several Jimmy Carter Work Projects, including Miami, FL; Washington, DC; Kitchner, Ontario; and on a South Dakota Sioux Reservation. On three of these projects I had the pleasure of working side-by-side with President Carter (one of my heroes) and his wife Roslynn.

Another important part of my career has been teaching others. I have spent every semester since 1993, teaching trial advocacy as an Adjunct Lecturer at the West Virginia University College of Law. I have taught at programs sponsored by the West Virginia Judicial Association, the West Virginia State Bar, Mountain State Bar and other legal organizations. I have lectured and been a group leader or panelist at the National Judicial College, the Roscoe Pound Foundation, the Virginia Bar Association, and other law schools. It is hard to find words to fully express the sense of duty that I feel for teaching. Although

into the new facility; we did it with office staff, inmate labor and a \$131.00 rental truck. I inherited my mom's "cheapskate" gene!)

At Pricketts Fort we built a publicly-owned facility which was estimated to be worth \$80,000.00 for an investment of around \$7,000.00. I spent most of my weekends working with inmates at the Park building that barn for three years.

⁵ See *In re State Pub. Bldg. Asbestos Litig.*, 454 S.E.2d 413 (W. Va. 1993).

my law students, for example, are adults, I know that they and their loved ones and families, and society in general, have entrusted their instructors with the job of helping the students prepare for a demanding career. After more than thirty years of teaching, I still spend hours preparing for a class or presentation. Anything less than my best effort is unacceptable.

After a 1996 state-wide campaign that I have described as “working eighteen hours a day, six days a week, for eighteen months,” I was nominated and then elected to the West Virginia Supreme Court of Appeals.

I joined the Supreme Court in January 1997. In addition to helping decide thousands of cases and writing hundreds of opinions, I exercised administrative responsibility for budgeting, facilities, program, and personnel management—for two years as Chief Justice, and other years in a shared capacity.

At the Supreme Court, I have placed a premium on enhancing the judiciary’s relationship with the larger community. When I served as Chief Justice, I wrote a monthly column on court/community issues for publication in the State Bar magazine—and a “newspaper version” that was carried by many state newspapers. In 1999, I convened a Mental Hygiene Task Force to revamp our state’s civil mental illness policy. We brought together doctors, lawyers, government officials, and advocacy groups to develop policies, and we have upgraded our laws and policies in this area. Although I would never qualify as a computer expert, I understand that the seemingly immutable practices of decades in the court system are now in a state of continuous change as a result of the microchip and the computer screen. In 1999, I convened our state’s first Court Technology Summit. From that event flowed a series of changes that have transformed our state’s judicial system—such as on-demand videoconferencing, web-based case law, streaming broadcast of internet court sessions, local online legal research centers, and electronic filing systems.

As an educational project, over the past four years my staff and I have taken to the road with a historical re-enactment program, “J. R. Clifford and the Carrie Williams Case,” a play about West Virginia’s first African American lawyer.

I have been involved with almost all of the law’s many facets. As a trial judge, I served as a presiding judge in twenty-three of our state’s fifty-five counties, conducted hundreds of jury trials, and decided many thousands of legal disputes. I have sent men and women to prison for life, and I have nurtured community-based sentencing efforts. From determining the division of assets in a divorce, to crafting a constitutional test for the delegation of legislative powers, I have used the tools of precedent and logic, filtered through the practical psychology that guides much of the law’s reasoning, on a daily basis. My life in the law has given me an informed perspective on human nature—on its potential for good and evil, for brilliance and stupidity—that is afforded by few disciplines. I have seen the majesty of the law; and I have at times seen its pettiness. It has been an extraordinary experience.

III. MY JUDICIAL PHILOSOPHY: CASE-BY-CASE

In writing signed opinions for the Court, setting forth new Syllabus Points, I have been able to contribute to our jurisprudence in a number of cases. In other cases I have sometimes written in concurrence and/or dissent—sometimes for the purpose of “enhancing the understanding” of a decision in a direction that is more compatible with my view, and in some cases to try to “limit the damage” that I believe the majority opinion might do. Following is a compilation of cases in which I have written that reflects how I see the law—as it develops, and as it should be applied.

A. *Criminal Sentencing and Punishment*

In the area of criminal sentencing and punishment, our Court advanced our jurisprudence in several opinions that I authored. In *State v. Lucas*,⁶ the issue was whether an insurance company that reimbursed a crime victim could be treated as a “victim” to whom a criminal defendant could be required to pay restitution. Victims of crimes are usually and justifiably furious. A criminal sentence that provides for full restitution—if even conceivably possible—can go a long way toward making something less than “lock them away for life” acceptable. Because full restitution is often the key to an effective criminal sentence, I was pleased to be able to put specific guidelines in place for our circuit courts.

Other sentencing- and punishment-related opinions that I wrote include *State v. Sears*⁷ (prohibiting a trial judge from refusing to consider a plea agreement reached after conclusion of pretrial proceedings); *Ward v. Cliver*⁸ (requiring findings before dismissing “frivolous” lawsuits by inmates challenging conditions of confinement); *State v. Whalen*⁹ (narrowly construing catch-all “sexual motivation” language in sex offender registration statutes); *Black’s Auto Repair and Towing, Inc. v. Monongalia County Magistrate Court*¹⁰ (assuring service of process in civil cases for incarcerated persons).

In some separate opinions, I express my personal opinions about criminal sentencing and punishment:

We who have worked daily in the criminal justice system know what we need to deal with offenders effectively and economically, and it sure isn’t more incarceration. We need more

⁶ 496 S.E.2d 221 (W. Va. 1997).

⁷ 542 S.E.2d 863 (W. Va. 2000).

⁸ 575 S.E.2d 263 (W. Va. 2002).

⁹ 588 S.E.2d 677 (W. Va. 2003).

¹⁰ 567 S.E.2d 671 (W. Va. 2002).

treatment programs for drug addicts, and more day reporting centers and community corrections centers.

We need high-tech home confinement and offender monitoring systems, and we need a limited amount of secure imprisonment, with good in-house rehabilitation services, for the violent people who pose a true danger. We need to get rid of mandatory minimum sentences, because they clog our jails and prisons with offenders who don't need that level of security.

The sentence in this case of a year in jail for a dog-stealer means that tens of thousands of dollars of taxpayer money will go to feed, clothe, house and give medical care to a person who should be outside, on supervised probation, *working*, to pay his debt to society and to his victim.

Multiply this offender's incarceration sentence by hundreds of other similar cases, and we can see why West Virginia is spending money that we need—for teachers and nurses and doctors and roads and bridges and schools—on wasteful, unnecessary imprisonment.¹¹

Despite his troubled raising, the defendant had achieved some real success in overcoming his background. He had completed his educational goals—and at age 17 he had fulfilled his dream of enlisting in the United States Army. He had just completed his basic training at the time of the instant offense.

I completely understand and respect the feelings of the family of the child victim. I have children, too. At the appellant's sentencing, the child's mother wanted the strongest possible penalty. I understand and respect that feeling. The circuit court could send the defendant to Anthony Center; and then bring him back with a full record of his progress or lack thereof—and then see what the victim's family has to say. Hard feelings often moderate somewhat over time.¹²

¹¹ State v. Watkins, 590 S.E.2d 670, 677 (W. Va. 2003) (Starcher, J., concurring).

¹² State v. Goff, 509 S.E.2d 557, 568 (W. Va. 1998) (Starcher, J., dissenting).

I have a suggested answer to the very fair question that is posed in the dissent [by Justice Maynard]—what to do about jail and prison overcrowding?

The answer is “work ‘em!” Community based sentencing with offenders repaying society for their wrongs in the form of public service is a preferable sentence for a very high percentage of offenders. Currently taxpayers are being required to pay nearly \$20,000.00 each year for each inmate while the offender sits in a cell and does nothing beneficial to either the community or himself.

We are unquestionably wasting a sizable percentage of our full-time, high-security prison and jail cells on nonviolent offenders who nearly everyone agrees do not pose a dangerous security risk. We could, today, put at least 500 checks forgers, drug users, and other nonviolent offenders who are in state prison and jails on strict probation, or home confinement, or weekends in jail. Then we should make them work—at fixing up our public roads, streets and buildings—to pay for their offenses.

Making offenders work in their own communities to pay for their crimes is not “soft on crime”—it is tough!¹³

B. *Criminal Procedure*

Important Constitutional protections that are designed to assure a fair trial are often embodied in the procedural aspects of criminal cases. In several opinions that I authored the Court articulated standards that will help give defendants a fair trial: *State v. Mechling*¹⁴ (requiring cross-examination of testimonial witnesses); *State v. Quinn*¹⁵ (creating a test to determine admissibility of evidence under the rape shield law); *State v. Legg*¹⁶ (prohibiting unfair mid-trial changes in the prosecution’s theory of the case); *State v. Harris*¹⁷ (giving a narrow reading to the “excited utterance” hearsay exception); *Choma v. West Virginia Division of Motor Vehicles*¹⁸ (holding that an acquittal in DUI criminal

¹³ From an unpublished dissent to the first *State ex rel. Berry v. McBride* opinion which was withdrawn, then reheard by the Court. The second *Berry* opinion was written by me and is cited at 625 S.E.2d 341 (W. Va. 2005).

