

# JUSTICE MIRIAM SHEARING: NEVADA'S TRAILBLAZING MINIMALIST

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Nevada Supreme Court Justice Miriam Shearing retired at the end of her second term on January 4, 2005. Over the nearly thirty years of her very public life on the bench, many have written of her accomplishments as the first woman to enter the brotherhood of the Nevada judiciary.<sup>1</sup> With Justice Shearing's retirement, the time is ripe for an examination of her judicial decisions during the twelve years she served on the Nevada Supreme Court. The analysis here provides one perspective on her body of work. It begins, as it must, with a glimpse into the person behind the work.

## I. A BRIEF LIFE HISTORY

Miriam Shearing is a self-described "loner."<sup>2</sup> One may find this an anomalous appellation for a person who has amassed a record of "firsts" unparalleled in Nevada history, but Shearing could write the book on how one indisposed to the limelight can succeed by sheer grit and a little luck. She broke through the all-male bastion of the Nevada judiciary not just once, but four times: first, as a juvenile court referee;<sup>3</sup> second, as a justice of the peace;<sup>4</sup> third, as a district court judge;<sup>5</sup> and finally, as a justice on the Nevada Supreme Court.<sup>6</sup> All but the first required Shearing to campaign for, and be elected to, the post.<sup>7</sup> So is Miriam Shearing just a passel of contradictions? While she has a host of good company if she is, one suspects there is more to her than that. Indeed, she appears to have much in common with her sisters on the bench across the country. A study of federal judges suggests that the women among them have common "childhood experiences as independent loners," which prepared them "to

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\* Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. I want to thank Senior Justice Miriam Shearing for her magnanimity in sharing her time and herself with me and for her candor and grace. I also want to thank Chief Justice Nancy Becker for helping me better understand both the workings of the court and Justice Shearing's role on it. Writing this article would have been hard to imagine without the able and timely contributions of my loyal research assistant, Monique McVoy, and I am grateful to the law school's generous backers for their recognition of the value in the work we do.

<sup>1</sup> See *infra* notes 3-7 and accompanying text.

<sup>2</sup> Interview with Miriam Shearing, Former C.J., Nev. Sup. Ct., in Las Vegas, Nev. (Aug. 16, 2005).

<sup>3</sup> Chris Chrystal, *Las Vegas Judge Recounts Her First Month on Job*, LAS VEGAS SUN, Apr. 25, 1975, at 11.

<sup>4</sup> Ardis Coffman, *Miriam Shearing*, LAS VEGAS SUN MAGAZINE, Apr. 9, 1978, at 9.

<sup>5</sup> Thom Sheets, *Nevada District Judge Miriam Shearing*, COMMUNIQUÉ, June 1989, at 6.

<sup>6</sup> Ed Vogel, *Blazing the Trail*, LAS VEGAS REV.-J., Jan. 5, 1997, at 1B.

<sup>7</sup> See Pamela Joy Graber, *Being Chief Becomes this Woman: A Profile of Miriam Shearing, Nevada's First Woman Supreme Court Justice*, NEV. LAW., Mar. 1997, at 12.

cope successfully as adults with the threatening and isolating experience of competing in a male-dominated field.”<sup>8</sup>

Unearthing a bit of Shearing’s roots reveals the beginnings of her life as one of those “independent loners.” The oldest of three children, Shearing grew up on a farm near the small town of Spencer, New York.<sup>9</sup> Shearing’s parents were of Finnish ancestry, and she spoke Finnish right along with them.<sup>10</sup> Shearing left farm life to attend nearby Cornell University, where she earned a Bachelor of Arts degree in philosophy<sup>11</sup> and, like many other women (and men), met her partner for life, husband Steven.<sup>12</sup>

Shearing often has described her entry into the study of law as “serendipitous.”<sup>13</sup> When Steven decided to go to medical school, Shearing thought that she should take the opportunity to pursue a professional degree herself.<sup>14</sup> Law school was the only professional degree program for which her undergraduate studies had prepared her, so law school is where Shearing went.<sup>15</sup> She attended Boston College of Law at night, while working as a project control officer for the United States Army research and engineering command.<sup>16</sup> Not long after she began her law studies, Shearing realized law school was where she belonged, and her graduation near the top of the class bore out that early assessment.<sup>17</sup>

After law and medical school, the Shearings departed the East Coast for California, where Steven completed his internship and residency, and then traveled to Pakistan, where Dr. Shearing worked with CARE.<sup>18</sup> Upon their return to the United States, the Shearings decided to practice their professions in Las Vegas.<sup>19</sup> In 1969, Shearing became the fiftieth woman lawyer admitted to practice in Nevada.<sup>20</sup> Soon after her admission to the Nevada bar, Shearing discovered that “all of us [women lawyers] were considered somewhat suspect

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<sup>8</sup> *Id.*

<sup>9</sup> Interview with Miriam Shearing, *supra* note 2; *see also* Graber, *supra* note 7, at 9.

<sup>10</sup> Graber, *supra* note 7, at 12.

<sup>11</sup> Interview with Miriam Shearing, *supra* note 2.

<sup>12</sup> Deanne M. Rymarowicz, *Presenting Judicial Firsts*, *NEV. LAW.*, May 2003, at 26.

<sup>13</sup> Interview with Miriam Shearing, *supra* note 2.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Rymarowicz, *supra* note 12, at 26.

<sup>17</sup> Interview with Miriam Shearing, *supra* note 2. Justice Shearing explained that, upon graduation, she received a letter from the law school dean advising her that she was eligible for membership in the Order of the Coif, as she was in the top ten percent of the class (based on all students—day and evening), but that the faculty had voted against Coif membership for evening students. *Id.*

<sup>18</sup> Rymarowicz, *supra* note 12, at 26.

<sup>19</sup> *Id.*

<sup>20</sup> Mel Parkinson, *Against All Odds, Nevada’s First 100 Female Attorneys Forged New Paths*, *NEV. LAW.* Mar. 2000, at 21.

by the male lawyers.”<sup>21</sup> Thus, Shearing followed the lead of local women lawyers like Emily Wanderer, and started her own practice.<sup>22</sup>

Shearing did not set out to be a trailblazer for Nevada women. She once said: “Most of us who have broken barriers didn’t start out to pave the way for other women. We just wanted to do what we wanted to do.”<sup>23</sup> After several years in practice in Las Vegas, Shearing was the beneficiary of a second serendipitous opportunity. In 1975, Clark County Juvenile Court Judge John F. Mendoza asked her to serve as a juvenile court referee.<sup>24</sup> Once appointed to that post, Shearing soon realized that the role of judicious decision maker suited her better than the role of advocate.<sup>25</sup> Shearing had “always been able to see the other side of a case,” and, as a juvenile court referee, she was able to do what came naturally to her.<sup>26</sup>

History has shown that what suited Shearing suited the people of Nevada. After her stint in the juvenile court, Shearing sought appointment by the Clark County Commissioners to an open seat on the justice court.<sup>27</sup> None of the commissioners agreed to consider her, and one commissioner even told her, “basically . . . that I, or any other woman, didn’t belong on the court.”<sup>28</sup> That rebuff propelled Shearing “to do something I never would have dreamed of doing. I went ahead and ran for election.”<sup>29</sup> During her campaign for justice of the peace, people were “very receptive. In fact, both men and women said, ‘It’s about time!’”<sup>30</sup> Shearing won her first time out and “without the support of the power structure.”<sup>31</sup> Most of those who appeared before her as a justice of the peace were respectful.<sup>32</sup> There were those, however, who “could not accept that a woman could know how to be a judge—especially when [she] did not necessarily follow the traditional male model of running a courtroom.”<sup>33</sup>

Shearing’s next step was to run for the district court. In 1980 she ran against an incumbent and, despite winning the primary handily, lost the election after a campaign against her that “thoroughly trash[ed her] and [her] abilities.”<sup>34</sup> The trashing went so far as to say that her election “would be a disaster

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<sup>21</sup> Miriam Shearing, *Then & Now: A Las Vegas Woman Attorney’s Perspective*, COMMUNIQUE, Sept. 2005, at 40. Shearing’s experience as a woman in the male-dominated Nevada bar was not altogether new. Earlier, when she was seeking employment as a lawyer in San Francisco during her husband’s medical residency, she had received a telephone call from a law firm informing her that the firm’s policy was that women should be at home with their children. Rymarowicz, *supra* note 12, at 26.

<sup>22</sup> Shearing, *supra* note 21, at 40.

<sup>23</sup> Vogel, *supra* note 6, at 1B.

<sup>24</sup> Interview with Miriam Shearing, *supra* note 2. With characteristic humility, Shearing freely acknowledges that she benefited from the affirmative action sensibilities of Judge Mendoza. *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Shearing, *supra* note 21, at 40.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 41.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

to the state,”<sup>35</sup> a claim that seems “a little excessive” to Shearing even now.<sup>36</sup> Throughout it all, Shearing took the high road and did not respond in kind.<sup>37</sup> Two years later, after the legislature created new district court judgeships, Shearing announced her candidacy and soon learned to her delight that those who remembered the trashing admired her pluck for coming back and trying again.<sup>38</sup> She recalls at least one person saying, “[o]h, you’re not the wimp I thought you were when you didn’t answer the charges.”<sup>39</sup> Others were not convinced that any woman should take the bench; election polling revealed that twelve percent of those polled “said they would never ever vote for a woman judge.”<sup>40</sup> Shearing did not need the votes of that benighted minority, however; the time had come for Nevada to seat its first woman judge on a court of general jurisdiction.

From her vantage point on the bench in juvenile, justice and district court, Shearing saw bias against women in the manner in which police, prosecutors, and judges handled disputes involving or affecting them.<sup>41</sup> Prosecutors frequently dropped rape cases, citing a “lack of evidence.”<sup>42</sup> In those cases, Shearing remarked, “it was the prosecutors’ attitude that ‘it’s just her word against his.’ But you never heard that in a robbery case. Maybe someone lied to the police about being robbed, but at least it would go to trial so a jury could decide.”<sup>43</sup> Shearing, too, experienced the reluctance of some men to recognize that what a woman said or did in the courtroom could be legitimate. Once, while she still was the lone woman on the bench, a male divorce litigant insisted that Shearing recuse herself because she “couldn’t possibly be fair to him.”<sup>44</sup> Apparently, Shearing later observed, it had never occurred to him that women had “been facing men judges since time immemorial.”<sup>45</sup>

Shearing’s inaugural campaign for the Nevada Supreme Court was “miserable,”<sup>46</sup> but her experience in her first run for the district court had prepared her “to slug it out and [win] . . . a tight race.”<sup>47</sup> Shearing recalls that her reception at the supreme court was “cordial, but there was some skepticism.”<sup>48</sup> She knew she had turned the corner when one of the justices told her, “You know, I don’t feel at all uncomfortable working with you!”<sup>49</sup> Not a shred of bitterness, but more a sense of bemusement, infuses Shearing’s comments on her own encounters with male chauvinism.

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Interview with Miriam Shearing, *supra* note 2.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Shearing, *supra* note 21, at 41.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 42.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

Because Shearing accomplished so many firsts for a woman lawyer, interviews with Shearing often have focused on her gender.<sup>50</sup> Shortly after she was appointed to the Clark County Juvenile Court, an interviewer asked Shearing if she presented a maternal image from the bench and if that made a difference to the children in the courtroom.<sup>51</sup> Her answer was what one who knows her would expect: that gender did not determine whether one was a good judge, and that some people, regardless of gender, simply had a rapport with children, while others did not.<sup>52</sup> Here, Shearing reflects the attitude of her counterpart on the United States Supreme Court, Justice Sandra Day O'Connor, who quoted a colleague as saying that in the end, "a wise old man and a wise old woman [will] reach the same decision."<sup>53</sup> Like O'Connor,<sup>54</sup> Shearing believes there is real value in having women (as well as racial and ethnic minorities) on the bench.<sup>55</sup> Her views accord with those of Supreme Court Justice Ruth Bader Ginsburg, who commented in an address to the National Association of Women Judges: "Our system of justice is surely richer for the diversity of background and experience of its judges. It was poorer, in relation to the society law exists to serve, when nearly all of its participants were cut from the same mold."<sup>56</sup>

As Shearing forged ahead with her career,<sup>57</sup> she never lost sight of her unique role as an agent for change in what for many years continued to be a closed society of male privilege.<sup>58</sup> Much of her impact on the supreme court is not evident because it is embedded in the published opinions of her male counterparts, whose language and approach, particularly in cases involving women or children, Shearing sought to influence through informal meetings and careful drafting of revisions to their draft opinions.<sup>59</sup> Shearing prides herself on being even-handed and fair, but is quick to acknowledge that the court needed at least one person with a different perspective, and she was glad to be that person.<sup>60</sup> One of the biggest compliments she ever got, Shearing recalled, was from a lawyer who specialized in custody disputes: he was always happy to be in her courtroom because he knew the husband would get a fair shake.<sup>61</sup>

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<sup>50</sup> See, e.g., Coffman, *supra* note 4, at 9; Sheets, *supra* note 5, at 7, 10-11.

<sup>51</sup> Chrystal, *supra* note 3, at 11.

<sup>52</sup> *Id.*

<sup>53</sup> Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U.L. REV. 1546, 1558 (1991) (quoting Oklahoma Supreme Court Justice Jeanne Coyne, but lamenting "New Feminism" focus on gender differences in judging, "precisely because it so nearly echoes the Victorian myth of the 'True Woman' that kept women out of law for so long." *Id.* at 1553.).

<sup>54</sup> See *id.* at 1549-53.

<sup>55</sup> Interview with Miriam Shearing, *supra* note 2.

<sup>56</sup> Ruth Bader Ginsburg, *Remarks on Women's Progress at the Bar and on the Bench*, 89 CORNELL L. REV. 801, 807 (2004).

<sup>57</sup> Constance L. Akridge, *Honoring Justice Miriam Shearing*, COMMUNIQUE, Nov. 2003, at 5.

<sup>58</sup> Interview with Miriam Shearing, *supra* note 2. See also Associated Press, *Procedures in Case Targeted by Justice*, NEV. APPEAL, July 7, 1994, at A-1 (reporting on Shearing interview in which she complained of other justices trying "to go around her in their handling of cases, including the case of [Second Judicial District Judge Jerry Carr Whitehead]").

<sup>59</sup> Interview with Miriam Shearing, *supra* note 2.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

While many describe Shearing as quiet and soft-spoken,<sup>62</sup> Shearing did not hesitate, even early in her judicial career, to share her views on the justice system. As a juvenile court referee, she believed that the court's role was to help, not punish, the child.<sup>63</sup> She thought children needed rehabilitation in whatever way worked for each individual child.<sup>64</sup> When Shearing ran for the district court in 1982, she said that the best way to make the community safer is to "bring swift justice" to criminals.<sup>65</sup> As a trial court judge, she viewed jail time as a necessity to keep first time offenders from becoming recidivists.<sup>66</sup> Those views, however, always were tempered by her respect for the rights of those charged with committing a crime. As a candidate for Justice of the Peace, Shearing said, "each person deserves to have his say and come away from court, regardless of the decision, with the feeling that he has had a full hearing by someone who cares."<sup>67</sup>

Shearing's politics are not easy to pinpoint. She defies simple categorization as a conservative or a liberal, but instead is pro-choice, pro-woman, and tough on crime.<sup>68</sup> As a judicial officer in a death penalty state, Shearing wrote decisions that may be viewed as pro-death penalty.<sup>69</sup> But her allegiance to the law she had sworn to uphold never sheltered her from distress over the state of death penalty litigation in Nevada. Nearly ten years ago, and long before the state legislature enacted a number of reforms,<sup>70</sup> Shearing voiced concerns over the lack of qualified death penalty lawyers in the state<sup>71</sup> and the low rate of pay for that most demanding work.<sup>72</sup>

During the 1992 campaign for the Supreme Court, Shearing called herself "unbought and unbossed" by casinos,<sup>73</sup> which undoubtedly resonated with Nevadans. Her election win over her male rival, long the favorite for the coveted high court position,<sup>74</sup> confirmed the wisdom of her message. As a justice, Shearing maintained her quiet independence and typically gave no hint of her thinking during oral argument or elsewhere.<sup>75</sup> When the court took the bench, Shearing was well prepared on the issues, but asked questions of the lawyers

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<sup>62</sup> See, e.g., Mike Henderson, "*Quiet Justice*" Seeks to Quell Bickering and Restor Respect to Embattled Bench, RENO GAZETTE-J., Dec. 12, 1996, at 1A.

<sup>63</sup> Chrystal, *supra* note 3, at 11.

<sup>64</sup> *Id.*

<sup>65</sup> *Shearing Enters Race*, LAS VEGAS REV.-J., June 15, 1982, at 7B.

<sup>66</sup> *Id.*

<sup>67</sup> *Shearing Announces Candidacy*, LAS VEGAS REV.-J., June 30, 1976, at 1B.

<sup>68</sup> *Supreme Court Hopeful Seeks a 'Name' in Elko*, ELKO DAILY FREE PRESS, July 29, 1992, at 18.

<sup>69</sup> Interview with Miriam Shearing, *supra* note 2. Shearing acknowledges that she is not convinced of the efficacy of the death penalty and regards it as far too expensive. She believes that life imprisonment without the possibility of parole is "sufficiently harsh," and "in light of recent exonerations, [is] concerned about killing the innocent." *Id.*

<sup>70</sup> See 2003 Nev. Stat. 442-43.

<sup>71</sup> Henderson, *supra* note 12, at 8A.

<sup>72</sup> *Id.*

<sup>73</sup> Philip Hager, *Nevada Elects First Woman to High Court*, L.A. TIMES, Nov. 5, 1992, at A12.

<sup>74</sup> See *id.*

<sup>75</sup> Interview with Miriam Shearing, *supra* note 2; see also Cy Ryan, *Shearing Finds Smooth Transition*, Las Vegas Sun, Sept. 14, 1993, at A6.

only when she did not understand something they said or wanted to see how far they would take an argument.<sup>76</sup> She viewed oral argument as the lawyers' time, not hers, and engaging in dialogue with the lawyers to demonstrate her grasp of the issues simply was not her style.<sup>77</sup>

Shearing toppled the final barrier to gender equality in the Nevada judiciary when she was named Chief Justice of the Nevada Supreme Court in 1997.<sup>78</sup> As Chief, she sought to move the court past internal problems it had faced in recent years,<sup>79</sup> to implement new procedures for managing the court's ever-increasing caseload,<sup>80</sup> and to help create a cohesive body of law for Nevada.<sup>81</sup> In the view of the court's current Chief Justice, Nancy Becker, Justice Shearing was successful on all fronts, though much remains for the court to do in the areas of caseload management and establishing consistency in Nevada law.<sup>82</sup>

In 2003, Shearing announced that she would not seek another term on the court.<sup>83</sup> Shearing has not, however, left public life entirely. Since her retirement earlier this year, Shearing has enjoyed the status of "senior judge,"<sup>84</sup> with a welcome return to the trial court bench, and she regularly sits by designation on the supreme court as needed.<sup>85</sup>

Chief Justice Nancy Becker has remarked that she misses the "calming influence" and "wealth of experience and perspective" Justice Shearing brought to the court.<sup>86</sup> Shearing "definitely was a mentor" for Becker when she joined the court in 1999.<sup>87</sup> Becker shares Shearing's view that the court's role is "to resolve the issues and questions of public policy before us, and avoid going beyond that."<sup>88</sup> On issues of first impression and statutory or constitutional interpretation, Shearing always "wanted to look at how the court's decision would play out in the real world."<sup>89</sup> In Becker's view, Shearing's most important contributions to the court's jurisprudence were in the area of child custody, particularly the "best interests" of the child analysis, "where she brought some of our divergent case law into alignment."<sup>90</sup> With Shearing's departure, another justice (or justices) will need to assume the role of consensus builder; just who that will be is not yet clear.<sup>91</sup>

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<sup>76</sup> Interview with Miriam Shearing, *supra* note 2.

