

July 2015

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Recommended Citation

Potter, Parker B. Jr. (2006) "Antipodal Invective: A Field Gude to Kangaroos in American Courtrooms," *Akron Law Review*: Vol. 39 : Iss. 1 , Article 4.

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ANTIPODAL INVECTIVE: A FIELD GUIDE TO KANGAROOS IN AMERICAN COURTROOMS

*Parker B. Potter, Jr.**

I. INTRODUCTION

Antipodes are “[a]ny two places or regions that are on diametrically opposite sides of the earth.”¹ Go to the opposite side of the earth from where I sat while drafting this article and you will find, among other things, Australia. Go to Australia, and you will find kangaroos, by the thousands. Go to Westlaw, and you will find kangaroo courts, by the hundreds.²

I ran a Westlaw search on the phrase “kangaroo court” after I discovered, while researching another article,³ that Justice Bernard Levinson of the Hawai’i Supreme Court once described the process by which a hospital had revoked a physician’s staff privileges as a “kafkaesque ‘kangaroo court.’”⁴ After attempting, without success, to imagine a connection between the celebrated Czech author and the iconic Australian marsupial,⁵ I decided on a whim to see how many other judges had used the phrase “kangaroo court” in an opinion. Expecting a couple of dozen, I went slackjawed when my whimsical Westlaw search boomeranged back with more than 375 state and federal judicial opinions stressing the seams of its sadly distended pouch.⁶

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1. THE AMERICAN HERITAGE DICTIONARY 62 (4th coll. ed. 2002).

2. See, e.g., *Kearney v. Town of Wareham*, 316 F.3d 18, 23 (1st Cir. 2002); *Silver v. Castle Mem’l Hosp.*, 497 P.2d 564, 575 (Haw. 1972) (Levinson, J., concurring); *Commonwealth v. Hill*, 632 A.2d 928, 928 (Pa. Super. Ct. 1993).

3. Parker B. Potter, Jr., *Ordeal by Trial: Judicial References to the Nightmare World of Franz Kafka*, 3 PIERCE L. REV. 195 (2005).

4. *Silver*, 497 P.2d at 575.

5. Kafka’s hometown, Prague, is not that far from Austria, and Austria sounds a lot like Australia, but that can’t be it.

6. See, e.g., *Kearney*, 316 F.3d at 23; *Silver*, 497 P.2d at 575; *Hill*, 632 A.2d at 928. My

Of those hundreds of opinions, several dozen arose out of the operation of courts “assembled by various groups, such as prisoners in a jail (to settle disputes between inmates) and players on a baseball team (to ‘punish’ teammates who commit fielding errors).”⁷ Those “real” kangaroo courts are the subject of another article.⁸ Several dozen more opinions recounted instances in which a litigant or an attorney directly accused a judge of conducting a kangaroo court. While they are extremely colorful, those opinions are also the subject of another article.⁹ This article discusses three other groups of opinions that use the phrase “kangaroo court.”

The first section describes the various decision-making behaviors that qualify a tribunal to wear the Scarlet K. It does so by discussing opinions in which a judge or a litigant has given a definition of the term “kangaroo court” when that term is used metaphorically, as invective, to disparage the fairness of another tribunal. The second section describes the habitat of adjudicatory kangaroos by examining opinions like *Silver v. Castle Memorial Hospital*, in which a judge has called another tribunal a kangaroo court.¹⁰ The third section is devoted to unverified sightings, as reported in opinions in which a judge has disagreed with a litigant who has accused another tribunal of kangaroo-ism.¹¹

Finally, by way of concluding my introduction, I should disclose that I am hardly the first to characterize the phrase “kangaroo court” as invective.¹² For example, in *Commonwealth v. Hill*, Judge Olszewski of the Pennsylvania Superior Court noted:

[Jeffrey] Hill’s handwritten appellate brief, however, contains little

surprise was two-fold. First, in nearly seven years as a judicial law clerk, no judge has ever asked me to slip the phrase “kangaroo court” into an opinion I was drafting, and I would never think of handing a judge a draft in which I had inserted that phrase on my own. Second, as a legal writing instructor, I always counsel my students against colorful writing. Write like a judge, I tell them, and you stand a better chance of convincing a judge of the judiciousness of your position. Based upon the gold mine of kangaroo court references I found, I may have to modify my advice to students. Or not.

7. BLACK’S LAW DICTIONARY 291 (7th ed. 2000).

8. Parker B. Potter, Jr., *The Good, the Bad, the Ugly, and More: A Survey of Litigation Arising from the Operation of Kangaroo Courts*, 1 INT’L J. PUNISHMENT & SENT’G 121 (2005).

9. Parker B. Potter, Jr., *Dropping the K-Bomb: A Compendium of Kangaroo Tales from American Judicial Opinions* 11 SUFFOLK J. TRIAL & APP. ADVOC. (forthcoming 2006).

10. *Silver v. Castle Mem’l Hosp.*, 497 P.2d 564, 575 (Haw. 1972).

11. The word “kangaroo-ism” appears in no dictionary with which I am familiar. I use the term simply as a shorthand synonym for “those qualities that would cause a judge to call some other tribunal a kangaroo court.”

12. See, e.g., *Kearney v. Town of Wareham*, 316 F.3d 18, 23 (1st Cir. 2002) (“While Kearney intimates that it [his suspension hearing] was a kangaroo court, he fails to support his invective with an evidentiary predicate.”).

substantive argument; it is mostly pure invective. Hill rants over “the crooked Lycoming County kangaroo court,” where “PATHOLOGICAL LIAR OSOKOW, THE PERJURER” (referring to District Attorney Kenneth Osokow) and “SENILE BIGOTTED, INCOMPETENT, CORRUPT GATES. . .” (referring to Judge Gates) “railroaded”. . . him with “deliberate and malicious perjuries.” See appellant’s brief, section mysteriously titled “Judicial Notice” (capitalization in the original). This Court fares little better; Hill addresses the Superior Court as “SANCTIMONIOUS, SELF-RIGHTEOUS CROOKS” and assures us that we are “ALL A BUNCH OF PERJURERS & CRIMINAL, ARROGANT, POMPOUS, HYPOCRITICAL, SANCTIMONIOUS BASTARDS.”

Hill is evidently a tad upset over his encounter with the judicial process. We might be willing to take Hill’s anger and invective in stride, if only he would address some legal issues in his brief. Unfortunately, in venting his spleen, Hill has covered his substantive arguments with bile [W]e cannot distill enough lucid discourse out of Hill’s raging tirade to understand his allegations of error.

Hill’s brief sets a new standard for scandalous and impertinent material. Setting aside the insults and abuse, Hill’s brief is still so defective as to preclude any kind of appellate review. . . . We cannot search a record which is not before us for possible abuses of discretion; it is incumbent upon Hill to bring these matters to our attention, explain them and document them. Even with the most generous allowances for pro se drafting, we should not hesitate to simply quash his appeal.¹³

Other judges have characterized the term “kangaroo court” as “inflammatory language”¹⁴ and “unnecessarily provocative.”¹⁵ In *Cheek*

13. Commonwealth v. Hill, 632 A.2d 928, 928-29 (Pa. Super. Ct. 1993). Jeffrey Hill, it turns out, has earned quite a reputation as a source of invective, antipodal and otherwise:

We also cannot help but note that Hill has filed numerous suits against not only his court appointed counsel, but district attorneys, judges and other county officials The essence of Hill’s present appeal seems to be that “[t]he prothonotary, the sheriff, and the judge along with the defendant who is an officer in their court don’t want me feeding the crooked Lycoming County kangaroo court anymore crow, so they conspired to stop me and are currently involved in shirking responsibility for their dirty, devious political chicanery and skullduggery.” At least Hill is a colorful writer.

Hill v. Thorne, 635 A.2d 186, 187 (Pa. Super. Ct. 1993) (reversing the trial court’s dismissal of Hill’s complaint alleging legal malpractice) (citations omitted).

14. Fureigh v. Haney (*In re Haney*), 238 B.R. 427, 430 n.5 (Bankr. E.D. Ark. 1999) (observing that the debtor’s motion “describ[ed] the Court as arrogant and feigning the powers of a

v. Commissioner,¹⁶ Judge Parker noted that “[t]he transcript of the trial generally consists of petitioner’s frivolous, protester-type arguments and petitioner’s unbridled harangue against this Court as ‘biased and prejudiced,’ ‘a fraud,’ ‘a kangaroo court,’ and ‘this star chamber Sixteenth Century court.’”¹⁷

Despite the rather odd mental image that appears when kangaroo courts and the Star Chamber are mentioned in close proximity, *Cheek* is not the only opinion to report (or utilize) that exotic juxtaposition.¹⁸ The most comprehensive statement about the similarities between kangaroo courts and the Star Chamber comes from Justice Adir’s dissent in *State ex rel. Burns v. City of Livingston*,¹⁹ in which the majority affirmed the trial court’s decision not to overturn the Livingston City Council’s discharge of Herbert Burns as the City’s fire chief:

The “Minutes of Adjourned Meeting of City Council held Aug. 13, 1962” fail to show what, if any, charges had been lodged against Fire Chief Burns when he was called on the carpet before the City Council on the night of August 13, 1962, and where he witnessed the adoption of the recommendation and motion of the three aldermen constituting the Fire and Police Committee that he, the Fire Chief, “be demoted from the position of Fire Chief to Fireman.”

Such hearings as were accorded the relator Herbert P. Burns, on August 13, 1962, and on January 10, 1963, could have been patterned after the Court of Star Chamber of England which was abolished by the Long Parliament in the year 1641, or they could have been patterned after the Spanish Inquisition which was abolished in France in 1772, and, at long last, in Spain in the year 1834, or such hearings could have been patterned after the “kangaroo courts” held by inmates

‘kangaroo court’”).

15. *Harris v. Bd. of Registration in Chiropody (Podiatry)*, 179 N.E.2d 910, 912 (Mass. 1962) (stating that the petitioner’s attorney characterized certain “hearings as ‘two steps below the kangaroo court’”).

16. *Cheek v. Comm’r*, 53 T.C.M. (CCH) 111 (1987).

17. *Id.* at 111 n.2.

18. *See, e.g., People v. Tuler*, 630 N.E.2d 1287, 1288 (Ill. Ct. App. 1994) (stating that “[o]n appeal, the petitioner claims that he was denied due process of law at the post-conviction petition hearing. In so doing, the petitioner characterizes the proceedings below as ‘Kangaroo Court’ proceedings which resembled something from the Court of Star Chamber”); *McCraw v. Adcox*, 399 S.W.2d 753, 754 (Tenn. 1966) (reporting defendant/appellant’s characterization of the trial court as a “hatchet court,” his protest of “the crookedness of Judge James F. Morgan,” and his awareness that judge and attorney were “plan[ning] a star chamber court proceeding or kangaroo trial for the alleged writ of replevin”).

19. *State ex rel. Burns v. City of Livingston*, 395 P.2d 971, 996 (Mont. 1964).

of various jails in this country.²⁰

In short, my research has revealed no instance in which a litigant or judge has ever turned to the kangaroo to help him or her say something nice about a decision-making individual or institution.

II. CHARACTERISTIC BEHAVIORS OF THE MARSUPIAL DECISION-MAKER

In this section, I begin with judicial discussions of the qualities that qualify a tribunal for designation as a kangaroo court. Then I turn to definitions offered by litigants. I conclude with a brief look at other legal nouns that have been modified by the adjective “kangaroo.” In other words, this section provides a comprehensive working definition of the term “kangaroo-ism” as well as a catalogue of the characteristic behaviors of the marsupial decision-maker.²¹

As a preliminary matter, and notwithstanding one opinion in which a prison official presiding over a disciplinary proceeding allegedly proclaimed himself to be “Captain Kangaroo,”²² there can be little doubt that kangaroo-ism in the courtroom – or any other decision-making forum – is generally regarded as injudicious behavior. In a dissenting opinion in *Pierson v. Ray*,²³ in which Justice William O. Douglas argued that not “all judges, under all circumstances, no matter how outrageous their conduct are immune from suit under 17 Stat. 13, 42 U.S.C. § 1983,”²⁴ Justice Douglas asked, rhetorically: “What about the judge who

20. *Id.* at 996 (citation omitted). See also Potter, *supra* note 3, at 287-88 (discussing judicial opinions that refer to both Franz Kafka and the Star Chamber).

21. Sadly, however, while my study of judicial references to kangaroo courts has yielded a treasure trove of interesting information – enough for three different articles – there is one kangaroo court question for which the caselaw does not provide a satisfactory answer: Among the hundreds of opinions I read while researching kangaroo court references, not a single one explained why sham legal proceedings are conducted in kangaroo courts as opposed to, say, platypus courts, weasel courts, or dung beetle courts. The best I can offer is the following observation:

The fact is, or seems to be, that the term “kangaroo court” is not disparaging of the Australian judicial process. Rather, it appears that the term arose in the American West in the 1850’s to refer to informal tribunals that dispensed instant “justice.” The marsupial analogy may have been a sardonic comparison between the hopping gait of a kangaroo and the ad hoc and unpredictable leaps of logic and procedures of the American frontier tribunals.

Marvin J. Garbis, *Aussie Inspired Musings on Technological Issues – Of Kangaroo Courts, Tutorials & Hot Tub Cross-Examination*, 6 GREEN BAG 2D 141, 142 n.8 (2003). While the foregoing passage comes from an article in *The Green Bag* rather than a judicial opinion, its author is an Article III judge, *id.* at 141 n.1, which lends a comforting degree of authority to his musing.

22. *Higgason v. Hanks*, 134 F.3d 374 (unpublished table decision), Nos. 97-1687 & 97-1688, 1998 WL 4741, at * 3 (7th Cir. Jan. 7, 1998).

23. *Pierson v. Ray*, 386 U.S. 547 (1967).

24. *Id.* at 558-59 (Douglas, J., dissenting).

conspires with local law enforcement officers to ‘railroad’ a dissenter? What about the judge who knowingly turns a trial into a kangaroo court? Or one who intentionally flouts the Constitution in order to obtain a conviction?”²⁵

During a colloquy with two disruptive jurors in a homicide trial, the presiding trial judge in *Shelton v. State*²⁶ noted: “No[,] it is no longer possible, and should never be possible to have kangaroo courts.”²⁷ In a dissenting opinion in *Yield, Inc. v. City of Atlanta*,²⁸ Justice Hill opined: “In my view, this unpopular petitioner is being abused by the system like a speed trap victim in a kangaroo court.”²⁹ In similarly colorful language, Judge Karlton of the Eastern District of California once explained that “denying applicability of the Federal Rules of Evidence to a particular hearing does not reduce that hearing to a ‘barroom brawl nor a Kangaroo Court.’”³⁰ And in *Jacobs v. Commonwealth*,³¹ Judge Schroder dissented from a majority opinion in which his colleagues affirmed the appointment of a special judge because the defendant had not made a timely objection.³² Judge Schroder argued that “[w]ithout authority from our constitution, statutes, or rules adopted pursuant thereto, the appointment has no legal basis”³³ and went on to opine that

25. *Id.* at 566-67. In *Tenney v. Brandhove*, 341 U.S. 367 (1951), the United States Supreme Court was faced with a civil rights action brought by a witness who had refused to testify before California’s Senate Fact-Finding Committee on Un-American Activities. While the majority ruled in favor of the defendants, on grounds of legislative privilege, Justice Douglas dissented, arguing that some abuses of legislative committees may be so egregious as to require policing by the judicial branch. *Id.* at 381-82. He explained:

It is speech and debate in the legislative department which our constitutional scheme makes privileged. Included, of course, are the actions of legislative committees that are authorized to conduct hearings or make investigations so as to lay the foundation for legislative action. . . . May they depart with impunity from their legislative functions, sit as kangaroo courts, and try men for their loyalty and their political beliefs? May they substitute trial before committees for trial before juries? May they sit as a board of censors over industry, prepare their blacklists of citizens, and issue pronouncements as devastating as any bill of attainder?

No other public official has complete immunity for his actions. . . . Yet now we hold that no matter the extremes to which a legislative committee may go it is not answerable to an injured party under the civil rights legislation.

Id. at 382-83.

26. *Shelton v. State*, 183 N.W.2d 87, 90 (Wis. 1971).

27. *Id.*

28. *Yield, Inc. v. City of Atlanta*, 247 S.E.2d 764 (Ga. 1978).

29. *Id.* at 765.

30. *United States v. Smith*, 87 F.R.D. 693, 700 (E.D. Cal. 1980) (quoting *United States v. Salsedo*, 477 F. Supp. 1235, 1240 n.7 (E.D. Cal. 1979)).

31. *Jacobs v. Commonwealth*, 947 S.W.2d 416 (Ky. Ct. App. 1997).

32. *Id.* at 420.

33. *Id.*

“[g]ood intentions and competence in the person appointed special judge will not substitute for legal authority any more than recognizing a kangaroo court of the ‘Freeman’ who attempts to set up a parallel government by ignoring the constitution and the ballot box.”³⁴ Most simply, the Nebraska Supreme Court has explained that “[t]he terms ‘Kangaroo Court’ and ‘Kangaroo Judge’ are terms of contempt and utter disrespect, and their use tends to bring discredit on the judiciary.”³⁵

The insult value of the phrase “kangaroo court” is so well understood that several criminal defense attorneys have argued, usually to no avail, that their clients were incompetent to stand trial based, in part, on their clients having accused the presiding judge of running a kangaroo court.³⁶ Another enterprising defense attorney once argued,

34. *Id.*

35. *State ex rel. Neb. State Bar Ass’n v. Rhodes*, 131 N.W.2d 118, 120 (Neb. 1964).

36. For example, in *State v. Perkins*, 811 P.2d 1142 (Kan. 1991), a defendant on trial for robbery, rape, and murder claimed to have a split personality and that the crimes were committed by an alter-ego. *Id.* at 1146. At trial, Perkins suddenly made the following outburst:

THE COURT: State’s Exhibits 4, 5 and 6 will be admitted at this time. You may publish those to the jury.

MR. PERKINS: . . . blow my goddamn brains out. Don’t stand a fuckin’ chance, man. I didn’t choke that damn woman. I didn’t rape that damn woman. I don’t care what the hell you do with me, just give me a fuckin’ gun, I’ll blow my fuckin’ head off. You guys got the wrong man. Judge, you denied everything I had. You denied my constitutional right for a new counselor. For no reason. You violated my right. I’ve got the rights as anybody else. I’m just a hitchhiker. I didn’t kill that woman. I seen the person that did it. But you people don’t want to fuckin’ believe me. I am what I am. I’m a blooming’ hitchhiker. That DA man had a pleasure. He knows he’s got an easy verdict, to find me guilty. People, I don’t really care. My ass is six feet under I go back to that jail, I guarantee it. I tried it once, I tried it twice. This ain’t right. This is not right. I passed into this town and this was what I get. A Kangaroo court. You’re worse than Louisiana. Send me back to jail, man. Send me back to jail. You violated my rights, man. I don’t care no more. . . .

After this, in chambers, the defense moved for a mistrial. Then, after the lunch break, the defendant refused to come to the courtroom and was crying and shaking. An in-chambers conference was held. The trial court expressed the opinion that Perkins was acting. The trial court then warned Perkins that he had to behave in court and Perkins asked to be taken back to jail in Colby and to let the trial proceed without him. This was done and the trial proceeded in his absence. The next morning, the defense, in an in-chambers conference, again moved for a mistrial and also moved for another competency evaluation. The trial court denied both motions, finding that Perkins was putting on an act.

The final part of the Larned State Hospital report (prepared in advance of trial) provides: “It was noted that should Mr. Perkins become behaviorally or communicatively disruptive or uncooperative either with his attorney or during criminal trial proceedings, it would be volitional in nature and not the result of a major mental illness.”

Based on the record before us, the trial court did not abuse its discretion in not ordering another competency hearing or in granting a mistrial.

Id. at 1148-49.

In *State v. Marshall*, 472 N.E.2d 1139 (Ohio Ct. App. 1984), the court of appeals affirmed the trial court's decision not to order additional inquiry into the defendant's competency to stand trial despite:

various outbursts including an accusation that the trial judge and prosecuting attorney were selling drugs; repeated references to the trial as a "kangaroo court"; reference to trial counsel as "this little gay-guy sitting here"; and defendant's statement on the stand that he had been raped by the sheriffs and corrections officers while in jail.

Id. at 1142. See also *State v. Arnold*, No. 03C01-9902-CR-00081, 2000 WL 14691, at *3 (Tenn. Crim. App. Jan. 11, 2000) (noting that "[i]n his *pro se* motions, the defendant refers once to [his] trial as a 'kangaroo trial' and makes accusations of inaction and malpractice against his attorneys," but rejecting defendant's claim "that the record contains 'multiple, voluminous [,] virtually irrational, accusatory and vituperative comments by the [defendant], which were available to the trial court' and which should have raised a doubt about the defendant's competency," explaining that its "review of [the defendant's] motions reveals nothing that rises to a level of caustic and illogical accusation that would indicate incompetence to the trial court").

In another case from Ohio, *State v. Cowans*, 717 N.E.2d 298 (Ohio 1999), the court ruled that a criminal defendant, during the penalty phase of his trial for murder, and who "[i]n disrespectful and sometimes foul language . . . protested that he regarded the court as a 'kangaroo court' and did not want to be in the courthouse at all," *id.* at 312, did not behave in a way that "inherently raise[d] questions concerning his capacity to understand the difference between life and death, to fully comprehend the ramifications of his decision, or to reason logically," *id.* at 313, and, thus, affirmed the trial judge's finding that "[w]hile disruptive, the Defendant evidenced no mental instability but rather acted out his pique," *id.* at 312. In a dissenting opinion, Justice Moyer provided a detailed description of the defendant's behavior at trial. *Id.* at 317-18.

A result similar to that in *Cowans* was reached in *Sweezy v. Garrison*, 554 F. Supp. 481 (W.D.N.C. 1982), a habeas corpus proceeding arising out of a trial in which the defendant told the court, "Man, I don't like no Kangaroo Court," *id.* at 485, and "[t]his is a Kangaroo Court," *id.*, and was excluded from the courtroom on several occasions.

A review of the foregoing excerpts from the trial transcript reveals that petitioner stated he felt he was being railroaded, which is probably a frequent feeling of persons charged with crime. In light of this feeling, it is not surprising that he was abrasive and brusque to the judge, as shown by the episodes of refusal to speak to the court; a request that his attorneys be replaced; a request for black lawyers; an assertion that the prosecutrix was lying; a reference to the judge as a hypocrite; snubs by turning his back to the judge on two occasions; references to the proceeding as a "Kangaroo Court;" a refusal to stand; a sullenness when asked if he desired to testify; a refusal to be cross-examined; and cursing during the rendition of the verdict. . . . The same conclusion that petitioner was essentially an aggressive, hostile person rather than an incompetent one is shown by the generally rude, sometimes demanding, sometimes condescending, and sometimes sarcastic tenor of his remarks toward counsel, the court, and the witnesses. The following serve to illustrate this point: "Take them two women off, just take them two women off . . .," "It don't make any difference what I said . . . I whispered when I come in," "I know my constitutional rights, my right to speak for myself," "Don't put that man on the stand," "You can call him off the stand now," "How can she say - that women lying," "What are you trying to do, boy? I don't go for that damn shit," "I didn't tell him nothing," "I don't think I have to testify on my own behalf, the facts speak for itself," "I don't have to answer that." In light of the above perspective on the events of which petitioner complains, it simply does not appear that incompetence was a problem from which petitioner suffered at trial.

Id. at 491-92. Finally, on at least two occasions, judges have mentioned litigant accusations of kangaroo-ism in opinions dissenting from decisions such as the ones discussed above. See, e.g.,

without success, that “the trial court improperly sentenced [his client] based upon passion resulting from [his client’s] statements contained in a presentence investigation report.”³⁷ His client had claimed, in a statement quoted by the trial judge just prior to pronouncing sentence, that “the only reason he had been convicted . . . was because Crawford County was a ‘kangaroo court’ and the judge had mishandled the courtroom.”³⁸ Kangaroo courts are apparently so beyond the pale that while the defendant deputy sheriff in *Colson v. Lloyd’s of London*³⁹ was able to insure himself against “loss by reason of liability imposed by law . . . by reason of any false arrest, assault and battery (as herein defined), false imprisonment, or malicious prosecution,”⁴⁰ his policy explicitly “exclude[d] . . . claims for libel or slander or the existence of a ‘kangaroo court’ or claims for invasion of property rights.”⁴¹

In *United States v. Gilley*,⁴² the U.S. Court of Appeals for the Armed Forces held that David Gilley “was denied effective assistance of counsel during the post-trial phase of his court martial”⁴³ in part because his counsel submitted to the court a letter from Gilley’s father, characterized by the court as a “vitriolic attack on the Air Force and its judicial system.”⁴⁴ Among other things, Gilley’s father said of the court martial that “[t]he whole damned thing was a kangaroo court.”⁴⁵ If a

United States ex rel. Phelan v. Brierley, 453 F.2d 73, 95 (3d Cir. 1971) (Gibbons, J., dissenting), *vacated in part*, 408 U.S. 939 (1972); *Dunn v. Commonwealth*, 573 S.W.2d 651, 655 (Ky. 1978) (Lukowsky, J., dissenting).

37. *State v. Rittenhour*, 678 N.E.2d 293, 296 (Ohio Ct. App. 1996).

38. *Id.*

39. *Colson v. Lloyd’s of London*, 435 S.W.2d 42 (Mo. Ct. App. 1968).

40. *Id.* at 43-44.

41. *Id.* at 44.

42. *United States v. Gilley*, 56 M.J. 113 (C.A.A.F. 2001).

43. *Id.* at 125.

44. *Id.* at 119.