¹⁴ 633 S.E.2d 311 (W. Va. 2006).

¹⁵ 490 S.E.2d 34 (W. Va. 1997).

¹⁶ 625 S.E.2d 281 (W. Va. 2005).

¹⁷ 531 S.E.2d 340 (W. Va. 2000).

¹⁸ 557 S.E.2d 310 (W. Va. 2001).

proceedings is relevant in a civil license suspension case); *State v. Dews*¹⁹ (holding that a jury in a second offense DUI case is ordinarily not to be told of the prior offense).

My heightened concern for fair criminal procedure is demonstrated by some of my remarks in separate opinions about trial procedures:

One could write a dissertation on how Rule 404(b), *McGinnis* [193 W.Va. 147, 455 S.E.2d 516 (1994)], and now *Edward Charles L.* [183 W.Va. 641, 398 S.E.2d 123 (1990)] have become a “runaway train” in some of our courts, when judges are tempted to abandon their proper gatekeeper role [to] overzealous prosecutors. We have moved far away from the original purpose for permitting such evidence. The standard now seems to be: Will it help the prosecutor?

In most cases, as soon as a jury hears about a defendant’s prior sex offense, a defendant is dead meat. Why even have a trial? I await the day when this Court can stop this runaway train. We can and will apply common sense to this currently confused area of law. When that happens, criminal trials in sex offense cases will be conducted fairly and in accord with the rules of evidence.²⁰

Hundreds of years of Anglo-American jurisprudence cannot be cast aside in the zeal to convict and punish offenders. On a wall in my chambers is a photograph of several dozen American citizens who were convicted of murder after 1970 or so, sentenced to die, and later were exonerated and released. One of the lessons of this photograph is that juries can be persuaded of a defendant’s guilt when in fact the defendant is not guilty. Perhaps nothing is more persuasive of guilt than evidence of other similar offenses—that is the way people think. It is precisely for this reason that our law allows such evidence only for very narrow purposes and in exceptional circumstances. We must not stray from this principle.²¹

¹⁹ 549 S.E.2d 694 (W. Va. 2001).

²⁰ *State v. Graham*, 541 S.E.2d 341, 349-50 (W. Va. 2000) (Starcher, J., concurring).

²¹ *State ex rel. Caton v. Sanders*, 601 S.E.2d 75, 84 (W. Va. 2004) (Starcher, J., concurring).

However, the instant case provides a good example of the rare instance when Rule 404(b) “other bad acts” evidence should properly be admitted.

In the instant case, the appellant argued that the court erred in admitting testimony about a previous domestic abuse incident involving the appellant, and in admitting testimony about a violent incident at a Christmas party. However, the evidence of the prior domestic abuse incident involving a child rebutted the appellant’s claim of accident or mistake. The appellant claimed that any injury to the child victim in the instant case was accidental and inadvertent. Yet, in the previous incident, the appellant had injured another child, either intentionally or due to a reckless disregard for the child’s safety.

Moreover, the appellant offered evidence tending to show that he was a person with a good reputation and a good character. The appellant called neighbors who testified that they were comfortable with leaving the appellant alone with their children. The appellant’s counsel specifically asked one witness: “Do you feel comfortable with [the appellant] Jeremiah being around your children?” The prosecutor, therefore, quite reasonably presented evidence of the previous incident to show that the appellant was not, in fact, a man who could be trusted around children.²²

C. *Consumer Protection*

The most notable opinion that I authored in the consumer law area is *State ex rel. Dunlap v. Berger*.²³ As of July 2008, that opinion has nearly 450 Westlaw citations, including 40 reported cases, and had been cited in hundreds of articles, treatises, and briefs. *Dunlap v. Berger* dealt with the issue of “mandatory arbitration” clauses in consumer contracts. Our Court held that boilerplate clauses in contracts for consumer goods and services and in everyday employment contracts cannot prohibit class actions, punitive damages, etc. so as to effectively deny important consumer rights. The opinion contains a good discussion of the law of adhesion contracts, and debunks the notion that the Federal Arbitration Act forbids a substantive look at attempts to strip consumers of their statutory and constitutional rights. The new syllabus points of *Dunlap v. Berger* have (so far) stood the test of time in this area of rapidly-changing law.

²² *State v. Mongold*, 647 S.E.2d 539, 553-54 (W. Va. 2007) (Starcher, J., concurring).

²³ 567 S.E.2d 265 (W. Va. 2002).

Other consumer law opinions that I authored include *State ex rel. McGraw v. Telecheck Services, Inc.*²⁴ (allowing preliminary injunctions in consumer cases before a “pattern or practice” is shown); and *Bryan v. Big Two Mile Gas Co.*²⁵ (authorizing the termination of gas leases when the lessee acts unreasonably).

Expressions of my thinking in the consumer law area are discernable in several separate opinions:

Because the many solicitations in the record are patently deceptive, misleading, and obviously calculated to unfairly induce West Virginia consumers to buy cheap merchandise at inflated prices, the circuit court was correct in granting summary judgment to the Attorney General, awarding injunctive relief against Suarez, and requiring Suarez to pay back every single consumer who lost money as a result of receiving one of Suarez’s solicitations.²⁶

For at least 128 years, this Court has utilized the common law to empower trustees to deeds of trust to “do the right thing.” The Court, not the Legislature, required trustees to approach each deed of trust with an open mind and do the fair thing for both the lender and the landowner. But the majority opinion’s holding that trustees can only do those acts contained in *W.Va. Code 38-1-3*, and no others, overrules centuries of common law, emasculates trustees and makes them virtual automatons working at the sole behest of lenders.

In the eyes of the majority opinion, a trustee is powerless to consider a party’s legitimate objections. In other words, if the duty to consider an objection isn’t set out in a statute, then there is no duty. Forget five centuries of application of the common law to facts; the majority opinion says that because the Legislature has spoken on this topic, the common law has ceased to exist.

The majority opinion is, therefore, a classic example of “dual personalities.” On the one hand, quoting the common law, it says trustees “may and ought” to do things to remove impedi-

²⁴ 582 S.E.2d 885 (W. Va. 2003).

²⁵ 577 S.E.2d 258 (W. Va. 2001).

²⁶ *State ex rel. McGraw v. Imperial Mktg.*, 506 S.E.2d 799, 813 (W. Va. 1998) (Starcher, J., concurring).

ments to a fair sale. On the other hand, it says trustees don't have to remove impediments to a fair sale because the statute doesn't explicitly give them the power to do so. If practitioners of the law come away from the majority opinion confused about the true responsibilities of a trustee, I wouldn't blame them.²⁷

If a contractor adds inflated processing charges and thereby rips off a subcontractor, and then the contractor puts the money in his "IRA" account—is the subcontractor barred from getting to the money, just because it is stashed in an "IRA?" I think that the due process, open courts/certain remedy, and takings clauses of the *West Virginia Constitution* protect the subcontractor's right to get the money back, whatever the Legislature may say. And I doubt that the Legislature intended to allow a debtor to hide money from legitimate creditors, by just putting that money in an account and calling it an "IRA."

There are many, many kinds of bank accounts, certificates of deposit, etc. that one can call an "IRA." It remains to be seen whether they can be used to avoid paying one's just debts. These issues are something that we may have to thrash out in the proper case.²⁸

D. *Employment Law*

In *Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, PLLC*, an employment law case, I enunciated the important principle of requiring unitary trials whenever possible, to resolve all of the claims among the parties.²⁹ I believe that "polyfurcated" trials can very often give an unfair advantage to defendants—those with greater resources can afford to drag out litigation to "wear out" a plaintiff, either with time taken or actual economic costs. I also discussed in *Sheetz* why "the advice of counsel" is at best a limited defense in employment law cases, saying "Simply put, an attorney is not an immunity machine."³⁰

Other examples of my writing for the Court in the employment law area include: *Stanley v. Department of Tax Revenue*³¹ (authorizing reasonable per-

²⁷ *Lucas v. Fairbanks Capital Corp.*, 618 S.E.2d 488, 499-500, 503 (W. Va. 2005) (Starcher, J., concurring and dissenting).

²⁸ *Burge v. Fortney*, 624 S.E.2d 487, 493 (W. Va. 2005) (Starcher, J., concurring).

²⁹ See Syllabus Point 4, *Sheetz, v. Bowles Rice McDavid Graff & Love, PLLC*, 547 S.E.2d 256, 260 (W. Va. 2001).

³⁰ *Id.* at 327.

³¹ 614 S.E.2d 712 (W. Va. 2005).

employee fee awards in employment discrimination cases); *Travis v. Alcon Laboratories, Inc.*³² (defining the elements of intentional infliction of emotional distress in an employment case); *Stone v. St. Joseph's Hospital of Parkersburg*³³ (holding that persons perceived as having a disability have legal protection); *Barthelemy v. West Virginia Division of Corrections, Pruntytown Correctional Center*³⁴ (applying the discovery rule to grievances); *Haynes v. Rhone-Poulenc, Inc.*³⁵ (pregnancy can be a temporary disability with entitlement to legal protection); *State ex rel. United Mine Workers of America, Local Union 1938 v. Walters*³⁶ (requiring a hearing to resolve NLRB preemption issues); *Russell v. Bush & Burchett, Inc.*³⁷ (workers on state-funded projects should be protected by West Virginia law); *Nutter v. Owens-Illinois, Inc.*³⁸ (setting out the burden of proof and evidentiary requirements in deliberate intention workplace injury cases).

