

11-1-2004

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Recommended Citation

Jeffrey T. Renz, *Look Again at Stare Decisis in Montana*, 30 Mont. Law. 22 (2004),

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Look again at Stare Decisis in Montana

By **Jeff Renz**, professor
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Kimberly Dudik takes on "Stare Decisis in Montana," 65 Mont. L. Rev. 41 (2004), in the October issue of *The Montana Lawyer*.¹ Her article is inaptly named. It should have been entitled, "A Cursory Look at Stare Decisis."

In "Stare Decisis", I concluded that from 1991-2000 the Montana Supreme Court issued 109 opinions that overruled precedent. This was substantially more than previous decades. It was substantially more than other similar state supreme courts during the same decade. I also concluded that many of those decisions were unwarranted and others were improper.

"2d Look" [Ms. Dudik's article] takes issue with some of my methodology. It questions my analysis of three cases. Its initial argument addresses only one small aspect of "Stare Decisis" – the debunking of the claim that the Court's high rate of overruling correlated to the increase in its caseload.

"2d Look" says that a footnote in the National Center for State Courts' report, State Court Caseload Statistics, 2001 (from which I calculated caseload estimates for Montana and nine other state supreme courts), declared Montana's data incomplete. Therefore, it concludes, my estimate is unreliable. "2d Look" also concludes, incorrectly, that I did not include unreported orders and non-cite opinions in my workload estimates when I conducted a decade-by-decade comparison of the Supreme Court's caseload.

There is a simple explanation for her complaints: She failed to read two footnotes.

Finally, "2d Look" complains that I have "misread" the cases. Dudik relies

upon her reading of three of 109 cases to demonstrate this. (She complains that "Stare Decisis" does not state "exactly which cases were used . . . to reach the conclusions" so she cannot know how I classified them. Had she asked, I would have been happy to provide her with my full analysis of all 109 cases.)

"2d Look" does not seriously question the rest of my methodology. More important, Dudik fails to offer her own estimate of the Court's caseload. She never offers an estimate of the total cases that overruled precedent in 1991-2000.

Let us ignore her silence, however, and turn to her faulty criticism.

INCOMPLETE DATA OR AN INCOMPLETE FOOTNOTE? "2d Look" questions my use of statistics from the National Center for State Courts.² I used these data to estimate the Montana Supreme Court's caseload during 1991-2000 and compare that estimate with estimates from nine other states. *See Stare Decisis*, 65 Mont. L. Rev. at 56. I hypothesized that if caseload explained the high rate of overruling in Montana, then we should see similar effects in other state supreme courts. Dudik complains that a " 'qualifying footnote' " in the material states that the data are "incomplete for the state of Montana." Ouch! She concludes that it was not a good idea for me to use incomplete data. I conclude that it is a worse idea to use an incomplete footnote.

You see, the entire footnote says, "The following courts' data are incomplete. . . Montana-Supreme Court-Data for 1991-2000 do not include administrative agency, advisory opinions, and original proceedings disposed."³

Once you read the rest of the footnote, you discover that Montana's data are complete. The Montana Supreme Court reported only two categories of appellate case filings – civil and criminal – to the National Center. It also distinguished between mandatory and discretionary appeals. In reporting its data, Montana lumped administrative agency appeals into the civil category and so did

not report them separately. The Montana Supreme Court does not issue advisory opinions and so did not report them. Finally, our Supreme Court has no original proceedings, and did not report them. (You could count applications for writs of habeas corpus as original proceedings, but these are civil filings that were included in the reported caseload.)

We can verify the accuracy comparing the National Center's Caseload Statistics with the Annual Report of the Montana Judiciary (2000). Our Annual Report reported 868 new filings in 2000.⁴ Caseload Statistics reported the same figure – 868 new filings in 2000.⁵

"2d Look" next wonders why its caseload totals for some states do not jibe with mine. In reviewing the National Center's tables, I discovered her problem. The National Center reported total filings that the supreme courts were required to accept (mandatory appeals) in one table and those that they could decline (discretionary appeals) in another. I reported the total of both tables for all such states but I neglected to identify the second table in my citation. *Mea culpa*. Please amend the citation at 65 Mont. L. Rev. at 56, n.38 to read, "Court Statistics Project, State Court Caseload Statistics, 2001, Table 13, 176-178, Table 14, 186-187 (National Center on State Courts 2001)." Why "2d Look" failed to diagnose this, I do not know. It wasn't difficult.

