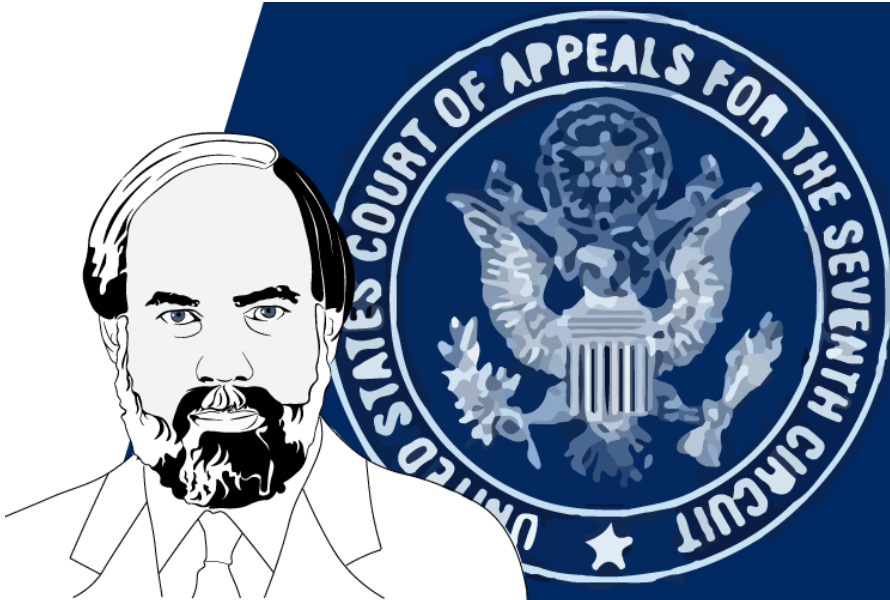


PROJECTS

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Pattern of misstated facts found in opinions of renowned U.S. Judge Easterbrook

By **Emily Hoerner** and **Rick Tulsy**



Graphics by Sam Hart

Judge Frank H. Easterbrook of the U.S. Court of Appeals for the Seventh Circuit in Chicago is considered one of the most distinguished of United States judges.

He is among the most cited of federal judges (http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6091&context=faculty_scholarship) in the country, and the judge whom the late Justice Antonin Scalia once said publicly he hoped would replace him on the Supreme Court.

So it was no small matter when Albert W. Alschuler, himself a highly respected law professor, wrote in a law review, “Judge Easterbrook persistently presents wildly inaccurate, made-up statements as unquestionable statements of fact,” adding, “The truth is not in him.”

The rarity of Alschuler’s attack underlined one of the facts of federal judges: once confirmed to lifetime appointments (<http://www.uscourts.gov/judges-judgeships/authorized-judgeships/judgeship-appointments-president>), the quality of their work is not subject to review except by their peers on the appellate court or by the Supreme Court. In the case of appeals courts like the Seventh Circuit, the opinions are reviewed only in the rare instances when the Supreme Court takes up a case, or in the more unlikely event (<http://www.ca7.uscourts.gov/forms/Handbook.pdf>) that a majority of the Seventh Circuit judges vote to rehear a case as a group.

That led *Injustice Watch* to conduct the kind of review that judges like Easterbrook seldom—if ever—undergo. Were Alschuler’s criticisms on target? And if the judge did those things in the case Alschuler had before him, did he do them in others?

The result: *Injustice Watch* documented a pattern of misrepresented facts in Easterbrook's opinions. *Injustice Watch* uncovered 17 cases since 2010 in which opinions authored by Easterbrook misstated the facts, omitted facts, or made assumptions that were contrary to the trial record.

In some cases, the misstatements only strengthened the court's ruling in favor of a party that seemed to have the better legal argument. In many cases, though, the errors seemed to play a significant role in the outcome.

An opinion authored by Easterbrook brushed aside one convicted murderer's challenge to his death sentence, which was based in part on the failure of his defense attorneys to present evidence that he had schizophrenia. Easterbrook wrote that the attorneys offered two specific reasons at a post-conviction hearing to explain their decision not to call an expert to the stand. But the transcript of that hearing shows that the lawyers gave no such explanation. Instead, they testified that they thought they had a reason for not having called the expert but couldn't remember what that reason was.

Easterbrook wrote an opinion refusing to let another prisoner challenge his death sentence on the basis of government records showing that the defendant had an intellectual disability before the crime occurred. The records of his mental state, Easterbrook wrote, were known to the defendant and his counsel long ago and could have been obtained sooner. But nothing in that record supported Easterbrook's conclusion.