Here are some remarks about employment law taken from my separate opinions:

It's not as "easy" to be an employer as it once was. Under modern employment discrimination law, employers must follow a number of "non-intuitive" rules about when they can and can't fire people. Behavior that was once normal or tolerated is now intolerable. Employment discrimination lawsuits are at best a blunt and imprecise instrument to change behavior. But they are working, and are an important part of changing the workplace for the better.³⁹

I am deeply concerned that the broad scope of Syllabus Point 4 would permit private sector employers to penalize and chill an individual's exercise of fundamental democratic rights.

For example, Syllabus Point 4 would allow a restaurant to fire an excellent chef who has no problems at work, for writing a letter to the newspaper in favor of campaign finance reform—or

³² 504 S.E.2d 419 (W. Va. 1998).

³³ 538 S.E.2d 389 (W. Va. 2000).

³⁴ 535 S.E.2d 200 (W. Va. 2000).

³⁵ 521 S.E.2d 331 (W. Va. 1999).

³⁶ 489 S.E.2d 266 (W. Va. 1997).

³⁷ 559 S.E.2d 36 (W. Va. 2001).

³⁸ 550 S.E.2d 398 (W. Va. 2001).

³⁹ *Kalany v. Campbell*, 640 S.E.2d 113, 121 (W. Va. 2006) (Starcher, J., concurring and dissenting).

of better wages for chefs! Or, a taxi company could fire a driver with a 20-year spotless record, because she or he called in to a radio talk show to support a woman's freedom of choice—or to call for stricter abortion laws. . . .

What if a maliciously anti-union person or entity compiled and circulated a clandestine “blacklist” of known pro-union workers to employers, with the hope and intent of interfering with and injuring these workers in their employment relationships? If the list was accurate and contained only “truthful information,” the compiler and circulator of the list (under the protection of Syllabus Point 5 of the majority opinion) would have no liability for tortious interference, even if the circulation of the list accomplished the circulator's intent of causing grievous harm to the workers and their families.⁴⁰

It is notable that the Prevailing Wage Act contains other language evidencing a legislative intent that public employees who are constructing public improvements should be paid prevailing wages. *W. Va. Code*, 21-5A-8 [1961] says that “[t]he contractor and each subcontractor *or the officer of the public authority* in charge of the construction of a public improvement shall keep an accurate record showing the names and occupations of all such skilled laborers, workmen, and mechanics *employed by them*, in connection with the construction on the public improvement. . . .” Clearly, in this instance the statute contemplates covering employees of the public authority.

The Legislature has made a commendable effort to help insure that *all* working people in West Virginia will earn a decent wage when constructing public improvements.

The majority opinion defies the legislative intent and denies that decent wage to an important class of workers, West Virginia's public employees. I dissent to this improper, unfair, and mean-spirited result.⁴¹

⁴⁰ *Tiernan v. Charleston Area Med. Ctr., Inc.*, 506 S.E.2d 578, 596, 599 (W. Va. 1998) (Starcher, J., concurring and dissenting).

⁴¹ *State ex rel. Tucker County Solid Waste Auth. v. W. Va. Dep't of Labor, W. Va. State Bldg. and Constr. Trades Council*, 2008 WL 2523591, at *12-*13 (W. Va. July 17, 2008) (Starcher, J., dissenting).

E. Environment

In the area of environmental law, I have tried to emphasize accountability on the part of all stakeholders, as illustrated by my comments in the following separate opinions:

In its 1995 reorganization, Allegheny Power employed “smoke and mirrors”—an illusion done on paper—so that it could operate as a single utility company, but claim it was a conglomerate of small, independent companies. . . . Allegheny Power smiles and says “none of your business—we’re not a public utility company.”

The result is that Allegheny Power gets the milk without having to buy the cow—it gets to drink in profits from selling electricity to the citizens of West Virginia, without having to submit its activities to the scrutiny of the Public Service Commission.

This is wrong, because in this case, the illusion has concrete, permanent, and in my judgment, devastating consequences for the people of this State. I therefore dissent.⁴²

The pleadings and record indicate that the appellee Kingwood Coal is a subsidiary of a large national energy company, the Coastal Corporation. Kingwood Coal bought Kingwood Mining, a company which chose to acquire coal for the purpose of mining it, and selected a company (T & T) to carry out coal extraction. Kingwood Mining received, processed and sold almost all of the coal as it was mined. Like the majority opinion, I would make the assumption that Kingwood Coal bought Kingwood Mining’s liabilities and responsibilities, as well as its assets.

Now Kingwood Coal, a subsidiary of a large national corporation, disclaims any responsibility for the creation of what the pleadings indicate may be one of the worst long-term acid mine drainage sites created in this state since the passage of the Surface Mine Reclamation and Control Act twenty years ago.

⁴² W. Va. Highlands Conservancy. v. Pub. Serv. Comm’n of W. Va., 527 S.E.2d 495, 504 (W. Va. 1998) (Starcher, J., dissenting).

Moreover, the pleadings indicate that because T & T Coal is bankrupt, the State of West Virginia is currently paying in the neighborhood of \$60,000 per month to treat the acid mine drainage that is flowing from the mine void left by the mining of the coal.

I am concerned that our ruling may have the effect of shielding Kingwood Coal from long-term liability for the financial and environmental consequences of its chosen economic activity. This sort of immunity distorts the market, and unfairly penalizes coal operators and companies who do accept responsibility for the long-term effects of their economic activity.⁴³

History shows us that the ownership of land is a powerful right, worthy of exceptional legal protection. Land is “the art of democracy” which every man “can shape in his own image.” For centuries, courts and legislatures have adopted a vast penumbra of rules designed to protect each person’s right to freely use his or her property without interference from others.

The Public Service Commission has followed this historical tradition and adopted regulations dedicated to ensuring that public utilities fairly use their land without unduly imposing upon the rights of neighboring landowners.

I dissent because the Public Service Commission, and now the majority opinion, have decided that the formally adopted regulations of the Commission are more like “guidelines” than “actual rules.”

I think that the Commission has a duty to fully take into account the effect of the turbines on the property values of the adjoining and nearby landowners and communities. . . . It is not enough to say, as the majority implies, that those landowners can file a nuisance suit in the future.⁴⁴

⁴³ W. Va. Div. of Env'tl. Prot. v. Kingwood Coal Co., 490 S.E.2d 823, 843-44 (W. Va. 1997) (Starcher, J., dissenting).

⁴⁴ Mountain Cmty's. for Responsible Energy v. Pub. Serv. Comm'n of W. Va. et al., 665 S.E.2d 315, 332 (W. Va. 2008) (Starcher, J., dissenting).

F. Insurance

I have written a number of opinions about insurance and insurance coverage. Because of the substantial advantages that insurance companies have over individuals in the sale of insurance and in the responses made to policy holders when claims are filed, and in the resources of the respective parties, the law tends to hold this industry to a rather strict standard of review. Some of the opinions I have authored include: *Gibson v. Northfield Insurance Co.*⁴⁵ (holding that defense costs are not included in liability coverage limits, and that limits on government entity insurance must be disclosed and agreed to); *Colonial Insurance Co. v. Barrett*⁴⁶ (holding that notice of a claim can be given to the insurer by someone other than the insured); *Farmers Mutual Insurance Co. v. Tucker*⁴⁷ (holding that a “household” may include people living in more than one building); *Marlin v. Wetzel County Board of Education*⁴⁸ (holding that a certificate of insurance may give rise to an estoppel); *Adkins v. Meador*⁴⁹ (holding that “use of a vehicle” is broader than “occupying”); *State ex rel. West Virginia Fire & Casualty Co. v. Karl*⁵⁰ (holding that court approval is not required for all infant settlements); *Miller v. Fluharty*⁵¹ (defining the insurer’s duty of investigation for first-party claims).

One notable insurance law opinion that I authored is *Columbia Casualty Co. v. Westfield Ins. Co.*,⁵² where our Court answered a certified question from the U.S. District Court for the Northern District of West Virginia. In *Columbia Casualty*, two lawsuits were filed against a jail as a result of inmate suicides. The jail’s insurance companies claimed that liability insurance coverage for the jail did not apply to the deaths, citing an “intentional injury” exclusion. We held that the jail did have insurance coverage.⁵³

Another notable insurance opinion that I wrote was *Farmers and Mechanics Mutual Insurance Co. of West Virginia v. Cook*.⁵⁴ In this case, an insurance company denied a defense and liability coverage to a woman who was (allegedly) defending herself, and killed a neighbor. We held in *Farmers and*

⁴⁵ 631 S.E.2d 598 (W. Va. 2005).

⁴⁶ 542 S.E.2d 869 (W. Va. 2000).

⁴⁷ 576 S.E.2d 261 (W. Va. 2002).

⁴⁸ 569 S.E.2d 462 (W. Va. 2002).