45. *Id.* The accusation of kangaroo-ism was, however, one of the milder parts of the letter. The elder Gilley characterized his son’s wife as “a lying tramp whore who wouldn’t know a decent person if they kicked her in the ass and give [sic] her a new set of brains, which she doesn’t have.” *Id.* And he told the members of the court-martial,

I hope you low-lifed [sic] bastards along with that lying no good whore and her bastard kids, that lied about David, enjoy your freedom now, and burn in hell later. . . . I think when the military or the government does something like this their [sic] nothing but a chicken-shit bunch that should have to face the firing squad because they don’t know what justice is. Those dumb ass Air Force judges, lawyers, and jurors all thrown together wouldn’t make one good civilian lawyer. In civilian life they laugh at the dumb asses. I wish I was a rich man, I’d shove all this up their ass.

Id. While it is impossible to say with certainty, it seems likely that if Gilley’s father had limited himself to the kangaroo court comment, his son’s attorney would not have been found ineffective for submitting the letter to the court.

lawyer is considered ineffective for giving a judge a document including his client's father's accusation of kangaroo-ism, then kangaroo-ism must necessarily be a bad thing, or at least a thing most judges would prefer not to be accused of. Some judges even object to allowing accusations of kangaroo-ism to remain part of the public record. In *Skolnick v. Hallett*,⁴⁶ "[p]laintiff's complaint charge[d] that defendants [including Judge Hallett] conducted a 'kangaroo court' with him as a victim."⁴⁷ The district court dismissed the complaint for failure to state a claim on which relief could be granted,⁴⁸ and also "found and held the complaint was replete with scurrilous, offensive and objectionable allegations principally leveled at Judge Hallett, and should not be permitted to remain of record."⁴⁹ The court of appeals affirmed.⁵⁰

In sum, there can be little doubt that kangaroo-ism, in all its various forms, is a universally disfavored paradigm for decision-making.

A. Judicial Observations

Judge Easterbrook of the Seventh Circuit, in rejecting a habeas petitioner's expansive reading of Circuit Rule 10, once explained: "We do not doubt the value of protecting the innocent. That is the principal reason why we have an elaborate criminal procedure rather than kangaroo courts."⁵¹ As it turns out, the term "kangaroo court" has not been applied to just one form of adjudicative malfeasance. In this section I explore the various categories of malfunctioning adjudication that have earned judicial declarations of kangaroo-ism.

1. Coercion

One particular kind of kangaroo court is that created by the coercion of confessions from criminal defendants. Justice Douglas

46. *Skolnick v. Hallett*, 350 F.2d 861 (7th Cir. 1965).

47. *Id.* at 861.

48. *Id.*

49. *Id.* In *Newcomer v. Huey*, 18 Pa. D. & C.2d 202 (Ct. Com. Pl., Fayette County 1959), the defendant filed a motion requesting a change of venue in which he "expresse[d] his opinion 'that this Court is of the nature of a Kangaroo Court, having no respect for the Law whatsoever,' and that the court is 'masterminded' by a 'politician' whose attorney represents the [plaintiffs] and concerning whom [defendant] has also made uncomplimentary remarks." *Id.* at 205. The plaintiffs moved "to strike the defendant's paper writing as impertinent and scandalous." *Id.* While determining that the defendant's pleading "might well, for the most part, be stricken upon that ground," *id.*, the court, nonetheless, "deem[ed] it better, in order to make clear the unfounded nature of [the defendant's] complaints of unfair treatment, to consider the merits of the application." *Id.*

50. *Skolnick*, 350 F.2d at 861.

51. *Branion v. Gramly*, 855 F.2d 1256, 1261 (7th Cir. 1988).

explained, in an appeal arising out of a criminal prosecution under 18 U.S.C. § 242:

It is plain as a pikestaff that the present confessions would not be allowed in evidence whatever the school of thought concerning the scope and meaning of the Due Process Clause. This is the classic use of force to make a man testify against himself. The result is as plain as if the rack, the wheel, and the thumb-screw – the ancient methods of securing evidence by torture – were used to compel the confession. . . . [W]here police take matters into their own hands, seize victims, beat and pound them until they confess, there cannot be the slightest doubt that the police have deprived the victim of a right under the Constitution. It is the right of the accused to be tried by a legally constituted court, not by a kangaroo court.⁵²

Justice Douglas expanded upon the concept of kangaroo-ism by coercion in his concurring opinion in *Spano v. New York*,⁵³ a case that involved the interrogation, without counsel, of a man who was “not . . . a suspect but . . . a man who [had] been formally charged with a crime.”⁵⁴ In the words of Justice Douglas:

This is a case of an accused, who is scheduled to be tried by a judge and jury, being tried in a preliminary way by the police. This is a kangaroo court procedure whereby the police produce the vital evidence in the form of a confession which is useful or necessary to obtain a conviction. They in effect deny him effective representation by counsel. This seems to me to be a flagrant violation of the principle . . . that the right of counsel extends to the preparation for trial, as well as to the trial itself.⁵⁵

In a similar vein, in a concurring opinion in *Brodkowicz v. State*,⁵⁶ in which the Missouri Supreme Court affirmed the denial of a prisoner’s motion for post-conviction relief on grounds that the defendant’s guilty plea was not coerced, Judge Seiler began by stating:

I know of no warrant for the jailers to hold kangaroo court and decide the punishment for assault and attempted jail break, and I am skeptical about a guilty plea taken from a defendant who concededly has been

52. *Williams v. United States*, 341 U.S. 97, 101-02 (1951) (citations omitted). *See also* *Pool v. United States*, 260 F.2d 57, 63 (9th Cir. 1958) (quoting *Williams* and rejecting defendant police officer’s argument that his beating of suspects was not actionable because beating did not lead to confession).

53. *Spano v. New York*, 360 U.S. 315 (1959).

54. *Id.* at 324-25.

55. *Id.* at 325 (citing *Powell v. Alabama*, 287 U.S. 45 (1932)).

56. *Brodkowicz v. State*, 474 S.W.2d 822 (Mo. 1971).

whipped with a leather belt while forced to spread-eagle himself against the wall and kept naked in a “dry cell” over a period of weeks in the dead of winter, because such attitude on the part of the jailers and treatment at their hands has an element or quality of coercion fixed in its very nature.⁵⁷

At least in *Brodkowicz*, the kangaroo court was run by jailers rather than the inmates.

2. Lack of Jurisdiction

In a dissenting opinion that quoted Justice Douglas’s statement in *Williams v. United States* in an entirely different context, Justice Pro Tem Redmann of the Louisiana Supreme Court adopted the following definition of a kangaroo court:

An irresponsible, unauthorized, or irregular tribunal, or one in which, although conducted under some authorization, the principles of law and justice are disregarded or perverted; as, [a] A mock court held by vagabonds or by prisoners in a jail. [b] An irregularly conducted minor court in a frontier or unsettled district. [c] Formerly, one of a number of courts in Ohio with county-wide jurisdiction, whose judge was paid only by fines and costs imposed by him upon conviction of accused persons.⁵⁸

57. *Id.* at 829. Despite his misgivings over the circumstances surrounding the defendant’s guilty plea, Judge Seiler deferred the judgment of his colleagues “who, needless to say, also disapprove of what went on in the Green County jail [but] do not believe it can be said on the record before [them] that the court clearly erred in holding the jail treatment had no effect on the guilty plea.” *Id.* at 830.

58. *State v. Petterway*, 403 So. 2d 1157, 1161-62 n.1 (La. 1981) (Redmann, J., dissenting) (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY (2d. ed)). As one who was raised in Ohio, I was somewhat disturbed by the foregoing dictionary definition. Then I read Judge Duffy’s opinion in *Stift v. Lynch*, 267 F.2d 237 (7th Cir. 1959), which included the following lines:

We must consider whether a justice of the peace is a judicial officer to which the common law immunity will apply.

A case closely in point is *Cuiksa v. City of Mansfield*, 250 F.2d 700 [(6th Cir. 1957)]. That case involved speed traps and alleged ‘Kangaroo Courts’ in the state of Ohio. While the court admits that the allegations, if true, present a sorry picture of local courts, it adheres to its earlier decision in *Kenney v. Fox*, 232 F.2d 288 [(6th Cir. 1956)], and holds that common law judicial immunity must necessarily extend even to mayors’ courts in small villages.

Id. at 240. And as if *Stift* were not bad enough, I took a look at *In re Von Uehn*, 27 Ohio N.P. (n.s.) 167, 1928 WL 3321 (Ohio Ct. Com. Pl. July 9, 1928), which arose in the following factual context:

The relator is being held in jail on a commitment by the mayor of the village of Harrison in default of the payment of a fine of \$500 on a liquor charge .

Relator was arrested without warrant by a state prohibition officer at a camp on the Whitewater River, in Hamilton county, seven or eight miles from the corporate limits of

The issue in *Petterway* was the legitimacy of a Louisiana Supreme Court policy under which criminal appeals were heard, for several years, by panels composed of four Supreme Court justices and three judges of the Court of Appeals.⁵⁹ In Justice Redmann's view, it was his own presence that made the Supreme Court panel on which he sat a kangaroo court, for want of lawful jurisdiction.⁶⁰

In *Brown v. United States*,⁶¹ Judge Newcomer offered the following, nearly poetic, discourse on jurisdiction and kangaroo-ism:

Our ideas of jurisdiction and its attributes have been formed over a thousand years of legal evolution. They serve an immensely important role in describing to us the ways in which power is limited. Their role is so important that they should be tampered with only for the most cogent reasons, for they are like a living organism: It is difficult to predict all the consequences that even a small change in the traditional incidents of jurisdiction may have, or its effect on the vitality of those doctrines in protecting each of us from the arrogance of tyrannical power.

Harrison, and taken by the officer to the mayor of Harrison

What probably happened is that the mayor and state prohibition officer sat down cheek by jowl, conspired and soft pedalled relator into jail.

Id. at *1. Legally, the court characterized the circumstances as follows:

[T]here are several grounds for the discharge of the relator, if we are to regard as of binding force fundamental law and principles of American government, the disregard of which as relates to the minor courts of the state in certain legislative policies, practices and court decisions leaves these courts subject to subsidization by individuals for selfish ends and by dominating reform groups in the interest of enforcing their particular reforms by penal action.

. . . This group [of citizens promoting the enforcement of prohibition] actually secured legislation whereby the minor courts of this state were fixed for convictions in liquor cases and for seven or eight years, through the organization of such of the minor courts as it could lay hold of into liquor and kangaroo courts subjected the people to trials involving their liberty and property without due process of law.

The court's first ground for discharging the relator is that the mayor of Harrison, as well as all minor courts of this state similarly situated are without final jurisdiction in state liquor cases, according to the Supreme Court of the United States in the *Tumey* case.

. . . The mayor cannot revest himself with jurisdiction by merely waiving fees, nor can the defendant revest the court with jurisdiction it lost by the *Tumey* decision by a plea of guilty.

Id. at *2. (citing *Tumey v. State*, Ohio N.P. (n.s.) 580, 1925 WL 2525 (Ohio Ct. Com. Pl. Oct. 1925)). Perhaps the outback is closer to home than I ever realized.

59. *Petterway*, 403 So. 2d at 1162.

60. *Id.*

61. *Brown v. United States*, 365 F. Supp. 328 (E.D. Pa. 1973) (granting defendants' motion for summary judgment in mandamus action in which plaintiffs, military personnel tried by special courts-martial, sought to have the district court order the Secretary of the Navy to apply ruling of the Court of Military Appeals retroactively).

Still, it must be admitted that sometimes the rigidity of traditional concepts of jurisdiction can have extreme effects which do not seem warranted. Jurisdiction traditionally either exists or does not exist. The common law made no distinction between a kangaroo court, and a court whose judge had by mistake been issued the improper commission. Both tribunals lacked jurisdiction equally. The proceedings of both tribunals were totally void. The common law looked not to the reasonableness or unreasonableness of the decisions which had led to the exercise of power, but to its metaphysical presence or absence.

This Draconian conceptual approach gives maximum protection against the improper assumption and exercise of power. No circumstance can ratify its exercise, no appearance of reasonable mistake can vindicate its assumption, and consequently there are no rewards to be gained and held by its improper exercise. And this approach was well suited to the conditions of most of our legal history.⁶²

In *Lambert v. Blackwell*,⁶³ the Court of Appeals for the Third Circuit explained that an Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”) claim “must be adjudicated by a court of competent jurisdiction, as opposed to a kangaroo court or an administrative body masquerading as a court.”⁶⁴ And according to Judge Easterbrook, in an opinion in a habeas corpus case,

Shortly after Congress extended federal power to state prisoners, the Supreme Court began pouring more into the vessel of “jurisdiction.” In 1915 the Court equated a kangaroo court with lack of jurisdiction and by 1942 the distinction between “no jurisdiction” and “grievous error” had eroded so substantially that the Court discarded the limitation.⁶⁵

Acting without jurisdiction is one of the most common behaviors covered by the concept of kangaroo-ism.⁶⁶

62. *Id.* at 345.

63. *Lambert v. Blackwell*, 387 F.3d 210 (3d Cir. 2004).

64. *Id.* at 238.

65. *Brecht v. Abrahamson*, 944 F.2d 1363, 1372 (7th Cir. 1991) (citations omitted).

66. On the other hand, when jurisdiction is proper, a judge can escape liability, at least under 42 U.S.C. § 1983, for the operation of a kangaroo court. *See Weiland v. Stillo*, No. 88 C 10391 1989 WL 165058 at *1 (N.D. Ill. Dec. 29, 1989) (stating “[t]hus, even accepting as true Weiland’s allegations of conspiracy, corruption, and a ‘kangaroo court,’ there are no facts alleged showing a clear absence of jurisdiction and the complaint [alleging civil rights violations] must be dismissed with respect to Stillo and Campion [two judges]”).

3. Other Defects

While fewer courts have espoused the following theories, there is no shortage of ways in which a tribunal can exhibit kangaroo-ism. In *Rideau v. State of Louisiana*,⁶⁷ Justice Potter Stewart, writing for a divided court, characterized the extensive pre-trial publicity surrounding a criminal prosecution as creating a “kangaroo court proceeding[] . . . that involved a . . . real deprivation of due process of law.”⁶⁸ And

67. *Rideau v. Louisiana*, 373 U.S. 723 (1963).

68. *Id.* at 726. In that case, the defendant was arrested, and the following morning, his twenty-minute “interview” with the county sheriff was filmed. *Id.* at 724. In the interview, the defendant admitted his guilt. *Id.* Over the course of the next three days, the interview was broadcast to television audiences totaling 97,000 viewers, in a county with a population of approximately 150,000. *Id.* In an opinion reversing the defendant’s conviction, Justice Stewart explained:

Under our Constitution’s guarantee of due process, a person accused of committing a crime is vouchsafed basic minimal rights. Among these are the right to counsel, the right not to plead guilty, and the right to be tried in a courtroom presided over by a judge. Yet in this case the people of Calcasieu Parish saw and heard, not once but three times, a “trial” of *Rideau* in a jail, presided over by a sheriff, where there was no lawyer to advise *Rideau* of his right to stand mute.

Id. at 726-727.

Justice Stewart’s kangaroo court language in *Rideau* is often cited, but usually in opinions holding that a defendant’s trial has not been tainted by publicity. *See, e.g., United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998). In *McVeigh*, the court of appeals explained:

The circumstances that led the Court to presume prejudice in *Sheppard* [*v. Maxwell*], *Estes* [*v. Texas*], and *Rideau* simply do not exist in this case. First, *McVeigh*’s attempt to show presumed prejudice is substantially weakened by the fact that, unlike the defendants in *Sheppard* and *Rideau*, he did receive a change in venue, removing his trial from the eye of the emotional storm in Oklahoma to the calmer metropolitan climate of Denver. Second, mere television images of the defendant in prison garb being led through an angry crowd do not come close to the type of inflammatory publicity required to reach the disruptive force seen in *Sheppard*, *Estes*, and *Rideau*.

Id. at 1182. In *Burgess v. State*, 827 So. 2d 134 (Ala. Crim. App. 1998), the court of appeals distinguished *Rideau* in the following way:

[T]he confession in *Rideau* was described by an indignant United States Supreme Court as a televised “kangaroo court” presided over by the sheriff, in which the accused, flanked by two state troopers, confessed in response to the sheriff’s leading questions. Unlike *Rideau*, there is no evidence in this case that the admission to reporters was contrived by law enforcement or that it resulted from a conspiracy between the police and the media. The videotape of *Burgess*’s admission . . . shows a sober, relaxed *Burgess* walking across the courthouse parking lot, escorted by two police investigators, as he responded in a composed, thoughtful, and articulate manner to questions posed by news reporters.

Id. at 160. In *State v. Coty*, 229 A.2d 205 (Me. 1967), the Maine Supreme Court reached a similar result:

Rideau seems to us readily distinguishable upon its facts. It is evident that the justice below took a very serious view, as do we, of the television “documentary” which furnished the principal basis of the respondents’ demand for change of venue. He took every proper precaution to make certain that no adverse effects of this program entered

Justice Harlan stated, in his concurring opinion in *California v. Green*,⁶⁹ that “[d]ue process does not permit a conviction based on no evidence, or on evidence so unreliable and untrustworthy that it may be said that the accused had been tried by a kangaroo court.”⁷⁰

In *Curry v. Pulliam*,⁷¹ an elementary-school custodian challenged both the fact of his termination and the manner in which it was carried out. In her opinion, Judge Barker explained: “Mr. Curry argues that [his termination] hearing was, in effect, a kangaroo court because the outcome was predetermined. Manifestly, if a public employer holds a sham hearing, the terminated employee has not been accorded due process and his claim should survive summary judgment.”⁷² Regarding what a sham hearing might look like, in a prisoner’s challenge to the procedures used in a disciplinary proceeding, Magistrate Judge Marbry opined that the defendant’s reading of *Superintendent v. Hill*⁷³ “would turn prison disciplinary boards into no more than kangaroo courts: where

the jury room. He could properly consider that the “documentary” had been shown but once and that it did not transmit the voices or conversation of any participants. He could take account of the fact that it was viewed by a limited audience at a point in time months removed from the date of trial. The evidence supported a finding that at the time of trial whatever effect it may have had originally had been greatly diluted and diminished and the memory of it, even on the part of those who had once seen it, had grown dim. It did not, of course, contain the admissions or confessions deemed so vital in *Rideau*. Finally, and most importantly, the presiding justice permitted the respondents to challenge for cause any prospective juror who had seen the entire film or any objectionable parts of it. . . . [T]he safeguards which were seasonably employed by the court below were adequate to overcome any residual effects of the “documentary” and insure the respondents a fair trial.

Id. at 213. See also *Tunstall v. Hopkins*, 126 F. Supp. 2d 1196, 1206-07 (N.D. Iowa 2000); *United States v. Wright*, No. 401CR3040, 2002 WL 842208, at *5 (D. Neb. May 3, 2002) (stating “[a]lthough the media publicized quotes taken from interviews with the defendant and certain of his family members in this case, the news coverage here is not at all similar to the ‘kangaroo court proceedings’ described in *Rideau*”); *State v. Eastlack*, 883 P.2d 999, 1009 (Ariz. 1994).

In *People v. Frogge*, 75 Cal. Rptr. 517 (Cal. Ct. App. 1969), the California Court of Appeal explicated the logic of a failed *Rideau* claim:

The pretrial publicity was not injected into the trial by any particular act or fact, and defendants can do no more than point objectively to the pretrial publicity and to the jury’s verdict. But this does not demonstrate prejudice; it is, in substance, an argument that the evidence does not support the verdict and, a fortiori, that the verdict resulted from the influence of prejudicial pretrial publicity.

Id. at 521.

69. *California v. Green*, 399 U.S. 149 (1970).

70. *Id.* at 186-87.

71. *Curry v. Pulliam*, 234 F. Supp. 2d 921 (S.D. Ind. 2001).

72. *Id.* at 928.

73. *Superintendent v. Hill*, 472 U.S. 445, 447 (1985) (determining that a court reviewing the decision of a prison disciplinary board should rule that the prisoner has received due process if the disciplinary board’s decision is based on “some evidence”).

evidence is placed on an unbalanced scale, with incriminating evidence being given full weight and exculpatory evidence given no weight.”⁷⁴ In a case in which a police chief challenged his termination, Judge Blue of the Connecticut Superior Court suggested setting aside the result of an administrative hearing “[i]f it appears from the record that [the] hearing was essentially a kangaroo court.”⁷⁵ Judge Blue cited *Staton v. Mayes*⁷⁶ as support for disregarding the outcome of an administrative hearing “where the administrative hearings at issue were summary or nonexistent and it was clear from the record that there was a determined purpose to reach a predetermined end.”⁷⁷

In a dissenting opinion in a case that involved public access to termination-of-parental-rights proceedings, Justice Anstead wrote: “Indeed, some contend that without openness, even traditional juvenile proceedings ‘have the potential to become “little more than kangaroo courts where judges rubber-stamp agency requests.”’”⁷⁸ Thus, while too much publicity can create a kangaroo court,⁷⁹ kangaroo-ism may also result from too little public scrutiny of judicial decision making.⁸⁰

*Cale v. Johnson*⁸¹ was a *Bivins* action that resulted when a prison official planted contraband on a prisoner in order to retaliate against him.⁸² In an opinion concurring with the majority’s decision to reverse the district court’s grant of summary judgment in favor of all defendants, Judge Nelson opined:

For the government knowingly to railroad someone into confinement by planting false evidence on his person is directly comparable, by my lights, to railroading a person into confinement through a kangaroo court proceeding in which the accused has no opportunity to be heard. Both procedures strike me as the very antithesis of “due process” in the

74. *Williams v. Wilkinson*, 132 F. Supp. 2d 601, 611 (S.D. Ohio 2001) (granting in part prisoner’s request for injunctive relief and ordering prison to implement policy allowing prisoners brought before disciplinary board to call witnesses).

75. *Clisham v. Bd. Of Police Comm’rs of the Bourough of Naugatuck*, No. 090211, 1991 WL 158159, at *7 (Conn. Super. Ct. Aug. 12, 1991), *rev’d on other grounds*, 613 A.2d 254 (Conn. 1992).

76. *Staton v. Mayes*, 552 F.2d 908 (10th Cir. 1977).

77. *Clisham*, 1991 WL 158159, at *7 (internal quotation marks omitted).

78. *Natural Parents of J.B. v. Fla. Dep’t of Children & Family Servs.*, 780 So. 2d 6, 14-15 (Fla. 2001) (Anstead, J., dissenting) (quoting Jan. L. Trasen, *Privacy v. Public Access to Juvenile Court Proceedings: Do Closed Hearings Protect the Child or the System?*, 15 B.C. THIRD WORLD L.J. 359, 362 (quoting Sandy Bauers, *Fighting to Lift the Veil on Child Welfare*, PHILADELPHIA INQUIRER, Aug. 15, 1993, at E1)).

79. *Rideau v. Louisiana*, 373 U.S. 723, 726-27 (1963).

80. *Natural Parents of J.B.*, 780 So. 2d at 14-15.

81. *Cale v. Johnson*, 861 F.2d 943 (6th Cir. 1988).

82. *Id.* at 944.

true sense of that term.⁸³

And in an opinion denying injunctive relief to students who had been suspended from their university, after receiving a disciplinary hearing, Judge Carswell noted that “[t]hese hearings were not precipitously or secretly convened ‘Kangaroo’ courts stripping one of a fair and reasonable chance to give account of his version of the case.”⁸⁴

In *Garland v. State*,⁸⁵ Justice Marshall of the Georgia Supreme Court provided a good thumbnail definition of kangaroo-ism. In that case, the majority reversed the trial court’s conviction of an attorney for criminal contempt, based upon statements he had given in an interview with a newspaper reporter.⁸⁶ Justice Marshall dissented:

I cannot conceive of more contemptuous statements, short of obscenity, than those made by the appellant: “That the trial court had conducted ‘a sham proceeding’; that the trial court’s ‘conducting an inquisition was unlawful and improper’; that ‘[t]his is a political effort to turn a tragedy into political hay for’ the trial judge and that ‘it stinks’; . . .” Paraphrased, appellant accused the judge of running a “Kangaroo court,” acting as an inquisitor, using the court as a political vehicle, and, in sum, conducting an operation that smells to high heaven. Such statements cannot fail to obstruct justice in the South Georgia Circuit and the State of Georgia.

Justice Marshall’s dissent leaves little doubt as to his definition of kangaroo-ism.

83. *Id.* at 953-54.

84. *Due v. Fla. Agric. & Mech. Univ.*, 233 F. Supp. 396, 403 (N.D. Fla. 1963). Judge Carswell elaborated:

There was notice to each of these plaintiffs, the charge was made explicit, and each was afforded full opportunity to be heard, and, in fact, was heard to the point where each said he had nothing more to say.

A fair reading of the Dixon case shows that it is not necessary to due process requirements that a full scale judicial trial be conducted by a university disciplinary committee with qualified attorneys either present or formally waived as in a felonious charge under the criminal law. There need be no stenographic or mechanical recording of the proceedings.

. . . The touchstones in this area are fairness and reasonableness.

. . .

There are no magic words of incantation which will guarantee this, but, by the same token, the difficulty cannot be the excuse for not making every effort to see that fairness is accomplished.

This is the standard by which this case must be decided.

Id.

85. *Garland v. State*, 325 S.E.2d 131 (Ga. 1985).

86. *Id.* at 134.