In a third case, Easterbrook wrote in an opinion that there was not sufficient evidence to support holding two members of the Chicago police department responsible for events that led to the highly publicized rape of a mentally disturbed woman. The federal judge hearing the case, however, recited a cascade of evidence in the record before the panel that sharply contradicted the Seventh Circuit's decision.

Looking into the black box

The Seventh Circuit, headquartered in Chicago, handles appeals of federal district court decisions in Wisconsin, Indiana, and Illinois (http://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf). There are 11 active judges on the Seventh Circuit, one of 13 circuits across the country. The Seventh Circuit has earned its distinguished national reputation in part because Easterbrook and another University of Chicago Law School professor, Richard A. Posner, are considered two of the leading jurists in antitrust and economic theory.

Three judges sit on every panel of U.S. Courts of Appeals cases, and at least one other judge signed on in every case to the opinions authored by Easterbrook. While the internal deliberations are not public, the drafts are circulated among the judges who each have the chance to correct errors.

"It's a bit like looking into a black box," said New York University School of Law Professor Arthur R. Miller, an expert on federal court practice, of the process of preparing an appellate opinion. "We don't see those drafts, we don't hear the conversations the judges had."

Miller noted in an interview that each of the three judges on the panel bears responsibility for getting the facts correct. Though Miller said the federal appellate judges, and their clerks, are among the best legal minds in the country, he added: "It's a very human business. The cases are extremely complicated. The records are often incredibly long."

The parties to a case may submit a petition citing flaws in either the opinion's statement of facts or law, and seek reconsideration before the opinion is published in the court's official opinions.

Such petitions rarely cause decisions to be overturned, and many attorneys regard them as an unwise use of time and effort, and file them only rarely.

Unless either the panel or the full Seventh Circuit court agrees to reconsider a decision, which is rare, there is only one appeal left—to the U.S. Supreme Court. The Supreme Court hears about one percent (<https://www.supremecourt.gov/about/justicecaseload.aspx>) of the roughly 8,000 appeals that are submitted annually.

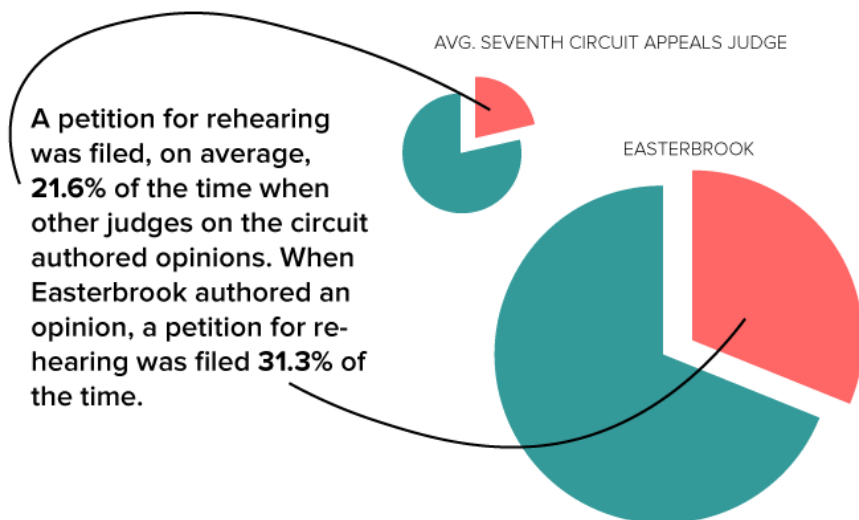
An analysis by *Injustice Watch* of 3,465 signed opinions by Seventh Circuit judges over a five-year period ending March 2016 showed opinions authored by Easterbrook prompted petitions for reconsideration more than opinions by any other judge on the court.

Petitions seeking reconsideration were filed in 21.6 percent of opinions signed by all the other judges of the Seventh Circuit, on average, fewer than one in every four. Easterbrook was the only judge in the circuit whose opinions prompted reconsideration motions in more than 30 percent of the cases; the petitions were filed in 31.3 percent of cases he authored.

It was by studying those petitions that *Injustice Watch* identified cases involving allegations of significant factual errors in Easterbrook's opinions. *Injustice Watch* then documented the pattern of errors by reviewing the trial record, listening to tape recordings of oral arguments and interviewing attorneys. The review then was expanded to identify earlier complaints about the accuracy of what Easterbrook wrote.

Easterbrook declined an interview to discuss the *Injustice Watch* review. A staff person in Easterbrook's office relayed that Easterbrook said he “does not comment on his opinions, and that the court's products speak for themselves.”