⁴⁹ 494 S.E.2d 915 (W. Va. 1997).

⁵⁰ 487 S.E.2d 336 (W. Va. 1997).

⁵¹ 500 S.E.2d 310 (W. Va. 1997).

⁵² 617 S.E.2d 797 (W. Va. 2005).

⁵³ See also *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1 (W. Va. 1998) (homeowners “all risk” insurance could cover landslide if partially caused by non-natural events); *Erie Ins. Prop. & Cas. Co. v. Stage Show Pizza, Inc.*, 553 S.E.2d 257 (W. Va. 2001) (insurance company has a duty to defend employer sued by employee under common law theories despite “workers’ compensation” exception where the employer failed to pay workers’ compensation premiums).

⁵⁴ 557 S.E.2d 801 (W. Va. 2001).

Mechanics that whether Cook intended her neighbor's death was a question of fact; and that even if she had intended the death and acted in self-defense, the "intentional acts" exclusion did not apply.

Some of my language in separate opinions about insurance companies sounds a little "tough":

This case is another example of the axiom that "what the big print giveth, the small print taketh away." As former Justice Neely eloquently stated, "In most insurance cases, the plaintiffs pay for and believe they have insurance, to discover only after disaster strikes, no insurance. The insurer has the plaintiffs' money and after the disaster—fire, death or accident—inform the plaintiffs that no insurance covers the fire, death or accident."⁵⁵

In the instant case, the policyholders bought two policies on two cars. They paid premiums on a "per-vehicle" basis. Yet State Farm now wants to pay benefits on a "per-person" basis, pointing to an exclusion which prohibits stacking the coverage bought on each vehicle.

An argument I hear repeatedly to support such practices is that insurance companies are struggling to comply with our State's laws, and simply can't profitably survive with this Court's interpretation of those laws. The argument is always posed that the decisions of this Court are going to bankrupt insurance companies.

I have one response: hogwash. In its 2000 Annual Report To State Farm Mutual Policyholders, State Farm made it patently clear that it can make a hefty profit from selling insurance policies. The report, available on the Internet at www.statefarm.com, indicates that State Farm has roughly \$78 billion—that's billion, with a "b"—dollars worth of assets. By any assessment, this company is a financial monster.⁵⁶

The plaintiff-passenger in this case paid for protection against bodily injuries that might be caused by an underinsured driver.

⁵⁵ Mitchell v. Broadnax, 537 S.E.2d 882, 896 (W. Va. 2000) (Starcher, J., concurring).

⁵⁶ Dairyland Ins. Co. v. Fox, 550 S.E.2d 388, 393 (W. Va. 2001) (Starcher, J., dissenting).

As fate would have it, that underinsured driver was her husband. Our automobile insurance laws mandate that underinsured motorist protection follow the plaintiff-passenger wherever she goes, but State Farm's exclusion is blatantly contrary to that statutory mandate.

State Farm's policy language is contrary to the statute, and denies the plaintiff that for which she bargained and paid. I therefore respectfully dissent.⁵⁷

G. *Torts & The Common Law*

For hundreds of years before legislatures began "sticking their oar in the water" to help figure out where justice can be found in disputes between parties, courts have been applying, updating, and revising the common law and tort law to resolve these disputes. In general, the common law system has worked quite well, and it is my continuing sense that the careful development of the common law needs to be guarded from excessive legislative intrusion.

Writing for our Court, I authored a number of opinions dealing with the common law and tort law: *Phillips v. Larry's Drive-In Pharmacy, Inc.*⁵⁸ (ambiguous statutes are to be interpreted as making the least change in the common law); *Hinchman v. Gillette*⁵⁹ (construing notice provisions in medical malpractice statute); *McDavid v. United States*.⁶⁰ (allowing estate to collect for a decedent's pre-death pain and suffering); *Foster v. City of Keyser*⁶¹ (modernizing *res ipsa loquitur*, placing "high duty of care" on transporters of dangerous substance). Also see *Rowe v. Sisters of Pallottine Missionary Society*⁶² (holding that the fact that a patient's negligence caused his initial injury is not a factor in assessing comparative negligence of a subsequent health care provider); *Bradshaw v. Soulsby*⁶³ (defining elements of the "discovery rule" as applied to wrongful death actions); *Gaither v. City Hospital, Inc.*⁶⁴ (defining the "discovery rule" as applied to the statute of limitations in tort actions).

Following is some language discussing the common law from my separate opinions:

⁵⁷ Cantrell v. Cantrell, 582 S.E.2d 819, 826 (W. Va. 2003) (Starcher, J., dissenting).

⁵⁸ 647 S.E.2d 920 (W. Va. 2007).

⁵⁹ 618 S.E.2d 387 (W. Va. 2005).

⁶⁰ 584 S.E.2d 226 (W. Va. 2003).

⁶¹ 501 S.E.2d 165 (W. Va. 1997).

⁶² 560 S.E.2d 491 (W. Va. 2001).

⁶³ 558 S.E.2d 681 (W. Va. 2001).

⁶⁴ 487 S.E.2d 901 (W. Va. 1997).

When Justice Oliver Wendell Holmes spoke of “fixed and uniform standards of external conduct” in his 1881 lecture series (now found in *The Common Law* (1909)), we must keep in mind that Holmes was writing in a time when the harsh rules of contributory negligence, assumption of the risk, and the fellow-servant doctrine were taking root in the law. These rules, which were once new, shiny principles designed to immunize entrepreneurs and businesses from liability at a time of early industrialization, have since weathered and fallen in the face of time, reason, and a growing intolerance for human suffering that has accompanied the post-industrial era.

Applying these principles to the instant case, rarely are the distinctions between licensee, invitee and trespasser proven “to have determined the conduct of the litigants.” A licensee is a person who enters onto property with permission; an invitee enters onto property with permission for some pecuniary or business benefit to the landowner; and a trespasser enters on land without any permission whatsoever. A landowner owes no duty to a licensee or trespasser, but owes a duty of due care to an invitee. I agree that a landowner doesn’t owe a trespasser the time of day. I have a right to assume people will obey the law and not trespass onto my land; therefore, I don’t owe a trespasser any duty whatsoever (except to not intentionally cause harm).

But I fail to understand why the invitee-licensee distinction should continue to exist, primarily because I don’t think landowners manage their property with these common-law status distinctions in mind. The invitee-licensee rule creates the fictional premise that a social visitor to a home walks across a lawn with full knowledge that they do so at their own peril, but a babysitter, mail carrier, taxi driver, garbage collector, deliveryman, paperboy or meter reader walking in the social visitor’s footsteps may feel safe in the knowledge that he or she can recover from the homeowner their damages for any negligently caused injury.⁶⁵

It is axiomatic that both the Legislature and the Court are constitutionally empowered to alter the common law. Courts amend the common law narrowly and incrementally, on a case-by-case basis and usually over many years. But the Legislature,

⁶⁵ *Self v. Queen*, 487 S.E.2d 295, 299-301 (W. Va. 1997) (Starcher, J., concurring).

when changing the common law, often makes drastic statutory changes in response to real or perceived crises, and often without a clear understanding of the impact those changes might have on individual cases. When the crises pass or are proven illusory, the Legislature is rarely impelled to repeal the statutes, and so statutes sometimes exist that address a non-existent problem. This means that cookie-cutter Legislative enactments intended to “fix” a problem with the common law often end up creating absurd conundrums—or worse, end up trampling upon constitutional rights—when applied to facts in a courtroom.⁶⁶

H. *Parents, Children, and Families*

In this important area of the law, my writings reflect that I am protective of children and parents from the power of the State, that I abhor family violence, and that I am forgiving when a woman, in self protection, injures or kills an abusive spouse. Opinions that I have authored include: *Katherine B. T. v. Jackson*⁶⁷ (a child may ask for a domestic violence protective order); *State v. Kirk N.*⁶⁸ (parents are not separate and independent parties in a juvenile proceeding); *State v. Damian R.*⁶⁹ (establishing due process requirements for transfer of a child to state custody); *In re George Glen B., Jr.*⁷⁰ (termination of parental rights requires a showing of actual current abuse or neglect); *State ex rel. West Virginia Dept. of Health and Human Resources, Child Support Enforcement Div. v. Michael George K.*⁷¹ (natural father may have a duty to support child even though another person was named as the father on the birth certificate).

As a judge, I have sometimes described myself as a “social worker with clout.” Here are some excerpts from separate opinions that express my thinking and feelings in this area:

The circuit judge in this case went to great lengths to protect the welfare of a very troubled family. The mother is a drug addict; the father committed a crime allegedly to “feed his family.” The mother is in and out of rehab; the father is stuck in a federal prison until the end of the year. And in the middle, two young children are growing up very quickly.

⁶⁶ Blankenship v. Ethicon, Inc., 656 S.E.2d 451, 460 (W. Va. 2007) (Starcher, J., concurring and dissenting).

⁶⁷ 640 S.E.2d 569, 575-76 (W. Va. 2006).

⁶⁸ 591 S.E.2d 288, 295 (W. Va. 2003)

⁶⁹ 591 S.E.2d 168, 177 (W. Va. 2003).