"2d Look" next considers my comparison of Montana Supreme Courts past and present. I hypothesized that if the rate of overruling correlated to case load, then we should see similar correlation in earlier decades.

"2d Look's" investigation came across this statement with respect to the Court's caseload during 1891-2000: "During the 1990s the Montana Supreme Court issued more unreported orders and 'non-cite' opinions than it had in the past. I have not included these in the total case load for any decade. . . ." Dudik says this "glaring flaw," *2d Look at 10*, "makes a substantial difference in base number data for the 1991-2000 decade." *Id.* Presumably

this means I would alter my conclusion that the Montana Supreme Court overruled 23.5 cases per 1,000 cases during 1991-2000.⁷

Unfortunately, "2d Look" misreads a footnote again.

"2d Look"'s error appears in footnote 42. "Unreported" modifies both orders and non-cite opinions. That is, to arrive at my the total case load ("2d Look" refers to this as "base numbers"), I counted every decision reported on Westlaw during the decades set out in Table 3 and Figure 3, whether they were non-cite opinions or not. I did not count those that were not reported on Westlaw. My method favors the Court more than 2d Look's adjustment.⁸ Dudik counts opinions. I counted reported decisions because decisions are more reflective of the Court's caseload. In other words, I included all the opinions that Dudik thought I excluded and I also included other orders and decisions for which opinions were written but not published. Using 2d Look's methodology, the rate of overruling for 1991-2000 increases from 23.5 case per 1,000 to 26 cases per 1,000.

"2d Look" again misreads a footnote and its error results from that misreading. The rate of overruling for 1991-2000, 23.5 cases per 1,000 decisions, is valid. It is and remains, as Ms. Dudik states, "an astonishing and implausible change" compared to earlier decades.

In the final analysis, 2d Look's critique of my statistical methods results in one correction – a corrected pinpoint citation to State Court Caseload Statistics. But there is one more observation to be made about data: Where are 2d Look's data that demonstrate that the Montana Supreme Court was not overruling at a high rate, compared to similar state courts and compared to past Montana Supreme Courts? "2d Look" doesn't offer it and that phenomenon is neither astonishing nor implausible.

IS IT CLARIFICATION OR IS IT NEWSPEAK? Next, "2d Look" claims "Superficial Legal Analysis." Actually what it says is that "overrule" does not mean "overrule." Overrule, we learn as we read 2d Look's analysis, actually means to "clarify" or to "resolve situations." This is Newspeak.

2d Look's case analysis brings us to

my comment in "Stare Decisis:" "While some readers may disagree with my categorization of a given case, I believe that the patterns that I set forth here are accurate." 2d Look does not address the patterns. So I will not rebut 2d Look's analysis of *Bush v. Montana Department of Justice*¹⁰ or *State v. Helfrich*¹¹ because I discuss those cases in "Stare Decisis."¹² I do, however, want to talk about *State v. Staat*¹³ because it illustrates my point about opportunistic overruling and I did not discuss it in "Stare Decisis."

Staat addressed *State v. McPherson*.¹⁴ *McPherson* had held that polygraphs are inadmissible as evidence but held that the defendant could not complain about the admission of a polygraph at his sentencing because he invited the error by offering the result.¹⁵ *Staat* also held that polygraph results are inadmissible as evidence at trial and overruled *McPherson*, "[t]o the extent that it is inconsistent with this order. . . ."¹⁶ Confused? You should be. *Staat* illustrates one of the problems with the Court's jurisprudence: *McPherson* and

Staat articulated the identical rule but the Court overrules the earlier case simply because the appellant tried to stretch it to fit his circumstance.