Several judges on the circuit did not respond to requests to discuss the opinion-writing process. One exception was Judge Posner, who described his approach to concurring with opinions written by another member of the panel: “If I agree with the result I'm not going to make a fuss about how the judge articulated the result...unless what seem to me to be clear errors.” Posner later added, “I'm a little surprised they are factual errors because, that's the sort of thing that the other judges or the law clerks or the authoring judge will notice.”



<http://www.injusticewatch.org/wp-content/uploads/2017/04/petitions.png>

Telling “whoppers”

It was his handling of one of the most high profile cases – the conviction of former Illinois Gov. George H. Ryan – that caused Easterbrook to be accused of telling repeated “whoppers.”

Ryan was indicted 11 months after he left office as governor in 2003, charged in a 22-count federal indictment with racketeering, mail and tax fraud, and making false statements from the time of his election as secretary of state in 1991 through the end of his term as governor in 2003.

The indictment was the result of Operation Safe Road, a federal probe launched around questions over how a semi-truck operator whose vehicle was responsible for a tragic highway accident in 1994 had obtained his Illinois commercial driver's license. The probe swept up dozens of state workers and lobbyists. The government contended that from the time he became secretary of state through his time as governor, Ryan had provided benefits through his office to friends and associates from whom he and his family had received gifts and favors.

During the six-month trial, the government introduced a mound of evidence that over the years Ryan had accepted gifts that he never revealed; and that friends and associates who had given him benefits received special treatment from the state. Ryan's attorneys argued evidence failed to prove Ryan had violated the "honest services" section of the mail fraud statute, which makes it a crime to deprive victims of honest services.

At issue was whether the benefits received by Ryan's friends and associates amounted to a "quid pro quo" – one favor given in exchange for a return favor – or whether they proved that Ryan merely had friends from whom he received gifts on occasion, and helped on other occasions. At the close of evidence, U.S. District Judge Rebecca R. Pallmeyer instructed the jury it could find Ryan violated the "honest services" statute if it determined either that Ryan had taken bribes or had hidden conflicts of interest from the public in his role as a government official.

Ryan was convicted after anguished deliberations over more than two weeks before jurors found him guilty on all counts. Judge Pallmeyer ruled there was not sufficient evidence to support the conviction on two mail fraud counts, but sent Ryan to prison for 78 months on the remaining convictions.

After Ryan's convictions were upheld on appeal, the U.S. Supreme Court took up the question in another case of whether the "honest services" section of the mail fraud statute was too vague to pass constitutional muster. In the 2010 appeal of Enron executive Jeffrey Skilling, the court majority ruled that the "honest services" section would be constitutional only if it was narrowly construed. It would not be enough to rely on evidence of hidden conflicts of interest to prove mail fraud, the majority opinion concluded; the jury had to find that the defendant had taken bribes.

Represented by Alschuler, Ryan contended that his mail fraud and racketeering convictions could not be upheld, given that Judge Pallmeyer had instructed the jury it could convict on mail fraud if it found either bribery or hidden conflicts of interest that deprived the public of honest services.

Last year, Valparaiso University Law Review published an article by Alschuler accusing Easterbrook of making eight significant false statements – Alschuler terms them "whoppers" – to support his opinion denying Ryan a new trial on racketeering and mail fraud charges. Alschuler told *Injustice Watch* that, in the months since his article was published, "no one has suggested that any of the 'whoppers' I reported were anything less than whoppers."

In the article, entitled "How Frank Easterbrook kept George Ryan in prison," Alschuler detailed the eight misstatements. They included falsely stating the government's legal arguments and wrongly stating that Ryan's mail fraud sentences had expired; in fact, Ryan still had three months to serve on the sentences at the time of Easterbrook's opinion.

Making matters worse, Alschuler wrote, the government never argued that the sentences had expired, and that the court should not review those convictions as a result. Instead, Alschuler said, Easterbrook made up that fact and first raised it in the opinion, giving the

attorney no chance to respond.

“All of Judge Easterbrook’s overbearing assertions were false,” Alschuler wrote. He later added “What is worse, Judge Easterbrook’s bullying rests on stuff he just makes up.”

In legal circles, the kind of attack Alschuler launched over the integrity of an appellate judge’s opinions, much less one as respected as Easterbrook, is rare. Yet Alschuler’s article was not the first time Easterbrook has been challenged over misstated facts.

Law professor Al Alschuler on Judge Frank Easterbrook:

**“The truth is
not in him.”**

Squeezing time

Frank Easterbrook was born in 1948 in upstate New York, not far from Niagara Falls, the son of a dentist and a school teacher. He attended Swarthmore College, where he graduated Phi Beta Kappa, and then enrolled at the University of Chicago Law School.