⁷⁰ 532 S.E.2d 64, 69 (W. Va. 2000).

⁷¹ 531 S.E.2d 669 (W. Va. 2000).

In looking at the facts in this case the judge did the best he could with the situation as presented to the court. It appears that the mother is so wrapped up in her addiction that she does not provide care for the children. The father, however, seems to regret his actions and is struggling to maintain a relationship with the children. He regularly visits with the children in a prison visiting room, plays with them, talks, and inquires about their well-being. Beyond that, there isn't much he can do from the confines of prison except count the days. . . .

The goal of abuse and neglect proceedings is to protect children from severe physical and emotional trauma, and to provide every child with long-term stability. While we may not be able to provide every child with the perfect, white bread, cookie-cutter childhood replete with sitcom-like suburban experiences, the court system must fashion a solution that provides protection for children, with a reasonable opportunity to reach adulthood safely and in as good physical and mental health as practicable. And this opportunity may include permitting a father who has been incarcerated for a crime to continue to parent his children.⁷²

I am concerned that the majority opinion has, in effect, applied a bright-line rule: unless a parent who abuses their child admits to the abuse, and unless the other parent accuses the "abuser parent" of abuse, neither parent will ever be the child's parent again. . . .

But it seems to me to be unreasonable to assume that parents who can't or won't "fess up" or make an accusation regarding abuse can't *ever* become and behave as acceptable parents. Nothing in our statutes says that this is a judgment that the Legislature has made, and I don't think this is an accepted principle of social science. So how can we make this the premise of such a harsh rule, a rule that certainly will have the effect of tearing some children away from basically loving and caring parents, and placing these children into the highly problematic worlds of foster care and adoption?⁷³

⁷² *In re Emily*, 540 S.E.2d 542, 562 (W. Va. 2000) (Starcher, J., concurring).

⁷³ *In re Taylor B.*, 491 S.E.2d 607, 617-618 (W. Va. 1997) (Starcher, J., dissenting).

When circuit judges determine that a child is neglected, or that parental rights be terminated, the decisions of this court often (and in my view quite properly) state that in these difficult cases we must give deference to the circuit court's perception and weighing of the evidence. Why? Because the judges see the people involved. The judges get a sense and feel of the situation and can size it up. Is this parent well-meaning and trying? Could the parent, with enough support, do a decent job? Look at the child—is it really fair to say that the child is neglected? Is it really fair to say that the parent is an abuser? Is it fair to separate a child from a parent, even when limited parenting skills are obvious? It's a tough call to make such determinations, and I think that it's a call that requires a face-to-face look at the people involved, to be done well.

But when circuit judges say—based on the same sorts of assessments—that a child should *not* be found to be neglected, or that parental rights should *not* be terminated, that the court should give the parent-child relationship another chance—then I sense that our decisions too often tend to find reasons why we shouldn't defer to or trust the circuit judge's judgment.⁷⁴

I am a firm believer that violence is an unacceptable parenting technique. No child should live in fear of physical or emotional injury from a parent. As a society, we expect responsible adults to refrain from violence when dealing with other adults; we should also expect responsible parents to refrain from violence or threats of violence toward their own children. As Mohandas Gandhi once said, "I object to violence because when it appears to do good, the good is only temporary; the evil it does is permanent." Mr. Powell, and other parents just like him, must understand that threatening or battering a child will not be tolerated in a civil society. . . .

But I also believe in the power of contrition. Mr. Powell has admitted his error, he has paid a serious price for his error, and no other misconduct involving students has been raised, let alone proven. On this record, the actions of the State Superintendent appear more like "piling it on," dishing out penalties that bear little relationship to the offense. Suspending Mr. Pow-

⁷⁴ State v. Julie G., 500 S.E.2d 877, 888 (W. Va. 1997) (Starcher, J., dissenting).

ell from teaching for four years, when there was no evidence he was unfit to teach, carried too much a load of unfairness.⁷⁵

To me, the instant case is not about “self-defense.” It is about the right of a mother to protect her child, and the right of a homeowner to stop a criminal from committing a violent crime in her home.

Valerie Whittaker shot a man who had brutally beaten her many times, and who came into her home in violation of a court order and feloniously attacked her daughter. Her response was what, I believe, most people would like to have the courage to do. Under these undisputed facts, I would simply reverse Ms. Whittaker’s conviction. The evidence in this case permitted only one result—justifiable homicide in the defense of a child and the sanctity of the home. The jury should have been so directed.⁷⁶

I. *Workers’ Compensation*

People who are injured in connection with their work lose most or all of their legal rights to hold their employers “accountable.” In return for that loss, these injured persons should have a speedy and adequate alternative remedy. Instead, they often get a slow and inadequate remedy—and too often, rejection.

In several opinions in the workers’ compensation area that I wrote, I felt that our Court was making a modest advancement in the law at the time, however incremental: *Skaggs v. Eastern Associated Coal Corp.*⁷⁷ (termination of worker for accepting workers’ rehabilitative benefits was actionable); *State ex rel. McKenzie v. Smith*⁷⁸ (claimants may not be required to use “company doctors” for rehabilitation).

However, in general, I have come to feel that our Court has improperly abandoned its duty to protect the rights of working people, as reflected by the following language from separate opinions:

What especially concerns me is that a public official files a number of lawsuits in 1998, and the same public official then dismisses the suits in 1999. In doing so, the action goes a long way toward immunizing the public official’s former business

⁷⁵ Powell v. Paine, 655 S.E.2d 204, 212 (W. Va. 2007) (Starcher, J., concurring).

⁷⁶ State v. Whittaker, 650 S.E.2d 216, 236 (W. Va. 2007) (Starcher, J., dissenting).

⁷⁷ 569 S.E.2d 769, 777 (W. Va. 2002).

⁷⁸ 569 S.E.2d 809, 820 (W. Va. 2002).

colleagues from any attempt by *a future administration* to collect these debts.

What a blow to West Virginia workers! What a sweet deal for the coal companies that made a fortune using contract mining companies! And what a sour deal for the West Virginia businesses—including responsible coal companies—that played by the rules, and paid their fair share of workers' compensation premiums!

Finally, what a stain on the public face of government! It just looks terrible for a former coal company executive to spearhead a move that has the effect of giving his former business colleagues immunity from civil liability.⁷⁹

The facts of this case demonstrate, in a nutshell, why our workers' compensation system is on financially tenuous ground. A historical problem in West Virginia has been the use by employers of "shell" corporations which are created, pay little or no workers' compensation premiums, and then go out of business a year or two later. The Workers' Compensation Commissioner and companies that do pay their compensation premiums are then left to foot the bill for injured workers. Shortly thereafter, the first shell corporation is replaced by another shell corporation with the same corporate officers using the same equipment and same employees to do the same work, and the cycle repeats itself endlessly.

The Legislature has tried to fix this problem. I dissent because the majority opinion undoes the Legislature's work, and strips the Workers' Compensation Commissioner of the statutory authority to put the workers' compensation system back on the right financial track and make *all* employers pay their fair share.⁸⁰

⁷⁹ State *ex rel.* Affiliated Const. Trades Found. v. Vieweg, 520 S.E.2d 854, 875 (W. Va. 1999) (Starcher, J., dissenting).

⁸⁰ IPI, Inc. v. Burton, 617 S.E.2d 531, 538 (W. Va. 2005) (Starcher, J., dissenting).

[T]he majority opinion sets West Virginia's workers' compensation and common law on a course that is almost wholly different from that of every other state in the nation. Arthur and Lex Larsons' *Larson's Workers' Compensation Law*—the leading summary of the nationwide state of workers' compensation law since the 1950s—makes it clear that workers' compensation is a tit-for-tat, *quid pro quo* system: the employee gives up a common law cause of action only when it is replaced with a statutory workers' compensation remedy. If there is no *quid pro quo* within the workers' compensation system to counter a worker's loss of the right to sue, then states allow the worker to proceed with a common law tort action. The majority opinion ignores the leading scholars on this issue, and charts a different course. . . .

I was troubled to also find in the majority's opinion a rewriting of science and rewriting of history. The majority opinion suggests that the mental injury incurred by the plaintiff, Berchie Eugene Bias, was a mere trifle because it "occurr[ed] within a period of 90 minutes or so ... when plaintiff was trapped in a smoky environment within a mine." The majority opinion then distinguishes Mr. Bias's injury from that of the plaintiff in *Jones v. Rinehart & Dennis*, because Mr. Bias's injury "was not at all similar to the slowly developing disease at issue in *Jones*."

First, modern medical science shows that traumatic stress disorders are, in fact, a physical injury. The shock of a terrifying event—like a rape, a robbery at gunpoint, or fearing death by suffocation when lost in the smoky darkness of a mine for ninety minutes—triggers chemical reactions in the brain that measurably scar and injure nerve tissue. The brain is actually, physically "re-wired" and injured. To somehow suggest that the injury to the plaintiff's brain is different from the lung injury that suffocated the decedent in *Jones* reflects a primitive, out-dated view of science.