<sup>77</sup> *Id.*; see also Ryan, *supra* note 75, at A6.

<sup>78</sup> Vogel, *supra* note 6, at 1B.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Interview with Nancy Becker, C.J., Nev. Sup. Ct., in Las Vegas, Nev. (July 29, 2005).

<sup>83</sup> *No Third Term for First Woman on Nevada Supreme Court*, LAS VEGAS SUN, May 1, 2003, at C21.

<sup>84</sup> See NEV. SUP. CT. R. 10 (providing for temporary assignment of retired justices and judges in good standing to "any state court at or below the level of the court in which he or she was serving at the time of retirement").

<sup>85</sup> Interview with Miriam Shearing, *supra* note 2.

<sup>86</sup> Interview with Nancy Becker, *supra* note 82.

<sup>87</sup> *Id.*; see also Ed Vogel, *Nevada Supreme Court Welcomes "the Cavalry": Four justices Sworn in*, LAS VEGAS REV.-J., Jan. 5, 1999, at 2B.

<sup>88</sup> Interview with Nancy Becker, *supra* note 82.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

Judging from her past, Miriam Shearing will remain a quiet, yet influential, voice in the development of the law and the advancement of the justice system in Nevada. We can only hope so.

## II. A SELECTED REVIEW OF JUSTICE SHEARING'S BODY OF WORK

### A. Introduction: An Analytical Framework<sup>92</sup>

University of Chicago law professor Cass Sunstein has written extensively of the "legitimate role" of the United States Supreme Court in our constitutional order<sup>93</sup> and of a philosophical approach he identifies as "decisional minimalism."<sup>94</sup> Judges who are minimalists, as were United States Supreme Court Justices Felix Frankfurter and John Marshall Harlan<sup>95</sup> "are conservative in the literal sense. They prize stability. They like small steps."<sup>96</sup> Minimalists eschew "ambitiously theoretical" doctrines, such as "fundamentalism"<sup>97</sup> or "perfectionism,"<sup>98</sup> and "they hope to do no more than is necessary to resolve

<sup>92</sup> The framework I have selected for the analysis of Justice Shearing's decisions is informed by the work of University of Chicago law professor Cass Sunstein, a prolific scholar whose work I admire. As I was reviewing Justice Shearing's professional history and published decisions, I happened to see an edited version of Sunstein's essay on the nomination of John Roberts to the United States Supreme Court in the local newspaper. See Cass R. Sunstein, *Minimalism v. Fundamentalism: Minimal Appeal*, NEW REPUBLIC, Aug. 1, 2005, at 17, [hereinafter Sunstein, *Minimalism v. Fundamentalism*] reprinted as edited in Cass R. Sunstein, *Understanding Roberts*, LAS VEGAS SUN, July 24, 2005, at 1E. Thus, as with so much of life and letters, it was serendipity and not a deliberate engagement in heuristics that led to the analysis suggested here.

<sup>93</sup> CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 8 (1999).

<sup>94</sup> *Id.* at 4. See also Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47 (2004); Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757 (2001); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996); Cass R. Sunstein, *Incompletely Theorized Arguments*, 108 HARV. L. REV. 1733 (1995). Sunstein has tackled a wide array of constitutional questions in his study and critique of the Supreme Court's decisions. See, e.g., Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081 (2005); Cass R. Sunstein, *Black on Brown*, 90 VA. L. REV. 1649 (2004); Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303 (1999); Cass R. Sunstein, *The Dred Scott Case*, 1 GREEN BAG 2D 39 (1997); Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J.L. & PUB. POL'Y 311 (1996); Cass R. Sunstein, *What Judge Bork Should Have Said*, 23 CONN. L. REV. 205 (1991).

<sup>95</sup> Sunstein, *Minimalism v. Fundamentalism*, *supra* note 92, at 18 (describing Justices Frankfurter and Harlan as "deploring [the Warren] Court's tendency to issue sweeping rules (as, for example its decisions giving broad protections to free speech and the right to vote).").

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 19. Fundamentalists, like Justice Clarence Thomas and, to a slightly lesser extent, Justice Antonin Scalia, "are committed to 'originalism' and treat that commitment as a fighting faith." *Id.* "[F]undamentalists believe that the Constitution should be read to fit with the original understanding of the Founding Fathers; they are willing to make large-scale changes to return to that understanding." *Id.* at 17. They "have radical inclinations," because they "know that current constitutional law rejects their own approach, and they tend to feel angry and even embattled about that fact." *Id.* at 18.

<sup>98</sup> *Id.* at 17. Perfectionist justices "want to interpret the Constitution to promote individual rights." *Id.* The Warren Court "fell squarely into the perfectionist camp," *id.*, and Justices William Brennan, William O. Douglas, and Thurgood Marshall "can all be described as



cases.”<sup>99</sup> Put another way: “Instead of adopting theories, they decide cases.”<sup>100</sup> Those characteristics, Sunstein argues, promote “a democratic nation’s highest aspirations without preempting democratic processes.”<sup>101</sup>

Minimalism “is still very much alive.”<sup>102</sup> Justices Sandra Day O’Connor,<sup>103</sup> Anthony Kennedy, David Souter, Ruth Bader Ginsberg,<sup>104</sup> and Stephen Breyer,<sup>105</sup> the “analytical heart” of the Court,<sup>106</sup> are cut of minimalist cloth. But that does not mean, as we know, that they all embrace the same views. “[T]he minimalist camp is large and diverse. The point is that they greatly prefer nudges to earthquakes.”<sup>107</sup> As Sunstein explains, “[b]y itself, minimalism is a method and a constraint; it is not a program, and it does not dictate particular results.”<sup>108</sup>

Like her counterparts on the United States Supreme Court, Justice Shearing is not inclined to issue bold or sweeping pronouncements of the law. Rather, her opinions demonstrate the careful, circumspect approach to judicial decision making of the Court’s minimalists. Analysis of Justice Shearing’s body of work reveals the hallmark of a decisional minimalist: She confined her rulings to the facts and issues presented in the cases before the court, developing the law incrementally, one step at a time, and not all in one fell swoop. In so doing, Justice Shearing enhanced both the Nevada judiciary and the democratic ideals of the State of Nevada.

Neither space nor time<sup>109</sup> permits analysis of every opinion authored by Justice Shearing. The sections below address issues of particular concern to her: the role of the judiciary, children’s rights, women and the law, and the fairness of the death penalty. Where appropriate, footnotes incorporate opin-

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perfectionists,” *id.* at 18, based on their view that, “to perfect the Constitution, they should interpret it in broad terms that expand democratic ideals.” *Id.* at 17. Today, “[p]erfectionism can easily be found in the major law schools, but it is no longer a significant presence on the federal bench,” *id.* at 18, to the great regret of many of us who grew up with the Warren Court.

<sup>99</sup> *Id.* at 18.

<sup>100</sup> SUNSTEIN, *supra* note 93, at 9.

<sup>101</sup> *Id.* at *xiv*.

<sup>102</sup> Sunstein, *Minimalism v. Fundamentalism*, *supra* note 92, at 18.

<sup>103</sup> Justice O’Connor’s recent retirement from the Supreme Court, and the nomination of federal appeals court judge John Roberts to replace her, prompted Sunstein to examine Roberts’s record and conclude that he is likely to continue in O’Connor’s footsteps. *See* Sunstein, *Minimalism v. Fundamentalism*, *supra* note 92, at 17. *See also* Cass R. Sunstein, *O’Connor’s Balance Will Be Missed*, L.A. TIMES, July 3, 2005, at M5.

<sup>104</sup> *See* Ruth Bader Ginsburg, *Speaking in a Judicial Voice: Reflections on Roe v. Wade, in JUDGES ON JUDGING: VIEWS FROM THE BENCH* 194 (David M. O’Brien ed., 2004). Justice Ginsburg suggests that a less ambitious decision would have prevented much of the post-*Roe* controversy and “served to reduce rather than to fuel” it. *Id.* at 195. The Court could have accomplished that by simply stopping with its declaration that the Texas abortion statute was unconstitutional, and not, as the Court did, going on “to fashion a regime blanketing the subject, a set of rules that displaced virtually every state law then in force.” *Id.* The view Justice Ginsburg expresses here is distinctively minimalist in its criticism of “[d]octrinal limbs too swiftly shaped,” and broad rule-making in general. *Id.*

<sup>105</sup> SUNSTEIN, *supra* note 93, at 9.

<sup>106</sup> *Id.*

<sup>107</sup> Sunstein, *Minimalism v. Fundamentalism*, *supra* note 92, at 18.

<sup>108</sup> *Id.*

<sup>109</sup> Nor the patience of the author or the readership, one might add.

ions from other areas of the law, both civil and criminal. We examine first the array of opinions loosely related by their reflections on the role of the judiciary in its many and varied aspects.

### B. *The Role of the Judiciary*

It is ironic indeed that the early years of the mild mannered, consensus-building Miriam Shearing's twelve-year career as a justice on Nevada's high court should be marked by the contentious series of *Whitehead v. Nevada Commission on Judicial Discipline* decisions<sup>110</sup> and that her tenure on the court should end not long after the furor over *Guinn v. Legislature*<sup>111</sup> subsided. One might say that, in both instances, cooler heads failed to prevail, as Shearing often found herself alone, consigned to dissenting from the principal *Whitehead* decisions<sup>112</sup> and writing a separate concurrence in the *Guinn* rehearing decision.<sup>113</sup> An examination of those cases and other less incendiary ones bearing on the role of the judiciary reveals Shearing's commitment to narrow rulings based on a close reading of constitutional, statutory, and procedural language and on the facts specific to the cases then before the court.

As much as one might wish to avoid mention of the unsavory *Whitehead* era at this late date, no discussion of a Nevada Supreme Court justice who served during those years would be complete without it. The controversy began in late 1993 when Second Judicial District Court Judge Jerry Carr Whitehead petitioned the Nevada Supreme Court for a writ of mandamus or prohibition to halt an investigation against Whitehead by the Nevada Commission on Judicial Discipline.<sup>114</sup> Whitehead's attempts to defend himself were understandable; the allegations against him, if proven, could cause his removal from

<sup>110</sup> The court's decision in early 1995 effectively concluded the proceedings. See *Whitehead v. Nev. Comm'n on Judicial Discipline (Whitehead IV)*, 893 P.2d 866 (Nev. 1995). The eight other published opinions addressed ancillary issues. See *Whitehead v. Nev. Comm'n on Judicial Discipline (Whitehead VII)*, 920 P.2d 491 (Nev. 1996) (per curiam), *vacated by Del Papa v. Steffen*, 920 P.2d 489 (Nev. 1996), *cert. denied sub nom. In re Whitehead (Del Papa II)*, 519 U.S. 1107 (1997); *Del Papa v. Steffen*, 915 P.2d 245 (Nev. 1996), *cert. denied sub nom. In re Steffen (Del Papa I)*, 519 U.S. 1107 (1997); *Whitehead v. Nev. Comm'n on Judicial Discipline (Whitehead VI)*, 908 P.2d 219 (Nev. 1995) (per curiam); *Whitehead v. Nev. Comm'n on Judicial Discipline (Whitehead V)*, 906 P.2d 230 (Nev. 1994); *Whitehead v. Nev. Comm'n on Judicial Discipline (Whitehead III)*, 878 P.2d 913 (Nev. 1994) (disqualifying attorney general's office from representing Commission in proceedings against state judicial officers); *Whitehead v. Nev. Comm'n on Judicial Discipline (Whitehead II)*, 873 P.2d 946 (Nev. 1994) (rejecting Commission's argument, on rehearing, that it was not answerable to Nevada Supreme Court, except by appeal from a final order, and reaffirming *Whitehead I* order); *Whitehead v. Nev. Comm'n on Judicial Discipline (Whitehead I)*, 869 P.2d 795 (Nev. 1994), *reported at* 906 P.2d 230 (Nev. 1994), *reh'g denied*, 873 P.2d 946 (Nev. 1994), *motion granted in part*, 878 P.2d 913 (Nev. 1994) (directing Commission to produce documents for in camera review).

<sup>111</sup> *Guinn v. State (Guinn I)*, 71 P.3d 1269 (Nev. 2003), *aff'd on reh'g, (Guinn II)*, 76 P.3d 22 (Nev. 2003).

<sup>112</sup> See *Whitehead V*, 906 P.2d at 254 (Shearing, J., dissenting); *Whitehead IV*, 893 P.2d at 965 (Shearing, J., dissenting); *Whitehead III*, 878 P.2d at 934 (Shearing, J., concurring in part and dissenting in part).

<sup>113</sup> *Guinn II*, 76 P.3d at 33.

<sup>114</sup> See A.D. Hopkins, *Reno Judge's Dispute Turns into Landmark*, LAS VEGAS REV.-J., Nov. 7, 1993, at A1.

the bench.<sup>115</sup> The implications of Whitehead's petition, however, were momentous not just for him, but for the judiciary as a whole. Were he to prevail on his assertions that the Commission could not hire a lawyer or interview witnesses before establishing probable cause, several legal ethics scholars concluded that "there would be no point to having a [Judicial Disciplinary Commission]."<sup>116</sup>

From the beginning, Shearing appreciated the epic dimensions of Whitehead's challenge. His allegations did no less than pit against each other two entities established by the Nevada Constitution: the Nevada Supreme Court, created by Article VI, Section 1, and the Nevada Commission on Judicial Discipline, created by Article VI, Section 21. In an early minority decision, Shearing observed: "Virtually every aspect of this case involves fundamental questions of the relationship between constitutional bodies of government."<sup>117</sup> Unfortunately, those important questions were lost in the public sparring and inflammatory rhetoric of individual justices<sup>118</sup> for which the Whitehead era is best remembered.<sup>119</sup>

In her separate opinions, Shearing often spoke in the "democracy enhancing" terms<sup>120</sup> characteristic of decisional minimalism. In *Whitehead III*, Shearing rejected the majority's ruling, on separation of powers grounds, that the Commission lacked the authority to seek legal counsel from the Office of Attorney

<sup>115</sup> *Nevada Supreme Court Investigated: Ethics Experts Criticize its Decision to Stay Disciplinary Probe of Reno Judge*, A.B.A. J., June 1994, at 26.

<sup>116</sup> *Id.* at 27.

<sup>117</sup> *Whitehead II*, 873 P.2d 946, 977 (Nev. 1994) (Shearing, J., concurring in part and dissenting in part).

<sup>118</sup> See *infra* note 119. For the most part, Justice Shearing managed to stay above the fray. She drew fire, however, for joining with Justices Young and Rose, who were disqualified, see *Whitehead VII*, 920 P.2d 491, 505 n.12 (Nev. 1996) *vacated by Del Papa v. Steffen*, 920 P.2d 489 (Nev. 1996), *cert. denied sub nom.*, in issuing an administrative order voiding the appointment of a special master to investigate the alleged leaks. See S. Matthew Cook, *Extending the Due Process Clause to Prevent a Previously Recused Judge from Later Attempting to Affect the Case from Which He Was Recused*, 1997 BYU L. REV. 423, 428-29 & n.25 (citing Petition for an Order Rescinding Appointment of Special Master Entered September 1, 1995, and Voiding Associated Expenses, ADKM No. 221 (Nev. Sept. 15, 1995)).

<sup>119</sup> See, e.g., *Give It Up*, LAS VEGAS REV.-J., July 7, 1996, at C2; *Acting Justice Opposes Probe of Media Leak*, LAS VEGAS REV.-J., Nov. 24, 1994, at B1; A.D. Hopkins, *Justices Continue Quarrel*, LAS VEGAS REV.-J., Dec. 30, 1995, at B1; A.D. Hopkins, *Revocation of Special Master Brings Reactions of Relief, Caution*, LAS VEGAS REV.-J., Sept. 16, 1995, at A2; A.D. Hopkins, *Rose Pins Damage to High Court's Reputation on Justices*, LAS VEGAS REV.-J., Mar. 4, 1995, at 1B; Jon Ralston, *High Court Mess Hits New Low*, LAS VEGAS REV.-J., Jan. 25, 1996, at B5; John L. Smith, *As Juice Jobs Go, the Whitehead Case Is One for the Books*, LAS VEGAS REV.-J., July 28, 1994 at 1B; John L. Smith, *High Court Cronies in Search of Whitehead Whistle-Blower*, LAS VEGAS REV.-J., Sept. 10, 1995, at B1; Ed Vogel, *High Court Slams Probe of Judge*, LAS VEGAS REV.-J., Apr. 23, 1994, at B1.

<sup>120</sup> Cf. *Enter. Citizens Action Comm. v. Clark County Bd. of Comm'rs*, 918 P.2d 305, 313 (Nev. 1996) (Shearing, J., dissenting) (noting complicated nature of land use decisions in urban environment and saying court should be "very circumspect about interfering with the decisions made by those who are selected by the people . . . to make those decisions"); *Carson City v. Price*, 934 P.2d 1042 (Nev. 1997) (reversing district court's grant of preliminary injunction to property owners who failed to act on their claims until affordable housing project approved unanimously by Carson City Board of Supervisors was nearly seventy-five percent complete).

General.<sup>121</sup> Instead of the majority's strict walling off of one branch of government from another, Shearing's view was that "the structure of government is such that the branches must interact. This is what keeps any one branch from dominating the government."<sup>122</sup> Hence, even as a member of the executive branch, the Commission could exercise judicial functions, just as numerous administrative agencies commonly do,<sup>123</sup> without running afoul of the separation of powers doctrine.<sup>124</sup> For Shearing, the *Whitehead* proceedings were, therefore, a legitimate exercise of the Commission's constitutionally delegated authority.<sup>125</sup>

A few months later and over another Shearing dissent,<sup>126</sup> the court ruled in *Whitehead IV* that the Commission lacked jurisdiction to proceed to a probable cause hearing.<sup>127</sup> Having dealt with that impediment, the court granted Whitehead's petition, issued certain commands for the Commission's future conduct, should it initiate further charges against Whitehead, and retained jurisdiction "to carry forward and implement all determinations and rulings that we have made in the course of these proceedings or will make in the future."<sup>128</sup> Shearing was incensed.<sup>129</sup> She would have dismissed Whitehead's petition and held that the Commission had jurisdiction to proceed to a probable cause hearing based on the complaint drafted by the Commission's special counsel.<sup>130</sup>

Shearing denounced the majority's suggestion<sup>131</sup> that former Commission counsel had injected into the case the issue whether Whitehead's conduct violated the Code of Judicial Conduct.<sup>132</sup> That suggestion, Shearing said, ignored Whitehead's own allegation, as a ground for his petition, that his conduct had

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<sup>121</sup> *Whitehead III*, 878 P.2d 913, 935 (Nev. 1994) (Shearing, J., concurring in part and dissenting in part).