Finally, however, there are some irregularities in trial procedure that, while unusual, do not qualify as kangaroo-ism. For example, in *People v. Partee*,⁸⁷ a criminal defendant was convicted in absentia after failing to return to court after the State rested.⁸⁸ In rejecting the State's argument that the appellate court lacked jurisdiction over the defendant's appeal because the defendant never moved the trial court for a hearing to determine whether his absence from court was willful,⁸⁹ the Illinois Supreme Court explained: "Section 115-4.1 [of the Illinois Code of Criminal Procedure] provides for a trial *in absentia*. It does not create a kangaroo court."⁹⁰ And moving beyond the realm of trial procedure, Justice Musmanno of the Pennsylvania Supreme Court once wrote, in the majority opinion in a fascinating case involving courts that had run amok and collided with the executive and legislative branches of government, that "[i]f Council decides to pay less or more salary for a judge's law clerk, it is not constituting itself a kangaroo court."⁹¹

4. Hypothetical Kangaroo-ism

Not only have judges stated directly the characteristics that make a court marsupial, others have defined kangaroo-ism hypothetically, as in "if X, Y, or Z took place, then the decision-maker who did those things was running a kangaroo court." In *Austin v. American Association of Neurological Surgeons*,⁹² in which Donald Austin sued the Association for taking disciplinary action against him, Judge Bucklo granted the Association's motion for summary judgment, noting in his order:

The AANS proceedings in Dr. Austin's case more than met these standards [i.e., the requirements for a fair hearing]. He does not

87. *People v. Partee*, 530 N.E.2d 460 (Ill. 1988).

88. *Id.* at 461.

89. *Id.* at 462-63.

90. *Id.* at 463.

91. *Smith v. Gallagher*, 185 A.2d 135, 159 (Pa. 1962), *overruled by In re Biester*, 409 A.2d 848 (Pa. 1962). As a law clerk myself, I might well be inclined to use terms a bit more pointed than "kangaroo court" to describe a legislative body that decided to pay less salary for a judge's law clerk, but that is neither here nor there.

What is both here and there, however, is Justice Musmanno's reputation as a judicial wordsmith. See Parker B. Potter, Jr., *Surveying the Serbonian Bog: A Brief History of a Judicial Metaphor*, 28 TUL. MAR. L. J. 519, nn. 109, 148 & 177 (2004) (discussing Justice Musmanno's references to the sargasso sea, twisting the law by the tail, and painting the lily); Parker B. Potter, Jr., *A Good Piece of Paper Spoiled: An Eighteen-Hole Round-Up of American Hole-in-One Jurisprudence*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 135, 180-81 (2004) (quoting Justice Musmanno's zesty dissent in *Taylor v. Churchill Valley Country Club*, 228 A.2d 768 (Pa. 1967)).

92. *Austin v. Am. Ass'n of Neurological Surgeons*, 120 F. Supp. 2d 1151 (N.D. Ill. 2000).

dispute that he received written notice of the charges, with prior disclosure of all documents considered in the case, or that he was allowed to present his arguments before an AANS Committee and to cross-examine witnesses, or that he received two levels of appeal and was allowed to have representation by counsel at all stages of the proceedings. Unless the whole thing was a sham conducted in bad faith, a kangaroo court run with the cynical purpose of harming him while pretending to be fair, Dr. Austin received as much due process as anyone might hope for.⁹³

In a special concurrence in *McKinney v. Pate*,⁹⁴ Judge Tjoflat stated: “Assuming McKinney’s allegations to be true, he is the victim of an illegal kangaroo court”⁹⁵ that presided over “a proceeding [that] was admittedly random and unauthorized.”⁹⁶ McKinney’s principal allegation was that he had been discharged from his position as the Osceola County (Florida) Building Official after a hearing “held before the [Osceola] Board [of County Commissioners] itself, instead of the Personnel Committee as provided for by the county’s policies.”⁹⁷

In a per curiam opinion reversing the district court’s dismissal of a prisoner civil rights action, the Court of Appeals for the Sixth Circuit explained, again in a hypothetical manner:

Plaintiff’s complaint alleges that in retaliation for the exercise of his *right* to file grievances, he was wrongfully retaliated against. Allegedly, the form of retaliation not only involved the filing of trumped-up misconduct charges but also their resolution in a kangaroo court held without authorization by the officers who wrote the misconduct violations. This certainly states a colorable legal claim....⁹⁸

In a dissenting opinion in *In re Soto*,⁹⁹ Justice Dye agreed with the argument advanced by discharged employees at an arbitration

93. *Id.* at 1154.

94. *McKinney v. Pate*, 85 F.2d 1502 (11th Cir. 1993), *vacated en banc*, 20 F.3d 1550 (11th Cir. 1994).

95. *Id.* at 1514.

96. *Id.* at 1514-15.

97. *Id.* at 1503-04. McKinney testified that one of the commissioners twice asked for his resignation, and that when he told the commissioner that there was no reason to fire him, the commissioner replied: “I don’t have anything. But I’ll get something.” *Id.* McKinney also produced “substantial evidence” to support his claim that his termination was pretextual. *Id.* *McKinney* was ultimately vacated, and Judge Tjoflat’s special concurrence became, in essence, the majority opinion of the en banc panel. *McKinney v. Pate*, 994 F.2d 772 (11th Cir. 1993), *reheard en banc*, 20 F.3d 1550 (11th Cir. 1994).

98. *Marcilis v. Bertucci*, 985 F.2d 560 (unpublished table decision), No. 92-1176, 1993 WL 20534, at *1 (6th Cir. Feb. 1, 1993).

99. *In re Soto*, 165 N.E.2d 855 (N.Y. 1960) (Dye, J., dissenting).

proceeding, that if they were forced to proceed at an arbitration hearing represented by a union lawyer “who [had once previously] appeared as of counsel to the attorneys for the employer in an injunction proceeding to enjoin [them] from picketing,”¹⁰⁰ they “would be in effect defendants in a kangaroo court.”¹⁰¹ Finally, in an order denying a criminal defendant’s motion to apply the Federal Rules of Evidence to a hearing on a motion to continue his trial due to physical incapacity, Magistrate Judge Alexander noted that “the trial of a mental incompetent in our adversary system would not be a trial at all; it would be a ‘kangaroo court,’ [and that] the integrity of our system of justice would be not only compromised, but verily destroyed if mental incompetents were allowed to stand trial.”¹⁰²

B. Litigant Observations

Judges are not the only players in the courtroom drama to have had a hand in defining the term “kangaroo court;” litigants, too, have offered their opinions regarding the characteristic behavior of the marsupial decision-maker. In *Brobson v. Borough of New Hope*,¹⁰³ the Borough’s former police chief appealed his termination and contended that the Borough deprived him of due process by reorganizing the Civil Service Commission during the course of his appeal, “dissolv[ing] Commission A and appoint[ing] Commission B, a ‘kangaroo court’ that did not hear live testimony or allow Plaintiff a meaningful opportunity to be heard.”¹⁰⁴ The right to be heard was also an issue in *Jones v. Iron Workers District Council Pension Trust*,¹⁰⁵ in which Judge Barker ruled that the plaintiff, a union member challenging the termination of his pension benefits, had “a full and fair opportunity to demonstrate to the trustees that he had not engaged in ‘Disqualifying Employment,’”¹⁰⁶ despite the following testimony by affidavit:

I can only liken that hearing to a “kangaroo court” because I was given very little chance to say anything and the questions that they asked me were repeated over and over with no let up until they were suggestive

100. *Id.* at 857.

101. *Id.*

102. *United States v. Zannino*, No. 83-235-N, 1985 WL 2305, at *2 (D. Mass. June 5, 1985).

103. *Brobson v. Borough of New Hope*, No. CIV. A. 00-0003, 2000 WL 1738669 (E.D. Pa. Nov. 22, 2000).

104. *Id.* at *3. Judge Bechtel was persuaded that the plaintiff’s argument was sufficient to defeat the defendant’s motion to dismiss his procedural due process claim. *Id.*

105. *Jones v. Iron Workers Dist. Council Pension Trust*, 829 F. Supp. 268 (S.D. Ind. 1993).

106. *Id.* at 272.

of what they wanted. Over and over again I was asked what was my job. I would tell . . . them more and more and they would isolate part of my answer and try to make it sound silly. The attorney for the union at one time said to me, "You were just a high-priced secretary." It was obvious to me the appeal was a sham.¹⁰⁷

Another complaint that frequently leads to accusations of kangarooism is bias. In a case involving the legality of imposing a trusteeship over a local labor union, the trustee "heard that Pope [the business manager] was telling the members [of the local] that the [trusteeship] hearing was going to be a 'kangaroo court' because, in Pope's opinion, the outcome was a foregone conclusion."¹⁰⁸ In an age-discrimination action against his employer, the Southeastern Pennsylvania Transportation Authority ("SEPTA"), John Murphy claimed that when he was finally granted a post-termination hearing, "the proceedings were biased against him because the arbitrator was a SEPTA employee who conducted a 'kangaroo court' and refused to hear his counsel's objections."¹⁰⁹ And in *Morgan v. Ward*,¹¹⁰ a plaintiff in a § 1983¹¹¹ action brought by prisoners against various prison officials "refused to leave his cell to attend Adjustment Committee Proceedings,"¹¹² on grounds that "he felt that the Adjustment Committee was a 'kangaroo court' that perfunctorily credited false or trivial charges made by Clinton's correctional officers."¹¹³

Procedural irregularity is another common concern that inspires litigants to drop the K-bomb. In his denaturalization proceeding, Ferenc Koreh argued that his 1947 conviction for a war crime, by the People's Court of Hungary, resulted from a "trial . . . before a 'kangaroo court' dominated by Communists and that he was denied most of the procedural protections a defendant enjoys in this country."¹¹⁴ In *United*

107. *Id.* at 272 n.4.

108. *Thompson v. Office & Prof'l Employees Int'l Union, AFL-CIO*, 74 F.3d 1492, 1498 (6th Cir. 1996).

109. *Murphy v. Se. Pa. Transp. Auth.*, Civ. A. No. 93-3213, 1993 WL 313133, at *1 (E.D. Pa. Aug. 9, 1993).

110. *Morgan v. Ward*, 699 F. Supp. 1025 (N.D.N.Y. 1988).

111. 42 U.S.C. § 1983.

112. *Morgan*, 699 F. Supp. at 1044.

113. *Id.* Judge Munson found that "[t]here [was] no evidence that this opinion had a basis in fact." *Id.*

114. *United States v. Koreh*, 856 F. Supp. 891, 896 (D.N.J. 1994) (granting summary judgment for the government on grounds that Koreh was ineligible for a visa he had received due to wartime activities which included advocating and assisting in persecution of Jews, assisting the enemy in persecuting civilians, and participating in movement hostile to the United States).

States v. Noblitt,¹¹⁵ an appeal from a parole revocation, Horace Noblitt argued that the conviction that led to the sentence from which he had been paroled was the result of a “kangaroo court” because at his trial, he was “never allowed to represent [himself] and was ‘forced to use a Public Defender.’”¹¹⁶ Finally, regarding “the proper composition of, and procedures to be followed by the Judicial Inquiry and Review Board,”¹¹⁷ Justice Larsen charged the Board with “kangaroo court proceedings”¹¹⁸ based upon his view that the applicable procedure for appellate review allowed the Board to “‘establish its own composition,’ ‘play it by ear[,]’ ‘make it up as it goes along[,]’ and ‘keep doing it over until it gets it right.’”¹¹⁹

Then there is *State Rubbish Collectors Ass’n v. Siliznoff*,¹²⁰ in which John Siliznoff claimed that the actions of the State Rubbish Collectors Association board of directors in settling a dispute between him and another rubbish collector caused him emotional distress which manifested itself in physical symptoms.¹²¹ At trial:

The argument to the jury by counsel for Siliznoff consisted of a bitter denunciation of the methods and motives of the directors of the association. They were accused of holding a “Kangaroo Court” with methods inconsistent with “good,” decent, American business; and with forcing their decision upon innocent people and who needed a “trouncing”; they were compared with people who poison horses, cut tires, smash windows, blackjack their victims and throw acid upon customers’ clothes. It was suggested that something evil might happen to the “brave” witnesses who came to testify for Siliznoff. The arbitration procedure of the by-laws was ridiculed as illegal, arbitrary and unauthorized.¹²²

The jury was persuaded by Siliznoff’s tale of woe and awarded compensatory and exemplary damages for the emotional distress he claimed to have suffered from the Association’s kangaroo-ism.¹²³ The court of appeals, presumably being made of sterner stuff than the jury,

115. *United States v. Noblitt*, 983 F.2d 1079 (unpublished table decision), No. 92-50025, 1993 WL 5176 (9th Cir. Jan 11, 1993).

116. *Id.* at *1.

117. *Larsen v. Kaufmann*, 579 A.2d 1302, 1302 (Pa. 1990) (Papadakos, J., dissenting).

118. *Id.*

119. *Id.*

120. *State Rubbish Collectors Ass’n v. Siliznoff*, 235 P.2d 95 (Cal. Ct. App. 1951), *aff’d*, 240 P.2d 282 (Cal. 1952).

121. *Id.* at 96.

122. *Id.* at 100.

123. *Id.*

was unmoved, and reversed the damages award.¹²⁴

Interestingly – with the possible exception of *Siliznoff* – it would appear that as a general matter, litigant definitions of kangaroo-ism track closely the definitions that have been framed on the other side of the bench.

C. Synonyms for the Metaphor

Finally, while “kangaroo court” is itself a metaphor, it should come as no surprise that the term kangaroo court itself now has a whole mob of synonyms such as: “kangaroo ass court,”¹²⁵ “Kangaroo Style Court,”¹²⁶ “kangaroo courtroom,”¹²⁷ “kangaroo justice,”¹²⁸ “kangaroo form of justice,”¹²⁹ “kangaroo proceeding,”¹³⁰ “kangaroo-like

124. *Id.* at 101.

125. *State v. Parrish*, No. CA2000-10-199, 2002 WL 31256647, at *3 (Ohio Ct. App. Oct. 7, 2002). The Ohio Court of Appeals’ per curiam opinion provides the following context for Parrish’s striking neologism:

When appellant refused to behave properly, the trial court set up a separate room with a video and audio feed so that appellant could participate in his trial without being in the courtroom. When the bailiff attempted to take him up to the room he stated, “Yeah. Do what you want to do. How the hell you gonna have me go to trial when I ain’t got no – my witnesses ain’t present or nothing. This shit is unconstitution (SIC) – this shit you all doin’ ain’t right to a black man.” Then he further commented, “What the fuck you talking about? This crazy ass court. This kangaroo ass court.”

Id. It is not clear from the opinion what role, if any, is played by the backside of a kangaroo adjudicator in the maladministration of justice, nor does the opinion give any indication why the ass of a kangaroo is any more offensive than any of the other asses in the animal kingdom, including what I would think to be the worst: the ass of an ass.

126. *Anderson v. Sixth Jud. Dist. Ct.*, 521 F.2d 420, 421 n.2 (8th Cir. 1975).

127. *United States v. Reynolds*, 10 Fed. Appx. 62, 66-67 (4th Cir. 2001) (affirming district court’s decision, at sentencing, to deny criminal defendant offense level reduction for acceptance of responsibility when defendant, at trial, “accused the judge of being ‘part of the group’ and of running a ‘kangaroo courtroom’ and stated that it was his intention to disrupt the courtroom and that the court would have to ‘cuff and gag’ him”).

128. *Ayers v. Ciccone*, 303 F. Supp. 637, 640 n.4 (W.D. Mo. 1969) (quoting letter from prisoner to social worker, in which prisoner complained that he was “a victim of ‘kangaroo’ justice, had had a ‘phony’ charge placed against him, and was in need of legal aid”).

129. *Gibbs-Alfanzo v. Ossining Boat & Canoe Club, Inc.*, 86 F. Supp. 2d 382, 385-86 (S.D.N.Y. 2000) (quoting plaintiff’s letter complaining about process by which she was suspended by boat club for raising concerns about sexual harassment and substance abuse on club property).

130. *Fotiades v. Hi-Tech Auto Collision Painting Servs., Inc.*, No. E029854, 2001 WL 1239716, at *6 (Cal. Ct. App. Oct. 17, 2001) (quoting *Cole v. Fair Oaks Fire Prot. Dist.*, 729 P.2d 743, 745 (Cal. 1987) (en banc) (discussing disciplinary proceeding brought against firefighter by panel of battalion chiefs)). See also *Smith v. Hilltown Twp.*, No. Civ. A. 88-2615, 1988 WL 115769, at *1 (E.D. Pa. Oct. 27, 1988) (“Plaintiffs liken defendants’ consideration of their site development applications to ‘the type of kangaroo proceedings imposed on blacks in the south [sic] when they registered to vote.’”); *In re Wolfson*, 453 F. Supp. 1087, 1089 n.2 (S.D.N.Y. 1978) (quoting twenty-seven-page letter circulated by petitioner for post-conviction relief accusing trial

proceeding,”¹³¹ “kangaroo process,”¹³² “Kangaroo type court process,”¹³³ “kangaroo hearing[],”¹³⁴ “kangaroo trial,”¹³⁵ “‘kangaroo’ disciplinary proceeding,”¹³⁶ “kangaroo kind of a deal,”¹³⁷ and “summary kangaroo

judge of “conducting ‘kangaroo’ proceedings, of having shown favoritism to highly publicized criminals and mafia figures . . . [and] of participating in a ‘scheme to frame’ him and of ‘railroading’ him”); *In re Yoder*, 682 N.E.2d 753, 754 (Ill. Ct. App. 1997) (“When the court asked the petitioner [who sought discharge from involuntary confinement in a mental institution] if he wished to testify, he asserted that he did want to do so, ‘but in a real legal proceeding, not a kangaroo proceeding.’”); *Swope v. Emerson Elec. Mfg. Co.*, 303 S.W.2d 35, 38 (Mo. 1957) (“Plaintiffs say this was done [*i.e.*, they cut short their use of the grievance process] because the hearings proved to be a mere ‘kangaroo’ proceeding, or sham . . .”); *Commonwealth ex rel. Spriggs v. Carson*, 368 A.2d 635, 638 (Pa. 1977) (quoting the trial court, “We are convinced that the Respondent [in a child custody proceeding] has been less than candid in many respects. Our first indication was her response to the Florida proceeding. When recounting it in Court, she purported to break down and sob at the very recollection of a horrible one-sided kangaroo proceeding.”).

131. *Morris v. Peyton*, 264 F. Supp. 911, 914 (W.D. Va. 1967) (“There being no kangaroo-like proceeding in the instant case, *Spano v. New York*, 360 U.S. 315 (1959)] is easily distinguishable from it.”).

132. *Gierbolini Colon v. Aponte Roque*, 666 F. Supp. 334, 338 (D.P.R. 1987).

133. *Horton v. Tenn. Dep’t of Corr.*, No. M1999-02798-COA-R3-CV, 2002 WL 31126656, at *3 (Tenn. Ct. App. Sept. 26, 2002) (quoting argument of prisoner/plaintiff who claimed that president of private prison company was necessary party in his suit challenging two prison disciplinary actions).

134. *In re Jones*, 747 So. 2d 1081, 1083 n.3 (La. 1999) (quoting attorney’s objection to disbarment). In response to Jones’s objection, the Louisiana Supreme Court stated:

Moreover, we are disturbed by the language respondent has used in his pleadings in the instant matter. Respondent’s characterization of the disciplinary process as “kangaroo hearings” and his exhortation to the disciplinary board to take the committee report and “shove it up your ass” displays a shocking lack of respect for the disciplinary authorities which act under the auspices of this court.

Id. at 1084-85.

135. *Estes v. Texas*, 381 U.S. 532, 611 (1965) (Stewart, J., dissenting) (explaining in a case about television cameras in the courtroom: “But we do not deal here with mob domination of a courtroom, with a kangaroo trial, with a prejudiced judge or a jury inflamed with bias.”); *Sweeden v. United States*, 209 F.2d 524, 525 (8th Cir. 1954) (quoting convicted defendant’s post-trial letter to the trial judge); *Schmidt v. State*, 265 N.E.2d 219, 228 (Ind. 1970) (Jackson, J., dissenting) (quoting the plea in abatement of a criminal defendant charged with murdering her husband: “This improper, televised press conference called by said [police chief] Null, conducted by him and Stewart’s attorney at Marion City Hall, amounted to a public kangaroo trial of this defendant effectively designed to prejudice potential jurors against her and to deprive her of her constitutional right to a fair trial, by an impartial jury, in this county.”); *McCraw v. Adcox*, 399 S.W.2d 753, 754 (Tenn. 1966) (quoting motion by *pro se* defendant in replevin action, who was found in contempt: “Defendant is aware of the fact that Attorney Keith Harber and Judge James F. Morgan plan a star chamber court proceeding or kangaroo trial for the alleged writ of replevin.”); *State v. Garcia*, 600 P.2d 1010, 1014 (Wash. 1979) (reporting dialogue between judge and indigent criminal defendant who argued that representation by court-appointed attorney would result in “kangaroo trial”).

136. *Shoemaker v. Myers*, 801 P.2d 1054, 1064 (Cal. 1990) (paraphrasing *Cole v. Fair Oaks Fire Prot. Dist.*, 729 P.2d 743, 745 (Cal. 1987) (en banc)).

137. *United States v. Roberts*, 185 F.3d 1125, 1143 (10th Cir. 1999) (quoting prosecutor’s closing argument in sexual assault case).

practice.”¹³⁸ Other opinions refer to courts operating in “kangaroo fashion”¹³⁹ and to a district attorney who referred to “a certain question, propounded by the counsel for the defendant to a state’s witness on cross-examination, a ‘kangaroo question.’”¹⁴⁰ Moreover, kangaroo-ism seems not to be confined to adjudications on the merits; reference has been made to a “kangaroo grand jury,”¹⁴¹ a “‘kangaroo’ preliminary

138. *In re Rauch*, 390 F.2d 760, 761 (C.C.P.A. 1968) (referring to appellant’s contention “that the alleged ‘summary’ ‘kangaroo’ practice accorded him by the Patent Office deprived him of an opportunity to amend his claims, thus denying him due process of law”).

139. *Fiorella v. State*, 121 So. 2d 875, 880 (Ala. Ct. App. 1960). In a contempt proceeding in the Wyoming Supreme Court brought against an applicant for admission to the Wyoming bar, the court quoted the following statement, published by the bar applicant, during the pendency of his contempt proceeding: “There is no doubt that the minds of the judges are poisoned and that I have been found guilty of contempt long ago. This trial is a mere formality as was the trial when Judge Stanton removed my name from the ballot in kangaroo fashion.” *In re Stone*, 305 P.2d 777, 798-99 (Wyo. 1957). The foregoing statement, supplemented by host of other misdeeds, earned Norman Stone six months in jail plus a fine of \$1,000. *Id.* at 799.

140. *State v. Morgan*, 77 So. 588, 593 (La. 1918). Regarding the propriety of the remark, Judge Leche noted: “The remark was perhaps not altogether respectful to the learned counsel for the defendant, but it was not prejudicial to the accused.” *Id.*

141. *United States v. Sigma Int’l, Inc.*, 244 F.3d 841, 856 (11th Cir. 2001). While the court was speaking hypothetically rather than accusing any particular grand jury of kangaroo-ism, its discussion of potential kangaroo-ism in the grand jury process is instructive:

It is clear, for example, that if a prosecutor simply drew up an “indictment,” had a grand jury foreperson sign it, and then used it to charge the defendant with a criminal offense, we would dismiss the “indictment” out of hand as violative of the Fifth Amendment. . . . So, too, would we dismiss an indictment that was issued by a “kangaroo grand jury” — one whose deliberations were so overborne by a prosecutor or judge that the indictment was, in effect, the prosecutor’s or judge’s handiwork, and not the result of a considered judgment by an independently functioning grand jury.

Id.

In *United States v. Lamantia*, 856 F. Supp. 424 (N.D. Ill. 1994), Judge Duff dismissed several indictments handed down by a grand jury that included one member who was “convicted of contempt of court, bribery and obstruction of justice for selling information pertaining to the Special October 1992 – I Grand Jury.” *Id.* at 425. That grand juror also “expressed considerable disrespect for the process, calling the grand jury proceedings a ‘kangaroo court’ where anyone could be indicted.” *Id.* In explaining the role of the grand jury, Judge Duff observed that

[t]he right to an indictment by a legally constituted, impartial grand jury is explicitly guaranteed by the Fifth Amendment to the Constitution . . . [and] must mean more than an indictment by a body consisting of at least one member who viewed the proceedings as a “kangaroo court” and was willing to trade his solemn obligations for cash.

Id. at 426. Ultimately, Judge Duff was reversed on grounds that the defendants whose indictments were dismissed did not demonstrate that they had been prejudiced by the grand juror misconduct they identified. *See United States v. Lamantia*, 59 F.3d 705 (7th Cir. 1995).