At Chicago, Easterbrook became an editor on law review, graduated with honors, and then was chosen to a prestigious legal clerkship for Judge Levin Hicks Campbell, who had recently been confirmed to the U.S. Court of Appeals for the First Circuit in Boston.

A year later, Easterbrook’s rise continued. Despite his lack of courtroom experience, he was hired to work in the Solicitor General’s office – arguing cases on behalf of the United States before the Supreme Court. Within four years, he was named a deputy solicitor general.

Within a year of being named deputy, Easterbrook was appointed in 1978 to the faculty of the University of Chicago Law School, where he taught with such esteemed faculty as Richard Posner, Antonin Scalia and Alschuler.

In 1984, Ronald Reagan first nominated him to the Seventh Circuit, one of the youngest nominees to a federal appeals court. The nomination died without action; but the next year, after Reagan re-nominated Easterbrook, he was swiftly confirmed. He took the oath of office in April, 1985.

Complaints that Easterbrook’s opinions misstate facts date back to the early years of his tenure on the Seventh Circuit.

Three years after he joined the court, Easterbrook wrote an opinion upholding the murder conviction of John M. Branion. Foreshadowing what occurred in Ryan, a Northwestern University law professor wrote in a law review article that Easterbrook had misstated facts in the opinion.

The law professor, Anthony D’Amato, wrote that Branion, a black doctor and civil rights activist, could not have committed the murder for which he was imprisoned, and that Easterbrook had altered the facts to justify the conviction.

Branion had walked into his Hyde Park apartment with his four-year-old son days before

Christmas, 1967, and found his wife lying in a pool of blood. She had been strangled and shot at least four times, and there was no sign of a break-in.

Branion was arrested, and prosecutors contended that he had killed his wife and then tried to create an alibi for himself.

The case went to trial in 1968, at a time of heightened racial conflict in Chicago. Dr. Martin Luther King Jr.'s assassination had triggered riots. Branion was tried before a jury of 11 white jurors, one black juror and a judge who, months later, would be implicated in corruption.

The prosecution evidence established the time of Donna Branion's murder at between 11:30 and 11:57, when police were called and learned of the discovery of her body. The undisputed evidence in the case showed that Dr. Branion was with a series of patients at the hospital that morning; his last patient was at 11:27 a.m. He then was seen picking his son up at school. He stopped by the workplace of his wife's cousin, Maxine Brown, and then returned home with his son, where he found his wife dead. The police were then called.

In 1986, D'Amato filed a petition with the U.S. District Court, urging that Branion's conviction be overturned based on evidence that he could not have committed the crime.

U.S. District Judge Susan Getzendanner rejected the appeal, but theorized that Branion may have left the hospital much earlier and killed his wife then.

Branion appealed to the Seventh Circuit, and the case then went to a panel that included Easterbrook.

What happened next would cause D'Amato to author a law review article entitled, "The Ultimate Injustice: When a Court Misstates the Facts," which contends that the panel opinion, authored by Easterbrook, misstated the record in a way that led to the ultimate horror: A "man was condemned by law to remain in prison for a crime he did not commit and could not possibly have committed."

Easterbrook's opinion upheld the conviction on a different theory than that posed by Getzendanner: Dr. Branion could have left the hospital, killed his wife, and then gone to pick up their son and come back home by 11:57.

To Branion's attorney, D'Amato, that theory, like Getzendanner's, was in conflict with the testimony:

After Branion saw his last patient, whom hospital records show he saw at 11:27, Branion drove to pick up his son from school. A teacher estimated he spent five minutes at the school, during which the doctor took off his own coat, dressed his son for the snow outside, and then put on his own coat. Branion and his son then went to the office of Brown, his wife's cousin. According to her trial testimony, she was supposed to join them for lunch but had to cancel.

Branion then put his son back in the car and drove home. The police logged Branion's total driving time at between six and twelve minutes.

With travel times and parking included, D'Amato wrote, each of the 27 minutes between Branion finishing up with his last patient and when police were called were accounted for, leaving no extra time to commit the murder.

But the panel opinion authored by Easterbrook outlined how time could easily be "squeezed" if Branion had not looked for legal parking spots, if he had not come to a full stop at stop signs, if he had exceeded the legal speed limits, if the clocks had been wrong at the hospital or if Branion fudged the times entered in the hospital records slightly.

Additionally, not only had Branion's wife been shot, but she had been strangled by a rope or cord, according to the state's expert, and the bruises from the strangulation would have

taken 15 to 30 minutes to form. Easterbrook wrote that perhaps the signs of bruising had developed after Donna Branion had been fatally shot. In his law review article, D'Amato quoted from testimony by the state pathologist that it was not possible the bruising occurred after death.

