

## Erring on the Side of Hidden Harm: The Granting of Domestic Violence Restraining Orders

By David Heleniak

On September 19, 2005, Yvette Cade went before Judge Richard A. Palumbo seeking an extension of a domestic violence restraining order against her husband, Roger Hargrave. Palumbo, whether from confusion, clerical error, or a genuine belief that the extension was unwarranted, dismissed the restraining order. One month later, Hargrave walked into the cell phone store where Cade worked, doused her with gasoline, and set her on fire.



Two weeks after the attack, Palumbo was removed from all domestic violence cases and placed on administrative duty. On July 20, 2006, Cade was interviewed by Nancy Grace on CNN's *Headline Prime*. Grace, emblematic of the media reaction, introduced the interview with:

Tonight, a primetime exclusive. She went before a trial judge and begged for help, begged for protection. He refused to hear her pleas for help. And then her nightmare came true. Her estranged husband came to her office and set her on fire. But against all odds, she lived, and tonight she wants justice. And PS, to the judge that sentenced her to being burned alive, Maryland judge Richard Palumbo, you are in contempt!

Adding to this, one of Grace's other guests, Congressman Ted Poe, commented: "Well, Nancy, you know I believe that judges need to be accountable for their actions just like we make criminals accountable. And this judge, whether it's a mistake or incompetence on his part, he needs to leave the bench." A judicial misconduct hearing scheduled for the end of August was cancelled when Palumbo announced he planned to retire on August 4th because of health problems.

Whether or not the horrific criminal act committed by Hargrave would have been prevented had Palumbo extended the restraining order, the Yvette Cade tragedy and the ensuing backlash against Palumbo is likely to have just one result. As if things weren't bad enough already in the family courts, judges are going to be even more likely to grant restraining orders, regardless of the facts, rather than risk being held responsible for a similar tragedy.

Economists have long realized that Food and Drug Administration (FDA) officials, in deciding whether to approve a drug, face the possibility of making two errors--they can approve a drug that turns out to be unsafe and/or ineffective, type I, or they can disapprove an effective drug that is, in fact, safe, type II--and have an incentive to make one type of error over the other.

A classic example of type I error, given by former FDA official Henry I. Miller, M.D., is the FDA's approval in 1976 of the swine flu vaccine.

Although the vaccine was effective at preventing influenza,... it had a major side effect that was unknown at the time of approval: temporary paralysis from Guillain-Barré Syndrome in a small number of patients. This kind of mistake is highly visible and has immediate consequences--the media pounces, the public denounces, and Congress pronounces. Both the developers of the product and the regulators who allowed it to be marketed are excoriated and punished in modern-day pillories: congressional hearings, television news magazines, and newspaper editorials.

A classic example of Type II error, given by economist Walter E. Williams, is the FDA's failure to approve the use of beta-blockers, available in Europe since 1967, until 1976.

In 1979, Dr. William Wardell, a professor of pharmacology, toxicology and medicine at the University of Rochester, estimated that a single beta-blocker, alprenolol, which had already been sold for three years in Europe, but not approved for use in the U.S., could have saved more than 10,000 lives a year.... Grieving survivors of those 10,000 people who unnecessarily died each year don't know why their loved one died, and surely they don't connect the death to FDA over-caution. For FDA officials, these are the best kind of victims--invisible ones.

Economist Thomas W. Hazlett sums it up this way: "Type I deaths result in headlines reading, 'FDA-Approved Drug Kills Pregnant Mother, Congressional Hearings Slated.' Type II deaths don't generate headlines, or even little blurbs. There are no visible victims to lay on the regulator's doorstep when potential beneficiaries are only statistical probabilities."

As Miller confides, "Because a regulatory official's career might be damaged irreparably by his good faith but mistaken approval of a high-profile product, decisions are often made defensively--in other words, to avoid type 1 errors at any cost."

Although it is not politically correct to say so, women can and do use false allegations of domestic violence to gain sole custody and to get their children to hate and fear their fathers. Even when a restraining order doesn't snowball into complete parental alienation, a judge's declaration that a father is an abuser can permanently tarnish his image in his child's eyes. The damage to father/child relationships and to children's mental health caused by the overzealous entering of restraining orders, however, is seldom if ever reported, while the harm caused by overtly violent acts following the failure to enter restraining orders most certainly is.

Just like FDA officials worrying about the headlines, judges deciding whether to enter domestic violence restraining orders have their careers to think about in addition to the merits of the particular cases before them. When in doubt, they err on the side of hidden harm.

Facts should be determined by several fresh, open minds, not one with a career on the line. Jurors, relatively anonymous one-time actors in the judicial system, are far less concerned with extraneous matters than are judges. In the wake of the Yvette Cade tragedy, it is more critical than ever that juries, not judges, be used to decide when domestic violence restraining orders are warranted.

---

*David Heleniak is a civil litigation attorney in New Jersey and the Senior Legal Analyst for [True Equality Network](#). He is the author of "The New Star Chamber: The New Jersey Family Court and the Prevention of Domestic Violence Act."*

This work is licensed under the Creative Commons Attribution\_Noncommercial\_No Derivative Works 2.5 License. To view a copy of this license, visit <http://creativecommons.org/licenses/by-nc-nd/2.5/> or send a letter to Creative Commons, 543 Howard Street, 5th Floor, San Francisco, California, 94105, USA.