In a case involving claims that an indictment should be dismissed because the prosecutor gave informal immunity to certain grand jury witnesses, Judge Van Sickle explained, “[T]he most important function of a grand jury is to stand between the prosecutor and the suspect as unbiased evaluators of the evidence. If they do not perform this function then the procedure and the safeguard contained therein is at best a farce and at worst a kangaroo court.” *United States v. Kouba*, 632 F. Supp. 937, 944 (D.N.D. 1986) (emphasis in the original).

hearing,”¹⁴² and a “Kangaroo Parole Revocation Hearing.”¹⁴³

Sometimes, the metaphor is stripped down to its essence, as when Robert Elmore sought the recusal of the judge in his criminal trial and stated, in front of the jury, no less: “He won’t dismiss himself. He say I’m number two dope seller. He’s the king. He’s the kangaroo, so he ain’t going to try me.”¹⁴⁴ In a similar vein, John Oppenheimer once referred to Judge Harold Shepherd as “a kangaroo artist, a distorter and perverter of law and justice.”¹⁴⁵

Finally, in perhaps its most impressive iteration, the word “kangaroo” has been pressed into service as a verb. In *Hale v. State*,¹⁴⁶ a defendant charged with a traffic violation was tried on the courthouse lawn, in a proceeding attended by between two hundred and three hundred people standing in a circle eight or ten deep, some of them in direct contact with the jury.¹⁴⁷ The defendant’s conviction was reversed, in part because a spectator commented, within earshot of the jury, that “[t]hey have been kangarooing people at the City Hall; they have kangarooed the wrong man this time.”¹⁴⁸

142. Robinson v. State, 297 N.E.2d 409, 410 (Ind. 1973).

143. Moore v. Wainwright, 253 So. 2d 736, 736 (Fla. Dist. Ct. App. 1971).

144. People v. Elmore, 285 N.W.2d 417, 419 n.1 (Mich. Ct. App. 1979).

145. People v. Oppenheimer, 26 Cal. Rptr. 18, 21 n.2 (Cal. Ct. App. 1963). Oppenheimer was more than a little miffed at Judge Shepherd; in addition to calling the judge a “kangaroo artist,” he also called him “Fascist, Nazi and Tyrant” (on the envelope containing his letter to the judge), “Dirty Bastard, Swindler, Asshole, Tyrant, Oppressor, Schyster, Fascist, Nazi, Crook, Scoundrel, Gangster Harold C. Shepherd, Bandit, Rat, Devil, S.O.B.” (in the salutation), and, in the body of the letter, “dirty dog, bastard, and rat,” “murderer of right and justice” “un-American prick” and “half-judge.” *Id.* He sent similar letters to three other judges. *Id.*

146. Hale v. State, 47 S.W.2d 834 (Tex. Crim. App. 1932).

147. *Id.* at 835. Specifically, the defendant was charged with blocking an intersection with his truck. *Id.* at 834. The defendant had been sitting in the bed of a truck parked near an intersection which was approached, from behind, by a car containing two police officers. *Id.* When the defendant motioned for the officers to drive around, one of them told him “you don’t know who we are, do you?” *Id.* Subsequently, the driver and the passenger were both arrested and taken to the city hall where they were told by a judge that the fine for their violation was three dollars. *Id.* When the defendant refused to pay, he was taken to jail, and ultimately put on trial. *Id.*

While the opinion in *Hale* does not indicate the defendant’s race, it seems reasonable to conclude that Algea Caffey’s statement, as reported in *In re Caffey*, 441 P.2d 933 (Cal. 1968), applies equally to the defendant in *Hale*: “In his verified petition petitioner alleges that he is a Negro and that courts in the southern states customarily meted out ‘kangaroo court’ justice to Negroes.” *Id.* at 938.

148. *Hale*, 47 S.W.2d at 834-35. Another spectator commented: “They just pick a man up and kangaroo him in the City hall.” *Id.* at 835. Other comments were more vituperative: “They ought to hang the s___ of a b___.” *Id.* See also Marquess v. State, 721 S.W.2d 173, 175 (Mo. Ct. App. 1986) (reporting that criminal defendant told judge: “I want no part of your kangaroo court. You can kangaroo me once you ain’t going to do it twice.”); State ex rel. Neb Bar Ass’n v. Rhodes, 131 N.W.2d 118, 123 (Neb. 1964) (reporting an allegation of an attorney in a disciplinary

III. HABITAT

As I noted earlier, this article was inspired by Justice Levinson's somewhat startling use of the phrase "Kafkaesque kangaroo court" to describe the board of trustees of the Castle Memorial Hospital.¹⁴⁹ As it turns out, Justice Levinson is a rather rare bird; there are only about twenty published opinions in which a judge has declared another tribunal to be a kangaroo court. This section examines those opinions, and while it is organized according to habitat – identifying the locations in which kangaroo decision-makers have been spotted – it also discusses the distinctive behaviors of the adjudicatory marsupial.

A. *Joey Justice for Juvies*

In what has become the single most famous judicial accusation of kangaroo-ism, "Mr. Justice Fortus . . . [made] the thundering statement that 'Under our Constitution, the condition of being a boy does not justify a kangaroo court.'"¹⁵⁰ In *In re Gault*,¹⁵¹ the opinion in which

proceeding, "that Albert W. Crites was an imported 'kanagroo judge,' imported by the State of Nebraska through its agents . . . 'to Kanagroo this respondent, and prevent this respondent from having a fair trial'"); *Southwestern Portland Cement Co. v. Reitzer*, 135 S.W. 237, 241 (Tex. Civ. App. 1911) ("[T]he insistence is that the indignities [the plaintiff] received from being kangarooed by the other prisoners naturally flowed from his wrongful imprisonment.").

149. *Silver v. Castle Mem'l Hosp.*, 497 P.2d 564, 575 (Haw. 1972) (Levinson, J., concurring).

150. *State v. Santana*, 444 S.W.2d 614, 617 (Tex. Crim. App. 1969), *vacated*, *Santana v. Texas*, 397 U.S. 596 (1970) (quoting *In re Gault*, 387 U.S. 1, 28 (1967)). One judge's thunder, it would seem, is another judge's diatribe. See *In re Billie*, 436 P.2d 130, 136 (Ariz. 1968), *overruled in part by State v. Martin*, 489 P.2d 254 (Ariz. 1971) ("The thrust of *Gault* appears clearly in the author's diatribe against the failure of the juvenile justice system to achieve its high principles of treatment and rehabilitation . . ."). And in *DeBacker v. Brainard*, Justice Carter of the Nebraska Supreme Court found Justice Fortas's statement to be "an implied criticism of juvenile judges that is wholly unwarranted." 161 N.W.2d 508, 516 (Neb. 1968) (Carter, J., dissenting). Justice Carter went on to say:

The Supreme Court of the United States appears to be pointing toward a declaration of the unconstitutionality of the beneficent provisions of most juvenile court statutes. . . . It appears to take the position that its wisdom in this area exceeds in quality all the judicial pronouncements before it in the field of juvenile delinquency. The fact that a judge is a member of the highest court of the nation or state is not, of itself, proof of infallibility of decision. It might be well for members of such courts, on occasion, to step down from their ivory towers and recall with some humility that they were at the time of their appointment better than average lawyers with little judicial experience, of which there are many, who knew a President or Governor. . . . When and if a decision of the Supreme Court of the United States holds the Juvenile Court Act of this state to be unconstitutional under the federal Constitution, I want to make it clear that I shall recognize the power of that court to do so under the doctrine of judicial supremacy, but with the reservation of the privilege to protest its right to do so. But I shall neither bend the knee nor bow the head on mere inferences, speculations, or probabilities as to what

Justice Fortas thundered, the United States Supreme Court reversed a decision of the Arizona Supreme Court to affirm the dismissal of a petition for a writ of habeas corpus filed by the parents of a fifteen-year-old boy who had been committed, by the Juvenile Court of Gila County, Arizona,¹⁵² to six years in the State Industrial School¹⁵³ for an offense – “Lewd Phone Calls”¹⁵⁴ – that would have earned an adult a sentence of “\$5 to \$50 [in fines], or imprisonment for not more than two months.”¹⁵⁵

Justice Fortas was moved to the point of thunder by the lack of due process afforded to Gerald Gault after he and a friend were picked up by the police for allegedly engaging in telephonic lewdness.¹⁵⁶ First, the police gave Gerald’s family no notice that he had been picked up.¹⁵⁷ Second, neither the deputy probation officer prosecuting the case nor the juvenile court served Gerald’s family with a copy of the petition the probation officer filed with the court.¹⁵⁸ Third, the petition itself was

that court will eventually do.

Id. at 518-19. Among other things, Justice Carter objected to the majority’s interpretation of *Gault* as requiring that

a juvenile charged with a violation of a state criminal law as the basis for an adjudication of delinquency is entitled to a constitutional right to a trial by jury in juvenile courts of the offense is one which would give rise to a constitutional right to a trial by jury if committed by an adult and triable in an adult criminal court.

Id. at 513.

151. *In re Gault*, 387 U.S. 1 (1967). Justice Fortas’s opinion in *Gault* has proven to be a mother lode of bon mots for critics of the juvenile justice system. In addition to the kangaroo court comment, there is this:

Accordingly, the highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context. The constitutional and theoretical basis for this peculiar system is – to say the least – debatable. And in practice, as we remarked in the *Kent* case . . . the results have not been entirely satisfactory. Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. In 1937, Dean Pound wrote: “The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts * * *.”

Id. at 17-18 (citing *Kent v. United States*, 383 U.S. 541 (1966); Roscoe Pound, forward to YOUNG, SOCIAL TREATMENT IN PROBATION AND DELINQUENCY xxvii (1937)) (footnotes and other citations omitted). Several subsequent opinions in the area of juvenile law have quoted both Dean Pound’s star chamber language and Justice Fortas’s kangaroo court comment. See, e.g., *State ex rel. Fulton v. Scheetz*, 166 N.W.2d 874, 890 (Iowa 1969); *In re L.K.W.*, 372 N.W.2d 392, 401, 402 (Minn. Ct. App. 1985); *Lanes v. State*, 767 S.W.2d 789, 793, 800 (Tex. Crim. App. 1989).

152. *Gault*, 387 U.S. at 4.

153. *Id.* at 7.

154. *Id.*

155. *Id.* at 8-9 (emphasis added).

156. *Id.* at 4-5.

157. *Id.* at 5.

158. *Id.*

entirely conclusory and contained no factual allegations.¹⁵⁹ Fourth, at the hearing held the day after Gerald was picked up: “Mrs. Cook, the complainant, was not there. No one was sworn at this hearing. No transcript or recording was made. No memorandum or record of the substance of the proceedings was prepared.”¹⁶⁰ At a second hearing, held one week later, “a ‘referral report’ made by the probation officers was filed with the court, although not disclosed to Gerald or his parents.”¹⁶¹ Moreover, in determining the proper disposition of Gerald’s case, the juvenile judge appears to have factored in a two-year-old referral, concerning Gerald’s alleged theft of a baseball glove, that resulted in no formal accusation and no hearing on the matter.¹⁶² Ultimately, the Supreme Court held that the process given Gerald was tainted by unconstitutional kangaroo-ism because: Gerald and his parents received inadequate notice of the charges against him;¹⁶³ Gerald and his parents were not advised of Gerald’s right to counsel;¹⁶⁴ and Gerald’s privilege against self-incrimination and his rights to confrontation and cross-examination were violated.¹⁶⁵ The Court declined, however, to decide whether it was kangaroo-ism for the law of Arizona to deny juveniles a right to appeal, for the juvenile court not to record its proceedings, or for the juvenile court judge to fail to state grounds for his conclusions.¹⁶⁶

Justice Fortas’s stirring indictment of the Gila County Juvenile Court is, paws down, the most famous kangaroo court reference of all time; it has been quoted or paraphrased in no fewer than twenty subsequent judicial opinions from courts across the country, mostly in the area of juvenile justice,¹⁶⁷ which is, by far, the most hospitable habitat I have found for marsupial decision-makers. Judges have quoted *Gault* in decisions that have identified kangaroo-ism in the Superior Court of Coconino County, Arizona,¹⁶⁸ the Juvenile Court and the Court

159. *Id.*

160. *Id.*

161. *Id.* at 7.

162. *Id.* at 9.

163. *Id.* at 31-34.

164. *Id.* at 34-42.

165. *Id.* at 42-57.

166. *Id.* at 58.

167. In the one opinion outside the realm of juvenile law that paraphrases Justice Fortas, Justice Sanders of the Washington Supreme Court, writing in dissent, quoted John Junker, who said: “Under our Constitution . . . the condition of being a [petty offender] does not justify a kangaroo court.” *City of Seattle v. Guay*, 76 P.3d 231, 239 (Wash. 2003) (Sanders, J., dissenting) (quoting John M. Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 705 (1968)).

168. *See In re Billie*, 429 P.2d 699, 701-02 (Ariz. Ct. App. 1967), *vacated*, 436 P.2d 130 (Ariz.

of Common Pleas of Philadelphia County, Pennsylvania,¹⁶⁹ the Meeker County Court in Minnesota,¹⁷⁰ the 252nd District Court, Jefferson County, Texas,¹⁷¹ the Connecticut Superior Court, Judicial District of Hartford,¹⁷² and a majority opinion from the Arizona Supreme Court.¹⁷³ *Gault* has also been quoted in opinions determining that kangaroo-ism had not raised its ugly head in the Juvenile Division of the Circuit Court of Clay County, Missouri,¹⁷⁴ the United States District Court for the Eastern District of North Carolina,¹⁷⁵ the District Court of Linn County, Iowa,¹⁷⁶ the Circuit Court for Prince George's County, Maryland, sitting

1968) (granting petition for writ of habeas corpus where juveniles were committed to State Industrial School after hearing at which they were not informed of right to counsel).

169. *Commonwealth v. Sadler*, 3 Phila. County Rptr. 316, 330 (Ct. Com. Pl. 1979). In *Sadler*, a fifteen-year-old was brought to trial, as an adult, eleven months after his arrest for an eight-dollar robbery. *Id.* at 316-17. In the words of Judge Forer, who granted the defendant's petition to set aside his conviction: "As Mr. Justice Fortas trenchantly ruled, the fact of being a boy does not justify a kangaroo court. . . . Nor does it justify a delay of eleven months in bringing a boy to trial." *Id.* at 330.

170. *See In re L.K.W.*, 372 N.W.2d 392, 402 (Minn. Ct. App. 1985) (reversing order of institutional placement where juvenile court's order was based upon insufficient evidence).

171. *See Lanes v. State*, 767 S.W.2d 789, 800 (Tex. Crim. App. 1989) (reversing court of appeals decision upholding trial court's denial of motion to suppress fingerprint evidence when juvenile suspect was fingerprinted without probable cause).

172. *See In re Steven M.*, 789 A.2d 1169, 1173-74 (Conn. Ct. App. 2002) (vacating trial court's order transferring juvenile from department of children and families facility to department of corrections facility because trial court made no finding as to juvenile's competency). On appeal, the Connecticut Supreme Court held that the trial court's failure to conduct a competency hearing was harmless error. *See In re Steven M.*, 826 A.2d 156, 169 (Conn. 2003).

173. *See Gammons v. Berlat*, 696 P.2d 700, 704 (Ariz. 1985) (Feldman, J., concurring in part and dissenting in part). In *Gammons*, the majority held that Arizona's statutory infancy defense to criminal charges was inapplicable in juvenile proceedings. *Id.* Justice Feldman disagreed: "'Under our Constitution, the condition of being a boy does not justify a kangaroo court.' Nor should the condition of being a child justify the imposition of criminal sanctions absent proof that a crime was committed." *Id.* (quoting *Gault*, 387 U.S. at 28).

174. *Ex parte DeGrace*, 425 S.W.2d 228, 232-34 (Mo. Ct. App. 1968) (holding that notice of juvenile hearing that "specifically alleged the factual basis for the charge of . . . delinquency" and was served twenty-three days before delinquency hearing satisfied requirements of due process).

175. *United States v. Costanzo*, 395 F.2d 441, 445 (4th Cir. 1968) (affirming juvenile's conviction for Dyer Act violation on grounds that defendant's rights of confrontation and cross-examination and his privilege against self-incrimination were not violated and that district court applied the correct standard of proof). The court of appeals did note, however, that "[i]f we had to decide this case on the standard of proof issue tendered by the Government, we would be compelled to reverse, for the diluted measure proposed for juvenile cases is predicated upon a logic the cogency of which has been utterly devastated." *Id.*

176. *State ex rel. Fulton v. Scheetz*, 166 N.W.2d 874, 890 (Iowa 1969) (affirming district court's adjudication of Scheetz as a "criminal sexual psychopath," noting: "*Gault* and our case are in no way comparable. There with no semblance of due process punishment was immeasurably enhanced. None of the procedures condemned in *Gault* appears in our case. The exact opposite appears. Defendant has had the benefit of the most lenient of procedures and has already been paroled.").

as a juvenile court,¹⁷⁷ the District Court of Lubbock County, Texas, sitting as a juvenile court,¹⁷⁸ and the Connecticut Superior Court for Juvenile Matters.¹⁷⁹

In *In re Lang*,¹⁸⁰ Judge Elwyn of the Family Court of Ulster County, New York, quoted *Gault* to support his decision to apply, in a juvenile proceeding, a rule of criminal procedure “which prohibits the conviction of a defendant upon the testimony of an accomplice unless corroborated by other evidence as tends to connect the defendant with the commission of the crime.”¹⁸¹ In other words, Judge Elwyn took affirmative action to keep his court from being fairly accused of kangaroo-ism by extending to a juvenile adjudication a rule of adult criminal procedure that was more favorable to the accused than the rule

177. *In re Johnson*, 255 A.2d 419, 423-24 (Md. 1969) (affirming juvenile court’s denial of a motion for a jury trial and holding that *Gault* does not require jury trials in juvenile proceedings).

178. *State v. Santana*, 444 S.W.2d 614, 622 (Tex. 1969) (holding that “*Gault* does not require that the juvenile trial be adversary and criminal in nature . . . that the ‘beyond the reasonable doubt’ test is not required” and that “it was not error for the [trial] court to grant the State the leave to amend . . . while at the same time offering Santana an opportunity to postpone the trial to some later date if he so desired”). In *Santana*, Justice Greenhill offered an excellent thumbnail precis of *Gault*:

The *Gault* opinion recognized, or at least reserved judgment on, the policy of the juvenile court system. It declined to announce that they were either criminal or civil courts, rather recognizing that they were *sui generis*. It did make it plain that the system was being badly abused in some areas so that many children, not properly treated as juveniles, were not given the protection of adults, and got “the worst of both worlds.” And, on many occasions, instead of getting the kindly father approach from the judge, a child was often whisked away to the equivalent of a prison in what amounted to Star Chamber proceedings. “His world becomes ‘a building of whitewashed walls, regimented routine and institutional laws * * *’ Instead of mother and father * * * his world is peopled by guards, custodians, state employees, and ‘delinquents’ confined with him for anything from waywardness to rape and homicide.” 387 U.S. at 27.

At the darkest point in this bleak picture masterfully painted by Mr. Justice Fortas is the thundering statement that “Under our Constitution, the condition of being a boy does not justify a kangaroo court.”

To correct the kangaroo court approach, the *Gault* opinion announced basic constitutional guarantees for juvenile proceedings, whether they be civil, criminal, or *sui generis*: adequate notice, right to counsel, confrontation and cross-examination of witnesses, and the privilege against self-incrimination.

Id. at 617.

Without citing *Gault*, the United States Supreme Court vacated the decision in *Santana*. *Santana v. Texas*, 397 U.S. 596, 596 (1970) (citing *In re Winship*, 397 U.S. 358, 359 (1970) (holding that beyond a reasonable doubt standard applies “during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed as an adult”)).

179. See *In re Jason C.*, 767 A.2d 710, 717-19 (Conn. 2001) (affirming trial court’s dismissal of State’s petition to extend commitment of juvenile, when juvenile was not advised, at the time of pleading nolo contendere, that a plea could result in extension of commitment).

180. *In re Lang*, 301 N.Y.S.2d 136 (N.Y. Fam. Ct. 1969).

181. *Id.* at 139.

normally applied in juvenile proceedings. Similarly, in *In re Knox*,¹⁸² Judge Schwab of the Oregon Court of Appeals quoted the kangaroo court language from *Gault*¹⁸³ and then went on to explain the court's dismissal of the State's appeal of the trial court's dismissal of a juvenile petition, announcing: "We . . . hold that the constitutional prohibition against double jeopardy applies in juvenile proceedings where a juvenile is charged with a criminal act and is therefore subjected to possible loss of liberty."¹⁸⁴ And in *Oklahoma Publishing Co. v. District Court*,¹⁸⁵ a case in which the trial court issued an order barring publication of the name and photograph of a juvenile who had been accused of a crime, Justice Hodges of the Oklahoma Supreme Court quoted *Gault*¹⁸⁶ and then noted that the question before the court was "whether the condition of being a boy warrants extension of rights in excess of those granted by the Constitution to all citizens."¹⁸⁷ Ultimately, the court ruled that the trial judge's order was permissible.¹⁸⁸ The trial judge's victory was short-lived; the Oklahoma Supreme Court was subsequently reversed by the United States Supreme Court.¹⁸⁹

182. *In re Knox*, 532 P.2d 245 (Or. Ct. App. 1975).

183. *Id.* at 247.

184. *Id.* at 249.

185. *Okla. Publ'g Co. v. Dist. Ct., Okla. County*, 555 P.2d 1286, 1287 (Okla. 1976) *rev'd*, 430 U.S. 308 (1977).

186. *Id.* at 1291.

187. *Id.*

188. *Id.* at 1293-94. However, Justice Hodges also acknowledged the merits of the argument against confidentiality:

The argument for freedom of the press to report juvenile proceedings is that the press is the watchdog of society and that if they are precluded by statute from reporting a matter of public interest, soon any judicial proceedings could be made subject to private proceedings, and a return to the star chamber would inure as the direct result of the denial of the press to unrestrainedly gather the news.

Id. at 1292.

189. *Okla. Publ'g Co. v. Dist. Ct., Okla. County*, 430 U.S. 308 (1977). In *San Bernardino County Department of Public Social Services v. Superior Court*, 283 Cal. Rptr. 332 (Cal. Ct. App. 1991), another case about public access to juvenile proceedings, the court of appeals quoted *Gault*, *id.* at 341, and then noted:

Public access may as well improve juvenile court practice and serve many, if not all of the societal values first recognized in the context of a criminal trial.

At the jurisdictional hearing in both dependency and delinquency cases, the court is engaged in a fact-finding process in attempting to determine whether the minor comes within the jurisdiction of the juvenile court. To the extent open proceedings discourage perjury and might encourage other witnesses to come forward which in turn leads to more accurate fact-finding, public access to juvenile proceedings is beneficial.

Id. In *San Bernardino*, the California Court of Appeal held that a newspaper had no constitutionally protected right to attend the juvenile dependency proceedings at issue, *id.* at 343, and went on to direct the juvenile court to vacate its order allowing press access primarily because

On the other hand, in an opinion in which she committed to the Warwick State Training School for Boys “a 13 year old boy who [was] a long-time school truant and beyond parental control in regard to his school attendance,”¹⁹⁰ but who had committed no crimes or acts harmful to others,¹⁹¹ Judge Dembitz of the New York Family Court explained that “while ‘the condition of being a boy does not justify a kangaroo court,’ the condition of being a boy does entail dependence on the part of the child and a reciprocal responsibility on the part of adults.”¹⁹²

Finally, there is one opinion quoting *Gault* that all but defies classification. In *DeBacker v. Brainard*,¹⁹³ a four-judge majority of the Nebraska Supreme Court determined that the Nebraska Juvenile Court Act was unconstitutional because it did not provide for jury trials and employed a preponderance of the evidence standard.¹⁹⁴ However, because the Nebraska constitution provides that “[n]o legislative act shall be held unconstitutional except by the concurrence of five judges,”¹⁹⁵ the three-judge dissent carried the day, and the Juvenile Court Act was not struck down.¹⁹⁶ Moreover, while the majority cited *Gault*, it was Justice Carter’s dissent that quoted *Gault*’s kangaroo court

apparently a significant reason, if not the sole reason, the juvenile court decided to allow the [newspaper] to attend the proceedings was the court’s misguided belief that allowing the press admittance would somehow afford the court an avenue through which it could control the publicity surrounding [the] case.

Id. at 344.

190. *In re Mario*, 317 N.Y.S.2d 659, 660 (N.Y. Fam. Ct. 1971).

191. *Id.* at 666.

192. *Id.* at 668. Judge Dembitz’s embellishment of Justice Fortas’s proclamation in *Gault* was paraphrased by Judge Lupiano of the New York Supreme Court, Appellate Division, in a dissent from a decision that reversed a decision of the Family Court to deny a motion to dismiss a petition for absconding from home brought by the State of New York against a sixteen-year-old Pennsylvania girl picked up at the Port Authority in New York City. See *In re Bonnie Michelle W.*, 429 N.Y.S.2d 638, 647 (N.Y.A.D. 1980) (Lupiano, J., dissenting) (“‘while the condition of being a (young girl) does not justify a kangaroo court’ . . . the condition of being a (young girl) does entail dependence on the part of the child and a reciprocal responsibility on the part of adults”). The majority had reversed the family court on jurisdictional grounds, because the girl’s father and step-mother in Pennsylvania had failed to obtain a requisition as required by the Interstate Compact on Juveniles. *Id.* at 638.

193. *DeBacker v. Brainard*, 161 N.W.2d 508 (Neb. 1968).

194. *Id.* at 508-09. Notwithstanding the opinion of the *DeBacker* majority, the United States Supreme Court subsequently held that “trial by jury in the juvenile court’s adjudicative stage is not a constitutional requirement.” *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).

195. *DeBacker*, 161 N.W.2d at 509. The juvenile appealed to the United States Supreme Court which noted probable jurisdiction, *DeBacker v. Brainard*, 393 U.S. 1076 (1969), but ultimately dismissed the appeal on grounds that none of the constitutional issues were properly presented for review, *DeBacker v. Brainard*, 396 U.S. 28, 29-30 (1969).

196. *DeBacker*, 161 N.W. 2d at 509.

language.¹⁹⁷ The bottom line is that it is anybody's guess whether the juvenile justice system in Nebraska qualifies as a kangaroo court.

B. Up and Down the Halls of Government

Following the juvenile justice system, the most common habitat for adjudicative kangaroos is the executive branch of government. For example, in *Dorsey v. Kingsland*,¹⁹⁸ the United States Patent Office issued an order disbaring Vernon Dorsey from practicing before it on grounds of gross misconduct, which order was affirmed by the district court.¹⁹⁹ The court of appeals resoundingly reversed:

Contrary to this salutary rule, the Patent Office in a desperate effort to alibi its confessed failure to perform its duty [to investigate Dorsey's alleged wrongdoing itself rather than relying upon an article in a trade journal] waited more than eighteen years until the evidence had largely disappeared to bring stale charges against appellant, and then proceeded to try and convict him before a "kangaroo court." We use the term "kangaroo court" advisedly because this so-called tribunal tried appellant on charges most of which were not even included in the notice to show cause and on which there is not a shred of evidence to connect him, convicted him on several of these charges and deprived a venerable man and respected lawyer of his means of livelihood. . . .