The majority opinion reflects a disdain for the extreme fear of death that coal miners like Mr. Bias face on a daily basis—a fear that has become all-too-real this year—and the disabling effect that fear can have on a miner's psyche. So far, in 2006, at least thirty-three miners have died in America on the job, nineteen of them in West Virginia. In January, twelve miners died at the Sago mine after an explosion, eleven of them by suffocation waiting for rescue. Less than three weeks later, two miners suffocated after a fire at the Aracoma Alma No. 1 Mine, when the

miners became lost in the smoke. In May, three miners survived an explosion at the Darby Mine No. 1 in eastern Kentucky only to die of carbon monoxide poisoning waiting in the smoke for rescue. It pains me to hear of these deaths, and then read the majority opinion's callous treatment of Mr. Bias's claims.⁸¹

J. *Mental Illness*

Mental illness is far too easily shoved to the side—in our courts, and in our general society. For this reason, I have actively attempted to expound constructively on this subject, when given the opportunity. In *State ex rel., Walker v. Mental Hygiene Commissioners*,⁸² I wrote:

The events leading to a mental hygiene commitment to a psychiatric hospital are dangerous, traumatic, and frightening. Every mental hygiene “pickup order” is an occasion of heightened risk for law enforcement. A mental hygiene commitment is not a “tune-up.” It is a crisis situation—for the ill person, for their family and loved ones, and for all of the other participants in the process.⁸³

Today, for most patients, modern medications—if taken as prescribed (a big “if,” see below)—can prevent many of the most dangerous symptoms of severe mental illness; can bring acute episodes of psychosis to an end in a relatively short time; and can reduce or often eliminate the need for hospitalization. However, many individuals with severe mental illnesses, as a result of their illness and through no fault of their own, have diminished insight into the need to adhere to a medication regime. Many experts feel that the most pressing current public health challenge in the area of mental illness treatment is obtaining better prescribed medication compliance by individuals with severe, chronic mental illnesses. . . . Discussing such individuals, the Supreme Court of Wisconsin recently said in *In Re Dennis H.*, 255 Wis.2d 359, 386, 647 N.W.2d 851, 863-64 (2002):

By permitting intervention before a mentally ill person's condition becomes critical, the legislature has enabled the mental

⁸¹ *Bias v. E. Associated Coal Corp.*, 640 S.E.2d 540, 551, 553-54 (W. Va. 2006) (Starcher, J., dissenting). The *Jones v. Rhinehart & Dennis* case referenced in the block quotation may be located at 168 S.E.2d 482 (W. Va. 1933).

⁸² 614 S.E.2d 727 (W. Va. 2005).

⁸³ *Id.* at 735 n. 18.

health treatment community to break the cycle associated with incapacity to choose medication or treatment, restore the person to a relatively even keel, prevent serious and potentially catastrophic harm, and ultimately reduce the amount of time spent in an institutional setting. This type of “prophylactic intervention” does not violate substantive due process.⁸⁴

Also see Syllabus Point 4, *Smith v. West Virginia Human Rights Commission*,⁸⁵ which found that depression can be a cognizable disability under the State Human Rights Act.

In a number of separate opinions I wrote about mental illness:

First, the Court in Syllabus Point 1 of *Smith v. Animal Urgent Care* reached the conclusion that “purely mental or emotional harm that arises from a claim of sexual harassment and lacks physical manifestation does not fall within a definition of ‘bodily injury’ which is limited to ‘bodily injury, sickness, or disease.’” Frankly, this is an archaic conceptualization of human anatomy and physiology, based on a belief that there is a distinction between “mental” and “physical” injuries. The science of today establishes that the brain can be physically injured solely through emotional disturbance. A traumatizing event can trigger severe chemical reactions in the brain, such that a tangible injury to the brain can occur. Ask any combat veteran about post-traumatic stress disorder, or any doctor who treats that veteran—they will tell you that intense stress can cause the brain to be “rewired.”

In other words, in the past when we said someone was “emotionally scarred” by an event, it might have been closer to the truth than we knew.

So when this Court said in *Smith v. Animal Urgent Care* that psychological injuries caused by sexual harassment were not bodily injuries, that conclusion ignored modern science and ignored the physical, chemical aspects of psychological injuries. If a record of medical evidence were presented on this point to the Court, perhaps to folly of *Smith v. Animal Urgent Care* might be recognized.⁸⁶

⁸⁴ *Id.* at 739 n. 18.

⁸⁵ 602 S.E.2d 445 (W. Va. 2004).

⁸⁶ *Tackett v. Am. Motorists Ins. Co.*, 584 S.E.2d 158, 168 (W. Va. 2003) (Starcher, J., concurring and dissenting).

I concur in the Court's opinion and judgment. I write separately to point out that the father in this case, Bobby F., has been diagnosed with schizophrenia and was not taking his prescribed medication.

Schizophrenia, a serious neurological brain disorder, strikes one out of one hundred people worldwide, with the usual onset of symptoms coming between the ages of 13 and 25. Like diabetes, there is no cure—only treatment, which is basically medication to relieve the symptoms of psychosis, disorganized thoughts, etc. The cause of schizophrenia is unknown, although there is some genetic-based component. Some of my best friends have adult children with schizophrenia.

Many people with schizophrenia “do well” if they consistently take prescribed medicine. (However, a substantial percentage, unfortunately, do not do well, despite the best treatment.) But many people with schizophrenia have a substantially diminished or no appreciation of the fact that they have an illness. These people often do not take prescribed medications, through no fault of their own.

The consequences of schizophrenia for patients, families, and our society—particularly untreated schizophrenia—are enormous. Most people with the illness are cared for by their families; many others are isolated and/or homeless. For many family members and other treatment and care providers, getting a person who has schizophrenia to “voluntarily” take their medicine can be a very difficult—or impossible—task. The result is often a spiral into psychosis and expensive involuntary hospitalization.

Fortunately, new laws like “Kendra’s Law” in New York have drastically reduced episodes of psychosis, violence, and homelessness among non-compliant patients—by using court orders and assertive community treatment as a less—restrictive alternative, to encourage patients with schizophrenia to take prescribed medicine.

In the instant case, the whole sorry series of events might have been avoided if Bobby F. had been required by a court order to take his prescribed medicine.

I pray that we will soon implement better laws in West Virginia to help health care providers and families and patients like Bobby F. and his children.⁸⁷

K. *We The Jury*

As a trial judge, I conducted hundreds of jury trials. Because I have a great respect for our Anglo-American tradition of having justice meted out by groups of ordinary citizens, I have written frequently on the jury system.

For the Court, I wrote *Evans v. Mutual Mining*⁸⁸ (jury may hear opinion testimony from the owner about the value of his personal property); *Jackson v. State Farm Mutual Auto Insurance Co.*⁸⁹ (whether insurance company reasonably investigated and evaluated liability is ordinarily a jury question); *State v. Thompson*⁹⁰ (judge may not injure a party's case by demonstrating partiality before the jury); *State v. Keaton*⁹¹ (judge should not ordinarily converse with jury off the record and without counsel present) (imposing strict requirements in the testimony of judges before juries); *State v. Shabazz*⁹² (magistrates should only converse with juries in the presence of counsel and on the record).

One of the jury law opinions that I take particular pride in authoring for the Court is *O'Dell v. Miller*.⁹³ In this case, we went a long way toward arresting a trend in the lower courts to "rehabilitate" prospective jurors who had clearly indicated the presence of a disqualifying prejudice or bias. I was assisted in writing *O'Dell* by the late Janie Peyton, Esq., who served as my law clerk from May 2001 to November 2005. She was a smart, funny woman, and I and her co-workers miss her very much.

My strong support for our jury system is expressed in the following statement from a separate opinion:

I am a stout believer in and defender of democracy, and I believe that juries are as pure a representation of direct democracy as you can have in our republic. The members of a jury—like our elected representatives—must be ready to render service with an open mind, ready to recognize their predispositions but ready to set them aside when they are in conflict with the facts or the law. But when a person expresses a clear prejudice against one party, or a clear bias in favor of certain theories or

⁸⁷ *In re Tiffany P.*, 600 S.E.2d 334, 339-340 (W. Va. 2004) (Starcher, J., concurring).

⁸⁸ 485 S.E.2d 695, 699-700 (W. Va. 1997).

⁸⁹ 600 S.E.2d 346, 353 (W. Va. 2004).

⁹⁰ 647 S.E.2d 834, 846 (W. Va. 2007).

⁹¹ 599 S.E.2d 799, 807 (W. Va. 2004).

⁹² 526 S.E.2d 521, 523 (W. Va. 1999).

⁹³ 565 S.E.2d 407 (W. Va. 2002).

forms of evidence, and does nothing to reflect on the possible folly of holding the prejudice or bias regardless of the facts, then the person has no business being qualified as a juror. Circuit judges must, above all else, preserve the integrity and vitality of the jury system by seating only those prospective jurors who demonstrate—by plain expression rather than recitation of a “magic phrase”—clear impartiality.⁹⁴

L. *Gotcha!*

One theme that can be found in many of my opinions is to favor the resolution of issues on their merits. I look skeptically on the claims of parties who seek to either impose or escape liability purely for procedural reasons—what I call “Gotcha!” justice. Here are some examples of how I have expressed this view:

The statute of limitations can sometimes help a person who stops doing bad things. But it’s another matter when a wrongdoer repeats those bad acts over and over, and then, when caught, tries to plead the statute of limitations to escape accountability for the earlier actions that have continued unabated. . . .