"In the Branion case, Judge Easterbrook rose to the intellectual challenge of the facts," wrote D'Amato. "He was able to write an opinion rationalizing his conclusion that Dr. Branion probably killed Donna Branion despite conclusive factual evidence that Dr. Branion could not possibly have committed the crime."

Branion remained in prison until 1990, when he developed a brain tumor and heart ailment. Citing his illness, Governor James R. Thompson commuted the sentence in August 1990; Branion died in the following month.

In 1994, the Chicago Council of Lawyers published its first and last effort to evaluate Chicago-area federal court judges. While crediting Easterbrook's intellect and writing skills, the council wrote that at times Easterbrook "acts like the worst of judges" when he disregards law and facts. The legal group added that Easterbrook "appears less concerned about the actual facts and issues presented in the appeals before him than about advancing his own philosophy."

An expert not called

Michael Dean Overstreet was convicted of murder in 2000 in Johnson County, Indiana, Superior Court and sentenced to die for the rape and murder in 1997 of an Indiana college student. After his conviction was upheld by the Indiana appellate court, Overstreet turned to the federal courts in 2008, contending that his conviction and sentence were flawed because his attorneys had failed to properly represent him at trial.

Among the issues: The attorneys had interviewed experts about Overstreet's mental state before trial, and two of them initially concluded he had schizophrenia. But one, neuropsychologist Eric Engum, backed away from his initial diagnosis. By the time of the trial, he was prepared to testify only that Overstreet had schizotypal personality disorder, a lesser impairment.

In the penalty phase of the trial, Overstreet's lawyers called Engum but not the second expert, clinical psychologist Robert Smith. Smith was prepared to testify that Overstreet had schizophrenia and depression. The attorneys inexplicably agreed to inform the jury that Smith's opinion was the same as Engum's.

In the post-conviction argument, new attorneys contended that Overstreet's lawyers' failure to present evidence that Overstreet had schizophrenia – hearing demons that directed him to act – violated Overstreet's constitutional right to effective representation.

U.S. District Court Judge Philip P. Simon rejected the argument. And when it got before a three judge panel – with Overstreet's life on the line – the judges split 2-1 on whether to order a new sentencing proceeding.

Writing for himself and Seventh Circuit Judge William J. Bauer, Easterbrook wrote that Overstreet's lawyers had testified at the post-conviction proceeding that they had two strategic reasons for their decision not to put Smith on the stand: "First, Engum saw Overstreet have a psychotic episode and could tell the jury what happened, while Smith had not seen such an episode; second, given the decision to have Engum testify, counsel believed that it would have been imprudent to put Smith on the stand, because then the jurors would have learned that mental-health professionals disagreed about Overstreet's condition and might have discounted the testimony of both men."

But the two attorneys offered no such testimony at the post-conviction hearing. To the contrary, both took the stand and said they had a reason, but could not recall what that

reason was for not putting on evidence of schizophrenia. In dissent, Seventh Circuit Judge Diane P. Wood wrote that the majority opinion “has either misunderstood or mischaracterized Overstreet’s argument.” Overstreet was entitled to a new sentencing hearing, she wrote: “A capital jury cannot make its decision with only half of the story before it, or worse, with objectively inaccurate information.”

Overstreet has not been put to death. After extensive hearings in 2014, an Indiana Superior Court judge ruled him mentally incompetent. His execution will not occur unless and until his competency is restored.

Facts assumed, appeal dismissed

Bruce Webster was sentenced to death after a trial in federal district court in Texas for his role in the brutal kidnapping, rape, and murder of a 16-year-old girl.

At trial, Webster introduced a series of experts who testified that he had an intellectual disability and therefore was ineligible for the death sentence. (The term used at the time, mental retardation, is no longer accepted by the medical or legal profession). The prosecution presented two experts who testified that he was motivated to fake his disability; the court ruled that he did not have a mental disability, and imposed the death sentence.

More than decade later, while he was in the Terre Haute, Ind., prison, Webster sought to overturn his death sentence based on evidence that new attorneys obtained in 2009 that showed he had been classified as mentally disabled even before the crime occurred. The evidence was in the form of records showing that two psychologists and one physician had separately diagnosed Webster as intellectually disabled when he applied for Social Security payments for a sinus condition about a year before the murder.