<sup>122</sup> *Id.*

<sup>123</sup> See *State ex rel. Dep't of Transp. v. Pub. Employees Ret. Sys.* 83 P.3d 815 (Nev. 2004) (Shearing, for the court, refusing to supplant judgment of state administrative agency which had upheld Public Employee Retirement System's assessment of back contributions for Nevada Department of Transportation archeologists whom it had treated as independent contractors rather than employees); *State Indus. Ins. Sys. v. Perez*, 994 P.2d 723 (Nev. 2000) (Shearing, for the court, upholding administrative appeals officer's award of benefits for permanent disability, over employer's objection, and holding that statutory requirement of medical evidence to support permanent disability claim was not applicable when disability was not result of changed medical condition, but of worker's poor aptitude for vocational rehabilitation, based on limited English skills, low educational level, and exclusive construction work experience); *Kolnik v. Nev. Employment Sec. Dep't*, 908 P.2d 726, 729-30 (Nev. 1996) (Shearing, J., dissenting) (stating that court should not "substitute its judgment of the evidence for that of the administrative agency," which had denied unemployment benefits to taxi driver after his firing for misconduct involving two accidents); *State Indus. Ins. Sys. v. Romero*, 877 P.2d 541 (Nev. 1994) (Shearing, for the court, upholding reinstatement of rehabilitation benefits by administrative appeals officer, whose decision was supported by substantial evidence and was correct as matter of law).

<sup>124</sup> *Whitehead III*, 878 P.2d at 936.

<sup>125</sup> See *id.* at 937 (analyzing NEV. CONST. art. VI, § 21).

<sup>126</sup> *Whitehead IV*, 893 P.2d 866, 965 (Nev. 1995) (Shearing, J., dissenting).

<sup>127</sup> *Id.* at 941.

<sup>128</sup> *Id.*

<sup>129</sup> Interview with Miriam Shearing, *supra* note 2.

<sup>130</sup> *Whitehead IV*, 893 P.2d at 965 (Shearing, J., dissenting).

<sup>131</sup> See *id.* at 898-99.

<sup>132</sup> *Id.* at 967 (Shearing, J., dissenting).

no “‘legal or ethical relevance to the Code of Judicial Conduct and the function of the Nevada Commission on Judicial Discipline’ and ‘[t]herefore the Commission is without jurisdiction to impose discipline for such an alleged violation.’”<sup>133</sup> Shearing continued: “Once this court agreed to intervene by way of extraordinary writ to determine the matter of jurisdiction, it had an obligation to resolve the jurisdictional issues raised by the petition, one of which is that the alleged conduct does not violate any provisions of the Code of Judicial Conduct.”<sup>134</sup> Whitehead was, of course, entitled to the presumption of innocence unless and until the Commission proved the charges against him.<sup>135</sup> Nevertheless, the majority’s reading of the Code so as to “condone the conduct described in the complaint,”<sup>136</sup> Shearing maintained, was a “grave disservice to the judges, attorneys, litigants, and citizens of this State. It is unconscionable to suggest that the conduct described is not serious enough to be within the jurisdiction of the Commission on Judicial Discipline.”<sup>137</sup>

Shearing also took her colleagues to task for conducting the *Whitehead* proceedings behind closed doors. While the Commission was bound by statute<sup>138</sup> to protect the confidentiality of its proceedings, the supreme court was under no such obligation; quite to the contrary: “Holding secret proceedings to decide vital issues of law and public policy is contrary to law and tradition in this state and country.”<sup>139</sup> Shearing went on to describe the public’s interest in the *Whitehead* proceedings:

Allegations of a district court judge’s intimidation and retaliation are of significant public interest. There is also a strong public interest in understanding (1) why Judge Whitehead thought that he should not have to answer the allegations contained in the Commission’s complaint, and (2) why the Nevada Supreme Court might see fit to grant his wishes. The Judge’s interest in maintaining his privacy does not amount to a compelling governmental interest sufficient to overcome these interests.<sup>140</sup>

In the end, Whitehead resigned from the district court bench, and the Commission closed the investigation.<sup>141</sup>

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<sup>133</sup> *Id.* (quoting Judge Whitehead in his petition).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 976.

<sup>137</sup> *Id.*

<sup>138</sup> See NEV. REV. STAT. § 1.4683(1) (2005) (providing for confidentiality of Commission proceedings before finding of probable cause and formal filing of statement of charges).

<sup>139</sup> *Whitehead IV*, 893 P.2d at 990 (criticizing majority for entering unconstitutional order in effort to keep proceedings secret and later sanctioning violators of order, and concluding, “[t]here is no basis for applying sanctions for violation of an unconstitutional order.” *Id.* at 995).

<sup>140</sup> *Id.* at 991.

<sup>141</sup> See *Give It Up*, *supra* note 119, at C2. Following the *Whitehead* decisions, the 1995 and 1997 Nevada legislatures passed resolutions amending NEV. CONST. art. VI, § 21, and the voters approved the amendment at the 1998 general election. See *Mosley v. Nev. Comm’n on Judicial Discipline*, 22 P.3d 655, 657 n.1 (Nev. 2001). The amendment removed from the Nevada Supreme Court its previously held power to make rules delineating the grounds for judicial discipline, governing the confidentiality of Commission proceedings, and conducting Commission investigations and hearings. *Id.* Now, the constitution reposes in the legislature the powers to delineate grounds for disciplinary action and to establish standards for Commission investigations and confidentiality. *Id.* (citing NEV. CONST. art. VI, § 21(5)(a)-(b)). The amendment also empowered the Commission to adopt its own procedural

In 2003, the year preceding Shearing's retirement, the court again encountered controversy and public outrage<sup>142</sup> when it issued its ruling in *Guinn v. Legislature*.<sup>143</sup> Local and national press accounts might lead one to believe that "the court had forcibly displaced the State Legislature by means of a violent coup d'etat."<sup>144</sup> There was talk of a recall of the majority justices<sup>145</sup> and of referenda to repeal the tax increase,<sup>146</sup> and some of the justices received threats of physical harm.<sup>147</sup> The furor began when Nevada Governor Kenny Guinn petitioned the Nevada Supreme Court for a writ of mandamus declaring the state legislature in violation of the state constitution and compelling that body to fulfill its constitutional duty to approve a balanced budget by a time certain.<sup>148</sup>

The issues raised in Governor Guinn's petition presented the court with conflicting provisions of the Nevada Constitution whose import came to a head during the 2003 session of the Nevada Legislature, when the state faced serious financial shortfalls.<sup>149</sup> After the legislature failed in its regular session and two special sessions to produce agreement on a balanced budget,<sup>150</sup> Governor Guinn petitioned the court, and the court acted.<sup>151</sup> It ruled that Article XI, Section 6 of the Nevada Constitution, which requires adequate funding of public education, trumped Article IV, Section 18(2)'s requirement of a two-thirds majority of both houses of the legislature to pass a tax increase.<sup>152</sup> Shearing joined five of her colleagues in the majority decision.<sup>153</sup>

In *Guinn II*, the court's decision on the rehearing petition filed by aggrieved legislators,<sup>154</sup> Shearing agreed with the court's ruling, but disagreed as to its reasoning.<sup>155</sup> Her narrower ruling would have denied the petition for

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rules "for the conduct of its hearings and any other procedural rules it deems necessary to carry out its duties." *Id.* (citing NEV. CONST. art. VI, § 21(7)).

<sup>142</sup> See, e.g., Steve R. Johnson, *Supermajority Provisions, Guinn v. Legislature, and a Flawed Constitutional Structure*, 4 NEV. L.J. 491, 495 (2003); Jeffrey W. Stempel, *The Most Rational Branch: Guinn v. Legislature and the Judiciary's Role As Helpful Arbiter of Conflict*, 4 NEV. L.J. 518, 518-19 (2003).

<sup>143</sup> *Guinn I*, 71 P.3d 1269 (Nev. 2003), *aff'd on reh'g*, *Guinn II*, 76 P.3d 22 (Nev. 2003). Governor Guinn sought mandamus relief, asking the court to declare the Nevada legislature's failure to pass a balanced budget a violation of the Nevada Constitution. *Id.* at 1272.

<sup>144</sup> Stempel, *supra* note 142, at 518-19.

<sup>145</sup> Johnson, *supra* note 142, at 495 (citing K.C. Howard, *Activists to Target Six Justices*, LAS VEGAS REV.-J., July 18, 2003, at 1A).

<sup>146</sup> *Id.* (citing Ed Vogel, *Seeking Signatures: Referendum on Tax Repeal in the Works*, LAS VEGAS REV.-J., Sept. 12, 2003, at 2B; *Editorial: Feel-Good Politics that Don't Work*, LAS VEGAS SUN, Aug. 24, 2003, at 2D).

<sup>147</sup> Stempel, *supra* note 142, at 519 n.4.

<sup>148</sup> *Guinn I*, 71 P.3d at 1272.

<sup>149</sup> See, e.g., *id.*

<sup>150</sup> See *Guinn II*, 76 P.3d 22, 27-28 (Nev. 2003).

<sup>151</sup> *Guinn I*, 71 P.3d at 1271-72.

<sup>152</sup> *Id.* at 1275-76. The court reached that result by characterizing the Article 4 requirement as a "procedural" provision, which must yield to the "substantive" mandate of Article 11. *Id.*

<sup>153</sup> *Id.* at 1276. See *id.* (Maupin, J., dissenting).

<sup>154</sup> 76 P.3d at 25. Only individual legislators petitioned for rehearing; the Legislature did not join in the petition. See *id.*

<sup>155</sup> *Id.* at 33 (Shearing, J., concurring).

rehearing based on its failure, by simply rehashing old arguments, to conform to the standards for such petitions set out in Rule 40(c) of the Nevada Rules of Appellate Procedure.<sup>156</sup> Shearing also took issue with the court's attempt to answer public criticism<sup>157</sup> and defend its own criticism of the state's constitution and laws.<sup>158</sup> Reflecting her strong views on separation of powers and the role of the judiciary,<sup>159</sup> Shearing stated:

We must accept the duly enacted constitution and laws of this state, whether they are well advised or ill advised; the court's duty is to decide the cases brought before it. Often that duty involves trying to reconcile provisions that, in practical application, produce results that are incompatible with one another. The court has accomplished that reconciliation in this case. That should end the matter.<sup>160</sup>

For Shearing, *Guinn* was simply another case the court had a duty to decide, an important case to be sure, but just a case, not the occasion for a political manifesto.

In the years between *Whitehead* and *Guinn* the court faced other, often politically sensitive, decisional challenges. Comments on a few of those cases further illustrate Shearing's respect for democratic ideals and the high standards to which she holds the judiciary and those serving on the bench.

In *Nevada Judges Ass'n v. Lau*,<sup>161</sup> the court examined a controversial ballot initiative that would have amended the Nevada Constitution to impose term limits on the elected judiciary.<sup>162</sup> Petitioners sought to have the measure removed from the ballot, complaining, first, that it violated the people's right to vote for candidates of their choice and incumbent judges' right to continue in office and, second, that it failed to state with clarity its effect on judges.<sup>163</sup> By

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<sup>156</sup> *Id.* at 33-34 (concluding that petition for rehearing "is not appropriate" under any provision of NEV. R. APP. P. 40(c)).

<sup>157</sup> *Id.* at 34. Shearing's thinking here echoed her dissent in *Whitehead IV* where she disagreed "wholeheartedly with the majority view that this court should respond to the comments and criticisms of the media." 893 P.2d 866, 966 (Nev. 1995). Shearing acknowledged the sting of media criticism felt by any public official, but believed that any desire to explain and defend oneself must yield to that most important of media responsibilities: their duty to the public "to report on the actions of public officials and to criticize them if necessary." *Id.* In the words of United States Supreme Court Chief Justice Warren Burger, "[i]t is assumed that judges will ignore the public glamour or media reports and editorials in reaching their decisions and by tradition will not respond [react] to public commentary." *Id.* at 967 (quoting *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978)).

<sup>158</sup> *Guinn I*, 71 P.3d at 34.

<sup>159</sup> See, e.g., *Schoels v. State*, 966 P.2d 735, 741-42 (Nev. 1998) (Shearing, J., concurring) (She wrote separately to address dissenting justice's assertion that prosecutors had adopted practice of seeking death penalty purely for tactical advantage, and stating, "this court must respect the doctrine of separation of powers. The judiciary may not invade the legitimate function of the prosecutor. Charging decisions are primarily a matter of discretion for the prosecution, which represents the executive branch of government.").

<sup>160</sup> *Guinn II*, 76 P.3d at 34.

<sup>161</sup> 910 P.2d 898 (Nev. 1996).

<sup>162</sup> *Id.* at 899.

<sup>163</sup> *Id.* at 900. The ballot initiative included term limits for legislators and state and local government officials as well, but judicial positions received no explanation of the maximum years of service allowed, whereas the other positions contained that information. *Id.* at 903. As to judges, the explanation stated only that "judges would be limited to two (2) terms." *Id.* While "two terms" would amount to a twelve-year maximum under Article 6, section 20(2),

the time the petitioners' challenge reached the Nevada Supreme Court, the voters had approved the measure in the 1994 election.<sup>164</sup> The initiative's success did not moot the challenge, however, because the Nevada Constitution requires voter approval of proposed constitutional amendments in two successive elections.<sup>165</sup> Thus, the issue was very much alive when the supreme court ruled in early 1996, well in advance of election day.<sup>166</sup>

The court upheld the constitutionality of the ballot initiative,<sup>167</sup> but agreed with the petitioners that the language in the explanation of the measure's effect was not a model of clarity.<sup>168</sup> To remedy that problem, the court severed the initiative into two separate questions and even went so far as to specify the precise language to be used in the initiative's explanation of its effect on judges.<sup>169</sup>

While Shearing agreed that the initiative was constitutional, she dissented from the severance order; she believed the court had gone too far when it accepted the challenge to the initiative's purportedly faulty explanation.<sup>170</sup> Two rationales supported her dissent. First, the initiative's explanation was both accurate and in compliance with the statutory requirements that it be "in easily understood language and of reasonable length."<sup>171</sup> Second, the court overstepped its bounds and trod on the rights of voters when it examined the question's language and issued the severance order, complete with revised language.<sup>172</sup> The proper remedy, to Shearing's mind, was crystal clear: "I submit that the question as presented to the voters in the 1994-95 election should either be upheld as satisfactory or struck down as defective."<sup>173</sup> Shearing was unequivocal in stating that, once the voters approved the initiative, the court was not at liberty to change it; its only choices were to approve it as written or require a new question and explanation to be placed on the ballot and passed in two consecutive elections.<sup>174</sup>

Returning to a related concern of the state's high court, judicial discipline, brings us to the all-too-public tale of Eighth Judicial District Judge Donald Mosley's battle for custody of his young son<sup>175</sup> and the ensuing ethics probe of Mosley.<sup>176</sup> In mid-1999, more than two years after Mosley prevailed in his

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of the Nevada Constitution, under certain circumstances a judge actually might serve far less than that, given the constitution's electoral requirements. *See id.*

<sup>164</sup> *Id.* at 900.

<sup>165</sup> See NEV. CONST. art. XIX, § 2(4), which provides: "If a majority of such voters votes approval of such amendment, the secretary of state shall publish and resubmit the question of approval or disapproval to a vote of the voters at the next succeeding general election in the same manner as such question was originally submitted."

<sup>166</sup> *See Nev. Judges Ass'n*, 910 P.2d at 898.

<sup>167</sup> *Id.* at 903.

<sup>168</sup> *See id.* at 904.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 904-05 (Shearing, J., concurring in part and dissenting in part).

<sup>171</sup> NEV. REV. STAT. § 293.250(5) (2004).

<sup>172</sup> *Nev. Judges Ass'n*, 910 P.2d at 904.

<sup>173</sup> *Id.* at 905.

<sup>174</sup> *Id.*

<sup>175</sup> *See infra* notes 276-81 and accompanying text.

<sup>176</sup> *See, e.g.,* Carri Geer Thevenot, *Ruling Throws Out Lawsuit by Judge*, LAS VEGAS REV.-J., Feb. 16, 2005, at 4B; Ed Vogel, *Court Upholds Mosley Fine, Censure*, LAS VEGAS REV.-



efforts to regain joint custody of his son,<sup>177</sup> the *Las Vegas Review-Journal* published two articles accusing Mosley of using his judicial office to benefit his custody pursuit.<sup>178</sup> After investigation, the Nevada Commission on Judicial Discipline instituted formal disciplinary proceedings against Mosley.<sup>179</sup> The Commission charged Mosley with eleven violations of the Nevada Code of Judicial Conduct and, at the conclusion of a three-day evidentiary hearing, found violations relating to seven counts,<sup>180</sup> dismissed the remaining four counts,<sup>181</sup> and sanctioned Mosley.<sup>182</sup>

On Mosley's appeal, Shearing wrote for a divided court.<sup>183</sup> Applying the deferential "clear and convincing evidence" standard required for review of such findings,<sup>184</sup> the plurality upheld, for the most part,<sup>185</sup> the Commission's

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J., Dec. 22, 2004, at 4B; Peter O'Connell, *Judge Says Actions Not Violations*, LAS VEGAS REV.-J., May 4, 2000, at 1B; Caren Benjamin, *Complaint Targets Judge in Custody Fight*, LAS VEGAS REV.-J., Jan. 27, 1999, at 1B; Cy Ryan, *Judge's Custody Battle Stays in Reno Court*, LAS VEGAS SUN, Sept. 9, 1997, at 6A; Cy Ryan, *Judge Escalates Custody Battle*, LAS VEGAS SUN, Aug. 26, 1997, at 5A.

<sup>177</sup> See *Mosley v. Figliuzzi*, 930 P.2d 1110 (Nev. 1997).

<sup>178</sup> See Peter O'Connell, *Felon: Judge Reneged on Deal*, LAS VEGAS REV.-J., April 24, 1999, at 1B (saying Mosley agreed to be lenient in sentencing felony defendant in exchange for testimony damaging to mother of Mosley's son); Peter O'Connell, *Man Released from Jail After Judge Intercedes for Friend*, LAS VEGAS REV.-J., August 13, 1999, at 7B (charging Mosley with releasing on his own recognizance criminal defendant whose friend testified for Mosley at custody hearing).