"2d Look" explains that *Staat*'s overruling language "clarified" case law. If so, when in the future a defendant offers a polygraph result, the trial judge erroneously admits it, the defendant is convicted, and he appeals and complains about the admission of the polygraph, what result? Does *Staat* mean that admission of the polygraph is now reversible error, regardless of who offers it? Or does *Staat* preserve *McPherson*'s holding that the defendant cannot complain if he offered the evidence? That does not seem like a clarification to me.

CONCLUSION. The author of "2d Look" needs to read footnotes more closely, needs to read statistical reports more carefully, and needs to read case law with a more critical eye. "2d Look" should have taken a 3d Look.

NOTES

1. "A 2d Look at Stare Decisis statistics," 30

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- 2. Court Statistics Project, State Court Caseload Statistics, 2001, Table 13, 176-178, Table 14, 186-187 (National Center on State Courts 2001).
- 3. Court Statistics Project, State Court Caseload Statistics, 2001, 180 n.A (National Center on State Courts 2001) (emphasis in original).
- 4. Annual Report at 8.
- 5. Court Statistics Project, State Court Caseload Statistics, 2001, Table 13, 176-178, Table 14, 186-187 (National Center on State Courts 2001).z
- 6. See Stare Decisis, 65 Mont. L. Rev. at 58-59 & n.42.
- 7. See, Stare Decisis, 65 Mont. L. Rev. at 58.
- 8. See 2d Look, 30 Montana Lawyer at 11.

- 9. 65 Mont. L. Rev. at 64.
- 10. 1998 MT 270, 291 Mont. 359, 968 P.2d 716.
- 11. 277 Mont. 452, 922 P.2d 1159 (1996).
- 12. 65 Mont. L. Rev. at 74-75.
- 13. 248 Mont. 291, 811 P.2d 1261 (1991).
- 14. 236 Mont. 484, 771 P.2d 120 (1989).
- 15. McPherson, 236 Mont. at 491-492; 771 P.2d at 125.
- 16. Staat, 248 Mont. at 292, 811 P.2d at 1262.

Kimberly Dudik replies:

Professor Jeffrey Renz, the author of *Stare Decisis in Montana*, 65 Mont. L. Rev. 41 (Winter 2004), appears to extend his criticism of the Montana Supreme Court to anyone who dares question his writing and research abilities. Unfortunately for readers, he fails to clarify whether his original study and the methodology he employed were accurate.

The numbers Professor Renz [hereinafter the author] utilized are still unreliable and his case analysis is still incomplete; consequently, his article "Stare Decisis in Montana" [hereinafter "Stare Decisis"] remains misleading. In "Look Again at Stare Decisis in Montana," the author now claims that what he meant in footnote 42 of *Stare Decisis*, 65 Mont. L. Rev. at 58, is not what the footnote clearly states. The author contends he actually included noncite opinions in the base court caseload numbers for the *Stare Decisis* study. However, the ambiguous language of the footnote's first sentence and the plain meaning of the second sentence lead readers to a different conclusion.

Footnote 42 in full states: "During the 1990s, the Montana Supreme Court issued more unreported orders and 'non-cite' opinions than it had in the past. I have not included these in the total caseload for any decade because the court deliberately treated them as non-precedential." Curiously, the author criticizes for not reading the entire footnote but then fails to reproduce the footnote in its entirety.

The author claims that the word "unreported" modified both the word "orders" and the phrase "non-cite opinions." A plain reading of the phrase,

however, would lead one to believe the adjective "unreported" would modify the immediately following noun "orders" and the adjective "non-cite" would modify the noun "opinions." If the footnote actually means that the author "counted every decision reported on Westlaw during the decades set out in Table 3 and Figure 3, whether they were non-cite opinions or not [but] did not count those that were not reported on Westlaw[,] he should have clearly stated this because the meaning is very different from how the footnote reads.

The footnote should have been more precisely written because as written it is ambiguous; it reads that he did not include the noncite opinions in his base caseload for the Court. Readers would rationally conclude that an article written by a law professor would not be ambiguous, would be accurately footnoted, and would include a telephone number (perhaps in another footnote) if phoning the author for clarity was required as the author suggests in "Look Again."