The only justification assigned for disbaring appellant on a proceeding which included trial on many charges of which he had not been apprised and had not been afforded an opportunity to prepare his defense and as to which the evidence did not even remotely connect him, was that as a witness in his own behalf he did not assume the burden of proof and affirmatively disprove the allegations against him (of many of which he had not been notified) and that on some questions his memory was faulty in that he sometimes responded that he could not remember. *Mirabile dictu*.

. . . To say that a man approaching eighty should be disbarred because he could not remember some incident of a trial which took place twenty years before seems to us to be absur[d].²⁰⁰

Moving from the realm of patents to that of alcoholic beverages, but staying with the federal government, the Third Circuit suggested, at least indirectly, that the Alcohol Tax Unit of the U.S. Department of the

197. *Id.* at 516, 518.

198. *Dorsey v. Kingsland*, 173 F.2d 405 (D.C. Cir. 1949), *rev'd*, 338 U.S. 318 (1949).

199. *Id.* at 406.

200. *Id.* at 407-08.

Treasury acted as a kangaroo court when it bypassed the procedures specified in the Emergency Price Control Act of 1942,²⁰¹ and used those specified in the Federal Alcohol Administration Act,²⁰² to sanction the Trenton Beverage Company for selling beer and whiskey “at prices above the maximum fixed under the Emergency Act.”²⁰³ Just before noting that “[t]he sanctions of the Emergency Act are entirely adequate for any violations of this measure,”²⁰⁴ the court observed that “quite germane here are the remarks of Congressman Wolcott on the so-called ‘kangaroo courts.’”²⁰⁵

While nearly half a dozen state prison disciplinary boards have prevailed against charges of kangaroo-ism leveled against them,²⁰⁶ at least one was not so fortunate. In *King v. Higgins*,²⁰⁷ “an inmate in the farm section of M.C.I., Concord [Massachusetts]”²⁰⁸ was brought before the prison disciplinary board but “was not afforded prior notice of the hearing, nor advised of his right to seek the advice of counsel, to confront the complaining officer and present witnesses on his own behalf.”²⁰⁹ He was found guilty at the hearing, and filed an unsuccessful appeal with the prison superintendent, in which he “characteriz[ed] the disciplinary proceeding as a ‘Kangaroo Court.’”²¹⁰ A magistrate judge in the district court agreed with the prisoner, ruling “that the procedures employed at his disciplinary hearing denied [him] of due process of law.”²¹¹ The Court of Appeals for the First Circuit affirmed.²¹² In *Gierbolini Colon v. Aponte Roque*,²¹³ Judge Pieras smelled more than a whiff of kangaroo-ism in the actions of the general manager of the Puerto Rico Department of Education Radio and Television Service, who terminated the director of WIPR-AM & FM without giving him an opportunity, prior to his termination, to respond to the charges against him.²¹⁴ In the words of Judge Pieras:

201. *Trenton Beverage Co. v. Berkshire*, 151 F.2d 227, 229 (3rd Cir. 1945) (citing 50 U.S.C.A. Appendix § 901 et seq.).

202. 27 U.S.C.A. § 201 et seq.

203. *Trenton Beverage Co.*, 151 F.2d at 228.

204. *Id.* at 229.

205. *Id.*

206. *See* section III.D, *infra*.

207. *King v. Higgins*, 702 F.2d 18 (1st Cir. 1983).

208. *Id.* at 19.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 22.

213. *Gierbolini Colon v. Aponte Roque*, 666 F. Supp. 334 (D.P.R. 1987).

214. *Id.* at 338.

More important, the decision to terminate was not only mistaken, it was a sham. Gierbolini was deprived of property without due process of law precisely because the reasons given for his termination were false. We need not tarry with any post-termination procedure that may have been afforded Gierbolini; he was deprived of property with only kangaroo process.²¹⁵

The kangaroo's range extends beyond the federal and state levels of government; interesting specimens have been spotted hopping down the halls of various municipal government agencies. In *Ciechon v. City of Chicago*,²¹⁶ a Chicago Fire Department paramedic sued the City of Chicago under 42 U.S.C. § 1983, asserting that she was terminated in violation of her rights to due process and equal protection.²¹⁷ Her termination, after a hearing before the Personnel Board, resulted from pressure exerted by the family of a man who died shortly after refusing to be transported to the hospital by Ciechon and her ambulance crew.²¹⁸ Judge Cummings explained just how and why the Personnel Board was, in Ciechon's case, a kangaroo court:

The investigation of the charges against Ciechon was so incomplete and biased as to demonstrate clearly that the City made no effort to assess the incident fairly. Rather, the City seemed bent from the outset upon limiting its investigation in order to justify discharging Ciechon. The most obvious evidence of this conduct is that paramedic Ritt, whose duties and responsibilities were identical to Ciechon's, was never formally investigated and was only questioned about the incident in the most casual manner. The reports of Ritt and Altman [the ambulance driver], which supported Ciechon's version of events, were virtually ignored by the investigators. Dziedzic [a candidate firefighter who also went on the call] was never interviewed nor asked to write a report. None of the contemporaneous documentary evidence which supported Ciechon was sought by the investigators – neither the transcripts of the two telephone calls by the patient's family seeking paramedic assistance nor the ambulance journal which recorded the call and its disposition. Moreover, testimony presented by the City at the Personnel Board hearing illustrates the improper motives with which the City conducted these proceedings. Dr. Mesnick was the primary witness against Ciechon. His testimony consisted of the results of his perfunctory investigation, countless unwarranted presumptions, and his personal opinions as to Ciechon's performance.

215. *Id.*

216. *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982).

217. *Id.* at 513, 516.

218. *Id.* at 520.

His own testimony betrays a considerable lack of thoroughness in his investigation: not only did he never question paramedic Ritt, but, for example, he never looked at Ciechon's personnel file. Most seriously, Mesnick's medical opinions were based on a view of events under which he characterized the patient's problems as "acute decompensation," *i.e.*, an obvious medical emergency requiring immediate stabilization. Not even the family so characterized the patient's condition on the first ambulance run. Yet the hearing officer unqualifiedly credited Mesnick's testimony on medical matters in dispute in this case. Finally, neither the initial investigator, Ormond, nor the Fire Commissioner recommended discharge when the charges were made against Ciechon. Yet by the time of the hearing her discharge was not only sought, but, according to the family, was virtually assured.

...

The transgression of the due process clause becomes plainer upon consideration of the irregular administrative procedures employed. Although Section 25.1-6 of the Municipal Code requires that charges against a career civil service employee be brought "by proper authority," most of these were brought instead by the Chicago Corporation Counsel's staff, which also represented the trial agency, *viz.*, the Personnel Board and all the defendants, including the initial charging party Albrecht – obviously a direct conflict in interest. . . . All these irregularities add up to a case slanted from the start against plaintiff, heard by a kangaroo court, and denying her due process.²¹⁹

In a frequently cited opinion, the California Supreme Court held that the assistant chief of the Fair Oaks Fire Protection District subjected Leonard Cole to a "kangaroo proceeding" to adjudicate a false charge of dishonesty, as part of a campaign to harass Cole for his activities as a union representative.²²⁰ And in an opinion that shows that prisoners are not the only people in prisons who are potentially vulnerable to kangaroo-ism, Justice Kass of the Massachusetts Court of Appeals explained, in an opinion in a racial discrimination case brought by an African-American prison guard, that "[t]he investigation into Brooks's role in the incident of August 27, the commissioner [of the Massachusetts Commission Against Discrimination] found, was 'kangaroo justice' directed to the object of firing Brooks, an end desired by Mark Kepple, deputy superintendent of the prison."²²¹

219. *Id.* at 520-22.

220. *Cole v. Fair Oaks Fire Prot. Dist.*, 729 P.2d 743, 744, 745 (Cal. 1987) (en banc).

221. *City of Boston v. Mass. Comm'n Against Discrimination*, 654 N.E.2d 944, 947 (Mass.

Kangaroos may also be found at school. In *Thompson v. Board of Education*,²²² a school librarian complained that she was denied “selected status,” and subsequently transferred “in retaliation for making remarks which were published in an article appearing in a weekly Chicago newspaper.”²²³ Ruling in the plaintiff’s favor after a bench trial, Judge Alesia observed, in response to the defendant’s argument that the plaintiff would have been denied “selected status” even if she had not participated in the newspaper article, that “no one . . . could deny that Thompson’s interview panel, akin to a kangaroo [sic] court, viewed Thompson with a jaundiced eye . . . [and that] denial of ‘selected status’ was a foregone conclusion.”²²⁴

In a majority opinion issued by an appellate court, identification of a tribunal as a kangaroo court is a stigma that carries the weight of law. While such an assertion in a dissenting opinion carries somewhat less weight, it must still sting. In *Marfork Coal Co. v. Callaghan*,²²⁵ the West Virginia Supreme Court held that the procedural due process rights of the Marfork Coal Company were not violated when the state Department of Environmental Protection (“DEP”) ordered Marfork to show cause why a mining permit should not be suspended or revoked and the director of DES presided over the show cause hearing.²²⁶ Justice Maynard dissented:

I dissent in this case because I do not believe that Marfork Coal Company (“Marfork”) received a fair hearing. Rather, it is clear to me that Marfork faced nothing less than a kangaroo court with Director Crum presiding. . . . His decision to suspend Marfork’s surface mining permit was a foregone conclusion before Marfork ever stepped into the hearing room. Director Crum’s lack of impartiality and his prejudgment of this case is evident from his remarks in a press release issued prior to the hearing.

. . .

. . . Not only had Director Crum already made up his mind, he announced as much in the press release. In effect, Crum was both the

Ct. App. 1995). Among other evidence for its finding of kangaroo-ism, the Commission noted that Brooks’s termination was based upon conduct for which white officers were not disciplined, *id.*, and that deputy superintendent “Kepple had voiced hostility to African-American correction officers; by way of raw example, Kepple had said on one occasion, ‘fuck the niggers.’” *Id.*

222. *Thompson v. Bd. of Educ.*, 711 F. Supp. 394 (N.D. Ill. 1989).

223. *Id.* at 396.

224. *Id.* at 410.

225. *Marfork Coal Co. v. Callaghan*, 601 S.E.2d 55 (W. Va. 2004).

226. *Id.* at 58, 60-61.

prosecutor and the judge in this Star Chamber proceeding.

. . .

. . . The actions of Director Crum in this case are similar to a circuit judge making comments regarding an accused murderer two weeks before he sits as the accused's trial judge. . . .

In my opinion, this case actually belongs in the annals of bad cases with unfair judges and bad results. It goes somewhere on the list of really bad trials, a few of which follow as examples. The trial of Susan B. Anthony for being a woman and voting, where Judge Ward Hunt barred her from testifying and directed a jury to find her guilty, which of course they did. Or the trial of Galileo for heresy for correctly teaching that the sun, not the earth, was the center of the solar system and the earth and other planets merely revolved around it. . . .

This list could go on forever but I will close it with only one more example, the famous "monkey" trial of John Scopes who was convicted of teaching evolution down in Tennessee. When Judge John Raulston was clearly being one-sided in favor of the prosecutor during trial one day, Clarence Darrow began saying very provocative things in court about bias and unfairness, which rattled the learned jurist Judge Raulston. "I hope," said the Judge nervously, "that counsel intends no reflection upon this Court!" Whereupon Darrow replied: "Your honor," he said, "is always entitled to hope!"²²⁷

In *St. Johns County v. Smith*,²²⁸ the trial court ordered the County Commission of St. Johns County (Florida) to grant an application for a modification of a planned unit development to allow a solid waste transfer facility as a permitted use.²²⁹ On certiorari review, the Florida District Court of Appeal quashed the order,²³⁰ because, *inter alia*, the trial court "substituted its evaluation of the evidence for that of the Commission's and in so doing, departed from the essential requirements of law."²³¹ Justice Harris dissented, noting:

In determining the County's real reason for turning down the application, the trial judge was required to determine whether the expressed concern was a legitimate reaction to a fair and impartial hearing or whether he was observing crocodile tears from a kangaroo

227. *Id.* at 67-69.

228. *St. Johns County v. Smith*, 766 So. 2d 1097 (Fla. Dist. Ct. App. 2000).

229. *Id.* at 1098.

230. *Id.* at 1100.

231. *Id.*

court. The judge's order makes clear what he determined.²³²

Justice Harris is, to my knowledge, the only American jurist to have expressed an opinion on the ability of kangaroos to shed crocodile tears.²³³ Regrettably, the opinion is silent as to the ability of crocodiles

232. *Id.* at 1101 n.2 (Harris, J., dissenting).

233. "Crocodile tears," however, is a relatively common metaphor in judicial opinions, judging by the number of hits – fifty-eight – on the term "crocodile tears" in the Westlaw ALLCASES database. Search was completed on October 25, 2005.

Regarding the meaning of the metaphor, "the phrase 'crocodile tears' means hypocritical sorrow or false or affected tears, deriving from an ancient belief that crocodiles shed tears over their victims and make moaning sounds to attract their prey." *Gardner v. Superior Court*, 227 Cal. Rptr. 78, 80-81 (Cal. Ct. App. 1986) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1968)).

Most often, crocodile tears flow into judicial opinions when the judge paraphrases or quotes a litigant. For example, Judge Rakoff began his opinion in *Nader v. ABC Television, Inc.* in the following way:

The on- and off-stage melodrama of "All My Children" may make for successful soap opera, but as a lawsuit it's a bust. In the instant case, Michael Nader, who once played the now-liquidated character of "Dimitri Marick," expresses shock and dismay that ABC, after crying crocodile tears at his second criminal arrest, went ahead and fired him anyway. But his angst does not translate into any legal claim that can survive summary judgment.

Nader v. ABC Television, Inc., 330 F. Supp. 2d 345, 346 (S.D.N.Y. 2004). *See also* *Mitchell v. Ward*, 150 F. Supp. 2d 1194, 1237-38 (W.D. Okla. 1999) (quoting prosecutor's closing argument: "He came in this courtroom, took an oath to tell the truth, looked you all straight in the face, and told you another story. It was another story that you found by your verdict was not the truth. He set up there and cried crocodile tears for Elaine but it was based on a lie and that's what you folks told him by your verdict."); *State v. Ewing*, No. 01C01-9612-CR-00531, 1998 WL 321932, at *10 (Tenn. Crim. App. June 19, 1998) ("[Defendant] also asserts that the prosecutor displayed 'crocodile tears' to inflame the jury.").

On the other hand, judges have sometimes used the phrase themselves to characterize a litigant. *See, e.g., In re Lakiya S.*, 636 N.Y.S.2d 65, 66 (N.Y.A.D. 1995) (remanding to the Family Court, for a new hearing before a different judge, in part because "the Family Court exhibited hostility toward the mother by charging her with 'crying crocodile tears' over her children's sexual abuse").

Perhaps the most remarkable judicial invocation of the metaphor of crocodile tears came from the pen of Justice Peck of the Vermont Supreme Court, in his dissenting opinion in *State v. Kirchoff*:

The medical profession has, in recent years, stressed preventative medicine equally with the curative. The courts should take heed of this in criminal matters and develop their potential for preventive law. One step might well be to serve notice that, in those cases where guilt, per se, is a fact, as distinguished from an evidentiary question, technicalities will be enforced, but with reluctance and with concern for the people who will be the future victims. As it is now, too often, judicial opinions with the authoring pens dipped in the crocodile tears of activist judges, constitute "A Criminal's Vade Mecum, or How to Commit Crime and Get Away With It."

Today's decision stands as evidence that this Court is preoccupied, particularly in criminal cases, with the favorite diversion of too many state appellate courts, the sport of hunting for a constitutional baby behind every bush, waiting for the courts to come along, arm in arm with the whining wrongdoers who have been detected *in flagrante*

to shed kangaroo tears.

C. *The Court Down Under and Collateral Damage*

As the opinions discussed in this section demonstrate, judicial-branch kangaroos, while most plentiful in the juvenile justice system, may also be found in other kinds of courts. In *Smith v. Chicago School Reform Board of Trustees*,²³⁴ the defendant appealed a \$2 million jury verdict awarded to Carrie-Merle Smith, in the Northern District of Illinois, on her claims of racial discrimination and emotional distress. The Seventh Circuit reversed and remanded,²³⁵ and writing for a unanimous panel, Judge Easterbrook pulled no punches:

According to the final pretrial order that governed the trial of this case, the parties agreed that Carrie-Merle Smith, a teacher at Collins High School in Chicago, was the victim of racial discrimination. . . . The jury was told that the parties agreed that “[a] racially hostile atmosphere existed at Collins H.S.” and that “the intimidation and racial harassment at Collins H.S. was unbearable” to Smith. . . . Emphasizing the extent to which the school system accepts Smith’s version of events, her lawyer hammered away during closing argument on the fact that the school system had called no witnesses of its own and barely questioned the testimony of hers. . . .

What the jury heard was a sham. . . . [T]he persons Smith accused of vexing her denied the allegations under oath in depositions[.] . . . Most of the events that were narrated occurred well outside the statute of limitations. But the jury knew none of this – in part because the district judge held the school system to a pretrial order that Smith’s lawyer drafted, and in part because the judge informed the school system that it could call witnesses only with the plaintiff’s consent. Needless to say, consent was withheld. The result was a kangaroo court, different only in the trappings from a default judgment.²³⁶

delicto, and find them.

State v. Kirchoff, 587 A.2d 988, 1007 (Vt. 1991) (Peck, J., dissenting).

234. *Smith v. Chi. Sch. Reform Bd. of Trustees*, 165 F.3d 1142, 1144 (7th Cir. 1999).

235. *Id.* at 1151.

236. *Id.* at 1144. According to the court of appeals: “The [trial court’s] legal error is subtle but important. The district judge permitted plaintiff’s counsel to file her dream version of a pretrial order after concluding that defendant failed to meet a deadline for submitting its own version.” *Id.* at 1144-45. *Smith* reports the third verified sighting of a kangaroo adjudicator in Chicago. *See id.* Unfortunately, my research offers no clue as to why Chi-town is such a hospitable habitat for kangaroos, but perhaps it is relevant to note that Melbourne, Australia’s own Luc Longley spent his most productive years as an NBA player in a Chicago Bulls uniform.

Justice Prentice of the Indiana Supreme Court was nearly as blunt in his characterization of the way in which the arrest and charging of William Robinson was handled: “We agree with the defendant that his constitutional rights were violated by the issuance of the arrest warrant without a determination of probable cause by a neutral and detached magistrate and again, as charged by him, by holding a ‘kangaroo’ preliminary hearing at which his rights were totally disregarded.”²³⁷

Judge Easterbrook and Justice Prentice are the only appellate judges I have found who went so far as suggest that the court below was actually a court down under.

Two other judges, however, have gone nearly as far, by suggesting that another court, in a collateral proceeding, committed kangaroo-ism. In *Little Horn State Bank v. Crow Tribal Court*,²³⁸ which involved the plaintiff’s futile attempt to have the Crow Tribal Court enforce a judgment it had received from the United States District Court on a claim that Daniel C. Old Elk Sr. had defaulted on a promissory note (secured by a purchase-money security interest in a forklift),²³⁹ Judge Battin delivered a blistering critique of the Crow Tribal Court:

The Crow Tribal Court, acting as a sort of “kangaroo court,” has made no pretense of due process or judicial integrity. Plaintiff was met not only with bias and uncooperativeness, but with a blatantly arbitrary denial of any semblance of due process. . . .

It would appear that the Crow Tribal government changes judges at a whim, to the detriment of non-Indian litigants, and of the Tribe. As a result, the Tribal Court lacks any continuity and uniform precedent which is the foundation of our judicial system. While the tribal members enjoy the protection of their rights under both the United States Constitution and the ICRA [Indian Civil Rights Act], depending on the forum, it appears that non-Indians are not granted the same privilege of dual citizenship in Tribal Court. If the Crow Tribe wishes to earn the respect and cooperation of its non-Indian neighbors, it must

237. *Robinson v. State*, 297 N.E.2d 409, 410 (Ind. 1973). The constitutional rights that were violated were Robinson’s “right to counsel at his preliminary hearing and the right of an effective preliminary hearing, with the right to call witnesses and to cross examine the state’s witnesses.” *Id.* Because the court held that pre-trial kangaroo-ism to be harmless, *id.*, it did not warrant reversing Robinson’s conviction. *Id.* However, Robinson did win a new trial, based upon another, non-marsupial, trial error: taking the jury on a view of the crime scene over the objection of the defendant. *Id.* at 412-23.

238. *Little Horn State Bank v. Crow Tribal Court*, 690 F. Supp. 919 (D. Mont. 1988), *vacated*, 708 F. Supp. 1561 (D. Mont. 1989).

239. *Id.* at 920-921.

do more to engender that respect and cooperation, not abuse those neighbors who attempt to work within its system.²⁴⁰

*In re Middlebrooks*²⁴¹ involved a petition for a writ of habeas corpus in which the petitioner alleged “that he was illegally held in custody by the Sheriff of Santa Barbara County, California, for extradition to the State of Georgia to there serve out the balance of a sentence imposed by a State Court in Georgia.”²⁴² In an order granting the petition, Judge Carter of the Southern District of California found that, in the state of Georgia, the petitioner “was not afforded a trial or an arraignment, but instead was brought before the Judge and sentenced without having entered a plea of guilty, or without a trial having occurred.”²⁴³ After framing the relevant question presented, “[w]as the sentence without plea and trial, namely the kangaroo court, a deprivation of due process of law?”²⁴⁴ Judge Carter ruled that “there was obviously a denial of due process under the Fourteenth Amendment where the state court sentenced in the absence of a plea of guilty or a trial and finding of guilt.”²⁴⁵

240. *Id.* at 923-24 (citations omitted). The incidents of kangaroo-ism to which Judge Battin referred include the following:

At the conclusion of the hearing [on the plaintiff’s complaint for Enforcement of Foreign Judgment], Tribal Judge Rowena Gets Down advised counsel for the plaintiff that the Court would issue its ruling in five working days. Plaintiff Little Horn State Bank also submitted to the Court proposed Findings of Fact, Conclusions of Law and Decree of Foreclosure. Although this hearing transpired more than two years ago, no decision has been issued by the Crow Tribal Court.

Since the default hearing concluded, plaintiff’s counsel has made numerous inquiries about the status of said case. Throughout all her communication with the Crow Tribal Court, plaintiff has only been advised that Tribal Judge Rowena Gets Down is no longer sitting on the bench and that a decision as to the underlying default is still pending.

...

Having been advised of [the defendant’s] ex parte communication with [the state District Court] Judge Baugh, plaintiff’s counsel travelled to Crow Agency, Montana, where she spoke with Chief Judge Dennis Big Hair of the Crow Tribal Court. . . . Judge Big Hair advised plaintiff’s counsel that no hearing would be scheduled and that no motion would be accepted by the Crow Tribal Court from Little Horn State Bank. Judge Big Hair further advised counsel that the Crow Tribal Appellate Court was a nonfunctioning body, but that the Appellate Court might begin hearing cases at Judge Big Hair’s request.

Id. at 920-21.

241. *In re Middlebrooks*, 88 F. Supp. 943 (S.D. Cal. 1950), *rev’d*, *Ross v. Middlebrooks*, 188 F.2d 308 (9th Cir. 1951).

242. *Id.* at 945.

243. *Id.* at 948.

244. *Id.*

245. *Id.* at 950.

D. In the Private Sector

Many of America's kangaroo decision-makers have been spotted doling out marsupial justice within the executive and judicial branches of government, but antipodal adjudicators are a hardy, adaptable breed, and their range extends into the private sector.

In *Brevetti v. Tzougros*,²⁴⁶ the plaintiff was granted an injunction barring her removal as a director of the Queensboro (New York) Federation of Parents' Clubs, Inc.,²⁴⁷ based upon Judge Tessler's finding that her "dismissal, accomplished without notice of any kind or the right of confrontation, is offensive and contrary to our fundamental processes of democratic and legal procedure, fair play, and spirit of the law."²⁴⁸ In the judge's view, "[i]t appear[ed] that the plaintiff was removed from office and membership by what amounts to a 'kangaroo court.'"²⁴⁹

*Randolph v. Spruce Cabin Camping Ass'n*²⁵⁰ involved Hampton Randolph's expulsion from the Spruce Cabin Camping Association for inactivity.²⁵¹ Judge Thomson agreed with Randolph "that his expulsion violated the provisions of the Nonprofit Corporation Law, 15 Pa.C.S.A. § 7767."²⁵² In the words of Judge Thomson:

We feel this section of the law requires basic due process proceeding, although not perhaps with all the formality which a day in court of record might entail. At any rate, the notice given Mr. Randolph was clearly deficient in that it did not inform him of any charge or basis to expel him, or that such action was contemplated.²⁵³

As it turns out, the Spruce Cabin campers are not the only recreationists who have learned, in court, that their rustic retreat was infested with kangaroos. In *Humphrey v. Northwestern Connecticut Sportsman Ass'n, Inc.*,²⁵⁴ Frederick Humphrey challenged the suspension of his membership in the Sportsman Association.²⁵⁵ Humphrey's membership

246. *Brevetti v. Tzougros*, 247 N.Y.S.2d 295 (N.Y. Sup. Ct. 1964).

247. *Id.* at 296.

248. *Id.*

249. *Id.* at 297.

250. *Randolph v. Spruce Cabin Camping Ass'n*, 11 Pa. D. & C.3d 71 (Ct. Com. Pl., Monroe County 1979).