In the instant case, one can apply the continuing tort theory to claim that the most recent “conversion” by the bank was when the statute of limitations began to run. But one may also view the case as one where fraudulent concealment or similar conduct by the bank “equitably tolled” the statute of limitations which had begun running at each of the earlier episodes. It’s unclear what the majority opinion means on these two different issues; but either way, the bank should not be able to get away with alleged misconduct when they never stopped engaging in it.⁹⁵

A problem that currently exists in the legal profession is that a lawyer who is most likely to “drop the ball” and fail to diligently prosecute a client’s case is also most likely to be unable, or simply not bother, to purchase legal malpractice insurance. The end result is that when a circuit court, like in this case, dismisses a case due to the lawyer’s inactivity, the client is left

⁹⁴ Black v. CSX Transp., Inc., 648 S.E.2d 610, 620 (W. Va. 2007) (Starcher, J., concurring).

⁹⁵ Copier Word Processing Supply, Inc. v. WesBanco Bank, Inc., 640 S.E.2d 102, 113 (W. Va. 2006) (Starcher, J., dissenting).

with recourse against a lawyer with few assets. In other words, the client ends up suffering.⁹⁶

Gentlemen, start your engines. The majority has dropped the checkered flag in favor of the defendant in a speedy analysis of whether the plaintiff was shoved aside, allowing the defendant to take the lead in operating the plaintiff's business. This case presents a summary result where, had the parties each been allowed to tell his story side-by-side to a jury, the result might have been quite different. . . .

My thinking is, if the shoe had been on the other foot, and Mr. Fry had on opening day suddenly refused to sell a single set of tires or a splash of gas to drivers at Mr. Chapman's new race-track, Mr. Chapman would feel that he had a right to a trial to show he lost business and profits under the contract. Basically, a jury should be allowed to decide whether or not Mr. Chapman's conduct was the pits.

If the majority had simply "whoa'd down" a little bit, it would also have discovered in the final turns of this event that the result dictated by the Golden Rule is also supported by settled legal principles—also fairly easy to understand—which strongly suggest that this case should not have been disposed of by a quick drop of the checkered flag called summary judgment.⁹⁷

Following my "anti-gotcha!" approach, I wrote for the Court in *Bradshaw v. Soulsby*⁹⁸:

We cannot conceive of how a beneficiary could be required to bring an action—within 2 years of a person's death—without knowledge that the person has died, without knowledge that the death was caused by the wrongful act, neglect, or default of another individual, or without knowledge of the identity of that individual. It is precisely these situations, where a beneficiary

⁹⁶ Covington v. Smith, 582 S.E.2d 756, 773 (W. Va. 2003) (Starcher, J., concurring).

⁹⁷ Fry Racing Enters., Inc. v. Chapman, 497 S.E.2d 541, 545-547 (W. Va. 1997) (Starcher, J., dissenting).

⁹⁸ 558 S.E.2d 681 (W. Va. 2001).

reasonably lacks knowledge of these elements necessary to prove a case, where the discovery rule was intended to apply.⁹⁹

I also expressed my “anti-gotcha!” philosophy writing for the Court in *Burkes v. Fas-Chek Food Mart Inc.*¹⁰⁰ (defining “good cause” for extending the period for serving a complaint); *Farm Family Mutual Ins. Co. v. Thorn Lumber Co.*¹⁰¹ (setting hearing standards to establish damages in default judgment cases); *Brooks v. Isinghood*¹⁰² (setting standards for “relation-back” of amended complaints); and *Gaither v. City Hospital, Inc.*¹⁰³ (defining the “discovery rule” in civil cases for tolling the statute of limitations).

M. *State Constitutional Law*

One of the most important duties of the West Virginia Supreme Court is to interpret the provisions of our Constitution, and I have written frequently on state constitutional issues. Am I a “strict constructionist” or an “activist judge who legislates from the bench” (to be defined in the final pages of this writing)? You be the judge! Here are some excerpts from my writing in this area:

I believe that the \$1,000,000.00 “cap” imposed by *W. Va. Code, 55-7B-8* [1986] is a patent violation of the equal protection and certain remedy provisions of the *West Virginia Constitution*. This discriminatory statute arbitrarily treats similarly situated persons differently and unfairly, and often deprives severely injured plaintiffs a remedy by due course of law. A plaintiff who is injured by the negligence of anyone *other* than a “health care provider” can collect his or her full damages as awarded by a jury—but a plaintiff who is injured by the negligence of a “health care provider” cannot. Why should health care providers get more protection for their carelessness than others do as a vehicle driver, homeowner, or provider of other professional services?¹⁰⁴

The Legislature cannot just give a Grant Committee a pot of money and tell them to “go do good stuff.” That is constitution-

⁹⁹ *Id.* at 688.

¹⁰⁰ 617 S.E.2d 838, 844-45 (W. Va. 2005).

¹⁰¹ 501 S.E.2d 786 (W. Va. 1998).

¹⁰² 584 S.E.2d 531, 541 (W. Va. 2003).

¹⁰³ 487 S.E.2d 901, 909 (W. Va. 1997).

¹⁰⁴ *Verba v. Ghaphery*, 552 S.E.2d 406, 413 (W. Va. 2001) (Starcher, J., dissenting).

ally impermissible—there must be some real standards set by law, not just by the Committee itself on an *ad hoc* basis. . . .

In *State ex rel. Holmes v. Gainer*, 191 W.Va. 686, 447 S.E.2d 887 (1994), this Court found that a legislative pay raise had been put in place in violation of a constitutional timing requirement—but because it was a “technical” mistake in an area where the law was unclear, this Court approved the legislative pay raise—and said, in effect, “Go and sin no more.”

Could and should we have said—“go and sin no more”—in this case?

I judge “no”—not with more than \$200 million of public dollars at stake. That would send a message that a statute could violate basic constitutional principles, but this Court would nevertheless approve the results of the statute for political expediency or because—quite frankly—there were “thousands of jobs at stake.”¹⁰⁵

Prior to this case, no West Virginia judicial officer or employee has ever been barred from running for any judicial office—because, of course, their right to do so is specifically reserved in our *Constitution*. . . .

Not long after the *Constitution* of this state was adopted, Justice Brannon warned that permitting additional qualifications for office to be imposed—by any process other than constitutional amendment—would make the fundamental right to hold public office “subject to the fluctuation of sentiment, the caprices of constantly changing legislatures, the passions of the hour:

If one additional material qualification may be prescribed, why not another? Why not many others? The constitution is fundamental law, and strictly construed in defense of the citizen’s rights. It is the Magna Carta of his freedom and rights, political and civil. Admit once that it does not fix his qualification for office. Where would his disfranchisement end? That would depend upon uncertain political, religious, or other winds. Would we limit the act within the

¹⁰⁵ *State ex rel. West Virginia Citizens Action Group v. West Virginia Econ. Dev. Grant Comm.*, 580 S.E.2d 869, 896 (W. Va. 2003) (Starcher, J., concurring).

bounds of the reasonable? That would be indefinite, unsafe, precarious, dependant upon the times and motives and aims dominating them. Against these things, it was intended to embed the right in the solid rock of the constitution. . . .¹⁰⁶

The majority opinion unconstitutionally steals the right to choose from the voters of this State. The majority has, in effect, successfully assisted the Hilton Head/Lincoln Navigator crowd in hijacking an election from the Myrtle Beach/pickup truck folks.¹⁰⁷

My sense is that our sovereign immunity jurisprudence has come to be—from a theoretical or academic perspective—fairly confused.

I further sense that this jurisprudential confusion has unfortunately created a fertile field for opportunistic attempts by litigants to escape liability for their wrongdoing, by the last-minute assertion of sovereign immunity.

Frankly, what does rather ancient and eroded constitutional language have to do with a multi-million-dollar hospital corporation's last-ditch attempt to escape paying money to a doctor who had to spend \$300,000.00 in attorney fees to get what he was legally entitled to? In my judgment, very little. Yet this scenario, of course, is the instant case in a nutshell.¹⁰⁸

Marmaduke Dent, the eminent and humane West Virginia jurist who served on this Court from 1893 to 1904, once commented that a decision exonerating a railroad for negligently killing cattle, after first attracting them to the tracks with salt, was “repugnant to the sense and justice of every reasonable man not learned in the intricacies of railroad jurisprudence.” *Kirk v. Norfolk & W.R. Co.*, 41 W.Va. 722, 732, 24 S.E. 639, 643 (1896) (Dent, J., dissenting).

¹⁰⁶ *State ex rel. Carenbauer v. Hechler*, 542 S.E.2d 405, 423-24, 431 (W. Va. 2000) (Starcher, J., dissenting) (quoting *State ex rel. Thompson v. McAllister*, 18 S.E. 770, 777-78 (1893)).

¹⁰⁷ *Hechler*, 542 S.E.2d at 423-24, 431 (Starcher, J., dissenting).

¹⁰⁸ *Univ. of W. Va. Bd. of Trustees ex rel. W. Va. Univ. v. Graf*, 516 S.E.2d 741, 747-748 (W. Va. 1998) (Starcher, J., dissenting).