<sup>179</sup> See *Mosley v. Nev. Comm'n on Judicial Discipline*, 22 P.3d 655, 658 (Nev. 2001). Mosley moved to dismiss the disciplinary proceedings, claiming violation of his due process rights, *id.* at 659, and an unconstitutional delegation of authority by the State Bar Board of Governors in the appointment of two Commission members. *Id.* at 661. The majority rejected Mosley's due process argument, *id.*, but agreed that the Bar had acted outside its constitutional authority and remanded for the proper appointment of two new Commission members. *Id.* at 663. Justice Shearing, joined by Justice Agosti, disagreed that the Bar's actions violated the constitution and instead found those actions "fully in keeping with the letter and spirit of the Constitution." *Id.* at 663-64 (Shearing, J., concurring in part and dissenting in part).

<sup>180</sup> *In re Mosley*, 102 P.3d 555, 558 (Nev. 2004) (two counts of improper personal use of judicial letterhead, three counts of improper ex parte communications, one count of ordering release of jail detainee without notifying district attorney, and one count of improperly failing to recuse himself from criminal case until after defendant had testified in Mosley's custody case).

<sup>181</sup> *Id.* (three counts of improper ex parte communications and one count of improperly assisting criminal defendant's wife in obtaining extrajudicial relief).

<sup>182</sup> *Id.* (requiring Mosley to attend ethics course at National Judicial College at his own expense, fining him \$5000, and ordering issuance of "strongly worded censures for violating ethical rules").

<sup>183</sup> *Id.* at 557. The decision did not command a majority, but only a plurality. Justice Agosti joined Justice Shearing's opinion in its entirety, *id.* at 566, but the remaining five justices wrote three separate minority opinions. See *id.* at 566 (Maupin, J., joined by Becker, J., and Puccinelli, D.J., concurring in part and dissenting in part); *id.* at 567 (Rose, J., concurring in part and dissenting in part); *id.* (Gibbons, J., dissenting).

<sup>184</sup> *Id.* at 558-59 ("[T]he constitution confines the scope of appellate review of the commission's factual findings to a determination of whether the evidence in the record as a whole provides clear and convincing support for the commission's findings. The commission's factual findings may not be disregarded merely because the circumstances involved might also be reasonably reconciled with contrary findings of fact.").

<sup>185</sup> See *id.*

findings.<sup>186</sup> The court agreed that Mosley acted improperly in using judicial letterhead for personal business,<sup>187</sup> conducting ex parte communications with a criminal defense attorney concerning damaging information her client had about the mother of Mosley's child,<sup>188</sup> and recusing himself from the criminal case only after the defendant testified for Mosley in his hard-fought custody hearing.<sup>189</sup> By those actions, the court concluded, Mosley "was using his position for personal advantage, thereby diminishing public confidence in the integrity and impartiality of the judiciary."<sup>190</sup>

The Shearing plurality did not, however, find clear and convincing evidence of unethical practices in Mosley's release of a man from detention following ex parte communications with the man's former employer, who was a personal friend of Mosley.<sup>191</sup> Testimony at the Commission hearing revealed that what Mosley had done was "within the spirit of [a] local practice" in which the district attorney's office had acquiesced for over thirty years.<sup>192</sup> While fairness to Mosley dictated reversal of the Commission's findings concerning his adoption of that practice, Shearing's opinion left no doubt that the court would not be so forgiving of future violators.<sup>193</sup>

Shearing's care in distinguishing between improper and merely unsavory conduct and her championing of fairness to the accused<sup>194</sup> exemplifies her role

<sup>186</sup> *Id.* at 558.

<sup>187</sup> *Id.* at 560 (upholding Commission's finding that Mosley improperly used judicial letterhead for personal business; Mosley wrote letters to principals at son's school asking them to prohibit boy's mother from visiting him there.). This was an issue of first impression for the court. Canon 2B of the Nevada Code of Judicial Conduct prohibited in general terms any use of "the prestige of a judicial office to advance the private interests of the judge or others," *id.* at 559, but did not explicitly address the judicial letterhead issue. The commentary to Canon 2B, however, stated succinctly that "judicial letterhead must not be used for conducting personal business." *Id.* Following the lead of the United States Supreme Court in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864-65 (1988), the Shearing court adopted a "reasonable person" standard for interpreting the canon and rejected Mosley's argument that he could not have been advancing his personal position because the school principals already knew he was a judge. *Id.* at 559-60.

<sup>188</sup> *Id.* at 563 (upholding Commission's finding that Mosley improperly conducted ex parte communications with lawyer for criminal defendant assigned to Mosley; defendant had damaging, and thereby helpful, information about mother of Mosley's son, Mosley's antagonist in custody battle).

<sup>189</sup> *Id.* at 564 (upholding Commission's finding that Mosley, who was known as a tough sentencing judge, improperly delayed recusing himself from criminal defendant's case, which suggested he wanted to assure he would get favorable testimony before acting on defendant's behalf).

<sup>190</sup> *Id.* at 564.

<sup>191</sup> *Id.* at 560.

<sup>192</sup> *Id.* at 561-62.

<sup>193</sup> *Id.* at 562 n.12 ("Although we reverse the findings of the Commission in this instance, nothing in our decision should be read to suggest the judges in Clark County may continue [such] practices.").

<sup>194</sup> See, e.g., *Jennings v. State*, 998 P.2d 557 (Nev. 2000) (reversing conviction of defendant where trial court allowed prosecution to amend indictment after defendant had testified; defendant had fundamental right to notice of charges against him; his primary defense and decision whether to testify might have been different had he received timely notice of prosecution's new theory); *Martinez v. State*, 961 P.2d 143 (Nev. 1998) (remanding for resentencing; judge violated defendants' due process rights when he commented on their "illegal immigrant" status and thereby created inference that their nationality negatively impacted his

in the court's oversight of the judiciary and practicing bar. Thus, Shearing joined the majority, over the strenuous dissent of two colleagues,<sup>195</sup> in granting a bar applicant's petition for waiver of a supreme court rule prohibiting him from reapplying for bar admission after once failing to meet the bar's character and fitness requirements.<sup>196</sup> The court concluded that the State Board of Bar Examiners, which recommended approval of the applicant, was in a far better position than the court to make such determinations, and the record before the Board supported its recommendation of admission.<sup>197</sup> The applicant's participation as an airplane pilot in an illicit marijuana smuggling scheme ten years earlier "should not brand him forever,"<sup>198</sup> particularly when he voluntarily withdrew from the activity before entering law school and thereafter cooperated with federal officials in unraveling the conspiracy.<sup>199</sup>

Similarly, Shearing's respect for the record and for the professional lives of individual members of the bar and judiciary led to her refusal, in a number of decisions, to consider allegations of bias which the record before the court did not support. In two cases, the Shearing majority rejected litigants' efforts to disqualify a sitting justice from participating in their appeals, refusing either to allow a "judicial fishing expedition"<sup>200</sup> or to interfere with "the independence of Nevada's judiciary"<sup>201</sup> on the basis of unsupported allegations. In another case, Shearing's majority opinion rejected the conflict of interest arguments of an unsuccessful candidate for the State Commission on Judicial Selection because, while the situation he posited "could present a potential conflict of interest on the part of a Commission member selected, no such situation is presented here."<sup>202</sup>

A further pair of cases reveals Shearing's conception of the powerful, but limited, place of the judiciary in our tripartite system of government. The

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sentencing decision); *Silva v. State*, 951 P.2d 591, 596 (Nev. 1997) (Shearing, J., concurring) (agreeing with reversal of conviction, but writing separately to emphasize unfairness to defendant when prosecutor called witness who he knew would refuse to testify and then focused on that refusal in closing argument; prosecutor was encouraging jury to draw inference against defendant based on witness's refusal to testify, when defendant had no opportunity to cross-examine witness); *Norwood v. State*, 915 P.2d 277 (Nev. 1996) (remanding for resentencing based on judge's unsubstantiated and prejudicial reference to defendant as Crips gang leader).

<sup>195</sup> *In re Birmingham*, 866 P.2d 1150, 1152 (1994) (Steffen, J., and Rose, C.J., dissenting).

<sup>196</sup> *Id.* at 1150.

<sup>197</sup> *Id.* at 1151-52.

<sup>198</sup> *Id.* at 1151.

<sup>199</sup> *See id.*

<sup>200</sup> *Hogan v. Warden*, 916 P.2d 805, 810 (1996) (denying habeas petitioner's request for discovery of any informal disciplinary proceedings against judges before whom he had appeared; petitioner argued request was justified by revelation in Whitehead proceedings of "secret" disciplinary arrangements for some judges).

<sup>201</sup> *Martin v. Beck*, 915 P.2d 898, 899 (Nev. 1996) (denying appellant's motion to disqualify on bias grounds sitting justice who had filed perjury complaint against appellant's counsel; motion was both procedurally deficient because it lacked required attorney's certificate and without substantive merit).

<sup>202</sup> *O'Brien v. State Bar of Nev.*, 952 P.2d 952, 955 (1998) (emphasis added) (rejecting petitioner's assertion that Board member who might be considered for nomination to fill judicial vacancy should be disqualified from participating in the selection of Commission members).

court's unanimous decision in *Blackjack Bonding v. City of Las Vegas Municipal Court*<sup>203</sup> displays Shearing's robust view of the powers of the judiciary *qua* judiciary. In contrast, her partial concurrence and dissent in *City of Las Vegas v. Eighth Judicial District Court*<sup>204</sup> illustrates her adherence to a time-honored limitation on the court's powers, to wit: that the court should strike down a statute as unconstitutional only as a matter of last resort.<sup>205</sup>

In *Blackjack Bonding*, bail bondsmen challenged the Las Vegas Municipal Court's assessment of bail bond filing fees, claiming the court lacked the necessary statutory authorization to assess the fees.<sup>206</sup> The Shearing court disagreed, ruling that municipal courts possess the authority to collect reasonable fees under "the separation of powers doctrine and the power inherent in a court by virtue of its sheer existence."<sup>207</sup> "Without inherent powers to perform its duties, the judiciary would become a subordinate branch of government, which is contrary to the central tenet of separation of powers."<sup>208</sup> Moreover, the power inherent by virtue of the "sheer existence" of a court "is broader and more fundamental."<sup>209</sup> The court concluded that both sources of inherent judicial power authorized the municipal courts to assess filing fees for bail bonds.<sup>210</sup>

The statute at issue in *City of Las Vegas* provided that "a person who annoys or molests a minor is guilty of a misdemeanor."<sup>211</sup> The district court declared it unconstitutionally void for vagueness, and the supreme court upheld the lower court's action.<sup>212</sup> The majority concluded that the terms "annoy" and

<sup>203</sup> 14 P.3d 1275 (Nev. 2000).

<sup>204</sup> 59 P.3d 477 (Nev. 2002).

<sup>205</sup> See, e.g., *Finger v. State*, 27 P.3d 66, 90 (Nev. 2001) (Shearing, J., dissenting) (rejecting majority decision declaring unconstitutional criminal insanity statute, based on maxim that where statute is susceptible to both constitutional and unconstitutional interpretations, court must construe statute so as not to violate constitution), *cert. denied*, 534 U.S. 1127 (2002).

<sup>206</sup> *Blackjack Bonding*, 14 P.3d at 1278.

<sup>207</sup> *Id.* at 1279.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* This was so even though municipal courts are created by statute, not by the constitution, as the court had ruled earlier that year in *Nunez v. City of North Las Vegas*, 1 P.3d 959 (Nev. 2000). There, the court held that once established, municipal courts are part of the constitutional judicial system of the state and "enjoy the inherent powers of all constitutionally created courts." *Id.* at 962. Given that ruling and the legislature's jurisdictional grant of power over bail and property bonds to municipal courts, the *Blackjack Bonding* decision was a natural extension of fundamental principles, and not a great leap forward, in keeping with Shearing's incremental approach to development of the law.

<sup>211</sup> 59 P.3d at 479; see NEV. REV. STAT. § 207.260 (1995). During the pendency of the constitutional challenge, the legislature amended the statute to read:

*Unless a greater penalty is provided by specific statute, a person who annoys or molests or attempts to annoy or molest a minor, including, without limitation, soliciting a minor to engage in unlawful sexual conduct, is guilty of: (a) For the first offense, a misdemeanor, (b) For the second and each subsequent offense, a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years, and may be further punished by a fine of not more than \$5,000.*

2001 Nev. Stat. 2789 (amended language in italics). The current language of section 207.260 reflects further amendments made in the 2003 legislative session. See 2003 Nev. Stat. 1377.

<sup>212</sup> 59 P.3d at 483.

"molest" had essentially the same meaning, and because "annoy" was too vague to provide fair notice of the proscribed conduct, the statute was unconstitutionally void on its face.<sup>213</sup> Shearing concurred with the result, but dissented from the majority's facial unconstitutionality ruling.<sup>214</sup> She agreed that the statutorily proscribed conduct of "annoying a minor" was unconstitutionally vague, but disagreed with the majority's treatment of "annoy" and "molest" as synonyms.<sup>215</sup> The dictionary definition of "molest" cited by the majority, Shearing noted, included a requirement of "hostile intent or injurious effect," which added a component of *mens rea* not present in the definition of "annoy."<sup>216</sup> The statute therefore criminalized not just one, but two forms of conduct. Here, the prosecutor had charged the defendant only with "annoying" the victim, not with "molesting" her.<sup>217</sup> Thus, the court could (and should) have held the statute unconstitutional only as applied to the defendant, not on its face.<sup>218</sup>

A final cluster of cases illustrates Shearing's adherence to well-defined principles of judicial review. For example, Shearing's respect for the role of the judiciary vis-a-vis the legislature undergirded her approach to the court's review of cases seeking to enlarge upon, or otherwise modify, legislative remedies. Thus, a Shearing majority declined to recognize a claim for wrongful discharge based on racial discrimination against an employer with fewer than fifteen employees.<sup>219</sup> That was for the legislature, not the court, to determine: "Although we recognize that racial discrimination is fundamentally wrong and undoubtedly against Nevada's public policy, we are constrained by the legislature's decision to address the issue through legislation and to provide statutory remedies for only certain employees."<sup>220</sup>

Similarly, Shearing advocated deference to trial court rulings in cases involving decisions committed to the discretion of those bodies. For example, writing for the majority, Shearing found no manifest abuse of discretion in the district court's denial of the National Collegiate Athletic Association ("NCAA")'s motion for a change of venue in the suit by former Runnin' Rebels basketball coach Jerry Tarkanian alleging the NCAA had forced him out of college basketball.<sup>221</sup> The Shearing court found substantial evidence to support the lower court ruling: the judge had heard testimony from both parties' experts concerning the effect on the jury pool of inflammatory pretrial

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<sup>213</sup> *Id.* (stating statute was unconstitutional under both the Nevada and United States Constitutions).

<sup>214</sup> *Id.* (Shearing, J., concurring in part and dissenting in part).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Chavez v. Sievers*, 43 P.3d 1022 (Nev. 2002).

<sup>220</sup> *Id.* at 1025-26; *see also Nev. Power Co. v. Haggerty*, 989 P.2d 870, 879 (Nev. 1999) (Shearing, J., concurring) (agreeing with majority's affirmance of dismissal of Nevada Power Company's third-party complaint and claim of immunity after worker was injured by electrical power line, and emphasizing role of legislature in defining statutory terms).

<sup>221</sup> *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 939 P.2d 1049 (Nev. 1997).

publicity some years earlier, and it had found the analysis of the NCAA's experts both outdated and unreliable.<sup>222</sup>

Shearing accorded jury verdicts the same deference. In a state condemnation action for the expansion of Interstate 15 in central Las Vegas, the jury awarded lessees who operated a franchise gasoline station and convenience store far less than the lessees claimed the property was worth.<sup>223</sup> Shearing wrote for the majority in affirming the jury award of \$260,000, and not the \$1.6 to \$1.8 million opined to by the lessees' testifying expert.<sup>224</sup> The Shearing court explained:

[T]he jury was free to disbelieve that testimony, particularly since part of it was based on inappropriate factors such as lost business income and lost business opportunity. Other evidence, including the purchase price five years earlier, suggested a lower value. Consequently, the district court did not err in entering judgment on the jury's verdict.<sup>225</sup>

In another case, the jury awarded compensatory and punitive damages to two men who alleged they were fired in retaliation for objecting to their employer's racially discriminatory rental policies.<sup>226</sup> Dissenting from the majority's reversal of the jury award, Shearing found substantial evidence to support the jury and disputed the majority's "unduly restrictive" view of tortious discharge actions.<sup>227</sup>

But Shearing did not hesitate to reverse lower court decisions that were not entitled to deference on appeal. A pair of tort cases is illustrative.

A water park user who suffered a broken hip when he slipped on one of the park's slides sued for negligence.<sup>228</sup> During discovery, the plaintiff learned that the water park had a policy of destroying its first aid logs at the end of each season, and at trial he proffered a jury instruction that would have allowed the jury to draw an inference that the unavailable logs would have been unfavorable to the water park.<sup>229</sup> The trial court refused to give the instruction, based on its conclusion that the water park had not intended to willfully suppress the logs,<sup>230</sup> and the jury ruled against the plaintiff.<sup>231</sup> The Shearing court reversed:

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<sup>222</sup> See *id.* at 1051-52. See also *Pombo v. Nev. Apartment Ass'n*, 938 P.2d 725 (Nev. 1997) (finding no abuse of discretion and therefore affirming trial court's dismissal, following bench trial, of former executive director's breach of contract and related tort claims against association); *Nelson v. Peckham Plaza P'ships*, 866 P.2d 1138 (Nev. 1994) (finding no manifest abuse of discretion by trial court because substantial evidence supported award of damages against lessees for negligent removal of equipment at end of lease term); *Tropicana Hotel Corp. v. Speer*, 692 P.2d 499, 502 (Nev. 1985) (Shearing, D.J., dissenting) (finding substantial evidence to support trial court's ruling, in bench trial, for employee on breach of oral contract claim where majority impermissibly substituted its factual findings for those of the trial judge).

<sup>223</sup> *State Dep't of Transp. v. Cowan*, 103 P.3d 1 (Nev. 2004).

<sup>224</sup> *Id.* at 6.

<sup>225</sup> *Id.*

<sup>226</sup> *Bigelow v. Bullard*, 901 P.2d 630, 631 (Nev. 1995).

<sup>227</sup> *Id.* at 637 (Shearing, J., dissenting).

<sup>228</sup> *Reingold v. Wet 'N Wild Nev., Inc.*, 944 P.2d 80 (Nev. 1997).

<sup>229</sup> *Id.* at 802.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 801 (assessing eighty percent fault against plaintiff and only twenty percent against waterpark).