251. *Id.* at 72-73.

252. *Id.* at 73-74.

253. *Id.*

254. *Humphrey v. Nw. Conn. Sportsman Ass'n, Inc.*, No. CV020087895S, 2002 WL 31045973 (Conn. Super. Ct. Aug. 8, 2002).

255. *Id.* at *1.

was suspended by the Association's Executive Committee on grounds that he had behaved intemperately toward a fellow member who was filleting a bird in a manner that Humphrey felt to be unsanitary and harmful to the environment.²⁵⁶ At the Executive Committee meeting at which Humphrey was expelled, he was not allowed to present witnesses and was denied the opportunity to be represented by counsel.²⁵⁷ Believing that such a hearing would be "inherently unfair,"²⁵⁸ Humphrey chose not to attend,²⁵⁹ and subsequently, he "did not avail himself of the right to appeal which is permitted by Article IX, D of the [Association's] bylaws . . . because, in his words, it's a 'kangaroo court.'"²⁶⁰ Judge Walsh agreed: "[t]he plaintiff was justified in believing that based upon the unreasonable ground rules established for the hearing itself, an appeal from the results of that unfair hearing, based upon a reading of the minutes of the hearing appealed from, would suffer from the same inherent unfairness."²⁶¹ *Humphrey* is one of those rare cases in which a party making a charge of kangaroo-ism has been able to make the charge stick without having gone through the hearing he or she claims to be unfair.

In *Nelson v. Johnson*,²⁶² Judge Larson called out a labor union, the Brotherhood of Painters, Decorators and Paperhangers of America, for kangaroo-ism directed toward several of its members. In *Nelson*, the officers of Local 386 charged approximately a dozen members of the Local with being communists²⁶³ and tried them on those charges.²⁶⁴

The first three union members tried were tried in accordance with the trial procedures set forth in the Union Constitution and they were acquitted. Thereafter the Trial Board changed the trial procedures; the accused were denied the right to have another accused union member act either as counsel or as witness and were presumed to be guilty instead of innocent of the charges, all in violation of the Union Constitution. . . . The Trial Board had secretly met with the charging party, Carlson, before the trials to consider his evidence and resolved that a constant vigil of the charged union members should be had pending trial. Respondents further admitted in engaging in

256. *Id.*

257. *Id.* at *4.

258. *Id.* at *3.

259. *Id.*

260. *Id.*

261. *Id.* at *4.

262. *Nelson v. Johnson*, 212 F. Supp. 233 (D. Minn. 1963).

263. *Id.* at 237.

264. *Id.*

surveillance of Petitioner Nelson's house earlier in the year, accompanied by the charging party, Carlson, his two assistant business agents (members of the Trial Board) and others.²⁶⁵

To make a long (but interesting) story short, union members found guilty by the Trial Board sued the union in federal court²⁶⁶ and achieved a settlement by which the Trial Board verdicts were set aside and withdrawn.²⁶⁷ Subsequently, the membership of the Local voted to pay the legal bills incurred by the members who had challenged the actions of the Trial Board,²⁶⁸ and the leadership of the Local, eventually backed by the International Union, steadfastly and successfully resisted doing so.²⁶⁹ In particular, the General Executive Board (GEB) of the International Union, in a letter dated November 15, 1961, urged the Local to reconsider its decision because: "(1) the International Union is against the general policy of the Brotherhood to sanction expenditure of local union funds for such purposes and, (2) the expenditure of such funds for such purposes might well constitute a violation of Title V of the Landrum-Griffin Act."²⁷⁰ In his order granting judgment to the union members, in a suit brought under the Labor Management Reporting and Disclosure Act, Judge Larson observed:

These Petitioners have already been through one Kangaroo court in this union. That injustice was not corrected by the GEB. That letter of November 15, 1961, suggests to the Petitioners that the GEB is inalterably on the side of the Respondents. Without hearing the case of the Petitioners, the GEB has again assisted the cause of the Respondents. This letter not only deprived the Petitioners of reimbursement for their legal expenses for the first Federal trials; it suggested that if more kangaroo courts were forthcoming, there would be no help from the GEB. This would in turn cause the Petitioners, men of modest means, to have to again seek the aid of the Federal courts. This is the way that freedom of speech in the union hall is snuffed out; this is the way that tyranny begins. As the House Committee report said, H.Rep.No.741, 86th Cong., 1st Sess. 6 (1959):

The power and control of the affairs of a trade union by leaders who abuse their power and forsake their

265. *Id.*

266. *Id.* at 238.

267. *Id.*

268. *Id.*

269. *Id.* at 238-40.

270. *Id.* at 239-40.

*responsibilities inevitably leads to the elimination of efficient, honest and democratic practices within such union, and often results in irresponsible actions which are detrimental to the public interest.*²⁷¹

Judge Larson further explained that “[t]he democratic process must determine the outcome of the union dispute – not the iron hand, the kangaroo court or the veiled threat.”²⁷²

IV. UNVERIFIED SIGHTINGS

Counterbalancing the twenty verified sightings of adjudicatory kangaroos discussed in the previous section are more than twice as many unverified sightings, described in opinions in which a judge has rejected a litigant’s claim of kangaroo-ism, thus cleansing the accused tribunal of any potential marsupial taint. Like the previous section, this one is organized on the basis of habitat, and in the same way that the previous section pointed out the decision-making behaviors that inspired a writing judge to declare another tribunal to be a kangaroo court, this section identifies those behaviors that spared various accused decision makers from being forced to wear the Scarlet K.

A. Across the Pond

The most famous defense of another tribunal – or at least the most frequently cited – originated in *British Midland Airways Ltd. v. International Travel, Inc.*²⁷³ In that case, brought to enforce a British judgment, the Ninth Circuit rejected the defendant’s claim that it was denied due process in the British courts: “United States courts which have inherited major portions of their judicial traditions and procedure from the United Kingdom are hardly in a position to call the Queen’s Bench a kangaroo court.”²⁷⁴ Similarly, in *In re Sindona*,²⁷⁵ Judge Griesa

271. *Id.* at 269-70 (emphasis added).

272. *Id.* at 279. One must presume that Judge Larson would be especially wary of a kangaroo with an iron hand wearing a veil.

273. *British Midland Airways Ltd. v. Int’l Travel, Inc.*, 497 F.2d 869 (9th Cir. 1974).

274. *Id.* at 871. As Judge Burns noted, “It has long been the law that unless a foreign country’s judgments are the result of outrageous departures from our own [n]otions of ‘civilized jurisprudence,’ comity should not be refused.” *Id.* The principal beneficiary of Judge Burns’s well-turned phrase would appear to be Lloyd’s of London. See *Richards v. Lloyd’s of London*, 135 F.3d 1289, 1296 (9th Cir. 1998) (quoting *British Midland Airways*, 497 F.2d at 871); *Society of Lloyd’s v. Ashenden*, 233 F.3d 473, 476 (7th Cir. 2000) (same); *Society of Lloyds v. Webb*, 156 F. Supp. 2d 632, 641 (N.D. Tex. 2001) (same); *Society of Lloyd’s v. Turner*, 303 F.3d 325, 330 (5th Cir. 2002) (quoting *Ashenden*, 233 F.3d at 476).

of the Southern District of New York granted a request for extradition based, in part, on his conclusion that:

There [was] no indication in the material submitted by Sindona that the Republic of Italy subjects accused persons to anything approaching summary proceedings or ‘kangaroo courts,’ which occur in nations which disregard human rights [and that] Italy has a criminal justice system which comports with standards of the civilized world.²⁷⁶

Regrettably, at least for the purposes of this article, no U.S. judge has ever been asked to determine whether a tribunal from Australia has acted as a kangaroo court.

B. Down Below

Given the number of litigants who have told a trial judge, to his or her face, that he or she was presiding over a kangaroo court,²⁷⁷ it is hardly surprising that no small number of appeals have included accusations of kangaroo-ism directed toward the lower court that issued the decision being appealed. Unremarkably, appellate courts have generally disagreed.

In *Cassidy v. Cassidy*,²⁷⁸ a suit between two brothers over the distribution of their late father’s estate, Timothy Cassidy filed a motion in the San Joaquin County Superior Court, Probate Department, to declare his brother Patrick a vexatious litigant.²⁷⁹ Unhappy when that court did so, Patrick contended on appeal that “the judgment entered by the trial court [was] ‘completely insane’ and a ‘phantom judgment.’”²⁸⁰ The court of appeals found “no lunacy or invisibility in the [trial] court’s pronouncement,”²⁸¹ and also found “no evidence of the ‘Kangaroo Court proceedings’ Patrick claim[ed] taint[ed] the record.”²⁸²

*Cook v. McCarron*²⁸³ involved an objection by a member of a plaintiff class to the findings of fact made by a special master which supported the settlement of a case against a labor union and its health and welfare fund.²⁸⁴ Judge Manning, of the Northern District of Illinois,

275. *In re Sindona*, 450 F. Supp. 672 (S.D.N.Y. 1978).

276. *Id.* at 695.

277. See Potter, *supra* note 9.

278. *Cassidy v. Cassidy*, No. C041972, 2003 WL 22311315 (Cal. Ct. App. Oct. 9, 2003).

279. *Id.* at *1.

280. *Id.* at *4.

281. *Id.*

282. *Id.*

283. *Cook v. McCarron*, Nos. 92 C 7042, 95 C 0828, 1997 WL 47448 (N.D. Ill. Jan. 30, 1997).

284. *Id.* at *11.

characterized Robert McGinnis's objections as follows:

As earnestly as we try, it is very difficult to decipher the exact theories McGinnis asserts, i.e. '[T]his is not fair . . .', 'Special Master Frank J. McGarr appears to be trying to discredit anyone who factually opposes his views and stands up for their rights,' or 'Almost all of the class members are aware of kangaroo court hearings.'²⁸⁵

Judge Manning saw things differently: "This court instead concludes that Special Master McGarr should be commended for a record which reveals the patience, accommodation and evenhanded approach accorded Mr. McGinnis."²⁸⁶

In *State v. Roberson*,²⁸⁷ the Ohio Court of Appeals rejected a criminal defendant's argument that the Summit County Court of Common Pleas, in which he was convicted, was "nothing more than a 'kangaroo court'"²⁸⁸ because his indictment failed to allege the city or town in which his crime was supposed to have taken place, thus depriving the trial court of subject matter jurisdiction.²⁸⁹ *Kelley-El v. Parke*²⁹⁰ is another criminal case with a jurisdictional twist. In his second petition for a writ of habeas corpus filed in the U.S. District Court for the Northern District of Indiana, South Bend Division, "Kelley-El claimed that the 'Indiana courts are engaged in an ongoing conspiracy' to keep him in 'judicial slavery' through the use of 'kangaroo courts.'"²⁹¹ His charge of kangaroo-ism was based upon his legal theory that "the Indiana courts lacked subject matter jurisdiction to try him [for possessing a stolen vehicle] because the stolen vehicle he was caught driving was stolen in Illinois."²⁹² After affirming the district court's dismissal of Kelley-El's petition on procedural grounds – failure to raise the jurisdictional claim in his first petition²⁹³ – the court of

285. *Id.* at *12.

286. *Id.*

287. *State v. Roberson*, No. 18224, 1997 WL 549592 (Ohio Ct. App. Aug. 27, 1997).

288. *Id.* at *1.

289. *Id.* In the opinion of the court of appeals, "[a]verment of the county and state in which the offenses occurred is sufficient to invoke the jurisdiction of the trial court." *Id.* at *2. As it turns out, however, the appellate court's vindication of the trial court was merely dictum; before reaching the merits of the defendant's argument, the court ruled that he had waived his objection to alleged defects in the indictment by failing to raise it on direct appeal. *Id.*

290. *Kelley-El v. Parke*, 89 F.3d 838 (unpublished table decision), No. 95-2561, 95-2621, 1996 WL 359755 (7th Cir. June 25, 1996).

291. *Id.* at *1.

292. *Id.* at *2.

293. *Id.*

appeals went on to observe that Kelley-El's jurisdictional argument was legally incorrect.²⁹⁴ In yet another twist on jurisdiction, a criminal defendant argued, on appeal, in *State v. Hunter*,²⁹⁵ that the failure of the Butler County (Ohio) Court of Common Pleas to "provide [him] with a copy of the law governing the jurisdiction of the arresting officer . . . resulted in a kangaroo court reminiscent of the Dark Ages."²⁹⁶ The Ohio Court of Appeals found nothing unenlightened in Hunger's conviction, noting in a per curiam opinion, that

neither the trial court judge nor the prosecutor is under any obligation to provide the defendant with this information [and that] [t]he defendant had a right to ask his counsel, who was serving in an advisory capacity, to research this question but no right to request this information from the trial court.²⁹⁷

In *State v. French*,²⁹⁸ a defendant convicted of various traffic offenses in the Hawai'i District Court, Third Circuit, contended, on appeal, that his trial took place in a kangaroo court.²⁹⁹ The state court of appeals construed the defendant's kangaroo-court reference as a claim that he had been denied a fair trial,³⁰⁰ and then ruled that the record disclosed no unfairness resulting from either the defendant's self-representation³⁰¹ or his alleged deafness.³⁰² The court concluded that any error the court may have made regarding either self-representation or the defendant's hearing impairment was harmless error because the defendant never denied committing any of the six violations he had been charged with.³⁰³ *People v. Tuler*³⁰⁴ was an appeal from the denial of a petition for post-conviction relief filed by a petitioner who had "entered

294. *Id.*

295. *State v. Hunter*, No. CA82-06-0068, 1983 WL 4432 (Ohio Ct. App. July 22, 1983).

296. *Id.* at *3.

297. *Id.* at *5. The defendant in *Hunter* was convicted of defacing a highway overpass with spray paint, *id.* at *1, and apparently objected to being arrested by "an Ohio State Highway Patrol trooper . . . who, at the time of defendant's arrest, was working under a Federal grant traffic control program." *Id.* at *5. In response to that argument, the court of appeals explained that "there is nothing to prevent an officer of the law, while on duty, regardless of his assignment, to interrupt that work in order to make a lawful arrest." *Id.*

298. *State v. French*, 883 P.2d 644 (Haw. Ct. App. 1994).

299. *Id.* at 649.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.* at 650. The only possible kangaroo in this case would appear to be the defendant himself.

304. *People v. Tuler*, 630 N.E.2d 1287 (Ill. Ct. App. 1994).

a blind plea of guilty to residential burglary in exchange for the dismissal of charges of aggravated battery and armed robbery.”³⁰⁵ In affirming the denial of Tuler’s petition by the Tenth Judicial Circuit Court, Peoria County, the Illinois Court of Appeals rejected his charge of kangaroo-ism,³⁰⁶ explaining that: (1) the trial record plainly refuted Tuler’s claim that the trial court had failed to hold an evidentiary hearing;³⁰⁷ and (2) once Tuler had told the trial court he was prepared to proceed, neither the court nor Tuler’s standby council was under any obligation to inquire further into his preparedness to go forward with the hearing.³⁰⁸

*Fiorella v. State*³⁰⁹ involved a criminal defendant’s claim that the judge who revoked his probation had predetermined his guilt before hearing all the evidence against him.³¹⁰ According to the court:

The most insistent argument pressed upon us, both in brief and upon our hearing of this appeal, arises from the fact that the trial judge, after making an oral statement, proceeded to read from a prepared written statement. It is argued that the afternoon session commenced at 1:32, P.M., and thereafter testimony was taken, and the record fails to show any recess from then until the end of the hearing. Hence, “the Court could not have known at the time of the preparation of the written statement that all the evidence was before the Court.”³¹¹

The court rejected that argument, declining to “ascribe prejudgment to merely being prepared,”³¹² deeming it “highly proper for a judge, in circumstances such as those here, to set forth his reasons for a decision . . . [which] serve[s] a very useful purpose in educating the public in the workings of the probation system,”³¹³ and declaring that “the mere fact that the court was prompt in deciding cannot be considered an element of bias and prejudice.”³¹⁴ Finally, the court framed the legal context of the trial court’s decision in the following way:

305. *Id.* at 1288.

306. *Id.* at 1289. According to the court of appeals, Tuler “characterize[d] the proceedings below as ‘Kangaroo Court’ proceedings which ‘resembled something from the Court of Star Chamber.’” *Id.* at 1288.

307. *Id.* at 1288-89.

308. *Id.* at 1289.

309. *Fiorella v. State*, 121 So. 2d 875 (Ala. Ct. App. 1960).

310. *Id.* at 878.

311. *Id.* at 879.

312. *Id.*

313. *Id.*

314. *Id.* at 880.

Certainly, when the amendment to the Constitution (No. XXXVIII) confers upon the Legislature authority to empower the courts of criminal jurisdiction to suspend sentence, it is contemplated that the courts will not operate in a kangaroo fashion, but will arrive at their decisions in accordance with the best tradition of common law, which means, of course, that the defendant is entitled to all of those elements of consideration which we lump under the expression “fair play.”³¹⁵

By affirming the trial court’s decision to revoke Fiorella’s probation, the court of appeals sent the clear message that Fiorella had been given a pouch full of fair play rather than a dose of kangaroo-ism.

In *Kalejs v. INS*,³¹⁶ an alleged Nazi collaborator challenged a deportation order issued by the Board of Immigration Appeals.³¹⁷ On appeal, Kalejs argued that the court of appeals should “scrap most of the evidence against him because it [was] inherently unreliable.”³¹⁸ While acknowledging that “the stakes of deportation hearings are great in terms of reputations and disruptions to lives”³¹⁹ and recognizing its duty to “ensure that such proceedings do not turn into kangaroo courts,”³²⁰ the court held that “the hearings in this case were conducted with eminent fairness to Kalejs.”³²¹ In so ruling, the court observed that “there is no general right of discovery in a deportation hearing so long as the accused had reasonable opportunity for cross-examination, as there was here,”³²² and explained, by implication, that the mere fact that the Federal Rules of Civil Procedure do not apply to deportation hearings is not enough to make those hearings antipodally unfair.³²³

In a case from the realm of military justice, the U.S. Navy-Marine Corps Court of Criminal Appeals was presented, in *United States v. Davis*,³²⁴ with an issue of first impression, namely: “whether, in exchange for a sentence limitation in a pretrial agreement, an accused can plead not guilty, enter into a confessional stipulation, and waive his right to present evidence on the merits.”³²⁵ After holding that the process was “unusual . . . [but] not inconsistent with due process under

315. *Id.*

316. *Kalejs v. INS*, 10 F.3d 441 (7th Cir. 1993).

317. *Id.* at 442.

318. *Id.* at 447.

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *United States v. Davis*, 46 M.J. 551 (N.-M. Crim. App. 1997).

325. *Id.* at 552.

the facts of this case,”³²⁶ the court of appeals detailed the military judge’s “comprehensive on-the-record review,”³²⁷ which included a *Bertelson* inquiry,³²⁸ and concluded that “[t]his was no ‘kangaroo court.’”³²⁹

*Gosa v. Mayden*³³⁰ presented the United States Supreme Court with the question of whether to give retroactive effect to its decision in *O’Callahan v. Parker*³³¹ that a member of the armed forces could not be tried in a court-martial for a crime that was not service related. In *Gosa*, an Air Force airman third class was convicted of rape in a court-martial for an act that took place while he was off duty, off base, and out of uniform.³³² He was convicted prior to the Supreme Court’s decision in *O’Callahan*,³³³ and filed a petition for a writ of habeas corpus after the decision in *O’Callahan*, seeking the benefit of the new rule.³³⁴ The Supreme Court ruled against *Gosa*, holding “that *O’Callahan* [would] be accorded prospective application only.”³³⁵ Justice Douglas concurred in part, noting that “petitioner was not tried by a kangaroo court or by eager vigilantes but by military authorities within the framework established by Congress in the Uniform Code of Military Justice.”³³⁶

Finally, in an appeal from an unfavorable decision by a Merit Systems Protection Board Administrative Law Judge, a former employee of the Defense Logistics Agency who had claimed racial discrimination challenged various discovery rulings by “mak[ing] conclusory allegations that the presiding official enacted a ‘ploy of orchestrating and presiding over a kangaroo hearing.’”³³⁷ However, the plaintiff “fail[ed] to identify any information that he was unable to obtain that would have affected the outcome of the proceedings . . . [and failed to] offer any reason that [his discovery] requests should have been granted,”³³⁸ thus causing Magistrate Judge Katz to conclude that “[t]here

326. *Id.*

327. *Id.* at 554.

328. *Id.* (citing *United States v. Bertelson*, 3 M.J. 314 (C.M.A. 1977)).

329. *Id.*

330. *Gosa v. Mayden*, 413 U.S. 665, 665 (1973).

331. *O’Callahan v. Parker*, 395 U.S. 258 (1969), *overruled by* *Solorio v. United States*, 483 U.S. 435 (1987).

332. *Gosa*, 413 U.S. at 669.

333. *Id.* at 669-70.

334. *Id.* at 670.

335. *Id.* at 685.

336. *Id.* at 689-90 (Douglas, J., concurring in part).

337. *Williams v. McCausland*, No. 90 CIV. 7563(RWS)(THK), 1995 WL 548862, at *1, *19 (S.D.N.Y. Sept. 15, 1995).

338. *Id.* at *19.

is nothing to suggest that the ALJ abused her discretion as to discovery.”³³⁹

C. *Off to the Side*

In at least three cases, courts have ruled that collateral proceedings of one sort or another were conducted in a matter that warranted rejection of the losing litigant’s accusation of kangaroo-ism. In one of those cases, Judge Young of the New York Court of Claims was faced with a civil action brought by an arrestee who claimed he had been assaulted by the police officer who arrested him.³⁴⁰ The defendant police officer won dismissal of the case, in part because “[t]he claimant [had] allowed his conviction for criminal assault [of the arresting officer], entered upon his own plea of guilt, to stand without attack direct or collateral [which] belie[d] his present assertion that his conviction occurred in a ‘kangaroo court’ as it belie[d] his present posture of innocence.”³⁴¹

In the second case, *Wiggins v. State*,³⁴² Alphonso Wiggins petitioned to have several criminal convictions expunged from his record.³⁴³ Wiggins had been tried as an adult, and convicted, for six burglaries he committed just before and just after his sixteenth birthday.³⁴⁴ Arguing for the expungement of his record, he relied upon, and sought retroactive application of, *Long v. Robinson*,³⁴⁵ which declared unconstitutional a Maryland statute under which sixteen- and seventeen-year-olds were to be tried as juveniles except in Baltimore City, where they were to be tried as adults. In ruling that the decision in *Long* was not subject to retroactive application, the court stated:

In the words of Mr. Justice Douglas in *Gosa*, Wiggins ‘was not tried by a kangaroo court or by eager vigilantes,’ but by a regularly constituted court of this State of the highest trial jurisdiction according to the regular criminal procedure with the right of trial by jury and the assistance of counsel.³⁴⁶

339. *Id.*

340. *Phillips v. State*, 222 N.Y.S.2d 633, 633 (N.Y. Ct. Cl. 1961).

341. *Id.* at 634.

342. *Wiggins v. State*, 344 A.2d 80 (Md. 1975).

343. *Id.* at 82.

344. *Id.* at 81.

345. *Id.*

346. *Id.* at 81, 95.

The third case, *Moore v. Wainwright*,³⁴⁷ was a habeas corpus proceeding in which Herman Roy Moore claimed that he had been subjected to “a ‘Kangaroo Parole Revocation Hearing’ by the Florida Parole and Probation Board.”³⁴⁸ The court disagreed, explaining “that the statute (Section 947.23, Florida Statutes, F.S.A.), allowing a parolee to have the representation of counsel at a hearing on revocation of parole, was permissive and that due process did not require that an indigent parolee be provided with counsel.”³⁴⁹

D. Behind Bars

Inmate-run kangaroo courts are largely a thing of the past,³⁵⁰ but that does not mean that penal institutions are free from the spectre of kangaroo-ism; in several cases, prison inmates have claimed – unsuccessfully – that they had been taken before prison disciplinary boards that were nothing more than kangaroo courts.

In *Brown v. Bowles*,³⁵¹ Magistrate Judge Boyle dismissed the claim of an inmate in the Dallas (Texas) County Jail system, arising from alleged due process violations committed by “a ‘kangaroo court’ [that] penalized him with ten days in solitary confinement without privileges.”³⁵² The magistrate judge based her ruling on the grounds that ten days in solitary confinement did not constitute an “atypical and significant hardship on the [plaintiff] in relation to the ordinary incidents of prison life.”³⁵³ It would seem that behind bars, a tribunal has to jump just a little bit higher to earn the dishonor of being called a kangaroo court.³⁵⁴

In *Gilligan v. County of Sonoma*,³⁵⁵ a case brought by an inmate in the Sonoma County (California) Main Adult Detention Facility, the plaintiff asserted “that he was denied the opportunity to call witnesses

347. *Moore v. Wainwright*, 253 So. 2d 736 (Fla. Dist. Ct. App. 1971).

348. *Id.* at 736.

349. *Id.*

350. See generally Potter, *supra* note 8.

351. *Brown v. Bowles*, No. 3:99-CV-2158-BC, 2000 WL 980011 (N.D. Tex. July 17, 2000).

352. *Id.* at *4.

353. *Id.*

354. See, e.g., *Lester v. Owens*, No. Civ. A. 85-5695, 1985 WL 25970, at *1 (E.D. Pa. Nov. 26, 1985) (rejecting prisoner’s claim that disciplinary hearing was a “kangaroo-court” and noting that “[p]rison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply”) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974)).