Attorneys Steven J. Wells and Kirsten E. Schubert wrote in the petition, filed in the Southern District of Indiana, that the new evidence refuted the prosecution’s claim that Webster had faked low intelligence scores to save himself from the death sentence. In addition, the attorneys cited new evidence they found to undercut what the prosecution claimed was evidence of Webster’s deception: Prosecutors had contended that Webster had falsely told a defense expert that he had been enrolled in special education, though no evidence supported that claim. But among the newly-discovered documents was a letter in the Social Security file that suggested Webster had been in a special education class, but the school records had long ago been destroyed.

Webster’s new petition included a declaration from his trial attorney that, although he could not recall the specifics, given the passage of time, he was certain that he “made every effort” to obtain all records of Webster’s intellectual disability at the time of trial. He wrote that he believed that he was told no such records existed.

Wells and Schubert described their own difficulty in getting the records. What they received from Social Security was not complete, they wrote; but when they sought the complete records, the Social Security Administration responded by saying that the information they had already received about Webster’s disability had been improperly provided to them. The additional records the attorneys were seeking were subsequently destroyed without ever being turned over, the attorneys were later told.

U.S. District Judge William T. Lawrence of Indiana rejected Webster’s renewed effort without a hearing. Webster’s attorneys appealed to the Seventh Circuit, where Easterbrook, Bauer and Judge Diane S. Sykes heard arguments in July, 2014. A week later, Easterbrook wrote the opinion for the panel upholding Webster’s death sentence.

Easterbrook wrote that the new evidence would not necessarily have warranted a new trial even if it had been presented in a timely way. Easterbrook added that the evidence “cannot helpfully be called ‘newly discovered.’ Webster has long known of it, or readily could have discovered it.”

According to Easterbrook, “one sensible inference” would be that the trial attorney did not follow through when he was not provided the records.

In a motion for rehearing, Webster’s attorneys wrote that the record did not support Easterbrook’s supposition that the evidence was long available.

The full Seventh Circuit Court agreed to reconsider the case, and on May 1, 2015, a majority reversed the panel decision by Easterbrook. The majority opinion, written by Judge Wood, reversed the panel’s opinion and sent the case back to the district courts for a new hearing to determine whether the evidence of Webster’s disability prohibits his execution. Wood wrote “there is no evidence in the record that Webster had any personal awareness” of the Social Security records.

As for whether the trial attorney should have known of the evidence, the majority opinion states that the minority opinion, written by Easterbrook in support of his prior decision, is based on unproven “factual assumptions.” The majority held that Webster was entitled to a hearing to determine whether his attorney should have uncovered the records at the time of trial.

The case remains before Judge Lawrence, who has granted the attorneys time to develop further evidence.

Facts overlooked, defendants dismissed

Christina Eilman’s mother brought suit against 13 officers and jailers as well as the City of Chicago, asserting their failure to protect her daughter and ensure she received appropriate medical care resulted in a 2006 tragedy.

Eilman, 21, was a student at UCLA who had bipolar disorder. Apparently in the midst of a manic episode, she created a disturbance at Midway Airport. After taking her into custody, police failed to seek medical treatment despite her odd conduct. The police then released her a day later into a dangerous neighborhood where she was raped. She then either fell or was pushed out the window of a seventh-story apartment in a high-rise housing project, suffering permanent brain injury.

When she first was in custody at the Eighth District station on West 63rd St, officers were concerned enough about her disruptive behavior to raise it with the watch commander, Lieutenant Carson Earnest. Earnest ultimately decided that, instead of taking her to a hospital, she should be booked and transferred to the Second District station, at 5101 S. Wentworth Avenue, which had a women’s holding cell that the Eighth District did not.

She spent the next day in custody at the Second District station, where her conduct alternated from calm to manic. According to the court record: At times she chatted amiably, while other times she screamed, chanted rap lyrics, smeared menstrual blood on the cell walls, and took off her clothes. Other detainees testified that the guards on duty ignored Eilman’s screams that she was having trouble breathing. The guards allegedly laughed while she banged on the bars of the cell.

Eilman was released without having to post bond the following evening. She walked out of the station in a neighborhood unfamiliar to her with an exceptionally high crime rate. She was dressed in a manner that attracted attention, according to court records.

As Eilman stood outside the police station, looking confused, one of the guards who had observed her strange behavior in custody came outside and saw her standing in the parking lot. The guard, Pauline Heard, said nothing to Eilman, but pointed her to 51st Street.

Eilman walked away, and stopped at a nearby restaurant where her strange behavior drew attention. She eventually accompanied several young men into a seventh floor apartment in the Robert Taylor Homes high-rise public housing project where she was raped. Then she

either fell or was pushed from the apartment to the ground, suffering brain injuries.

The process leading up to trial lasted six years. Before trial, several of the officers named in the lawsuit asked both that charges be dropped and that they be freed from the suit because they did not have personal responsibility for the decisions that led to Eilman's horrific experience.