The district court apparently believed that "willful suppression" requires more than following the company's normal records destruction policy. We disagree. It appears that this records destruction policy was deliberately designed to prevent production of records in any subsequent litigation. Deliberate destruction of records before the statute of limitations has run on the incidents described in those records amounts to suppression of evidence. If Wet 'N' Wild chooses such a records destruction policy, it must accept the adverse inferences of the policy.<sup>232</sup>

In another tort case, a Shearing majority reversed the trial court's grant of summary judgment against a woman who claimed negligent infliction of emotional distress after witnessing the adverse effects on her mother of negligently dispensed prescription medication.<sup>233</sup> The Shearing court rejected Nevada's historical limitation of such claims to bystander witnesses of automobile accidents and, instead, relied on the basic tort law principle of foreseeability.<sup>234</sup> Here, the daughter had purchased prescription medications for her mother and properly administered them "until her mother was rendered comatose."<sup>235</sup> Shearing rejected the trial court's legal conclusions, sent the case back for a jury trial, and summed up: "In effect, because of the pharmacist's negligence, the daughter poisoned her mother. Under these circumstances, it was entirely foreseeable that the drug would significantly harm the actual patient and that a close relative would continue administration until the ultimate catastrophic effect was realized."<sup>236</sup>

The cases discussed here confirm the characterization of Justice Shearing as a minimalist on questions concerning the role of the judiciary. Not one to diminish the essential roles and great powers of the judiciary, Shearing endorsed the equally essential limits on the court's power mandated by separation of powers and principles of judicial and appellate review. In every case, Shearing's opinion demonstrated her commitment to deciding the case on the facts presented and going no further, even when that meant she was the lone dissenter.

### C. *Children's Rights*

During her years on the bench, Justice Shearing distinguished herself as a champion of children's rights. She ceaselessly stressed the "best interests" of the child, a term to which her opinions added new depth of meaning. Shearing's work in this arena is notable for its blending of a practical understanding of the complexities of contemporary family life with a faithful adherence to the

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<sup>232</sup> *Id.* at 802.

<sup>233</sup> *Crippens v. Sav-On Drug Stores*, 961 P.2d 761 (Nev. 1998). *See also* *Woosley v. State Farm Ins. Co.*, 18 P.3d 317 (Nev. 2001) (reversing trial court's denial of insured's motion for new trial in breach of contract action to recover uninsured motorist benefits because trial court abused its discretion by failing to give *res ipsa loquitur* instruction and giving erroneous comparative negligence instruction); *Grotts v. Zahner*, 989 P.2d 415, 418 (Nev. 1999) (Shearing, J., dissenting) (disapproving trial court's dismissal of "bystander" emotional distress claim brought by injured accident victim's fiancé; fact-finder should have opportunity to assess nature of relationship between plaintiff and victim; excluding fiancé from definition of "closely related person" elevated form over substance).

<sup>234</sup> 961 P.2d at 763.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

people's will, as expressed through the child protection laws and related enactments of the state legislature. So, too, her decisions outside the "best interests" realm reveal her deep understanding of the young's particular vulnerabilities and her abiding respect for their rights. We turn first to the "best interests" cases.

The right of a child to have his custody, care and control decided based on his or her "best interests" is the cornerstone of judicial determinations concerning termination of parental rights<sup>237</sup> and child custody.<sup>238</sup> The seminal decision on "best interests" in termination proceedings is *In re Termination of Parental Rights as to N.J.*,<sup>239</sup> in which a unanimous court overruled *Champagne v. Welfare Decision*<sup>240</sup> and the line of cases following it.<sup>241</sup> Based on its interpretation of the governing statute, N.R.S. § 128.105, *Champagne* required a finding of parental fault before considering the best interests of the child; if the evidence failed to establish that the parents were at fault, the child's best interests were not to be addressed.<sup>242</sup> Displeased with *Champagne*, the legislature acted quickly to shift the primary focus from the parents' conduct to the child's best interests.<sup>243</sup> Despite that amendment and a further legislative clarification in 1995,<sup>244</sup> district court judges, often with the blessing of the supreme court, continued to require a finding of parental fault before considering the child's best interests.<sup>245</sup> Those cases, the *N.J.* court said, improperly placed "too much emphasis on the conduct of the parents instead of on the best interests of the child."<sup>246</sup> "[T]he statute clearly provides that when deciding whether to terminate parental rights, the district court must always consider the best interests of the child in conjunction with a finding of parental neglect."<sup>247</sup>

<sup>237</sup> See NEV. REV. STAT. § 128.105 (2004).

<sup>238</sup> See NEV. REV. STAT. § 125.480(1) (2004).

<sup>239</sup> 8 P.3d 126 (Nev. 2000).

<sup>240</sup> 691 P.2d 849 (Nev. 1984).

<sup>241</sup> See *In re Parental Rights as to Carron*, 956 P.2d 785 (Nev. 1998); *In re Parental Rights as to Daniels*, 953 P.2d 1 (Nev. 1998); *Cooley v. State Dep't of Human Resources*, 946 P.2d 155 (Nev. 1997); *In re Parental Rights as to Gonzales*, 933 P.2d 198 (Nev. 1997); *In re Parental Rights as to Bow*, 930 P.2d 1128 (Nev. 1997); *In re Parental Rights as to Weinper*, 918 P.2d 325 (Nev. 1996); *Scalf v. State Dep't of Human Resources*, 801 P.2d 1359 (Nev. 1990); *Smith v. Smith*, 720 P.2d 1219 (Nev. 1986); *Daly v. Daly*, 715 P.2d 56 (Nev. 1986); *McGuire v. Welfare Div.*, 697 P.2d 479 (Nev. 1985).

<sup>242</sup> 691 P.2d at 854.

<sup>243</sup> See *In re N.J.* 8 P.3d at 131. The amendment changed the introductory sentence in the statute to provide: "[A]n order of the court for termination of parental rights must be made . . . with the initial and primary consideration being whether the best interests of the child would be served by the termination, but requiring a finding [of parental fault]." *Id.* (citing 1987 Nev. Stat. 210). The court noted that the legislative history showed that the primary purpose of the amendment was to put children's rights and parents' rights on equal footing and require their consideration together. *Id.*

<sup>244</sup> *Id.* The 1995 amendment again revised the statute's introductory language, to state: "The primary consideration in any proceeding to terminate parental rights must be whether the best interests of the child will be served by the termination." *Id.* (citing 1995 Nev. Stat. 215).

<sup>245</sup> *Id.* at 131-32.

<sup>246</sup> *Id.* at 132.

<sup>247</sup> *Id.* See NEV. REV. STAT. § 128.105 (2) (2004) (Listing that "parental neglect" is not the only grounds for termination of parental rights; additional grounds include abandonment, parental unfitness or failure to adjust, and risk of injury to the child).



Although Shearing did not author the *N.J.* opinion,<sup>248</sup> her earlier decisions had laid the groundwork for it. Shearing's contributions to the best interests analysis in the form of published opinions began with her 1995 majority decision in *Greeson v. Barnes*.<sup>249</sup> Over a vigorous dissent,<sup>250</sup> the Shearing majority upheld the district court's termination of a father's parental rights based on his abandonment of his young son.<sup>251</sup> The court found in the trial court's review of the evidence concerning the father's true intentions "no better illustration of the adage 'actions speak louder than words.'"<sup>252</sup> The court explained: "When a parent fails to pay child support for five years and makes virtually no gesture demonstrative of real care and concern for the child, subsequent pleas of a lack of intent to abandon the child ring hollow."<sup>253</sup> Thus, Shearing employed the deferential standard regularly applied to appellate review of factual findings: "This court has no basis for contesting the findings of the district court which had the opportunity to observe the witnesses and judge their credibility."<sup>254</sup>

A pair of decisions issued during a two-week period in late 1996 and early 1997 further cemented the primacy of the best interests of the child in termination decisions. In the first case, *Bush v. State Dept of Human Resources*,<sup>255</sup> the Shearing court upheld the termination of a mentally deficient couple's parental rights based on clear and convincing evidence that termination was in the best interests of their two sons.<sup>256</sup> Shearing did not assign blame to the parents and instead noted that they "love their children and have made some efforts toward becoming better parents."<sup>257</sup> However, in light of the boys' special needs, "which would daunt an above-average parent,"<sup>258</sup> the parents' mental deficiency rendered them unable to care for their children.<sup>259</sup> The court refused to

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<sup>248</sup> 8 P.3d at 127 (Agosti, J.).

<sup>249</sup> 900 P.2d 943 (Nev. 1995).

<sup>250</sup> See *id.* at 948 (Springer, J., dissenting). Springer's view, which he voiced repeatedly in dissenting from termination affirmances, is that the United States Supreme Court's recognition of parenthood as a "fundamental liberty interest," in *Santosky v. Kramer*, 455 U.S. 745 (1982), is controlling. See *id.* at 949 (Springer, J., dissenting).

<sup>251</sup> *Id.* at 947.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 948. See also *In re Montgomery*, 917 P.2d 949, 957 (Nev. 1996) (Shearing, J., dissenting) (disagreeing with majority that insufficient evidence of parental unfitness existed to terminate mother's rights, where mother had chronic alcohol problem that trial court concluded was "irremediable"; best interests of child dictated result even if unfair to mother, who had shown stability in recent months).

<sup>255</sup> 929 P.2d 940 (Nev. 1996).

<sup>256</sup> *Id.* But see *id.* at 946 (Springer, J., dissenting) (complaining broadly of the court's "onslaughts on the poor and the handicapped").

<sup>257</sup> *Id.* at 942. Justice Shearing candidly acknowledged that the *Bush* decision was very difficult because both the children and their parents were plagued by circumstances beyond their control. In the end, though, it was the children whose interests were paramount under the law, even when that meant that their parents would lose them through no fault of their own. Interview with Miriam Shearing, *supra* note 2.

<sup>258</sup> *Id.*

<sup>259</sup> See *id.*

compromise the children's development "for the sake of the parents."<sup>260</sup> "While the parents' right to retain their children is an important consideration in the analysis, the rights of the children to a stable future with a loving family must be paramount."<sup>261</sup>

Shearing wrote a separate concurrence in the second case, *In re Parental Rights as to Bow*,<sup>262</sup> in which the court upheld the termination of an indigent Native American mother's rights to her young son.<sup>263</sup> Shearing agreed with the majority's reasoning and result, but wrote separately to respond to the dissent.<sup>264</sup> Shearing abandoned her characteristic dispassionate assessment of the case to take issue with her colleague Springer's accusation that the State appeared "'to be intent on dissolving the families of the poor, powerless, and handicapped.'"<sup>265</sup> Not so, Shearing stated: "In each case affirmed by this court, the parental rights were terminated because the parent or parents irrefutably demonstrated their inability to care for their children."<sup>266</sup> Referring to her experience on the criminal trial bench, Shearing provided a rare insight into her personal thought processes:

The overwhelming majority of defendants who have appeared before me for sentencing were subject to abuse and neglect as children. By terminating parental rights in appropriate cases, I hope that we are in the process of breaking the pattern by providing safe, loving homes to the children who are tomorrow's parents.<sup>267</sup>

Thus, "termination shows compassion for children by not condemning them to live with abusive and neglectful parents."<sup>268</sup>

As with proceedings for termination of parental rights, child custody in dissolution of marriage actions is governed by a statutory "best interests of the child" standard.<sup>269</sup> The weight to be accorded those interests is even stronger here, however; it is not just the primary consideration, but "the sole consideration."<sup>270</sup> In her child custody decisions, Shearing took the statutory language

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<sup>260</sup> *Id.* The Shearing court agreed with the trial court's "dismay" that the boys had been in foster care for over five years (since one was ten months old and the other, two years old). *Id.* The court also noted that the boys' foster mother had stated that, if they were free for adoption, she and her husband would adopt them. *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> 930 P.2d 1128 (Nev. 1997), *overruled on other grounds by In re Termination of Parental Rights as to N.J.*, 8 P.3d 126 (Nev. 2000).

<sup>263</sup> *See id.* at 1129-30.

<sup>264</sup> *Id.* at 1134 (Shearing, J., concurring).

<sup>265</sup> *Id.* *See also In re Parental Rights as to Daniels*, 953 P.2d 1, 10 (Nev. 1998) (Springer, J., dissenting) (disagreeing with Shearing majority decision upholding termination of parental rights based, as he viewed it, on parents' "destitution and poverty").

<sup>266</sup> *In re Parental Rights as to Bow*, 930 P.2d at 1134.

<sup>267</sup> *Id.* at 1135.

<sup>268</sup> *Id.*

<sup>269</sup> *See NEV. REV. STAT. § 125.480(1)* (2004), *amended by* 2005 Nev. Stat. 1677-82 (retaining "best interests" focus).

<sup>270</sup> *See id.* "In determining custody of a minor child in an action brought under this chapter, the sole consideration is the best interest of the child." *Id.*

seriously, whether her adherence to it placed her with the majority<sup>271</sup> or required a separate concurrence<sup>272</sup> or dissent.<sup>273</sup>

The hotly contested battle for custody of the son of Eighth Judicial District Court Judge Donald Mosley<sup>274</sup> illustrates Shearing's commitment to the primacy of the child's "best interests." Based on the detailed findings of the trial court, Shearing refused to join in the majority decision reversing the trial court's award of custody to the child's mother and awarding custody to Mosley.<sup>275</sup> After stating that "the district's court's foremost concern is the welfare of the child,"<sup>276</sup> Shearing noted that "the court made extensive findings which fully justify its conclusion and order."<sup>277</sup> The lower court had concluded that the child "would be safer, more warmly loved and more daily nurtured with the mother, in the mother's home."<sup>278</sup> There being no clear abuse of the court's discretion, Shearing would have affirmed its order.<sup>279</sup>

While Shearing's concern for the particular vulnerabilities of the young permeates her termination and custody decisions, it reveals itself most prominently in cases involving child sexual abuse and related crimes. Shortly before Shearing joined the court, the nation was rocked by the infamous McMartin

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<sup>271</sup> See *Halbrook v. Halbrook*, 971 P.2d 1262 (Nev. 1998) (reversing and remanding denial of former wife's relocation motion; her increased career opportunities constituted good faith reason for request, and her alternative visitation plan was reasonable); *Blaich v. Blaich*, 971 P.2d 822 (Nev. 1998) (reversing and remanding; trial court erred in concluding it had to award former wife primary custody of children before addressing her motion to relocate); *Davis v. Davis*, 970 P.2d 1084 (Nev. 1998) (affirming trial court's denial of former wife's motion to relocate to Florida; former wife had sensible good faith reason for move, but move would not permit former husband, a firefighter, reasonable visitation); *McGuiness v. McGuiness*, 970 P.2d 1074 (Nev. 1998) (reversing and remanding for consideration of former wife's relocation motion, noting that wellbeing of parent may substantially affect best interests of child); *McDermott v. McDermott*, 946 P.2d 177 (Nev. 1997) (reversing and remanding district court's change of primary custody from mother to father, based on statutory presumption against awarding custody to perpetrator of domestic violence, which lower court had not considered).

<sup>272</sup> See *Mack v. Ashlock*, 921 P.2d 1258, 1261 (Nev. 1996) (Shearing, J., concurring) (writing separately to address disturbing aspect of lower court's order denying father's request for court approval to enroll children in Montessori school; mother's status as primary custodian did not trump joint custodial father's equal right to make decisions concerning children's education; sole question was what was in best interests of child); *Pearson v. Pearson*, 871 P.2d 343, 350 (Nev. 1994) (Shearing, J., concurring) (disagreeing with majority that proceedings before Second Judicial District Court Judge Whitehead conformed to Nevada law, where mother received no notice that psychologist had been appointed, had examined husband while she was in Las Vegas on medical school surgical rotation, and had submitted report to court which provided basis for court's award of primary physical custody to father; judge's order violated concepts of fundamental fairness and due process).

<sup>273</sup> See *Gepford v. Gepford*, 13 P.3d 47, 51 (Nev. 2000) (Shearing, J., dissenting) (disagreeing with majority's reversal of trial court's change of custody from father to mother; trial court's determination that mother would be "the better parent to allow frequent and continuing association with the other parent, . . . one of the most important factors in determining who should have child custody").

<sup>274</sup> *Mosley v. Figliuzzi*, 930 P.2d 1110 (Nev. 1997).

<sup>275</sup> *Id.* at 1121 (Shearing, J., dissenting).

<sup>276</sup> *Id.* at 1122 (citing *Culbertson v. Culbertson*, 533 P.2d 768, 770 (Nev. 1975)).

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

Preschool investigation and trial in Manhattan Beach, California.<sup>280</sup> The *McMartin* case shone a spotlight on the questionable reliability of children's allegations and trial testimony in such cases.<sup>281</sup> Over the next decade, Nevada's courts struggled to accommodate the conflicting interests of the child and the accused.

In 2002, the Nevada Supreme Court resolved one of the critical issues in *Braunstein v. State*.<sup>282</sup> The court concluded that the trial court's failure to conduct a pretrial "trustworthiness" hearing did not "warrant automatic reversal," but was subject to harmless error analysis.<sup>283</sup> In so ruling, the court overturned a line of cases beginning with *Lytle v. State*,<sup>284</sup> a decision rendered prior to Shearing's election to the court. In *Lytle*, the court ruled that the trial court's failure to conduct a "trustworthiness" hearing before allowing the introduction of hearsay statements of the five year-old victim was reversible error and required reversal of the defendant's conviction for open and gross lewdness with a child under fourteen years of age.<sup>285</sup> Once on the bench, Shearing was unable to gain a majority, but her dissenting opinion in *Quevedo v. State*,<sup>286</sup> in which Chief Justice Steffen joined,<sup>287</sup> presaged *Braunstein*.

Similarly, Shearing's influence was not immediately apparent in the court's rulings on the question whether child victims should be required to submit to psychological examination pretrial. Her dissenting opinion in *Marvelle v. State*,<sup>288</sup> joined by Justice Maupin,<sup>289</sup> chided the majority for letting its personal views guide its decision to reverse the defendant's conviction for open and gross lewdness with a child under fourteen years of age.<sup>290</sup> The dissent's concluding paragraph illustrates Shearing's understanding of the traumatic effects of sexual abuse:

The majority questions the victim's credibility, citing the fact that the victim has had problems in her relationships and her behavior. Unfortunately, victims of sexual abuse usually have problems in these areas by the very reason of the fact that they

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<sup>280</sup> See *People v. Buckley*, No. A750900 (Super. Ct., Los Angeles County, Cal. 1990).

<sup>281</sup> See Maggie Bruck et al., *Reliability and Credibility of Young Children's Reports: From Research to Policy and Practice*, in *CHILDREN AND THE LAW: THE ESSENTIAL READINGS* 86, 92 (Ray Bull ed., 2001) (reporting that none of the hundreds of allegations of sexual abuse were ever substantiated, and all defendants were acquitted after a three-year long trial).

<sup>282</sup> 40 P.3d 413 (Nev. 2002).

<sup>283</sup> *Id.* at 420.

<sup>284</sup> 816 P.2d 1082 (Nev. 1991).