355. *Gilligan v. County of Sonoma*, No. C 00-1706 CRB, 2001 WL 1352895 (N.D. Cal. Oct. 22, 2001).

during a disciplinary hearing,³⁵⁶ which resulted in a violation of his due process rights.³⁵⁷ However, “Gilligan admittedly signed the hearing notice but did not identify witness[es] on the bottom portion because he ‘thought it was a kangaroo court.’”³⁵⁸ Reasoning that Gilligan could not have been denied something he did not ask for, and that it was not even clear that Gilligan had a right to call witnesses at a disciplinary hearing, Judge Breyer granted the defendants’ motion for summary judgment on the due process claim.³⁵⁹

*Morgan v. Ward*³⁶⁰ is another case in which an inmate declined, to his own detriment, to fully participate in a prison disciplinary proceeding:

Morgan’s disciplinary record [from the Clinton County Correctional Facility in Dannemora, New York] reveals that between January 24, 1975 and his transfer from Unit 14 in September 1975, he refused to leave his cell to attend Adjustment Committee Proceedings. Morgan testified that he felt that the Adjustment Committee was a “kangaroo court” that perfunctorily credited false or trivial charges made by Clinton’s correctional officers. There is no evidence that this opinion had a basis in fact. Although the Adjustment Committee Proceedings failed to satisfy the *Wolff* requirements, they hardly constituted a mockery of justice. . . . To allow Morgan to challenge the charges after he unjustifiably refused to comply with established administrative procedures would undermine respect for all of the administrative mechanisms established by the State of New York for resolving disputes within its penal institutions. . . . Morgan’s failure to contest the charges made against him through the Adjustment Committee Proceedings provided precludes him from challenging in federal court the factual basis of those charges. . . .³⁶¹

The clear lesson of *Gilligan* and *Morgan* is that a charge of kangarooism is a dish best served after the fact. Such charges should also be garnished with adequate factual support.³⁶²

In a uniquely pled action, Billy J. Brooks, an inmate at the Stateville (Illinois) Correctional Center, sued the warden of the prison

356. *Id.* at *1, *3.

357. *Id.* at *9.

358. *Id.* at *3.

359. *Id.* at *9.

360. *Morgan v. Ward*, 699 F. Supp. 1025 (N.D.N.Y. 1988).

361. *Id.* at 1044-45.

362. See *Lunsford v. Reynolds*, 376 F. Supp. 526, 529 (W.D. Va. 1974) (dismissing prison inmate’s “broad and conclusory allegation[.]” that “Unit Adjustment Committee is a ‘Kangaroo Court’” because allegation was “devoid of factual support”).

for cruel and unusual punishment based upon the warden's alleged deliberate indifference to the actions of the prison's Adjustment Committee, which, in Brooks's view, was a "kangaroo court" that wrongly and intentionally convicted him of an assault."³⁶³ In affirming the trial court's decision to grant the defendant's motion for judgment as a matter of law, after the jury had awarded a plaintiff's verdict, the court of appeals first explained that "Brooks did not plead or prove the kind of 'punishment' recognized under the Eighth Amendment,"³⁶⁴ and then went on to rule that "even if the bringing of false charges did constitute a kind of 'punishment' cognizable under the Eighth Amendment, Brooks' claim would fail because he has not presented sufficient evidence on a necessary element of such a claim: the issue of [Warden] O'Leary's mental state."³⁶⁵ In the Eighth Amendment context, at least, it is not enough to jump like a kangaroo, but an adjudicator must also think like a kangaroo before his or her tribunal can correctly be called a kangaroo court.

*E. At the Police Officer Station*³⁶⁶

Perhaps not coincidentally, police department disciplinary boards are nearly as popular as prison disciplinary boards as targets for accusations of kangaroo-ism. In *Kearney v. Town of Wareham*,³⁶⁷ a former member of the Wareham (Massachusetts) Police Department challenged his termination and intimated that his termination hearing was a kangaroo court,³⁶⁸ but "fail[ed] to support his invective with an evidentiary predicate."³⁶⁹ As Judge Selya went on to explain,

[r]hetoric alone will not suffice to prevent summary judgment, and, here, the facts are arrayed against Kearney. After all, he was represented by counsel at the hearing, and the ground rules ensured him ample opportunity both to introduce evidence and to cross-examine adverse witnesses. Equally as important, he has adduced no proof of bias or partiality on the part of the independent hearing officer.³⁷⁰

363. Brooks v. O'Leary, 33 F.3d 56 (unpublished table decision), No. 93-3559, 1994 WL 468903, at **1 (7th Cir. Aug. 30, 1994).

364. *Id.* at **2.

365. *Id.*

366. With apologies to Arlo Guthrie, and to those readers unfamiliar with *Alice's Restaurant*, for whom the phrase "police officer station" is merely an ungrammatical redundancy.

367. *Kearney v. Town of Wareham*, 316 F.3d 18 (1st Cir. 2002).

368. *Id.* at 23.

369. *Id.*

370. *Id.*

In *Kerr v. Pennsylvania State Troopers Ass'n*,³⁷¹ a state trooper who had been terminated by the Pennsylvania State Police contended that the grievance arbitration procedure that resulted in his termination was “a sham, nothing more than a kangaroo court without adequate notice of the severity of the discipline and of appellate rights, and without adequate legal counsel.”³⁷² Judge Troutman disagreed, ruling that the availability of a post-deprivation remedy under state law defeated Kerr’s due process claim.³⁷³ The judge also rejected Kerr’s due process claims on the merits, explaining that: (1) the Pennsylvania State Police had no duty to “guide plaintiff through the adversarial process and inform the plaintiff, a state trooper, of his right to appeal,”³⁷⁴ (2) adequate notice was provided to Kerr by a form that stated, directly above the plaintiff’s signature: “I UNDERSTAND NO MATTER WHICH PROCEDURE I SELECT, I AM SUBJECT TO DISCIPLINARY ACTION UP TO AND INCLUDING DISMISSAL, TRANSFER AND REDUCTION IN RANK,”³⁷⁵ and (3) the plaintiff’s collective bargaining unit, the Pennsylvania State Troopers Association, was not a state actor and, consequently, not subject to liability under 42 U.S.C. § 1983.³⁷⁶

In *Anderson v. Dolce*,³⁷⁷ a police officer facing termination from the White Plains (New York) Police Department challenged the constitutionality of Section 75 of New York’s civil service law, which “sets out the procedures for removal and other disciplinary action against tenured civil service employees of New York State and its political subdivisions.”³⁷⁸ Specifically:

Officer Anderson charge[d] in his complaint that Section 75 is unconstitutional on its face because it allows the disciplinary authority, here Commissioner Dolce, to prefer the charges, select the prosecuting attorney, select the hearing officer if one is to be used, and render the final determination regardless of a hearing officer’s recommendation. This procedure allegedly violates due process which, according to the

371. *Kerr v. Pa. State Troopers Ass'n*, Civ. A. No. 93-4816, 1994 WL 585935 (E.D. Pa. Oct. 13, 1994).

372. *Id.* at *1,*4.

373. *Id.* at *4.

374. *Id.* at *5.

375. *Id.*

376. *Id.*

377. *Anderson v. Dolce*, 653 F. Supp. 1556 (S.D.N.Y. 1987).

378. *Id.* at 1557.

complaint, requires that the adjudicative party be independent of the investigative and charging party.

On his motion for summary judgment, Officer Anderson argue[d] that the overlapping of functions provided for in Section 75 poses a high risk that a disciplinary proceeding, whether conducted by the disciplinary authority personally or by a designated hearing officer, will be adjudicated by a biased and partisan tribunal and thereby rendered meaningless – a sham conducted by a “kangaroo court.” The complaint faults the disciplinary authority’s absolute right to credit all testimony given against the employee and to discredit all favorable testimony based on findings of credibility. By vesting such discretion in the disciplinary authority, Section 75 purportedly does little to protect the public employee who does not get along with his superiors but otherwise adequately performs his job. In other words, Officer Anderson is arguing that Section 75 is inadequate to eradicate every last vestige of the old spoils system of the nineteenth century because the statutory scheme lends itself to manipulation and evasion by the disciplinary authority.³⁷⁹

In response, the court stated that “[i]t is not clear that the statutory scheme, as currently construed by the state courts, vests as much power in the disciplinary authority as Officer Anderson claims,”³⁸⁰ and went on to rule that Section 75, in combination with Article 78 review, provided Officer Anderson with all the process he was due under *Cleveland Board of Education v. Loudermill*,³⁸¹ and that the charges against Officer Anderson were heard by an unbiased tribunal.³⁸²

In *Clisham v. Board of Commissioners*,³⁸³ a former police chief challenged his termination by the Naugatuck (Connecticut) Board of Police Commissioners on grounds that two members of the board were biased against him.³⁸⁴ After acknowledging that “[i]f it appears from the record that an administrative hearing was essentially a kangaroo court, the result of that hearing must be set aside,”³⁸⁵ and identifying a “determined purpose to reach a predetermined end”³⁸⁶ as a form of

379. *Id.* at 1564.

380. *Id.*

381. *Id.* at 1567 (citing *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532 (1985)).

382. *Id.* at 1570.

383. *Clisham v. Bd. of Police Comm’rs of the Borough of Naugatuck*, No. 090211, 1991 WL 158159 (Conn. Super. Ct. Aug. 12, 1991), *rev’d on other grounds*, 613 A.2d 254 (Conn. 1992).

384. *Id.* at *3.

385. *Id.* at *7.

386. *Id.*

kangaroo-ism, Judge Blue ruled in favor of the Board of Police Commissioners:

Reviewing the record with this standard in mind, the Court is unable to conclude that the record establishes a personal bias sufficiently great to require the result of the hearing to be set aside. The hearing . . . lasted over a year, and Clisham's procedural due process rights were meticulously observed. With respect to Mason [one of the two Commissioners Clisham accused of bias], it must be observed that he took an active part in the February 14, 1989, deliberations and found five of the six charges pending against Clisham to be not proven. On each of the three charges involving the Gene's Cafe incident, Mason was in a minority voting for Clisham; on written charge 1, claiming that Clisham had threatened Malec, Mason was the only member voting for an acquittal. This is not the sort of behavior that one expects from a member of a kangaroo court.³⁸⁷

Harris v. City of Russell,³⁸⁸ brought by a former officer of the Russell (Kansas) Police Department, involved yet another futile due process claim made by a terminated police officer:

In his statement of facts, Harris includes a single comment by Sheriff Balloun condemning the hearing as a "kangaroo court." The reasons for this conclusory statement are unclear. Moreover . . . Harris was provided with a lengthy post-termination hearing, which he attended with his lawyer. He was permitted to present his side of the story, and to cross-examine adverse witnesses. The hearing was attended by an independent advisory panel which unanimously recommended his termination.³⁸⁹

Similar vindication was given to the Trial Board convened by the Coral Gables (Florida) Police Department to consider charges against Officer Lawrence A. Carastro:

To begin with, Plaintiff received detailed notice of the charges. . . . Plaintiff was afforded an extensive evidentiary hearing . . . The procedures were fairly conducted inasmuch as rules of evidence were substantially adhered to. Witnesses were subpoenaed and ten witnesses testified before the Trial Board. Plaintiff was represented by counsel throughout the hearing, and counsel even conducted discovery of witnesses in advance of the hearing. Plaintiff had the opportunity to

387. *Id.*

388. *Harris v. City of Russell*, No. 93-1071-PFK, 1994 WL 240759, *1 (D. Kan. May 13, 1994).

389. *Id.* at *10.

be heard and to present his defense although he himself chose not to testify on advice of counsel. Finally, the neutrality of the Trial Board panel cannot be questioned. . . . The Court finds, therefore, that the proceedings of the Trial Board were more than adequate in the context of an administrative hearing and were not in any way a “Kangaroo Court.”³⁹⁰

Taken together, *Harris* and *Carestro* provide a nearly foolproof recipe for Teflon disciplinary proceedings, adjudications so fair that no charge of kangaroo-ism could ever stick to them.

F. In Labor

Along with the various police and prison disciplinary boards that have been cleared of charges of kangaroo-ism, there are a handful of labor unions.

In *Jones v. Iron Workers District Council Pension Trust*,³⁹¹ Judge Barker rejected the claim of a union member who argued that his challenge to the termination of his pension benefits by the Iron Workers District Council of Southern Ohio & Vicinity Pension Trust had been adjudicated by a kangaroo court, explaining that “Jones was represented by counsel before the appeals board, had numerous opportunities to explain what he did at KBE [the company where he was alleged to have engaged in disqualifying employment], and submitted to the appeals board several exhibits for consideration.”³⁹² In *Daniels v. National Alliance of Postal & Federal Employees*,³⁹³ Judge Green made short work of claims of kangaroo-ism lodged by three plaintiffs who had been suspended from the union: “[P]laintiff Daniels testified that the procedure [used by the union to suspend him] resembled a ‘kangaroo court,’ and that he ‘never got a chance to be heard.’ The evidence presented at trial and at length below suggests precisely the opposite.”³⁹⁴ Specifically, Judge Green found that all three plaintiffs were notified of the charges against them, replied to those charges, and were notified of the date, time, and location of their hearings.³⁹⁵ And in *Burke v. International Brotherhood of Boilermakers, Iron Shipbuilders,*

390. *Carastro v. Gainer*, 434 F. Supp. 296, 300 (S.D. Fla. 1977).

391. *Jones v. Iron Workers Dist. Council of S. Ohio*, 829 F. Supp. 268 (S.D. Ind. 1993).

392. *Id.* at 272, 273.

393. *Daniels v. Nat’l Alliance of Postal and Fed. Employees*, Civ.A. No. 83-1444, 1985 WL 6408 (D.D.C. Oct. 4, 1985).

394. *Id.* at *7.

395. *Id.* at *7-*8.

Blacksmiths, Forgers & Helpers,³⁹⁶ Judge Zirpoli ruled that the plaintiff's disciplinary hearing before a Trial Panel convened by the union "was not shown to be a sham or kangaroo court,"³⁹⁷ despite the plaintiff's claims of bias in favor of his accuser, who was an influential union official.³⁹⁸ In Judge Zirpoli's view, the bias claim was refuted by "the record of the Trial Panel's proceedings [which] show[ed] that the Panel ruled against Precht [the plaintiff's accuser] on several occasions and afforded Burke every opportunity to present his case."³⁹⁹

*Mayle v. Laborer's International Union of North America, Local 1015*⁴⁰⁰ involved a union member's claim that he had been wrongfully suspended from the union. Judge Bell did not agree that the plaintiff's suspension was improperly imposed:

[P]laintiff . . . was given written notice of the charges and evidence was presented which he could, but did not, address. . . . The trial board members have all submitted affidavits saying that they did not prejudge plaintiff's guilt. While they admitted knowing some of the facts underlying the charges and reading the newspaper accounts, that is hardly surprising and not, in itself, the equivalent of prejudgment. Plaintiff's depositions testimony shows that he decided that the hearing was a "kangaroo court," he decided not to respond to questions and he decided not to present witnesses. He thus cannot complain about the decision to expel him which was based on the evidence which was presented.⁴⁰¹

Just like prisoners facing disciplinary hearings, union members would be well advised to drop the K-bomb after being kangarooed, rather than prejudging the character of a proceeding yet to take place and losing the chance to complain about it afterward.

In *Toussaint v. Hall*,⁴⁰² Local 100 of the Transport Workers Union of America and a number of its members sued the national organization, and a number of its members, for misuse of union funds.⁴⁰³ Specifically, the plaintiffs claimed that various defendants, including Local 100's former vice-president, Eddie Melendez, had used the Local's American

396. *Burke v. Int'l Bhd. of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers*, 302 F. Supp. 1345 (N.D. Cal. 1976).

397. *Id.* at 1353.

398. *Id.* at 1352.

399. *Id.* at 1353.

400. *Mayle v. Laborer's Int'l Union of N. Am., Local 1015*, 678 F. Supp. 690 (N.D. Ohio 1987).

401. *Id.* at 697.

402. *Toussaint v. Hall*, No. 02 Civ. 6403(PKC), 2004 WL 1770062 (S.D.N.Y. Aug. 6, 2004).

403. *Id.* at *1.

Express cards to charge goods and services for personal use.⁴⁰⁴ After a disciplinary proceeding held by the Local's Trial Committee found Melendez liable for approximately \$6,000 in credit card charges,⁴⁰⁵ Melendez "claim[ed] at his deposition that the hearing he was afforded was not fair and was conducted before a 'kangaroo court.'"⁴⁰⁶ Without analyzing the procedures used by the Trial Committee, Judge Castel nevertheless rejected Melendez's claim of kangaroo-ism as both factually unsupported and illogical.⁴⁰⁷

G. Up and Down the Halls of Government

Courts, of course, are not the only government entities that perform an adjudicatory function, and a wide variety of government agencies have been absolved of charges of kangaroo-ism.

In *Michael D. Jones, P.A. v. Seminole County*,⁴⁰⁸ the plaintiff applied "for a declaratory judgment holding that Chapter 162, Florida Statutes, violates Article V, section 1 of the Florida Constitution by establishing a 'rogue' judicial system"⁴⁰⁹ in the form of the code enforcement board.⁴¹⁰ The court was "not unsympathetic to Jones' argument (based on newspaper accounts and Jones' description of hearings before other boards, which Jones cites in this case) that some boards take unbridled and arbitrary actions, and may well deserve Jones' characterization of them as 'kangaroo courts,'"⁴¹¹ but declined to grant Jones the judgment he sought, ruling that "[t]he powers given by the Legislature to code enforcement boards by Chapter 162 do not appear to

404. *Id.*

405. *Id.* at *2.

406. *Id.* at *3. Melendez made that claim despite conceding that he had been afforded various rights under section 411 of the union's constitution, including "service of the written charges against him," *id.*, and "a reasonable time to prepare his defense." *Id.*

407. *Id.* at *4. "Indeed, the conclusory claim that he did not appear because the Trial Committee was a 'kangaroo court' is inconsistent with his position that he did not appear before the Trial Committee or appeal its decision because he was no longer a member of the union." *Id.* Judge Castel further explored the illogic of Melendez's position:

While Melendez calls the Trial Committee a "kangaroo court" comprised of individuals who sought to discredit him, he never challenged a single individual who sat on the Trial Committee even though he was aware of his right to challenge these individuals. Melendez['s] conclusory statement that he was denied his due process rights, without specific facts or affidavits to support this contention, cannot withstand plaintiffs' motion [for summary judgment].

Id.

408. *Michael D. Jones, P.A. v. Seminole County*, 670 So. 2d 95 (Fla. Dist. Ct. App. 1996).

409. *Id.* at 96.

410. *Id.*

411. *Id.*

us as having crossed the line between ‘quasi-judicial’ and ‘judicial.’”⁴¹² *Solitron Devices, Inc. v. United States*⁴¹³ involved “another variation on the theme of a rich but impecunious government contractor who has realized and should refund excess profits, at least according to orders of the Renegotiation Board, but who cannot stay enforcement of the orders because of inability to obtain a bond.”⁴¹⁴ Regarding the work of the Renegotiation Board, the Court of Claims stated it “read the Board’s opinions attached to the petition, and [saw] that they are at least facially reasonable, not bearing the indicia of bias and prejudice, nor appearing the work product of a kangaroo court.”⁴¹⁵

In *Creppel v. U.S. Army Corps of Engineers*,⁴¹⁶ the plaintiffs challenged a decision by the Environmental Protection Agency (“EPA”) that placed restrictions on discharges related to a flood control project.⁴¹⁷ Among other things, the “[p]laintiffs argued that there was some foul play at the public hearings [held by EPA] because ‘individuals present at [them] were met by a hastily assembled “board” of “kangaroo court” ecological activists pre-set in their determinations of the issues to be aired publicly that evening.’”⁴¹⁸ Judge Mitchell disagreed, noting that the hearing was “conducted . . . in an orderly and expeditious manner,”⁴¹⁹ which was all that was required.⁴²⁰ In another case involving environmental issues, the United States Forest Service achieved one-third of a full vindication in the form of Judge Barrett’s dissenting opinion in *Jette v. Bergland*.⁴²¹ In that case, which involved the Forest Service’s granting a permit to Exxon to search for copper in New Mexico’s Gila Forest,⁴²² the court of appeals remanded to the district court for a determination of whether the Forest Service correctly determined that an Environmental Impact Statement was not necessary.⁴²³ In his dissent, Judge Barrett stated his belief that the district court had already implicitly decided the issue that was being

412. *Id.*

413. *Solitron Devices, Inc. v. United States*, 537 F.2d 417 (Ct. Cl. 1976).

414. *Id.* at 418.

415. *Id.* at 424.

416. *Creppel v. U.S. Army Corps of Eng’rs*, CIV. A. No. 77-25, 1988 WL 70103 (E.D. La. June 29, 1988).

417. *Id.* at *1.

418. *Id.* at *10.

419. *Id.*

420. *Id.*

421. *Jette v. Bergland*, 579 F.2d 59 (10th Cir. 1978), *overruled by* Vill. of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992).

422. *Id.* at 60.

423. *Id.* at 65.

remanded,⁴²⁴ and also took a swipe at the plaintiff:

Jette has been vocal in his insistence that the Forest Service, which he chose to unjustifiably accuse of conducting a “Kangaroo Court System” which “reaches its zenith in Fascist state but, unfortunately, is *emulated* by the Federal Bureaucracy,” is arbitrary and uncaring. This is nonsense. Jette intentionally by-passed administrative remedies which were proper and meaningful.⁴²⁵

*Timmons v. Division of Military & Naval Affairs*⁴²⁶ involved claims of racial discrimination brought by an employee who was disciplined and ultimately discharged by the New York State Division of Military and Naval Affairs (“DMNA”).⁴²⁷ “In an unsigned statement, plaintiff claim[ed] that his numerous conflicts with his employer were part of a ‘pattern [in] the way DMNA treat[ed] Black people,’ and that the disciplinary proceedings for African-Americans were unfair ‘kangaroo courts.’”⁴²⁸ Based upon an analysis of both statistical evidence and evidence concerning the disciplinary actions taken against the plaintiff, the court found nary a trace of kangaroo-ism.⁴²⁹

*Stands Over Bull v. Bureau of Indian Affairs*⁴³⁰ involved a claim by the former Tribal Chairman of the Crow Tribal Council that he had been removed from office in a manner that “violated the due process clause of the Indian Civil Rights Act”⁴³¹ because, among other things, the impeachment procedures deprived him of his “right to be free of the ‘Kangaroo-Court’ atmosphere within which the proceedings transpired.”⁴³² At the Tribal Council meeting that resulted in a vote to impeach Stands Over Bull, proponents of impeachment were allowed to speak, followed by opponents.⁴³³ The plaintiff made such a statement:

As for my defense, I will not make any comments. Because I don’t realize this kind of kangaroo hearing, null and void. I hereby as Chairman of the Crow Tribe declare it null and void. My answers will come in proper authorities. That’s all I have to say. I will continue to

424. *Id.*

425. *Id.* (emphasis in the original).

426. *Timmons v. Div. of Military & Naval Affairs*, No. 92 Civ. 0237 (MBM), 1994 WL 38861 (S.D.N.Y. Feb. 8, 1994).

427. *Id.* at *1.

428. *Id.* at *3 (citations omitted).

429. *Id.* at *5-*6.

430. *Stands Over Bull v. Bureau of Indian Affairs*, 442 F. Supp. 360 (D. Mont. 1977).

431. *Id.* at 365.

432. *Id.*

433. *Id.* at 370.

2006]

KANGAROO COURTS

139

act as your Chairman, if I am impeached I will still continue until I go through the proper channel. I believe we are not done yet, (have them vote).”⁴³⁴

While Stands Over Bull considered the Tribal Council to be operating as a kangaroo court, Judge Batten disagreed:

The plaintiff’s refusal to present his case to the tribal council, and his election to disregard the proceedings as being those of a kangaroo court, are a manifestation of a vague familiarity with some precepts of Anglo-American jurisprudence and a disregard for the culture and tradition of the Crow Tribe. In this case, although there were no formal invitations and even though non-tribal members were not permitted to speak, notice was properly given of the quarterly meeting and the agenda for that meeting.⁴³⁵

Because Stands Over Bull received “the even-handed application of tribal customs, traditions and any formalized rules relative to the impeachment process itself,”⁴³⁶ Judge Batten “refuse[d] to hold that the manner in which Patrick Stands Over Bull was removed from office [was] so lacking in fundamental fairness as to constitute a denial of due process.”⁴³⁷ In other words, Stands Over Bull was not faced with the indignity of standing before a kangaroo at the Crow Tribal Council.

H. In Sickness and in Healthcare

While the case that set my kangaroo court research in motion involved a hospital committee that was called a kangaroo court by Justice Levinson of the Hawai’i Supreme Court, several tribunals from the world of medicine have been given a clean bill of health following accusations of kangaroo-ism.

*Leonard v. Board of Directors, Prowers County Hospital District*⁴³⁸ involved a physician’s challenge to the termination of his staff privileges at the Prowers Medical Center.⁴³⁹

In January of 1980, four of the five hospital board members voted to renew plaintiff’s medial staff membership for the calendar year 1980. About one month later, the board requested plaintiff to remain after a

434. *Id.* at 371.

435. *Id.* at 376.

436. *Id.*

437. *Id.* at 376-77.

438. *Leonard v. Bd. of Dirs., Prowers County Hosp. Dist.*, 673 P.2d 1019 (Colo. Ct. App. 1983).

439. *Id.* at 1021.

regular meeting to discuss with them a certain medical procedure involving possible malpractice performed by plaintiff on February 12, 1980. Plaintiff refused.