The majority opinion has the same characteristics that Judge Dent identified over 100 years ago. The majority opinion worries about the “inconvenience” to railroads of having to maintain crossings. What about the inconvenience to businesses, farmers and landowners who have to drive dozens of miles because a railroad unilaterally tears up a crossing that has been used for decades?¹⁰⁹

In one state constitutional law case, *State ex rel. McGraw v. Burton*,¹¹⁰ my opinion addressed the thorny issue of the duties and powers of the attorney general, *vis-a-vis* executive branch agencies who were using their own attorneys. The opinion stated in Syllabus Points 2, 4, and 5:

2. Pursuant to Article VII, Section 1 of the *West Virginia Constitution*, the Attorney General of the State of West Virginia is the State’s chief legal officer, which status necessarily implies having the constitutional responsibility for providing legal counsel to State officials and State entities.¹¹¹

4. The inherent constitutional functions of the Office of the Attorney General of the State of West Virginia include: (1) to play a central role in the provision of day-to-day professional legal services to State officials and entities in and associated with the executive branch of government; (2) to play a central role in ensuring that the adoption and assertion of legal policy and positions by the State of West Virginia and State entities, particularly before tribunals, is made only after meaningful consideration of the potential effects of such legal policy and positions on the full range of State entities and interests; (3) to assure that a constitutional officer who is directly elected by and accountable to the people may express his legal view on matters of State legal policy generally and particularly before tribunals where the State is a party.¹¹²

5. In light of long-established statutes, practice, and precedent recognizing that State executive branch and related entities may in some circumstances employ and use lawyers who are not employees of the Attorney General, such employment and

¹⁰⁹ *A & M Properties, Inc. v. Norfolk S. Corp.*, 506 S.E.2d 632, 639-640 (W. Va. 1998) (Starcher, J., dissenting).

¹¹⁰ 569 S.E.2d 99 (W. Va. 2002).

¹¹¹ *Id.* at 101.

¹¹² *Id.* at 101-02.

use—and statutes, rules, and policies authorizing such employment and use—are not *per se* or facially unconstitutional.¹¹³

N. *United States Constitution*

Our State Supreme Court has jurisdiction to resolve disputes involving the provisions of the United States Constitution. I have written several opinions for our Court addressing U.S. Constitutional issues; happily, the opinions were not reversed by the United States Supreme Court.

One such case was *United States Steel Mining Co., LLC v. Helton*,¹¹⁴ where a number of coal companies challenged West Virginia's coal severance tax as violating the Import Export Clause of the United States Constitution, art. I, sec. 10, cl. 2. A lot was at stake—about \$360 million dollars in past severance taxes and \$40 to \$50 million annually in future tax revenue. Writing for the Court in *U.S. Steel*, I concluded:

To uphold the refunds requested by the appellants and the resulting prospective loss of coal production severance tax revenue would be—again undisputedly—a body blow to the welfare and public fisc of West Virginia and her citizens.

If the severance taxes in question are clearly unconstitutional, they must of course be invalidated, without regard to the fiscal effect of such a ruling.

But for this Court to overrule the studied decision of the West Virginia Legislature to impose certain taxes—to deny the people of the State the benefit of laws enacted by their representatives and of crucial revenue—a strong and clear showing of the taxes' invalidity would be necessary.

No such showing has been made.¹¹⁵

Although I believe our decision rested on sound legal ground, as a loyal “Mountaineer,” I admit to a slight “bias” toward interpreting the U. S. Constitution so as to cause no severe economic harm to West Virginia.

In *Morris v. Crown Equipment Corp.*,¹¹⁶ the U.S. Constitutional provision at issue was the Privileges & Immunities Clause, art. IV, sec. 2. The issue was whether a statute could deny a Virginia resident access to the West Virginia

¹¹³ *Id.* at 102.

¹¹⁴ 631 S.E.2d 559, 561 (W. Va. 2005).

¹¹⁵ *Id.* at 568.

¹¹⁶ 633 S.E.2d 292, 297-98 (W. Va. 2006).

court system, when a West Virginia resident would have had such access.¹¹⁷ I wrote an opinion for the Court that said citizens and residents of other states can't be discriminated against, *per se*, in access to the courts.¹¹⁸ This decision was "chided" by the West Virginia business community.

O. Gambling

I will conclude with my thoughts on gambling. I do not like it, not on moral grounds, but on economic grounds. I do not care if rich people gamble every night. But I hate to see people who cannot afford to gamble having an addicting "carrot on a stick" waved before them by State-sponsored slick advertising.

In *State ex rel. Cities of Charleston, Huntington and its Counties of Ohio and Kanawha v. West Virginia Economic Development Authority*,¹¹⁹ I penned not a dissent, but a concurring "lament":

Professionally, I think that the Legislature, which has overwhelmingly and repeatedly voted to establish a massive, state-wide, government—operated gambling system in West Virginia—and to finance a significant piece of our public budget from that system—has the legal right to do so under our *Constitution*.

Personally, I question whether it is right or wise for my government to set up and operate this massive, statewide, government-operated gambling system—and to use, in managing this system, thousands of privately-managed sites that are impossible to supervise and monitor; and to also use thousands of gambling devices that are known to be especially dangerous and addictive; and then to make it next to impossible for future generations to cancel, revamp, or restrict this system, because of the legal obligation to pay off bonds that are based on gambling revenues. . . .

Under the system created by the Legislature, we can expect to have between twenty to forty (closer to forty) *thousand* West Virginia adults, and about five *thousand* West Virginia teenagers—at any given time—who are problem or pathological gamblers.

The effects of these thousands of West Virginians' severe gambling problems—on their families, jobs, schools, communities,

¹¹⁷ *Id.* at 298.

¹¹⁸ *Id.* at 299-300.

¹¹⁹ 588 S.E.2d 655 (W. Va. 2003).

and households—will directly and negatively affect several hundred thousand other West Virginians: family members, employers, etc. Many personal bankruptcies will originate in gambling problems, as will many incidents of crime, suicide, divorce, and domestic violence. Less than five percent of West Virginians with gambling problems will seek help; of those, perhaps half will be able to recover significantly. . . .

It appears to me, however, that the system that the Legislature has created—massive, statewide, convenience gambling—is pretty much the exact opposite of a sound approach.

Furthermore, the Legislature does not even allow gamblers to have the best chance of success, or at least to prolong their entertainment as they lose their money. Instead, the Legislature sets high odds against gamblers (much higher than Las Vegas). Then, the massive gambling revenues, well above the costs of doing business, are treated as a “cash cow” for our government, which becomes dependent upon these revenues. *The Legislature is even issuing bonds that must be paid from money taken from our State’s children decades from now, when they become gamblers.* Talk about a credit-card government!

To me, this is a dismal situation. For these reasons, I personally question the wisdom of the course that the Legislature has chosen.¹²⁰

Enough said!

IV. LOOKING BACK

Looking back over these many opinions, several themes emerge. First, because elementary notions of fairness to people often conflict with the legal details of commercial relationships (like employment or insurance), the law in these areas must be interpreted and applied carefully so as not to achieve clearly unfair results. Second, the general public and individuals need strong protection from the tremendous powers of the state—for example, in cases of environmental and property protection, agency abuses of power (including courts), and state fiscal policy (that relies on schemes like gambling for financing basic services). Third, the criminal justice system needs to address the victim—and the public fisc—as well as the criminal actor. Finally, “gotcha justice” should not trump

¹²⁰ State *ex rel.* Cities of Charleston, Huntington and its Counties of Ohio and Kanawha v. West Virginia Econ. Dev. Auth., 588 S.E.2d 655, 674-76 (W. Va. 2003) (Starcher, J., concurring and lamenting).

the resolution of conflicts on the merits of the case—as those merits are judged by “the community” (that is, a jury), to the greatest extent possible. Overall, I have attempted to practice people-oriented justice. My approach is rooted in my personal experiences, where I have met and worked with people in all walks of life—people in whom I have always looked for the good, and in whom I have almost always found it.

Earlier in this article I invited the reader to look at my judicial “track record” on constitutional issues, to try to classify my judicial philosophy. Such classification is common in our society’s political debates and discussions about the judiciary. The political right tends to be critical of so-called “activist judges,” claiming those judges misread constitutional and statutory law and promote a social agenda, by “legislating from the bench.” Some advocates argue that “strict constructionist” judges should transport themselves back into history hundreds of years and apply the law as the founding fathers of this nation would have. On the political left, some advocates are equally critical of “too conservative” judges who are unwilling to see our laws and constitutions as “living documents,” to be interpreted in light of current social and technological realities. After three decades of hearing these arguments, my conclusion is, if you agree with my interpretation of a statute or constitutional provision, I am a “strict constructionist.” If you disagree with my interpretation, I’m an “activist judge” legislating from the bench! Take your pick!

I would like to again thank the *West Virginia Law Review* for publishing this article. And I would like to say a deep and heartfelt “thank-you” to West Virginia University—and in particular to the College of Law—for providing me with the means to be successful in my professional life and, in turn, for my family to have “the good life.” We are forever grateful and indebted to West Virginia University.