<sup>285</sup> *Id.* at 1083.

<sup>286</sup> 930 P.2d 750, 753 (Nev. 1997) (Shearing, J., dissenting) (advocating harmless error analysis as appropriate standard, where child had testified and been subject to cross-examination, and her testimony was "merely repetitive"). Interestingly, it is Chief Justice Steffen's separate dissent that voiced outright concern for the child victim, calling "the wooden decision to subject this child-victim to the trauma of another trial . . . most distressing." *Id.* at 751 (Steffen, C.J., dissenting). Shearing's dissent, though reaching the same conclusion as Steffen, is consistent with her minimalist approach to judicial decision making. See *supra* notes 94 through 108 and accompanying text.

<sup>287</sup> *Id.* at 753.

<sup>288</sup> 966 P.2d 151, 157 (Nev. 1998) (Shearing, J., dissenting).

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 159 (challenging the majority's dismissal of expert's testimony as "psychological jargon" and stating, "[t]his court is in no position to allow its personal opinion of the theory to affect its ruling.").

have been sexually abused. That is why it is particularly important that the jurors see the witnesses and listen to all of the evidence, both good and bad, so that they may judge the truth.<sup>291</sup>

Two years later, *Koerschner v. State*<sup>292</sup> abrogated *Marvelle* and other prior decisions<sup>293</sup> and established a "compelling need" standard for defense requests for court-ordered psychological evaluations of sexual assault victims.<sup>294</sup> Shearing's influence on the court's decision is evident in the majority's explicit agreement<sup>295</sup> with her separate concurrence.<sup>296</sup> Shearing took issue with her colleague Rose's argument<sup>297</sup> that sexual assault defendants are entitled to psychological examinations to "'level the playing field'" in child sexual assault cases.<sup>298</sup> Although Shearing agreed with Rose that "there is no 'level playing field' in child sexual assault cases,"<sup>299</sup> her experience as a trial and juvenile court judge taught her that "the so-called 'playing field' is virtually always tipped heavily against the child victim."<sup>300</sup> Too often, defendants sought a psychological examination "to further demean and harass the child victim."<sup>301</sup> The court was, therefore, correct in ruling that such examinations should be allowed "only in the rare cases when there is a compelling reason to do so."<sup>302</sup>

The sexual abuse cases demonstrate that Shearing's concern for the rights of children and her appreciation for their vulnerabilities run deep.<sup>303</sup> Two final cases further reveal the breadth of her commitment to children's rights.

*Kirkpatrick v. Eighth Judicial District Court*<sup>304</sup> is a decision that Shearing is "proud" to have authored.<sup>305</sup> Her majority opinion withdrew the court's earlier ruling that the statute at issue was unconstitutional<sup>306</sup> and upheld the dis-

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<sup>291</sup> *Id.* at 160.

<sup>292</sup> 13 P.3d 451 (Nev. 2000).

<sup>293</sup> *See id.* at 455.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 457 n.6.

<sup>296</sup> *Id.* at 459 (Shearing, J., concurring).

<sup>297</sup> *Id.* at 457 (Rose, J., concurring).

<sup>298</sup> *Id.* at 459.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* *See also* *State v. Romano*, 97 P.3d 594 (Nev. 2004) (joining majority in granting writ of prohibition challenging trial court's order compelling psychological evaluation of child sexual assault victim).

<sup>303</sup> *Cf.* *Winnerford v. State*, 915 P.2d 291, 295-98 (Nev. 1996) (Shearing, J., dissenting) (disagreeing with majority's reversal of sexual assault delinquency adjudication of ten year old boy who had been playing game with other children called "hide-and-go-get-it" and was charged with placing his hand between girl's legs and jabbing at her crotch; whether he knew act was wrong was irrelevant; juvenile court system provides helpful guidance in teaching children appropriate conduct, as here, where boy was put on three years formal probation and ordered to complete sexual offense psychoeducational program and participate in family counseling with mother; stating: "The majority appears to regard the alleged actions as mere child's play. I strongly disagree. The children were playing a nasty game which foreshadows adult criminal activity if the children are not properly educated.").

<sup>304</sup> 64 P.3d 1056 (Nev. 2003) (*Kirkpatrick II*).

<sup>305</sup> Interview with Miriam Shearing, *supra* note 2.

<sup>306</sup> *Kirkpatrick v. Eighth Judicial District Court*, 43 P.3d 998 (2002) (*Kirkpatrick I*).

trict court's controversial<sup>307</sup> approval of the marriage of a fifteen year old girl to a forty-eight year old man.<sup>308</sup> The foundation for the Shearing court's holding was its recognition of the girl's right to marry<sup>309</sup> under a Nevada law permitting a minor under sixteen to marry with the consent of one parent and the approval of the court.<sup>310</sup> United States Supreme Court decisions recognizing the fundamental right to marry<sup>311</sup> and the applicability of constitutional rights to children as well as adults<sup>312</sup> supplied the constitutional underpinnings for the Shearing court's ruling. In the end, the majority upheld the constitutionality of the Nevada statute pursuant to which the district court had approved the marriage because it "strikes a balance between an arbitrary rule of age for marriage and accommodation of individual differences and circumstances."<sup>313</sup>

The same disdain for arbitrariness, and its resulting unfairness, lies at the heart of Shearing's dissent in *Greco v. United States*.<sup>314</sup> In questions of first impression, the majority ruled that a mother had a medical malpractice claim for failure to diagnose "gross and disabling fetal defects," but that the child born with those defects had no cognizable claim.<sup>315</sup> The majority rejected the child's claim based on its conclusion that doing so "would require us to weigh the harms suffered by virtue of the child's having been born with severe handicaps against 'the utter void of nonexistence' . . . a calculation the courts are incapable of performing."<sup>316</sup> Shearing disagreed; the court<sup>317</sup> and the legisla-

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<sup>307</sup> See, e.g., *Editorial: Gaston's Judgment*, LAS VEGAS REV.-J., Feb. 28, 2001, at 10A; Glen Puitt, *Couple Fights for Marriage*, LAS VEGAS REV.-J., May 8, 2001, at 1B; Glenn Puitt, *Man Trying to Remarry Teen in New Mexico*, LAS VEGAS REV.-J., Apr. 5, 2001, at 6B; Glenn Puitt, *State Supreme Court to Review Marriage of 15-Year-Old to 48-Year-Old*, LAS VEGAS REV.-J., Mar. 26, 2001, at 1B; Ed Vogel, *Supreme Court: Judge Faulted for Allowing Teen to Marry*, LAS VEGAS REV.-J., June 16, 2001, at 1B.

<sup>308</sup> 64 P.2d at 1057. The decision arose out of the minor's petition for rehearing after the supreme court declared unconstitutional the statute pursuant to which the district court had approved her marriage, and thereby voided the marriage. See *Kirkpatrick I*, 43 P.3d 998. The *Kirkpatrick II* court granted the petition, withdrew its earlier decision, and issued the opinion discussed here. See 64 P.2d at 1057. In essence, Justice Shearing's dissent in *Kirkpatrick I* became, with the addition of Justice Rose, the majority in *Kirkpatrick II*. Compare *Kirkpatrick II*, 64 P.3d at 1064, with *Kirkpatrick I*, 43 P.2d at 1015 (Shearing, J., dissenting).

<sup>309</sup> See *Kirkpatrick II*, 64 P.3d. at 1060.

<sup>310</sup> *Id.* at 1057 (NEV. REV. STAT. § 122.025 (2004)).

<sup>311</sup> *Id.* at 1059-60 (citing *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (striking down as unconstitutional impingement on fundamental right to marry state statute requiring anyone with out-of-state child support obligations to obtain court approval before marrying)).

<sup>312</sup> *Id.* at 1060 (citing *In re Gault*, 387 U.S. 1, 13 (1967) (recognizing due process rights of juveniles facing delinquency charges; "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone")); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (holding blanket parental consent for abortion by minor unconstitutional; "Minors, as well as adults, are protected by the Constitution and possess constitutional rights.").

<sup>313</sup> *Id.* at 1061.

<sup>314</sup> 893 P.2d 345, 352 (Nev. 1995) (Shearing, J., concurring in part and dissenting in part). The court exercised jurisdiction under Rule 5 of the Nevada Rules of Appellate Procedure, pursuant to which the United States District Court for the District of Maryland certified the dispositive state law questions in *Greco* to the Nevada Supreme Court. *Id.* at 347.

<sup>315</sup> *Id.* at 346-47. The child was born with spina bifida, hydrocephaly, and related deformities that left him mentally retarded and paraplegic from the hips down. *Id.* at 347 n.2.

<sup>316</sup> *Id.* at 347.

ture<sup>318</sup> had already established a policy that “in some situations, non-life may be preferable to an impaired life.”<sup>319</sup> Moreover, that policy recognized that “each individual has the right to make his or her determination as to the relative value of life and non-life.”<sup>320</sup> Thus, in the context of an action for professional negligence, Shearing “would allow the child the cost of the extraordinary expenses attributable to the impairment.”<sup>321</sup> For Shearing, that was the only fair result: “The claims of the child and the parents are mutually dependent; it would be unfair to deny compensation to the child if the parent or parents are not available to make their claim.”<sup>322</sup>

Shearing’s concern for fairness to the child in *Greco* exemplifies her approach to questions of children’s rights across the legal spectrum. However, that overarching concern, coupled with Shearing’s high regard for the rights of children, caused her on occasion to move from strict minimalism to a more liberal minimalism akin to that of Supreme Court Justice Ruth Bader Ginsburg.<sup>323</sup>

A case in point is *Kirkpatrick II*. Had Shearing adhered to the basic minimalist principle of “do[ing] no more than is necessary to resolve cases,”<sup>324</sup> she would have limited her ruling in *Kirkpatrick II* to the issues raised in the rehearing petition and not revisited the constitutionality of the statute pursuant to which the district court had approved the fifteen year old petitioner’s marriage to a 48-year old man.<sup>325</sup> The *Kirkpatrick II* dissenters, who had declared the statute unconstitutional in *Kirkpatrick I*,<sup>326</sup> took the Shearing majority to task for treating the case “as though it were before the court for the first time”<sup>327</sup> and argued that “the *only* issue raised on rehearing is whether the district court should be required to conduct a new hearing.”<sup>328</sup> But that was decidedly not the only issue on the minds of Shearing and those who joined in her majority opinion; much more was at stake than whether the district court should conduct a new hearing.<sup>329</sup> This was no mere procedural question, but a

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<sup>317</sup> *Id.* at 354 (citing *McKay v. Bergstedt*, 801 P.2d 617 (Nev. 1990) (affirming quadriplegic’s right to withdraw respirator)).

<sup>318</sup> *Id.* (citing NEV. REV. STAT. § 449.535-690 (2005) (providing for deprivation of life-sustaining procedures)).

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> See Sunstein, *Minimalism v. Fundamentalism*, *supra* note 92, at 18, where Sunstein discusses the wide array of minimalist views. “We can easily find liberal minimalists and conservative minimalists.” *Id.* Sunstein says of Justice Ruth Bader Ginsburg’s approach to the law that it “is complex, but it is fair to describe her as a liberal minimalist,” while conservative minimalism “is nicely captured in the opinions of Justice Sandra Day O’Connor.” *Id.*

<sup>324</sup> *Id.* at 18.

<sup>325</sup> *Kirkpatrick I*, 43 P.3d 998, 1012 (Nev. 2002) (holding statute unconstitutional on procedural due process grounds).

<sup>326</sup> *Id.*

<sup>327</sup> *Kirkpatrick II*, 64 P.3d 1056, 1064 (Nev. 2003) (Agosti, C.J., dissenting).

<sup>328</sup> *Id.*

<sup>329</sup> For Justice Shearing, the majority’s holding in *Kirkpatrick I* that parents have a constitutional right to notification of important events in a child’s life was troubling. The United States Supreme Court has never recognized such a right, and Shearing feared that *Kirkpatrick*

fundamental question of the right of any fifteen year old who, like the petitioner, was not yet quite old enough to marry without parental consent and court authorization, yet was sufficiently mature to enter into marriage, to do so.

Here, in this exceptional case, Shearing displayed her more liberal minimalist bent by announcing a sweeping ruling that was not essential to resolution of the precise issue before the court. In other respects, however, Shearing stayed the course of strict minimalism. Her decision spoke only of fifteen year olds, and not anyone of a younger age.<sup>330</sup> It is no stretch of the imagination to anticipate that the court will soon consider a case brought by a twelve, thirteen or fourteen year old who seizes the opportunity presented by the court's statement, in dicta, that "[a]ge alone is an arbitrary factor."<sup>331</sup> But in Shearing's decidedly minimalist style, *Kirkpatrick II* left those decisions for another day.

#### D. Women and the Law

Justice Shearing did not set out to further the cause of women's rights through judicial activism. Instead, when she joined Nevada's high court, she followed her usual course of deciding each case as she saw it. If, however, the aggrieved party happened to be a woman, Shearing was well positioned to contribute a viewpoint the high court lacked before her election to it in 1992. Unlike the United States Supreme Court,<sup>332</sup> the Nevada Supreme Court does not often have occasion to rule on matters that directly impact women's rights.<sup>333</sup> Nonetheless, in those cases that presented an opportunity for the unique contributions of a female jurist, Shearing was up to the challenge.

Shearing authored a series of decisions involving petitions by mothers<sup>334</sup> to relocate out of state with children for whom they were the primary physical custodian, but whose legal custody was joint with the fathers. The Nevada legislature had enacted procedures for obtaining court approval to relocate in such situations,<sup>335</sup> and the supreme court already had issued several opinions interpreting the statute.<sup>336</sup> Despite the guidance available from those sources, some lower court judges persisted in misapplying the law, to the disadvantage, largely, of women. The following statement by the *Trent v. Trent*<sup>337</sup> court reveals its frustration:

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*rick I* would lead to a holding that a child must notify both parents of any significant decision, particularly abortion, in direct contravention of all the Supreme Court decisions. Interview with Miriam Shearing, *supra* note 2.

<sup>330</sup> *Kirkpatrick II*, 64 P.3d at 1060.

<sup>331</sup> *Id.*

<sup>332</sup> See, e.g., Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546, 1549-53 (1991) (commenting on how Supreme Court jurisprudence has changed in response to women's changing position in society).

<sup>333</sup> Interview with Miriam Shearing, *supra* note 2.

<sup>334</sup> Shearing did not single out mothers for preferential treatment over fathers; the fact is that, most often, the losing parties in trial court rulings on relocation petitions were women, not men. Shearing Interview *supra* note 2. A few years before the series of decisions described here, a Shearing majority ruled in favor of a father whose relocation petition the trial court had denied. See *Gandee v. Gandee*, 895 P.2d 1285 (Nev. 1995).

<sup>335</sup> See NEV. REV. STAT. § 125A.350 (now § 125C.200) (2004).

<sup>336</sup> See, e.g., *Gandee*, 895 P.2d at 1285; *Trent v. Trent*, 890 P.2d 1309 (Nev. 1995); *Schwartz v. Schwartz*, 812 P.2d 1268 (Nev. 1991).

<sup>337</sup> 890 P.2d 1309.



We find it disturbing that despite our decision in *Schwartz* [v. *Schwartz*, 812 P.2d 1268 (Nev. 1991)], many district courts are using NRS 125A.350 as a means to chain custodial parents, most often women, to the state of Nevada. NRS 125A.350 is primarily a notice statute intended to prevent one parent from in effect "stealing" the children away from the other parent by moving them away to another state and attempting to sever contact. . . . [I]t should not be used to prevent the custodial parent from freely pursuing a life outside of Nevada when reasonable alternative visitation is possible.<sup>338</sup>

But prevent custodial mothers from pursuing advantageous opportunities out of state is just what the lower courts continued to do, even after *Trent*. Two Shearing opinions reversing district court denials of custodial mothers' relocation petitions illustrate the lower courts' disregard for the legitimacy of women's interests and the Nevada Supreme Court's resolve to firmly apply the law.

In *McGuinness v. McGuinness*,<sup>339</sup> the former wife sought to relocate to Virginia, where she could be near siblings and other family members, live in her recently deceased mother's home, complete college, and become a teacher, rather than remaining in Las Vegas at a dead-end secretarial job.<sup>340</sup> The trial court denied her petition based on its conclusion that her relocation would render impossible the parties' joint physical custody arrangement for their child.<sup>341</sup> The Shearing majority reversed, quoting *Trent* and admonishing the lower court to apply the proper legal standards, which required the court to consider "the possibility of reasonable, alternative visitation"<sup>342</sup> once the petitioner presented a good faith reason for the move.<sup>343</sup> The court further stressed that "the well-being of a parent, which could be heightened by relocation, may have a substantial effect on the best interest of the child."<sup>344</sup> Moreover, "unless the parents' interests are considered as part of the calculus of these decisions, a parent properly seeking a motion to move would be irrevocably chained to this state by our child custody laws."<sup>345</sup>

In *Hayes v. Gallacher*,<sup>346</sup> the former wife sought approval to relocate with her three minor children to Japan, where her second husband had been transferred by the United States Air Force.<sup>347</sup> Without conducting an evidentiary hearing, the district court denied the motion to relocate and, at the same time, granted the former husband's countermotion to change primary physical cus-

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<sup>338</sup> *Id.* at 1313.

<sup>339</sup> 970 P.2d 1074 (Nev. 1998).

<sup>340</sup> *Id.* at 1075.

<sup>341</sup> *Id.*

<sup>342</sup> *Id.* at 1078-79.

<sup>343</sup> *Id.* at 1079. See also *Halbrook v. Halbrook*, 971 P.2d 1262 (Nev. 1998) (reversing denial of relocation petition where former wife's enhanced career opportunities in Texas were sensible, good faith reason for move and her alternative visitation plan was reasonable); *Blaich v. Blaich*, 971 P.2d 822 (Nev. 1998) (reversing denial of former wife's petition to relocate to Texas and award of custody to former husband and admonishing lower court to follow applicable law).

<sup>344</sup> *McGuinness*, 970 P.2d at 1078.

<sup>345</sup> *Id.* at 1079.

<sup>346</sup> 972 P.2d 1138 (Nev. 1999).

<sup>347</sup> *Id.* at 1139.

tody if his former wife moved to Japan.<sup>348</sup> The Shearing majority reversed, noting in particular that the lower court had failed to consider the statutory presumption against assigning sole or primary custody of minors to perpetrators of domestic violence,<sup>349</sup> even though evidence in the record showed that the former husband had committed such violence and that the lower court had extended the former wife's protective order for a year.<sup>350</sup> Even without the domestic violence problem, the trial court erred badly: "In this case, the public policy considerations make the district court's conditional order particularly unacceptable in that it is designed to test the maternal attachment by forcing [the former wife] to choose between her children and her husband."<sup>351</sup> With those words, Shearing made clear her views of both the law and the realities of contemporary life for families.