Additionally, to state that he included "reported" noncite opinions but not "unreported" noncite opinions draws a false distinction between unreported and reported noncite cases. First, no difference exists between "reported" and "unreported" noncite opinions - they are all non-precedential and all reported in the same fashion. Second, because the stated reason in "Stare Decisis" for not including the unreported orders and noncite opinions was that "the court deliberately treated them as non-precedential," it seems strange that he would include "reported" noncite opinions since all noncite opinions are non-precedential (which is why he stated in the footnote he did not include them). Nonetheless, if this is what was done it should have been clearly and succinctly explained in his original article.

The author fails to provide any evidence that the methodology employed and the numbers utilized provided a statistically accurate representation of the rate at which the Court overruled precedent. The purpose of my article, "A 2nd Look at *Stare Decisis* Statistics," *The Montana Lawyer*, 10-12 (Oct. 2004) [hereinafter "A 2nd Look"], was to illustrate that the numbers "Stare

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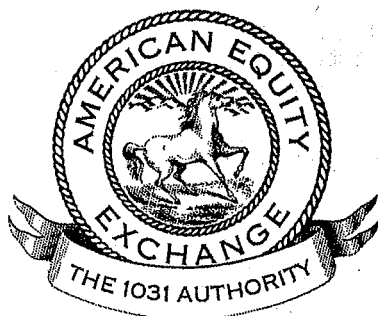
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Decisis used were unreliable; the purpose was not to produce a new study or provide numbers to be incorporated into the "Stare Decisis" study. The conclusion that there would be a higher rate of overruling if data from "A 2nd Look" was incorporated into the "Stare Decisis" study is inaccurate because any numbers provided in "A 2nd Look" were not gathered for those purposes and are unsuitable for such use. As stated in "A 2nd Look," the numbers were an average of the number of noncite opinions released every year. The numbers provided were not to calculate the Court's caseload or the rate at which the Court was acting; the numbers were provided to illustrate that the methodology in "Stare Decisis" was incomplete and flawed.

The clarification that base court caseload numbers (which were utilized by the author to compare Montana to nine other states) were gathered from two tables (not one, as originally cited) in the National Center for State Courts' report, *State Court Caseload Statistics, 2001*, to create the numbers exhibited for comparison of the base court caseload does not prove that the comparison was accurate. Additionally, the circular argument that although the numbers for

Montana were incomplete, they were nonetheless complete is unconvincing and does not verify the reliability of the numbers he utilized.

If the author had fully read all qualifying footnotes provided in the National Center for State Courts' report (not only for Montana but also for the states he compared Montana with) he would have learned that the numbers provided were "incomplete" (for Montana); "incomplete and overinclusive" (for Maine and South Dakota); "overinclusive" (for Delaware); and the data included for the different states was greatly varied. Although he prefers to blame the reader for not deciphering what he really meant or what data he really used (when his article clearly states otherwise), the results he obtained are still doubtful because an accurate comparison is impossible given the variances between the different states. It is never explained how these differences amongst the states allow for an accurate comparison.

The author fails to recognize that further analysis of the many cases he cited as overruling precedent is necessary before any accurate claim can be made of the effect these cases had on case precedent. A thorough review of a small sampling of the 109 cases he claimed

overruled precedent indicates that his conclusion is not valid. Additionally, the brief analysis he provides of *State v. Staat* (1991), 248 Mont. 291, 811 P.2d 1261, further shows that this case does not have the effect of overruling case precedent as he claimed it did (it actually follows decades of case precedent).

To summarize, the methodology utilized in "Stare Decisis" has not been proven accurate. No evidence has been produced which shows the methodology provided a statistically reliable picture of the Montana Supreme Court's actions, especially as these actions compare to other states. The author fails to prove that the cases he claimed overruled precedent actually had this effect. Until a critical and thorough analysis of all the cases is provided, the true rate at which the Montana Supreme Court overruled precedent in the 1991-2000 decade will not be known.

Perhaps if the author takes his own advice to heart and reads footnotes and statistical reports more closely and carefully, reads case law with a more critical eye, and writes more precisely, no one will be forced to take a second or third look to ascertain the validity, accuracy, or meaning of his words.

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