U.S. District Judge Virginia M. Kendall dismissed some counts, but ruled that there was enough evidence against 10 officers to keep them in the case. That decision went up to the Seventh Circuit, where Easterbrook wrote the opinion, with which Judges Ilana D. Rovner and Posner concurred.

The panel concluded that the case should go to trial but ruled that the two original arresting officers should be dropped as defendants. It also ruled that, unless additional evidence existed, Eighth District Watch Commander Earnest as well as Officer Heard, one of the guards inside the jail who also pointed the way for Eilman outside, should be dropped from the case.

Easterbrook's opinion states that Earnest had received "conflicting recommendations" from one of the arresting officers and then from a sergeant on whether Eilman needed medical care. Absent something more, Easterbrook wrote, supervisors cannot be held liable "for the errors of subordinates" such as the sergeant who recommended against care.

And he wrote of Heard, "She does not appear to have been responsible for either evaluating Eilman's need for medical care or making the decision to release her...Unless the record has other facts that the parties have not discussed," Heard should not be liable, Easterbrook wrote.

Eilman's attorney, Jeffrey Singer, unsuccessfully asked for reconsideration, writing that the panel "overlooked certain material facts" on the role Earnest and Heard had played. Meanwhile the City of Chicago also asked for the record to be corrected, contending Easterbrook's opinion misstated the record about whether it was proven that drugs in Eilman's possession were to treat her bipolar disorder.

The panel revised its opinion to state that the drugs "may have been" to control Eilman's disorder. But no changes were made based on Singer's petition.

The case went back to U.S. District Judge Kendall. Following the Seventh Circuit directive, she dropped Earnest and Heard from the case. But as she did so, Judge Kendall recounted what she considered significant evidence of the role the two officers played—evidence that Singer had presented to the Seventh Circuit and reiterated in his petition for rehearing but that Easterbrook's opinion did not mention.

Kendall described Earnest's case as more than that of a supervisor deciding what conflicting advice to follow. She wrote:

"Earnest was the Watch Commander at the Eighth District Station when Eilman arrived. Earnest received multiple reports of Eilman's erratic behavior. First, Officer [Richard] Cason informed him that Eilman was acting 'goofy,' experiencing major mood swings and did not appear to be on drugs. Based upon this information, Earnest told Cason and Officer [Rosendo] Moreno to take Eilman to the hospital. However Cason and Moreno did not have a car to transport Eilman to the hospital.

"Instead of assigning them a different squad car, which he had the authority to do, Earnest ordered Sergeant [David] Berglind (who is not a medical professional) to interview Eilman to determine whether she needed a mental health evaluation...Officer Delia later informed Earnest that she had spoken to [Eilman's step-father] who, according to her testimony, told her that Eilman may have bipolar disorder and that he was concerned about her mood swings. Earnest decided to disregard the call by challenging its authenticity...As Watch Commander, Earnest had the authority to transfer Eilman to the hospital for a mental

health evaluation. Furthermore, he admitted that if an arrestee exhibits signs of a mental illness, that individual should be taken to a hospital. Earnest, however, never checked on Eilman and decided not to send her to the hospital.”

Nevertheless, Kendall wrote, she was “bound by the Seventh Circuit’s ruling that those facts are insufficient to establish” that there was sufficient evidence that the officer had failed in his duty.

Similarly, as Kendall wrote she was bound by the Seventh Circuit’s ruling that there was not sufficient evidence to keep Heard in the case, she recounted the evidence that went unmentioned in Easterbrook’s opinion: “Heard worked the Second District lockup with Officer [Teresa] Williams during the Third Watch on May 8, 2006. At some point during Heard’s shift, she heard Eilman repeatedly yell, ‘[b]itch feed me.’”

Further, Kendall wrote, another detainee, Corliss Holland, who was in the lockup between 4 p.m. May 8, 2006, and 10:30 a.m. on May 9, 2006, “testified that she heard Eilman yell, call for the guards and ask to use the phone approximately four to six times but that the guards ignored her. Holland also avers that she heard Eilman scream for approximately fifteen minutes that her heart hurt and that she could not breathe. While she screamed, Eilman banged on the bars of her cell.

“Holland was able to hear the guards joking and laughing about Eilman’s complaints. While Holland identified Heard as one of the guards that was present while Eilman was screaming, she does not know what, if any, contact she had with Eilman. Detainee [Kimberly] Warren, who was in the lockup from 12:50 p.m. on May 8, 2006 to 10:23 p.m. on May 9, 2006, testified that she heard (but never saw) a woman, who she identified as both young and Caucasian, yell, ‘I’m sick,’ ‘help me’ and ‘I have to go to the hospital.’ Warren stated that this woman’s yelling persisted for one to two hours and originated from a cell behind hers. Warren’s cell was located in a cell block behind Eilman’s with an opening facing the opposite direction.