Likewise, Shearing refused to participate in the perpetuation of myths about women who are victims of sexual assault. The cases discussed here illustrate Shearing's impact on the court's treatment of defendants' claims of victim consent and lack of credibility.

In *Honeycutt v. State*,<sup>352</sup> the defendant asserted that he believed the victim had consented to his sexual acts.<sup>353</sup> The Shearing majority acknowledged that the law entitled him to a jury instruction on "reasonable mistaken belief,"<sup>354</sup> but upheld the trial court's refusal to give his proposed instruction.<sup>355</sup> The instruction was not merely "technically deficient in form,"<sup>356</sup> as the dissent argued,<sup>357</sup> but "an incorrect statement of the law."<sup>358</sup> The defense had proposed an instruction that recited, in part, an approved California jury instruction,<sup>359</sup> but left out the following: "However, a belief that is based upon ambiguous conduct by an alleged victim that is the product of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another is not a reasonable good faith belief."<sup>360</sup> The Shearing majority found in the record substantial evidence that the defendant obtained the victim's "consent" through "threats, force, and violence"; therefore, the proposed instruction was incorrect as a matter of law.<sup>361</sup>

Shearing's majority opinion in *Johnson v. State*<sup>362</sup> displays a similar attention to the concerns of sexual assault victims. The trial court had refused to allow the defense to impeach the victim's testimony that she was a virgin before the incident here with her preliminary hearing testimony that she had

<sup>348</sup> *Id.*

<sup>349</sup> *Id.* at 1141 (citing NEV. REV. STAT. § 125.480(5) (2004)).

<sup>350</sup> *Id.*

<sup>351</sup> *Id.* at 1142.

<sup>352</sup> 56 P.3d 362 (Nev. 2002).

<sup>353</sup> *Id.* at 368.

<sup>354</sup> *Id.* at 369.

<sup>355</sup> *Id.* at 370.

<sup>356</sup> *Id.* at 369.

<sup>357</sup> *Id.* at 374 (Rose, J., dissenting).

<sup>358</sup> *Id.* at 369.

<sup>359</sup> *Id.* at 369 (citing CALIFORNIA JURY INSTRUCTIONS, CRIMINAL 10.65, at 828 (6th ed. 1996)).

<sup>360</sup> *Id.*

<sup>361</sup> *Id.* at 369-70.

<sup>362</sup> 942 P.2d 167 (Nev. 1997).

been sexually molested when she was nine or ten.<sup>363</sup> Despite a strong dissent,<sup>364</sup> Shearing mustered a majority to join her opinion affirming the conviction and thereby protecting the victim from an attack on her credibility when no evidence supported the defense claim of prior sexual penetration.<sup>365</sup>

But Shearing was not always so successful. In *Cipriano v. State*,<sup>366</sup> she was unable to persuade the majority that the testimony of the defendant's daughter-in-law revealed behavior similar to what he was alleged to have done to the victim.<sup>367</sup> In both cases, the victims alleged that: "[The defendant] used force and intimidation to gain sexual favors. . . . [He] placed them in a position where they could not retreat . . . kissed or attempted to kiss them, touched them on the breasts and touched them in the crotch area despite their attempts to fight him off."<sup>368</sup> Those allegations, Shearing said, indicated that the defendant's acts "were part of a common scheme or plan and showed his deliberate intent to commit open and gross lewdness."<sup>369</sup> Although not admissible in the state's case in chief, the testimony was admissible to rebut the defendant's testimony that "the victim in this case attempted to seduce him, that he had never threatened violence to women, and that he had always been a gentleman around women."<sup>370</sup> Thus, Shearing would have affirmed the defendant's conviction of open and gross lewdness.<sup>371</sup>

Like women in sexual assault cases, women entering the mental health system often get little respect from male-dominated courts. The dangers of involuntary commitment to a psychiatric facility provoked a strong dissent from Shearing in *Schlotfeldt v. Charter Hospital of Las Vegas*.<sup>372</sup> The plaintiff voluntarily committed herself to the defendant treatment facility after abusing alcohol and methamphetamine.<sup>373</sup> Hospital doctors concluded that she was suffering from major depression and suicidal ideation.<sup>374</sup> The next day, Schlotfeldt said she was ready to go home, but the doctors refused to release her because they thought she was a suicide risk and her husband was out of town.<sup>375</sup> Eventually, she gained release, but not until she had spent sixty-six hours at the facility.<sup>376</sup> Schlotfeldt's later suit for false imprisonment resulted in a jury verdict in her favor.<sup>377</sup>

The supreme court overturned the jury verdict, based on what Shearing said in her dissent were irrelevant issues.<sup>378</sup> The crux of the case, in Shearing's

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<sup>363</sup> *Id.* at 170-71.

<sup>364</sup> *Id.* at 171 (Rose, J., dissenting).

<sup>365</sup> *Id.* at 170-71.

<sup>366</sup> 894 P.2d 347 (Nev. 1995), *overruled on other grounds by* State v. Sixth Jud. Dist. Ct., 964 P.2d 48 (Nev. 1998).

<sup>367</sup> *Id.* at 353 (Shearing, J., concurring in part and dissenting in part).

<sup>368</sup> *Id.*

<sup>369</sup> *Id.*

<sup>370</sup> *Id.* at 354.

<sup>371</sup> *Id.*

<sup>372</sup> 910 P.2d 271 (Nev. 1996).

<sup>373</sup> *Id.* at 272.

<sup>374</sup> *Id.*

<sup>375</sup> *Id.*

<sup>376</sup> *Id.*

<sup>377</sup> *Id.* at 273.

<sup>378</sup> *Id.* at 276 (Shearing, J., dissenting).

view, was the hospital's abuse of its limited power to hold Schlottfeldt involuntarily.<sup>379</sup>

Involuntary commitment is one of the most dangerous weapons that a society can employ. Totalitarian governments have used it extensively against their political enemies. Private organizations can use it for financial gain. Because of the inherent potential for misuse of this weapon, it is crucial that the procedural safeguards established by the State be strictly observed.<sup>380</sup>

Here, the hospital made no attempt to follow Nevada law by obtaining a court order or a certification from a physician as required to detain Schlottfeldt after she insisted on leaving.<sup>381</sup> Therefore, Shearing said, "[t]he hospital had no legal justification for detaining her," and the verdict in her favor should stand.<sup>382</sup>

Similarly, Shearing would have upheld the jury verdict in favor of a University of Nevada, Reno sociology professor on her Equal Pay Act claim, which the majority reversed in *University and Community College System of Nevada v. Farmer*.<sup>383</sup> Based on the jury's verdict in Farmer's favor and in contrast to her male colleagues, Shearing concluded that "the jury did not believe the University's witnesses."<sup>384</sup> Shearing explained: "Regardless of our own inclinations, we must accept the fact that the jury believed that the disparity in pay between Farmer and her male colleague was based on gender discrimination."<sup>385</sup> Unfortunately for Farmer and perhaps for other women in the future, Shearing's view did not carry the day.

In contrast, the unanimous decision Shearing authored in *Shelton v. Shelton*<sup>386</sup> was an unadulterated victory for a former military wife and those similarly situated. *Shelton* considered the applicability of federal law to the interpretation of provisions in a divorce decree.<sup>387</sup> The underlying facts were these: Roland and Maryann had been married for more than sixteen years when they jointly petitioned for dissolution of their marriage.<sup>388</sup> The terms of their property settlement agreement designated both Roland's military retirement pay and his military disability pay as community property.<sup>389</sup> The agreement further allocated to Roland one-half of his retirement pay, in the amount of \$500, and all of his disability pay, in the amount of \$174; and to Maryann, the "other half" of Roland's retirement pay, in the amount of \$577, for the duration of her life.<sup>390</sup> After the divorce decree, Roland's disability status was

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<sup>379</sup> *Id.*

<sup>380</sup> *Id.*

<sup>381</sup> See *id.* (hospital could have obtained court order pursuant to NEV. REV. STAT. § 433A.200-330 (2003) or physician's certification pursuant to NEV. REV. STAT. § 433A.160-180 (2003)).

<sup>382</sup> *Id.*

<sup>383</sup> 930 P.2d 730 (Nev. 1997), *cert. denied*, 523 U.S. 1004 (1998).

<sup>384</sup> *Id.* at 739 (Shearing, J., dissenting).

<sup>385</sup> *Id.*

<sup>386</sup> 78 P.3d 507 (Nev. 2003), *cert. denied*, 541 U.S. 960 (2004).

<sup>387</sup> *Id.* at 508.

<sup>388</sup> *Id.*

<sup>389</sup> *Id.*

<sup>390</sup> *Id.* At the time of the divorce, Roland was receiving \$1000 per month in retirement pay and, based on a ten percent disability, \$174 in disability pay. *Id.*

upgraded from ten to one hundred percent disabled, and he elected to waive his military retirement benefits for an equal amount in tax-exempt disability pay, as allowed by federal law.<sup>391</sup> Then, two years after the divorce decree, Roland stopped making the monthly payments of \$577 to Maryann.<sup>392</sup>

Based on its reading of federal law, the family court judge rejected Maryann's efforts to enforce the divorce decree, "despite repeatedly saying how unfair the result was to Maryann."<sup>393</sup> On appeal, the Shearing court recognized, as had the district court, that federal law prohibits states from treating veterans' disability benefits as community property.<sup>394</sup> That did not conclude the analysis, however, because the dispositive issue was a question of Nevada law: What was the parties' intent, as expressed in their property settlement agreement?<sup>395</sup> Applying standard principles of contract interpretation,<sup>396</sup> the Shearing court concluded that the parties' agreement was for Roland to pay Maryann \$577 each month, rather than one-half of his retirement pay, which would have been only \$500.<sup>397</sup> Moreover, "Roland ratified the terms of the agreement by performing his obligations under the decree for a period of two years."<sup>398</sup> Shearing summed up in fairness terms: "Roland cannot escape his contractual obligation by voluntarily choosing to forfeit his retirement pay."<sup>399</sup>

With the exception of Shearing's relocation opinions, the cases treated here make no mention of women's rights or well-being. Yet, Shearing's careful analysis will benefit scores of women because she offered a new perspective for her colleagues to consider, and whether intentional or not, her decisions enhanced the rights of women. As we have seen before, Shearing limited her review and commentary to the issues squarely presented and the evidence in the record below and did not engage in sweeping condemnations of practices that may well have offended her personally. For example, her dissent in *Scholtfeldt* mentions nothing about the historic mistreatment of women through commitment to mental institutions as a means of social control or the over-diagnosis of mental illness in women whose responses to injustices in their lives were rational and sane.<sup>400</sup> Nor does she trumpet the military retirement pay ruling as a long overdue stroke of financial justice for women.<sup>401</sup> As with her other decisions in which women were subjected to stereotypical and degrading treat-

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<sup>391</sup> *Id.* (citing 38 U.S.C. § 5305 (2000)).

<sup>392</sup> *Id.*

<sup>393</sup> *Id.*

<sup>394</sup> *Id.* at 509 (citing *Mansell v. Mansell*, 490 U.S. 581, 589 (1989) (interpreting Uniformed Services Former Spouses Protection Act, 10 U.S.C. § 1408(a)(4)(B) (2000), as grant of authority to state courts to treat "disposable retired pay," but not "total retired pay," including disability pay, as community property)).

<sup>395</sup> *Id.* at 510.

<sup>396</sup> *Id.*

<sup>397</sup> *Id.*

<sup>398</sup> *Id.*

<sup>399</sup> *Id.*

<sup>400</sup> See PHYLLIS CHESLER, *WOMEN AND MADNESS* 164 (1989) (critiquing patriarchal social construction of women's mental illnesses).

<sup>401</sup> See Brad M. LaMorgese & Robert E. Holmes, Jr., *Division of Retirement Benefits: The Impact of Federal Preemption on Women in Texas*, 7 TEX. J. WOMEN & L. 207, 226 (1998) (commenting on inequity women in community property states suffer from denial of spousal military retirement benefits, calling for others to seek ways to remedy injustice, and criticiz-

ment by our various systems, Shearing's minimalist principles and considerable experience guided her, and that makes each small victory for women all the sweeter.

### E. *The Death Penalty*

Justice Shearing will not likely be remembered as a proponent of a kinder, gentler death penalty. Neither should she be seen as a "hangin' judge." Her death penalty jurisprudence, while not affording the sort of reading any defense lawyer would savor,<sup>402</sup> nevertheless consistently and coherently sought to assure that those given the ultimate sanction for their crimes received a fair and dispassionate hearing. Throughout her years on the Nevada Supreme Court, Shearing ruled on many direct appeals and petitions for post-conviction relief brought by occupants of Nevada's death row. It is fair to say that she (and a majority of the court) rarely saw reason to reverse a conviction.<sup>403</sup> However,

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ing Texas courts for according federal law preemptive power over any contrary action under state law).

<sup>402</sup> See, e.g., *Leslie v. Warden*, 59 P.3d 440, 449 (Nev. 2002) (Shearing, J., dissenting) (rejecting majority's analysis and conclusions and stating she would affirm trial court's denial of habeas petition and uphold death penalty and would not overrule "extensive and well-established legal precedent" concerning application of "random and without apparent motive" aggravator as applied to killing during robbery, where statutory procedural bar also precluded court's consideration of claim). The precedent overruled by the *Leslie* majority, *Bennett v. State*, 787 P.2d 797 (Nev. 1990), *cert. denied*, 498 U.S. 925 (1990), had affirmed a death sentence imposed by Shearing when she was an Eighth Judicial District Court judge. See *id.* Moreover, Shearing had written for the majority in rejecting *Leslie*'s direct appeal. See *Leslie v. State*, 952 P.2d 966 (Nev. 1998). See also *Lane v. State*, 881 P.2d 1358 (Nev. 1994) (Shearing, for majority, affirming jury finding of "random and without apparent motive" aggravator in robbery conviction), *overruled by Leslie v. Warden*, 59 P.3d 430, 446 (2002); *Atkins v. State*, 923 P.2d 1119 (Nev. 1996) (affirming murder conviction and death sentence, even after reversing sexual assault conviction because state failed to prove victim was alive at time of alleged sexual assault, as required by Nevada law).

<sup>403</sup> But see *Young v. State*, 102 P.3d 572 (Nev. 2004) (per curiam) (reversing conviction and death sentence where district court denied defendant's motion for substitution of counsel and conducted inadequate inquiry into irreconcilable differences between defendant and defense counsel); *Daniel v. State*, 78 P.3d 890 (Nev. 2003) (per curiam) (reversing conviction and death sentence where trial court met privately with reluctant State witness without making record of meeting, failed to notify counsel before communicating with jury on substantive matter, unduly limited defendant's cross-examination of surviving victims, excluded testimony by defense witnesses regarding prior violent conduct by victims known to defendant, and refused to question juror about juror's comment to bailiff, asking why defendant was not in shackles; and where, as matters of apparent first impression, prosecutors asked defendant whether other witnesses had lied, or goaded defendant into accusing other witnesses of lying, where defendant did not directly challenge veracity of other witnesses during his direct examination); *Mazzan v. Warden*, 993 P.2d 25 (Nev. 2000) (per curiam) (granting capital defendant's habeas petition based on prosecutors' *Brady* violation in failing to disclose police reports); *Manley v. State*, 979 P.2d 703 (Nev. 1999) (per curiam) (reversing conviction and death sentence based on trial court's violation of defendant's Sixth Amendment right to counsel); *Jimenez v. State*, 918 P.2d 687 (Nev. 1996) (per curiam) (granting capital defendant's habeas petition based on prosecutor's *Brady* violation in failing to disclose evidence concerning other possible suspects and informant's associations with police in other cases); *Jones v. State*, 877 P.2d 1052 (Nev. 1994) (per curiam) (reversing conviction and death sentence where defense counsel provided ineffective assistance by conceding client's guilt during guilt phase of capital trial, despite not guilty plea).

as often as not, she concluded in decisions she authored that the defendant suffered a deprivation of bedrock rights in the sentencing phase of the capital proceedings.<sup>404</sup> And even when she concluded that neither the facts nor the application of the law in a particular case required reversal of the conviction or death sentence, she took pains to point out prosecutorial misconduct and other deficiencies that, though harmless in their effect on the result, called for comment and prophylactic measures.<sup>405</sup>

The foundation for Shearing's death penalty resentencing decisions is the Eighth Amendment's requirement that the death penalty "be imposed fairly, and with reasonable consistency, or not at all."<sup>406</sup> Her conclusion that the defendant had not received a fair penalty hearing compelled the reversal of the death sentences imposed by the jury in several decisions she authored.<sup>407</sup> The significance of those rulings warrants treatment of each here.

In the earliest case, *Chambers v. State*,<sup>408</sup> Shearing's majority decision both vacated the death sentence and directed the imposition of a sentence of life without the possibility of parole.<sup>409</sup> The court's statutorily prescribed independent review of the record<sup>410</sup> compelled the court to conclude that the death

<sup>404</sup> See text accompanying notes 408-63.

<sup>405</sup> See, e.g., *Gallego v. State*, 23 P.3d 227 (Nev. 2001) (clarifying trial court's ruling on self-representation requests and admonishing prosecutor who had improperly suggested that defense had burden to disprove aggravators); *Vanisi v. State*, 22 P.3d 1164 (Nev. 2001) (clarifying law governing motions for self-representation; complexity of legal issues is not basis for denial of defendant's right to represent himself), *cert. denied*, 534 U.S. 1024 (2001); *Byford v. State*, 994 P.2d 700, 714 (Nev. 2000) (abandoning previous line of authority and requiring separate instruction on meanings of "premeditation" and "deliberation" in first degree murder cases); *Leonard v. State*, 958 P.2d 1220 (Nev. 1998) (finding that defense counsel, though not rendering ineffective assistance of counsel under the *Strickland* test, misstated law regarding directed verdict, performed deficiently in not presenting evidence of victim's prior possession of weapon, erred in asking defense witness whether he was carrying a weapon, and should have presented expert testimony on defendant's mental and emotional problems at penalty hearing), *cert. denied*, 525 U.S. 1154 (1999); *Greene v. State*, 931 P.2d 54, 62 (Nev. 1997) (warning prosecutor that supreme court will not tolerate such behavior as his during opening argument, when he repeatedly ignored district judge's admonitions). But see *Parker v. State*, 849 P.2d 1062, 1065-66 (Nev. 1993) (affirming death sentence after finding neither prosecutorial misconduct nor error in trial judge's refusal to declare mistrial after striking victim's brother's testimony that defendant had "fatal attraction" to victim and admonishing jury to disregard it).

<sup>406</sup> See, e.g., *Hollaway v. State*, 6 P.3d 987, 997 (Nev. 2000) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982)).

<sup>407</sup> See *Butler v. State*, 102 P.3d 71, 83-86 (Nev. 2004); *Servin v. State*, 32 P.3d 1277 (Nev. 2001); *Hollaway v. State*, 6 P.3d 987 (Nev. 2000); *Chambers v. State*, 944 P.2d 805 (Nev. 1997).

<sup>408</sup> 944 P.2d 805 (Nev. 1997).