After having received several letters from the hospital board and its attorney requesting more open communications, plaintiff wrote the hospital board a letter characterizing the board's request for information as a "kangaroo court proceeding." In addition, plaintiff sent a written memorandum to the board's attorney advising him to contact plaintiff's attorney if he wished any further information. This memorandum depicted a set of lips on the posterior of a nude figure. The letter and memorandum described were the key events which led the board, following its 1980 renewal of plaintiff's staff membership, to change its position and commence proceedings against plaintiff to terminate his staff privileges.⁴⁴⁰

While the trial court had no occasion to rule on the propriety of the particular act that the plaintiff labeled kangaroo-ish, the Colorado Court of Appeals affirmed the trial court's determination that the plaintiff's privileges were revoked in strict accordance with the procedures outlined in the Powers County Hospital District Bylaws.⁴⁴¹ The court went on to reject the plaintiff's claim "that the district court abused its discretion in concluding that neither the hospital board nor its hearing committee was disqualified by reason of bias and prejudice,"⁴⁴² ruling that "[b]ecause only the defendant hospital board has the statutory power to revoke hospital privileges, the policy favoring an unprejudiced tribunal must yield, under the so-called 'rule of necessity' to allow action by the only body empowered to act in the matter."⁴⁴³

*Smith v. Ricks*⁴⁴⁴ is another case arising out of the revocation of staff privileges.⁴⁴⁵ Specifically, John Smith asserted that Good Samaritan Hospital of the Santa Clara Valley in California violated the Sherman Antitrust Act⁴⁴⁶ and the Clayton Act⁴⁴⁷ when it revoked his staff privileges.⁴⁴⁸ The defendants moved for summary judgment on grounds that they were immune from federal antitrust liability under the

440. *Id.*

441. *Id.* at 1022.

442. *Id.*

443. *Id.*

444. *Smith v. Ricks*, 798 F. Supp. 605 (N.D. Cal. 1992).

445. *Id.* at 606.

446. 15 U.S.C. §§ 1, 2.

447. 15 U.S.C. § 17.

448. *Smith*, 798 F. Supp. at 606.

Health Care Quality Improvement Act of 1986.⁴⁴⁹ Regarding the plaintiff's charge of kangaroo-ism, Judge Ware had this to say:

The Court finds, in reviewing Plaintiff's submissions, that Plaintiff's broadly based allegations of conspiracy and flagrant violations of due process rights are largely unsubstantiated. Plaintiff makes claims as to the current state of the law, the technical competence of other physicians at Good Samaritan Hospital, and broad accusations of the Good Samaritan review proceedings being akin to a "kangaroo court." What Plaintiff fails to do, however, is explain in detail how and when any of these allegations truly occurred, and why they are relevant to the question of whether the Defendants' review action warrants immunity. The Court is not required to conduct discovery for the Plaintiff in order to take the unsubstantiated allegations within Plaintiff's papers and match them up with facts that tend to support these theories and claims.⁴⁵⁰

Lack of specificity, it seems, is often the Achilles heel of a litigant's accusation of kangaroo-ism.

In *Maxey v. United States*,⁴⁵¹ a physician sued his former employer and, among other things, "suggest[ed] that the decision of the Veterans Administration (VA) to terminate him was improperly made and implemented, then followed by 'kangaroo court' procedures to provide some 'semblance of propriety.'"⁴⁵² In rejecting the plaintiff's charge of kangaroo-ism, Judge Waters characterized the procedure employed by the Fayetteville, Arkansas VA facility as follows:

The procedure employed by the VA was fair. It provided the plaintiff full, timely, and explicit notice of the basis for the disciplinary hearing, the possible results of such a hearing, and the procedures to be utilized. Plaintiff was allowed representation and an opportunity to submit anything he chose for consideration by the review board. Plaintiff was given ample opportunity to cease the conduct of which the VA complained prior to the convening of the review board.⁴⁵³

In *Waltz v. Herlihy*,⁴⁵⁴ a physician claimed that his due process rights were violated by the Alabama Board of Medical Examiners when it suspended his license to practice medicine.⁴⁵⁵

449. *Id.* See also 42 U.S.C. § 11101 et seq.

450. *Smith*, 798 F. Supp. at 611-12 (citations omitted).

451. *Maxey v. United States*, Civ. No. 88-5034, 1989 WL 56497 (W.D. Ark. May 12, 1989).

452. *Id.* at *1.

453. *Id.* at *5.

454. *Waltz v. Herlihy*, 682 F. Supp. 501 (S.D. Ala. 1988).

455. *Id.* at 503. Specifically, the plaintiff was found to have violated provisions of the

[Plaintiff] contend[ed] that the November 25, 1987 hearing [of the Board of Medical Examiners] was conducted by “a Kangaroo Court” made up of “Board hireling[s]” and that he [was] entitled under the Constitution to select the forum in which the [Alabama Medical Licensure] Commission’s complaint could be adjudicated, including a federal district court.⁴⁵⁶

Regarding the plaintiff’s charge of kangaroo-ism, Judge Hand noted: “Plaintiff also contends that his post-deprivation hearing was meaningless because it was conducted by a ‘Kangaroo Court,’ a term not specifically defined by the plaintiff. It would appear that plaintiff intended to [impugn] the impartiality of the decisionmakers.”⁴⁵⁷ Judge Hand rejected the plaintiff’s argument, observing that the plaintiff presented no facts to support a claim that the Alabama Medical Licensure Commission “impermissibly functions in both an investigatory and an adjudicatory role,”⁴⁵⁸ and ruling that even accepting the plaintiff’s claim that the Commission did perform those two functions, that alone would be insufficient to impugn its fairness.⁴⁵⁹

*Rust v. Missouri Dental Board*⁴⁶⁰ was an appeal from a decision of the Circuit Court of St. Louis City to revoke A.J. Rust’s license to practice dentistry, a decision that followed “a like order made by the Missouri Dental Board after a hearing.”⁴⁶¹ Dr. Rust’s license was revoked because he advertised his practice in violation of state law.⁴⁶² The Missouri Supreme Court affirmed the circuit court’s decision as follows:

Sometime . . . before the trial, appellant had a pamphlet printed and circulated in St. Louis and vicinity. At the head appeared his name,

Alabama Code calling for the suspension and/or revocation of the medical licenses of physicians found guilty of:

(8) Distribution by prescribing, dispensing, furnishing, or supplying of controlled substances to any person or patient for any reason other than a legitimate medical purpose;

(19) Being unable to practice medicine . . . with reasonable skill and safety to patients by reason of illness, inebriation, excessive use of drugs, narcotics, alcohol, chemicals or any other substance, or as a result of any mental or physical condition.

Id. at 506 n.5.

456. *Id.* at 506 n.6.

457. *Id.* at 508.

458. *Id.* at 509.

459. *Waltz*, 682 F. Supp. at 509-10.

460. *Rust v. Mo. Dental Bd.*, 155 S.W.2d 80 (Mo. 1941).

461. *Id.* at 82.

462. *Id.*

“Dr. A.J. Rust, Dentist,” and his two office addresses. It was addressed “To the People of Missouri,” and was a diatribe on the prevailing high charges in dentistry. It challenged “Missouri’s Dental Organization.” On the witness stand he characterized the Dental Board as a kangaroo court, and said there was more mechanical skill than medical skill in dentistry; and that he thought dentists should be allowed to advertise. He was against the law [banning advertizing by dentists]. Dr. Rust’s professional history and all this recalcitrance were competent evidence on the question of whether revocation of his license was cruel and unusual punishment.

We think the judgment of the trial court should be affirmed. It is so ordered.⁴⁶³

Plainly, with his challenge to the Missouri Dental Board, Dr. Rust bit off more than he could chew.

I. At the Schoolhouse

In a case that links the previous section to this one, Robert Hall challenged his dismissal from the Medical College of Ohio at Toledo (“MCO”), for academic dishonesty, claiming racial discrimination and violation of his constitutional right to due process.⁴⁶⁴ The court of appeals affirmed the district court’s rejection of Hall’s due process challenge:

We also find baseless Hall’s vague accusations that the entire hearing process had been somehow contrived, as a “kangaroo court,” to drive him from medical school after he refused to withdraw voluntarily and seek psychiatric counselling. Hall received adequate notice of the charges, and was permitted to offer evidence in his own behalf. The hearing record contained evidence supporting the panel’s conclusion. Thus, we cannot conclude that any other “clearly established” constitutional rights were violated in Hall’s expulsion from MCO.⁴⁶⁵

463. *Id.* at 89.

464. *See* Hall v. Med. Coll. of Ohio, 742 F.2d 299 (6th Cir. 1984).

465. *Id.* at 310. The process by which Hall was disciplined was discussed in even greater detail in the preceding paragraph of the court’s opinion:

Turning to Hall’s other allegations of due process violations, we find that he was given timely notice of both of the charges against him, . . . Hall was further afforded the opportunity to testify on his own behalf, to present his own witnesses, and to cross-examine those witnesses presented by Associate Dean Gerber (including his principal accusers). He was given a copy of the hearing panel’s report, and of the decisions of Dean Kempf and President Ruppert adopting its recommendations. A formal transcript

The balance of this section is devoted to other equally unavailing charges of schoolhouse kangaroo-ism.

In *Due v. Florida Agricultural & Mechanical University*,⁴⁶⁶ Judge Carswell held that the disciplinary hearings that resulted in the indefinite suspension of two students “were not precipitously convened ‘Kangaroo’ courts stripping one of a fair and reasonable chance to give account of his version of the case.”⁴⁶⁷ In *Curry v. Pulliam*,⁴⁶⁸ Judge Barker held that Robert Fields, President of the Greater Clark County (Indiana) Board of School Trustees, did not subject custodian Maurice Curry to a kangaroo court disciplinary hearing, because Curry “merely assert[ed] that the decision to terminate him was made before the hearing”⁴⁶⁹ but did not “offer evidence from which a reasonable trier of fact could infer such a conclusion.”⁴⁷⁰

Finally, in *Breitling v. Solenberger*,⁴⁷¹ a teacher who was dismissed by the Frederick County (Virginia) school system sued five members of the county school board who had voted for his dismissal.⁴⁷² In his suit, he asserted “that he was denied due process of law under the fourteenth amendment and 42 U.S.C. § 1983 by the School Board’s use of their retained counsel, Mr. William Johnson, in the capacity both as representative of the prosecuting agency and as the representative of the adjudicatory body.”⁴⁷³ In an order granting summary judgment to the school board members, Judge Michael stated:

Acceptance of the plaintiff’s contention would require that either the superintendent would have to present his case for dismissal without legal assistance or that the School Board must retain additional counsel

of the hearing was prepared and (presumably) available to Hall, and he was able to point out what he perceived to be the deficiencies in the hearing and the panel’s decision during his meeting with the college president. Aside from the question of counsel, it is hard to see what further procedural safeguards could have been provided without turning this hearing process into an exact equivalent of a courtroom trial – something that no court has yet required.

Id. at 309-10. A more detailed prescription for how to avoid kangaroo-ism – and charges of kangaroo-ism – can hardly be imagined.

466. *Due v. Fla. Agric. & Mech. Univ.*, 233 F. Supp. 396 (N.D. Fla. 1963).

467. *Id.* at 403. Judge Carswell’s reasoning is discussed in greater detail in section II.A.3, *supra*. The students were suspended because they had been convicted for contempt of court, which, according to the student handbook, was an offense that could be punished by suspension from the university. *Id.* at 399.

468. *Curry v. Pulliam*, 234 F. Supp. 2d 921 (S.D. Ind. 2001).

469. *Id.* at 928.

470. *Id.* at 928-29.

471. *Breitling v. Solenberger*, 585 F. Supp. 289 (W.D. Va. 1984).

472. *Id.* at 290.

473. *Id.*

for the superintendent alone in the context of such an administrative hearing.

The plaintiff bases his argument, novel to this court, on the case of *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982). In a footnote, the court makes a passing critical reference in this public employee dismissal case to the employer's use of the same counsel both to represent the prosecuting agency and the adjudicatory body. *Id.* at 522 n.14. The plaintiff admits that the factual setting of *Ciechon* is far different from his; the *Ciechon* court refers to the dismissed employee's hearing as a "kangaroo court" replete with egregious due process violations. Certainly, this mere dictum constitutes weak support for the plaintiff's proposition, given the general rule that no "Chinese wall" must be erected between prosecutory and adjudicatory functions in an administrative setting such as the one here.

J. Affirming with Faint Praise

Of course, when one is accused of kangaroo-ism, the sweetest vindication is hearing a judge say (or write) that it just ain't so. Sometimes, however, vindication comes in half measures, based upon a procedural rather than a substantive victory. Litigant accusations of kangaroo-ism have been defeated, deflected, or deferred by all manner of procedural mechanisms, including forfeiture,⁴⁷⁴ waiver,⁴⁷⁵ failure to adequately allege facts supporting a charge of kangaroo-ism,⁴⁷⁶ lack of

474. *Torres-Rosado v. Rotger-Sabot*, 335 F.3d 1, 14 (1st Cir. 2003). In the words of Judge Lynch:

Plaintiff protests in her brief to us that these determinations, made during the disciplinary process [instituted by the Puerto Rico Justice Department's Special Investigations Bureau], were factually incorrect in various ways. We assume that it would be probative for plaintiff if she could show she was subjected to a biased kangaroo court in the disciplinary process. But her objections come too late. . . . [S]he failed to contest these facts before the district court within the deadlines established by the local rules, and to provide evidence – not just assertions – that the process had been biased and flawed.

Id.

475. *Holt Hauling & Warehousing Sys., Inc. v. Int'l Longshoreman's Ass'n, AFL-CIO*, No. Civ.A. 93-7059, 1995 WL 540524, at *2-*3 (E.D. Pa. Sept. 8, 1995) (holding that plaintiff's previous agreement to participate in arbitration procedure with Local 1332 of the International Longshoreman's Association trumped its argument that likely result of arbitration was a kangaroo court). *See also* *Burton v. Dickson*, 180 P. 216, 218 (Kan. 1919) (expelled member of the Kansas State Grange of the Patrons of Husbandry gave up right to challenge, in court, various procedures at her expulsion hearing by "refus[ing] to be tried by a 'kangaroo court'" and, thus, "refus[ing] to have anything to do with the . . . proceedings").

476. *Anderson v. Sixth Jud. Dist. Court*, 521 F.2d 420, 421 (8th Cir. 1975). *See also* *SEC v. Profit Enters, Inc.*, Civ. A. No. 90-2020, 1992 WL 420904, at *6-*7 (D.D.C. Nov. 16, 1992)

jurisdiction,⁴⁷⁷ *Rooker-Feldman* abstention,⁴⁷⁸ collateral estoppel,⁴⁷⁹ the rule that a convicted criminal defendant cannot re-litigate the question of his guilt in a civil rights action,⁴⁸⁰ ripeness,⁴⁸¹ failure to comply with the

(rejecting as “partially unintelligible” defendants’ claim that plaintiff’s “fictitious facts make [defendants] out to be like Jesse James and Bonnie and Clyde all wrapped into one” and that plaintiff had “designed and engineered” a “kangaroo hearing”); *Smith v. Hilltown Twp.*, Civ. A. No. 88-2615, 1988 WL 115769, at *1 (E.D. Pa. Oct. 27, 1988).

477. *In re Rauch*, 390 F.2d 760, 761 (C.C.P.A. 1968) (explaining that the court had no authority to review decisions of the Commissioner of Patents concerning Patent Office’s alleged denial of the opportunity to amend patent claims); *Trauss v. City of Philadelphia*, 159 F. Supp. 672, 674 (E.D. Pa. 1958) (declining to entertain plaintiffs’ “plethoric assertions as to discrimination, conspiracy and overreaching” of Board of Labor Standards due to plaintiffs’ failure to exhaust state remedies); *Crooks v. Dist. Council 37, Local 1549*, 390 F. Supp. 354, 355 (S.D.N.Y. 1975) (dismissing complaint of racial discrimination against employer and labor union, for want of jurisdiction, due to plaintiff’s failure to bring suit with ninety days of EEOC’s decision to dismiss her charge, thus absolving Personnel Review Board of New York City Health and Hospitals Corporation of plaintiff’s claim that hearing that resulted in her discharge “was no more than a ‘Kangaroo Court’”).

478. *McManama v. Clackamas County*, No. CV-00-1387-ST, 2001 WL 34047022 (D. Or. June 13, 2001). In the words of Magistrate Judge Stewart:

The essence of the first of these claims is that *McManama* considers the [Oregon] state court system incompetent by alleging that the underlying proceedings consisted of a “kangaroo trial” in front of a “kangaroo court” (Complaint, pp. 6-7), and believes that he can only be vindicated by filing a claim in federal court. This claim is clearly barred by the *Rooker-Feldman* doctrine in that it amounts to an improper attempt to have this Court review an adverse state court judgment.

Id. at *4 (citing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983)).

479. *Moscovitz v. Brown*, 850 F. Supp. 1185, 1195 (S.D.N.Y. 1994) (holding that a discharged New York City Police Department employee was not permitted to pursue claim that termination hearing was kangaroo court because he had opportunity to litigate fairness of hearing during Article 78 proceeding).

480. *Felders v. Miller*, 776 F. Supp. 424, 430 (N.D. Ind. 1991). As Chief Judge Sharp explained things:

Apparently, the plaintiff’s charge as to a so-called kangaroo court relating to the conduct of the [Lake County, Indiana] prosecutor, T. Edward Page, and a commissioner in regard to proceedings on December 5, and 7, 1984, in 4CR-227-11284-885, represents an attempt to re-litigate the issue of this plaintiff’s guilt. *King v. Goldsmith*, 897 F.2d 885 (7th Cir. 1990), simply does not authorize that enterprise. This plaintiff may, if he hasn’t already, raise issues under 28 U.S.C. § 2254, but this is not such a case. This case is under Title 42 U.S.C. § 1983.

Id.

481. *Villani v. N.Y. Stock Exch., Inc.*, 348 F. Supp. 1185, 1191 (S.D.N.Y. 1972), *modified on reargument*, 367 F. Supp. 1124 (S.D.N.Y. 1973). In *Villani*, Judge Lasker stated:

While it is true that appeals are to be heard by the Board of Directors (or a delegated committee of the Board) who are presently suing the plaintiffs here, and that, therefore, the question of fairness is more acutely presented than in the case of the hearing procedure, we think that until the hearing stage is completed, it is too early to consider appellate questions.

Although the plaintiffs assert that, at the hearing they will face a “kangaroo court”, we have indicated our doubts that this is so, and it is mere speculation to predict the outcome

local rules and the Federal Rules of Civil Procedure,⁴⁸² the rule that “relief from alleged trial errors may not be obtained by habeas corpus,”⁴⁸³ and the fact that an alleged act of kangaroo-ism, setting aside a default judgment, was not an appealable decision.⁴⁸⁴ Perhaps the most striking example of this form of demi-vindication was penned by Justice Edwards of the Oklahoma Criminal Court of Appeals:

The evidence is weak, and the trial as exemplified by the record suggests a kangaroo proceeding. However, no demurrer was filed to the information, nor objection to the introduction on the ground of insufficiency made, and no exception taken to any instruction. . . . The brief argues various questions not presented by the petition in error.

. . . [T]he defects and errors are either waived, or not so fundamentally erroneous as to require a reversal.⁴⁸⁵

If several of the cases in previous sections stand for the proposition that one must submit to the marsupial before asserting a credible claim of kangaroo-ism, *Shestokas* and the other cases in this section stand for an equally important proposition: one who has been kangarooed must say so, in the right way, before relief can be granted.

V. CONCLUSION

As advertised in the title, this article is a field guide to kangaroos in American courtrooms. Thus, I conclude with several pointers regarding where to look for marsupial decision-makers and what to look for.

As for where to look, there are two good choices: follow the joeys, or go to Chicago. Institutionally speaking, juvenile courts have been the

of the hearing.

Id. at 1191-92.

482. *Safeguard Mut. Ins. Co. v. Commonwealth*, 372 F. Supp. 939, 952-53 (E.D. Pa. 1974).

483. *Commonwealth ex rel. Baerchus v. Myers*, 168 A.2d 754, 755 (Pa. Super. Ct. 1961) (declining to reach prisoner’s claim that “the trial judge [in the Court of Common Pleas of Lackawana County, Pennsylvania] was prejudiced, that sentences were imposed in chambers by ‘a kangaroo court’, that one of the jurors was a personal friend of the warden of the county jail, and that the conviction was obtained as a result of perjured testimony and on evidence that was generally insufficient”).

484. *See Gosnell v. Gosnell*, 329 S.W.2d 230, 234 (Mo. Ct. App. 1959). In *Gosnell*, the Springfield (Missouri) Court of Appeals did not reach a claim of kangaroo-ism asserted against the Pulaski County Circuit Court and noted not only that the alleged act of kangaroo-ism was the product of an unappealable judicial act, but also that the party complaining of kangaroo-ism appeared not to have challenged the trial court’s action at the time, raising questions of forfeit or waiver. *Id.* at 233-34.

485. *Shestokas v. State*, 236 P. 629, 629 (Okla. Crim. App. 1925).

most frequent targets of judicial accusations of kangaroo-ism. But of course, searching for kangaroos in juvenile courts would be an enormous undertaking, given the dispersion of juvenile courts across the entire country. So, for those interested in a geographically limited kangaroo safari, it is difficult to imagine a more productive venue than that toddling town, the city of big shoulders, the hog butcher to the world, where kangaroo-ism has been detected in the personnel board and two different school boards. If you're interested in one-stop shopping for your next kangaroo, Chicago is the place to go.

However, even with a prime spot staked out, it is important to bear in mind the characteristic behaviors of the kangaroo adjudicator. So here, in ascending order of popularity (with all due respect to David Letterman and a tip of the metaphorical fedora to Quentin Tarantino), I present the top twelve decision-making behaviors that have inspired a judge to get marsupial on another tribunal's ass: (12) depriving a person of property based upon false charges;⁴⁸⁶ (11) employing procedural rules that unfairly favor one side over the other;⁴⁸⁷ (10) conducting an inadequate investigation;⁴⁸⁸ (9) basing a decision on insufficient evidence;⁴⁸⁹ (8) denying an accused person the opportunity to cross-examine witnesses;⁴⁹⁰ (7) acting out of an improper motivation;⁴⁹¹ (6) exhibiting bias;⁴⁹² (5) denying an accused person the opportunity to confront his or her accusers;⁴⁹³ (4) delaying excessively the decision-making process;⁴⁹⁴ (3) denying an accused person the opportunity to present witnesses;⁴⁹⁵ (2) denying an accused person access to counsel;⁴⁹⁶

486. *Gierbolini Colon v. Aponte Roque*, 666 F. Supp. 334, 338 (D.P.R. 1987); *Cole v. Fair Oaks Fire Prot. Dist.*, 729 P.2d 743, 745 (Cal. 1987) (en banc).

487. *Smith v. Chi. Sch. Reform Bd. of Trustees*, 165 F.3d 1142, 1144 (7th Cir. 1999); *Little Horn State Bank v. Crow Tribal Court*, 690 F. Supp. 919, 921 (D. Mont. 1988).

488. *Ciechon v. City of Chicago*, 686 F.2d 511, 521 (7th Cir. 1982); *Dorsey v. Kingsland*, 173 F.2d 405, 407 (D.C. Cir. 1949).

489. *Dorsey*, 173 F.2d at 407; *In re L.K.W.*, 372 N.W.2d 392, 399, 402 (Minn. Ct. App. 1985).

490. *In re Gault*, 387 U.S. 1, 42-57 (1967); *Robinson v. State*, 297 N.E.2d 409, 410 (Ind. 1973).

491. *Ciechon*, 686 F.2d at 522; *Cole*, 729 P.2d at 745; *City of Boston v. Mass. Comm'n Against Discrimination*, 654 N.E.2d 944, 947 (Mass. Ct. App. 1995).

492. *Ciechon*, 686 F.2d at 521; *Thompson v. Bd. of Educ.*, 711 F. Supp. 394, 410 (N.D. Ill. 1989); *Little Horn State Bank*, 690 F. Supp. at 921.

493. *Gault*, 387 U.S. at 42-57; *King v. Higgins*, 702 F.2d 18, 19 (1st Cir. 1983); *Brevetti v. Tzougros*, 247 N.Y.S.2d 295, 296-97 (N.Y. Sup. Ct. 1964).

494. *Dorsey*, 173 F.2d at 407; *Little Horn State Bank*, 690 F. Supp. at 921; *Commonwealth v. Sadler*, 3 Phila. County Rptr. 316, 330 (Ct. Com. Pl. 1979) (citation omitted).

495. *King*, 702 F.2d at 19; *Nelson v. Johnson*, 212 F. Supp. 233, 237 (D. Minn. 1963); *Humphrey v. Ne. Conn. Sportsman Ass'n, Inc.*, No. CV020087895S, 2002 WL 31045973, at *4 (Conn. Super. Ct. Aug. 8, 2002); *Robinson*, 297 N.E.2d at 410.

2006]

KANGAROO COURTS

149

and (1) providing an accused person with inadequate notice of the charges against him or her.⁴⁹⁷

Having set out where to look for adjudicatory kangaroos, and what to look for, there is nothing left for me to do but say happy hunting, and g'day mates!

496. *Gault*, 387 U.S. at 34-42; *King*, 702 F.2d at 19; *Nelson*, 212 F. Supp. at 237; *In re Billie*, 429 P.2d 699, 701 (Ariz. Ct. App. 1967), *vacated*, 436 P.2d 130 (Ariz. 1968); *Robinson*, 297 N.E.2d at 410; *Humphrey*, 2002 WL 31045972, at *4.

497. *Gault*, 387 U.S. at 31-34; *King*, 702 F.2d at 19; *Dorsey*, 173 F.2d at 407; *Little Horn State Bank*, 690 F. Supp. at 921; *Gierbolini Colon*, 666 F. Supp. at 338; *Brevetti*, 247 N.Y.S.2d at 296-97; *Randolph v. Spruce Cabin Camping Ass'n*, 11 Pa. D. & C.3d 71, 73 (Ct. Com. Pl., Monroe County 1979).