“In response to the yelling, Warren heard a guard yell ‘shut the fuck up’ and ‘shut the hell up.’ Finally, the Court noted Eilman’s odd behavior in repeatedly yelling ‘bitch feed me,’ coupled with her general pleas for help...specific reference to her heart condition, and her prolonged screaming for hours on end.”

The case against the remaining officers and the City of Chicago never got before a jury; instead, the city settled the case in 2013 by paying \$22.5 million to Eilman’s family.

Statistical analysis by Zach Markin. Additional reporting by Zoe Rosenbaum.



Experts: Easterbrook misstatements shows need for greater judicial scrutiny

By **Emily Hoerner** and **Rick Tulsy** | April 10, 2017

Legal experts say that the work of federal judges receives too little scrutiny, despite their far-reaching power to interpret federal law.

More attention needs to be paid to the “integrity and validity” of opinions issued by the U.S. Court of Appeals, said Vikram David Amar, dean of the University of Illinois School of Law. Though the appeals courts are the final word in many cases in the federal courts, too little attention is spent reviewing those cases.

Cornell Law School Professor Jeffrey J. Rachlinski also highlighted the need to provide feedback to judges, and said “Judges should in fact know that they are fallible and the ways in which they are fallible.”

Their comments came after an *Injustice Watch* investigation (<http://www.injusticewatch.org/projects/2017/pattern-of-misstated-facts-found-in-probe-of-renowned-federal-judges-opinions/>) identified 17 cases since 2010 in which opinions authored by Judge Frank H. Easterbrook of the U.S. Court of Appeals for the Seventh Circuit included misrepresentations of the record, including misstatements of facts, omissions of facts in the record, or assumptions that were contrary to the trial record.

Easterbrook declined to discuss his opinions, saying through a spokeswoman “the court’s products speak for themselves.”

The U.S. Courts of Appeals reviews appeals from all U.S. District Courts in their jurisdiction; the Seventh Circuit oversees the federal trial courts in Illinois, Indiana and Wisconsin. The appellate courts consider cases in three-judge panels, so at least one other appellate judge signs onto every majority opinion that the court issues.

The *Injustice Watch* analysis of Seventh Circuit opinions since 2010 found that attorneys for the losing party filed post-opinion petitions contending the panel either got the law or the facts wrong in a greater percentage of opinions authored by Easterbrook than those authored by his colleagues.

The U.S. Supreme Court takes about one percent of the cases that are appealed from the circuit courts each year, leaving the circuit court decisions almost always as the final say.

Despite the court’s far-reaching impact, the opinions of appellate court judges get scrutinized far less often than U.S. Supreme Court or U.S. District Court opinions, Amar said. He wrote an [online article](https://verdict.justia.com/2016/08/25/oversees-overseers-explosive-law-review-article-points-difficulty-keeping-appellate-courts-honest) (<https://verdict.justia.com/2016/08/25/oversees-overseers-explosive-law-review-article-points-difficulty-keeping-appellate-courts-honest>) suggesting one reason: “Court of appeals jurisprudence simply isn’t sexy or glamorous enough” for law professors.

Court of appeals judges are appointed by the President and confirmed by the Senate for lifetime appointments; Easterbrook was appointed to his seat in 1985 by then-President Ronald Reagan, one of the youngest appellate judges in history.

How court of appeals judges arrive at their opinions, and the role other panel members play in the crafting of the decision, is what New York University School of Law professor Arthur Miller called a “black box.”

Amar wrote that having three separate judges, and their clerks, examine each case provides less of a safeguard than outsiders would expect. “The judge assigned primary responsibility

is often given a fair degree of deference by the other judges on the panel. That deference increases once a judge is assigned the task of writing an opinion,” given that judges must decide hundreds of cases a year, and their main focus is on the cases for which they author the opinion, he wrote.

Charles Gardner Geyh, a University of Indiana Maurer School of Law professor who studies judicial accountability, also noted the factor of time. While judges always can do better at factual accuracy, he said in an interview, “There’s an inevitable tradeoff in getting it right and offering justice in a timely way. Justice delayed is justice denied.”

Cornell professor Rachlinski, who studies the psychology of judicial decision making, noted that judges have less accountability in part by design. “If you want judges to be independent of the political process, then those judges really will be sort of invulnerable or impervious to any manner of the kind of accountability that any employee in America is used to,” he said.