<sup>409</sup> *Id.* at 812. See NEV. REV. STAT. § 175.055 (2003), which provides, in pertinent part:

3. The Supreme Court, when reviewing a death sentence, may: (a) Affirm the sentence of death; (b) Set the sentence aside and remand the case for a new penalty hearing before a newly impaneled jury; or (c) Set aside the sentence of death and impose the sentence of imprisonment for life without possibility of parole.

<sup>410</sup> See NEV. REV. STAT. § 177.055(2) (2003), which provides:

Whether or not the defendant or his counsel affirmatively waives the appeal, the sentence must be reviewed on the record by the Supreme Court, which shall consider, in a single proceeding, if an appeal is taken: a) Any errors enumerated by way of appeal; (b) If a court determined that the defendant is not mentally retarded during a hearing held pursuant to NRS 174.098, whether that

penalty was excessive and to impose the lesser sentence, rather than remanding the case to the trial court for a new penalty hearing.<sup>411</sup> Upon review of the evidence, the court found insufficient support for the two aggravating circumstances<sup>412</sup> on which the jury based its death sentence: that the murder involved torture and that Chambers had prior convictions.<sup>413</sup> Contrary to the jury's finding that Chambers tortured his victim, the evidence did not demonstrate any intent to torture and instead was "far more consistent with there having been a fight" between the two men.<sup>414</sup> As to the "prior convictions" aggravator, the court determined that crimes which occurred eighteen years before the verdict in question when Chambers was just eighteen years old "hardly show[ ] a pattern of violence sufficient to justify the death penalty."<sup>415</sup> Thus, based on the unique circumstances of the case, the court deemed a sentence of life without the possibility of parole "more appropriate than a death sentence."<sup>416</sup>

Three years later, in *Hollaway v. State*,<sup>417</sup> the court concluded that a number of troubling aspects of the trial had improperly influenced the imposition of the death penalty and, accordingly, remanded for a new penalty hearing.<sup>418</sup> One of the grounds for setting the death sentence aside implicated the prosecutor in the "apparently accidental" activation of Hollaway's stun belt at a particularly timely stage of the state's closing argument and thus served unfairly to reinforce for the jury the prosecution's image of Hollaway as an extremely violent man.<sup>419</sup> The prosecutor's conduct provided the second ground for vacation of the sentence as well; he improperly appealed to jurors' passions and emotions by arguing that the victim's family would "have no more holidays

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determination was correct; (c) Whether the evidence supports the finding of an aggravating circumstance or circumstances; (d) Whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor; and (e) Whether the sentence of death is excessive, considering both the crime and the defendant.

<sup>411</sup> 944 P.2d at 812. See NEV. REV. STAT. § 175.055(3)(c) (2003), the full text of which is set out in note 409 above.

<sup>412</sup> See NEV. REV. STAT. § 200.033 (2003) (listing exclusive circumstances by which first degree murder may be aggravated).

<sup>413</sup> 944 P.2d at 811.

<sup>414</sup> *Id.*

<sup>415</sup> *Id.*

<sup>416</sup> *Id.* at 812.

<sup>417</sup> 6 P.3d 987 (Nev. 2000).

<sup>418</sup> *Id.* at 994 (citing NEV. REV. STAT. § 177.055(3) (2004) (providing for remand as one option for the reviewing court).

<sup>419</sup> *Id.* See also *Wegner v. State*, 14 P.3d 25 (Nev. 2000) (Shearing, writing for majority, reversing first degree murder conviction and admonishing prosecutor for arguing facts not in record and vouching for strength of evidence against defendant during closing argument); *Silva v. State*, 951 P.2d 591, 596-97 (Nev. 1997) (Shearing, J., concurring) (finding reversible error based on prosecutorial misconduct in putting witness/co-defendant on stand while knowing full well that he would refuse to testify; commenting on refusal to testify by saying, in presence of jury, "because you don't want to be a snitch up at jail, right?"; focusing in closing argument on failure to testify; and encouraging jury to draw inference against defendant based on witness/co-defendant's appearance at trial, when defendant had no opportunity to cross-examine him).



with their daughter," even though Nevada law precluded such "holiday arguments."<sup>420</sup>

It was the set of errors affecting the jury's consideration of the evidence during the penalty phase, however, through which *Hollaway* made a lasting imprint on Nevada's death penalty jurisprudence.<sup>421</sup> First, the Shearing court called on trial courts to properly instruct jurors that, even if the defendant presents no mitigating factors during the sentencing phase, they "may consider any evidence presented in the guilt phase that may indicate that a penalty less than death is appropriate."<sup>422</sup> The court noted in the record a number of potential mitigating factors: *Hollaway* had immediately reported the crime, admitted his guilt, and expressed remorse for his actions.<sup>423</sup> Moreover, extensive evidence showed that intoxication had "played a major role in the crime" and that *Hollaway* and the victim "had been arguing incessantly when the killing occurred."<sup>424</sup> All of this could have provided a basis for the jury to impose a lesser sentence than death, but the jury did not have that opportunity here because of *Hollaway*'s refusal to present any case in mitigation, the state's arguments, and misleading jury instructions.<sup>425</sup> The court took pains to set out a proper instruction, which it directed courts to use, to prevent such errors in the future.<sup>426</sup>

Second, the court tackled the problem of the lower courts' and jurors' apparent confusion over the proper use of "other matter" evidence introduced by the state during the penalty phase.<sup>427</sup> The court explained that three types of evidence are relevant at capital penalty hearings: "evidence relating to aggravating circumstances, mitigating circumstances, and 'any other matter which the court deems relevant to sentence.'"<sup>428</sup> The court explained, further, that "other matter" evidence is "*not* admissible for use by the jury in determining

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<sup>420</sup> *Hollaway v. State*, 6 P.3d 987, 994 (Nev. 2000) (citing *Quillen v. State*, 929 P.2d 893, 901 (1996)); see also *Hernandez v. State*, 50 P.3d 1100 (Nev. 2002) (citing *Hollaway* with approval in remanding for new capital sentencing hearing based in part on prosecutor's improper "holiday" arguments to jury).

<sup>421</sup> See, e.g., *Thomas v. State*, 83 P.3d 818 (Nev. 2004) (reiterating *Hollaway* admonition for courts and juries to consider *any* mitigating evidence); *Johnson v. State*, 59 P.3d 450 (Nev. 2002) (reciting *Hollaway* explanation of statutory requirements for proper consideration and weighing of aggravators and mitigators at capital sentencing hearings); *Servin v. State*, 32 P.3d 1277 (Nev. 2001) (relying on *Hollaway* for protocol in jury determination of aggravators and mitigators at capital sentencing hearings); *Evans v. State*, 28 P.3d 498 (Nev. 2001) (same).

<sup>422</sup> 6 P.3d at 995.

<sup>423</sup> *Id.*

<sup>424</sup> *Id.* at 995.

<sup>425</sup> *Id.*

<sup>426</sup> *Id.* The instruction reads:

In determining whether mitigating circumstances exist, jurors have an obligation to make an independent and objective analysis of all the relevant evidence. Arguments of counsel or a party do not relieve jurors of this responsibility. Jurors must consider the totality of the circumstances of the crime and the defendant, as established by the evidence presented in the guilt and penalty phases of the trial. Neither the prosecution's nor the defendant's insistence on the existence or nonexistence of mitigating circumstances is binding upon the jurors.

*Id.* at 995-96.

<sup>427</sup> *Id.* at 996-97.

<sup>428</sup> *Id.* (quoting NEV. REV. STAT. § 175.552(3) (2004)).

the existence of aggravating circumstances or in weighing them against mitigating circumstances.”<sup>429</sup> Finally, the court ruled that the trial judge must admonish jurors that they must consider such evidence only after they have determined, by finding at least one aggravator, that the defendant is death-eligible.<sup>430</sup> Based on the trial court’s failure to give such an instruction at *Hollaway*’s sentencing hearing and the other errors described above, the court reversed the death sentence and remanded for a new penalty hearing.<sup>431</sup>

In *Servin v. State*,<sup>432</sup> in which the ruling was narrower than *Hollaway* and more akin to *Chambers*, the court vacated the death sentence as excessive and imposed a sentence of life without possibility of parole<sup>433</sup> based on the jury’s faulty assessment of aggravating circumstances.<sup>434</sup> The trial court had permitted the jury to find both burglary and home invasion as aggravators, and the jury had so found.<sup>435</sup> That constituted error, the Shearing majority ruled, because those aggravators were duplicative.<sup>436</sup> In its ruling, the court held that

<sup>429</sup> *Id.* at 997 (emphasis in original). See also *Evans v. State*, 28 P.3d 498 (Nev. 2001) (relying on *Hollaway* for statement of Nevada law concerning proper consideration of “other matter” evidence only after jury unanimously finds at least one aggravator and determining that it outweighs any mitigating evidence presented); *Johnson v. State*, 59 P.3d 450 (Nev. 2002) (same).

<sup>430</sup> *Hollaway v. State*, 6 P.3d 987, 997 (Nev. 2000); see also *McConnell v. State*, 102 P.3d 606 (Nev. 2004), *reh’g denied*, 107 P.3d 1287 (Nev. 2005) (reiterating *Hollaway* requirement that “other matter” evidence be considered only after determining whether the defendant is death-eligible). If Shearing had been on the court when *McConnell* was decided, she likely would have separately concurred in the result only, and not agreed with the court’s extensive reasoning in finding unconstitutional the use of the felony aggravator in capital cases predicated on a felony murder. See *id.* at 620-25. Shearing’s adherence to the minimalist “one case at a time” approach likely would have compelled her to stop short of considering the constitutionality of the felony aggravator, as it was not essential to resolution of *McConnell*’s appeal. He had admitted to committing a “cold-blooded, premeditated, first-degree murder,” *id.* at 620, and that admission justified imposition of the death sentence against him. *Id.* Thus, the court’s felony aggravator/felony murder analysis and decision would not invalidate the use of the aggravator in *McConnell*’s sentencing. *Id.* The court’s affirmance of *McConnell*’s death sentence based on its premeditated nature likely would have concluded the matter for Shearing. Cf. *Schoels v. State*, 966 P.2d 735, 741 (Nev. 1998) (Shearing, J., concurring) (agreeing with dissenting justice that race of defendant and victim should play no role in determining whether death penalty is sought, but disagreeing as to applicability of that concern here and reiterating that court’s decision “must always be based on the evidence in the record”).

<sup>431</sup> *Hollaway*, 6 P.3d at 997.

<sup>432</sup> 32 P.3d 1277 (Nev. 2001).

<sup>433</sup> *Id.* at 1280. *Servin* received two life sentences, as mandated by NEV. REV. STAT. § 193.165(1) (2004), the Nevada weapon enhancement statute, because he was convicted of murder with the use of a deadly weapon. See *id.* at 1280 n.1.

<sup>434</sup> *Id.* at 1287. The court rejected *Servin*’s argument that the death penalty violated the International Covenant on Civil and Political Rights, see S. Treaty Doc. No. 95-2, 999 U.N.T.S. 171 (1976), which the United States Senate had ratified in 1992, because he was only sixteen years old at the time of the crime for which he was sentenced to death. Article 6(5) of the treaty provides that “[a S]entence of death shall not be imposed for crimes committed by persons below eighteen years of age.” 999 U.N.T.S. at 175. The court’s rejection of the argument accords with its earlier handling of the international law question when raised by Michael Domingues. See *Domingues v. State*, 961 P.2d 1279 (Nev. 1998), *cert. denied*, 528 U.S. 963 (1999). See *Servin*, 32 P.3d at 1286.

<sup>435</sup> *Servin*, 32 P.3d at 1287-88.

<sup>436</sup> *Id.*

a strict analysis under the *Blockburger*<sup>437</sup> rule for determining when separate offenses exist for double jeopardy purposes was not necessary for determining whether multiple offenses are duplicative in the context of death penalty sentencing.<sup>438</sup> Although *Blockburger* would permit conviction of both burglary and home invasion because “each requires proof of an element the other does not,”<sup>439</sup> allowing both as aggravating circumstances was improper, the Shearing court ruled, because “the actual conduct underlying both aggravators was identical.”<sup>440</sup> The court thus extended a protection to capital defendants not previously recognized in this state, and that ruling set the stage for the court to conclude that imposition of the death penalty against Servin was excessive.<sup>441</sup>

The final death penalty case considered here, *Butler v. State*,<sup>442</sup> both broke new ground and retrod old and familiar ground. The issue of first impression presented by Butler’s direct appeal arose out of the trial court’s refusal to allow both of his counsel to address the jury during the penalty phase of his trial.<sup>443</sup> Butler argued that he had that right, pursuant to N.R.S. § 175.151, and the Shearing court agreed.<sup>444</sup>

Resolution of the issue required the methodical construction of section 175.151,<sup>445</sup> an exercise Shearing was well disposed to execute with precision. The focal point of the court’s analysis was the word “may,” as it appeared in two sentences of the statute.<sup>446</sup> The first sentence stated, in pertinent part: “If the indictment or information be for an offense punishable by death, two counsel on each side *may* argue the case to the jury.”<sup>447</sup> The second provided: “If it be for any other offense, the court *may*, in its discretion, restrict the argument to one counsel on each side.”<sup>448</sup> Shearing reasoned that, in the first sentence, the word “may” gave to capital counsel themselves the discretion whether two counsel would argue, whereas its use in the second sentence vested discretion in noncapital cases in the trial court.<sup>449</sup> Any other reading, she concluded, “would render the entire first sentence and its distinct wording superfluous.”<sup>450</sup> Thus, the trial court erred in refusing to grant Butler’s request.<sup>451</sup>

The “old and familiar” issues *Butler* presented look strikingly similar to those examined above in *Hollaway*: “other matter” evidence<sup>452</sup> and

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<sup>437</sup> *Blockburger v. United States*, 284 U.S. 299 (1932).

<sup>438</sup> *Servin*, 32 P.3d at 1287.

<sup>439</sup> *Id.* (quoting *Blockburger*, 284 U.S. at 304).

<sup>440</sup> *Id.*

<sup>441</sup> 32 P.3d at 1290. The court also considered “problematic” the quality of the evidence that Servin had shot the victim and took into account Servin’s youth, lack of significant criminal background, expression of remorse, and drug-impaired state throughout the robbery and murder. *Id.*

<sup>442</sup> 102 P.3d 71 (Nev. 2004).

<sup>443</sup> *Id.* at 81.

<sup>444</sup> *Id.*

<sup>445</sup> *Id.*

<sup>446</sup> *Id.*

<sup>447</sup> *Id.* (emphasis added).

<sup>448</sup> *Butler v. State*, 102 P.3d 71, 81 (Nev. 2004) (emphasis added).

<sup>449</sup> *Id.*

<sup>450</sup> *Id.*

<sup>451</sup> *Id.* at 82.

<sup>452</sup> See *id.* at 82-83.

prosecutorial misconduct.<sup>453</sup> Indeed, the trial court in *Butler* purported to base its instruction on *Hollaway*,<sup>454</sup> but made the fatal error of adding language that contradicted the *Hollaway* admonition concerning the limited use of "other matter" evidence and wrongly implied that such evidence could be used to determine death eligibility.<sup>455</sup> The Shearing court concluded that the trial court's error was not harmless, particularly in light of compelling evidence of Butler's extreme neglect and abuse during his childhood, which the jury identified as mitigating circumstances, and the sole aggravating circumstance alleged by the state and found by the jury.<sup>456</sup>

Finally, the court reviewed the prosecutor's conduct and, as in *Hollaway*, found it improper.<sup>457</sup> Here, the prosecutor made inflammatory and disparaging remarks about Butler's counsel, portraying his mitigation and other defense tactics as "a dirty technique in an attempt to fool and distract the jury, [and] implying that Butler's counsel acted unethically in his defense."<sup>458</sup> Shearing soundly denounced the prosecutor's "cleverly crafted rhetoric."<sup>459</sup> At the same time, she demonstrated her understanding of the critical role capital defense lawyers play: "Butler not only has a legal right, but his counsel have an ethical duty, to present all evidence in mitigation of a death sentence. The presentation of mitigating evidence during the penalty phase is essentially the heart of a defense."<sup>460</sup> The court similarly dispensed with the prosecutor's disparaging remarks that cast two defense expert witnesses as "high falootin' . . . pseudo experts" whose testimony amounted to an "infomercial."<sup>461</sup>

The court observed that the erroneous "other matter" instruction may have been sufficient, standing alone, to overturn the death penalty imposed on Butler.<sup>462</sup> Given the other errors at the penalty hearing, the court had no difficulty ruling that Butler had not received a fair hearing and that his case must be remanded for a new hearing.<sup>463</sup>

In none of the cases discussed here did Shearing depart from decisional minimalism by establishing broad rules or resolving issues of basic principle. Instead, she conducted the searching examination of the record essential to death penalty review, and when she found the record at odds with the law or the facts as found by the jury, fashioned remedies narrowly confined to resolving the problems presented, and no more.

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<sup>453</sup> See *id.* at 83-85.

<sup>454</sup> *Id.* at 82.

<sup>455</sup> *Id.* at 82-83.

<sup>456</sup> *Id.* The aggravator found by the jury was that each of the two murders of which Butler was convicted had been committed by "a person who had, in the immediate proceeding, been convicted of more than one offense of murder." *Id.* at 78.

<sup>457</sup> *Id.* at 85.

<sup>458</sup> *Id.* at 84-85; Cf. *Whitney v. State*, 915 P.2d 881 (Nev. 1996) (Shearing, writing for majority, reversing conviction for receiving stolen property and admonishing prosecutor to refrain from commenting on defense counsel's failure to call witnesses or put on evidence; comments impermissibly shifted burden of proof to defendant).

<sup>459</sup> *Butler*, 102 P.3d at 85.

<sup>460</sup> *Id.* at 84-85.

<sup>461</sup> *Id.* at 85 (concluding, in addition, that it was improper for prosecutor to remark on how much expert witnesses were being paid).

<sup>462</sup> *Id.* at 86.

<sup>463</sup> *Id.*

### III. CONCLUSION

One may not agree with the reasoning and results in the majority decisions Justice Shearing authored or the positions she advocated in her concurring and dissenting opinions. One cannot say, however, that her decision-making was unprincipled. Shearing's body of work as a Nevada Supreme Court Justice reveals a consistent and rigorous application of jurisprudential principles of separation of powers, strict statutory construction, deference to the fact finder, and close scrutiny of lower court rulings on matters of law. Viewed through the lens of decisional minimalism, Justice Shearing's opinions reflect her preference, along with that of a number of our United States Supreme Court Justices, for deciding cases on the facts presented, rather than adopting broad theories, and for avoiding issues of basic principle. Some may find this a wholly unsatisfactory choice for a member of the state's highest court who, after all, has the ability to say what the law is. But it was Shearing's choice to make and, as with so many other choices she had to make as the first woman of the Nevada judiciary, she made it and moved on, one step at a time.