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EDITOR’S NOTE

We begin this issue with remarks given by Roger Warren on the need to tie preservation of judicial independence with a healthy dose of judicial accountability. Warren is a former judge and the former president of the National Center for State Courts. He argues that we focus on the things we can control, not those we don’t. He urges us to take a leadership role in getting our own house in order and in making sure we’re accountable to the public both for our use of funds and for our fidelity to fairness.

Roger Warren’s themes tie in with a new publication from the Justice at Stake organization mentioned in the Resource Page (page 44). This is no coincidence: Warren was recently named the chair of Justice at Stake’s board of directors. We also encourage you to go online to read this new, 22-page publication (“Speak to American Values: A Handbook for Winning the Debate for Fair and Impartial Courts”), which is summarized, with a link to the web, on the Resource Page. Combined with Warren’s article, this new publication serves as a roadmap for keeping our courts strong and for enhancing public support for them.

In our second article, researchers Max Rothman and Burton Dunlop explore ways in which the aging of the population is affecting the courts. Through surveys and court site visits, they describe ways in which the courts are being made more accessible to older users. Our third article reviews the establishment of at least 63 specialized courts handling cases involving drivers under the influence of alcohol or drugs. Gene Flango of the National Center for State Courts provides a helpful listing of these courts and their early experiences. Our final article is Professor Charles Whitebread’s annual review of the criminal decisions of the past Term of the United States Supreme Court. His review of the civil decisions of the past Term will be in the next issue.

I’m pleased to announce that three law students at the University of Kansas and University of Missouri–Kansas City law schools have agreed to be student editors for this volume of Court Review. We are once again behind in our publication schedule, but will be able to get caught up with their help. You will not miss any issues and, during the next 12 calendar months, will receive more than the usual four. As always, if you have suggestions for authors or article topics that would be good for Court Review, or if you would like to speak to other judges through a letter to the editor, please contact me at sleben@ix.netcom.com.—SL

Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. Court Review seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for Court Review are set forth on page 42. Court Review reserves the right to edit, condense, or reject material submitted for publication.

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Photo credit: Mike Fairchild. The cover photo is of the old Douglas County Courthouse in Lawrence, Kansas, built in 1903. Douglas County was organized in 1855, five years before Kansas became a state, and named after U.S. Senator Stephen A. Douglas of Illinois. Mike Fairchild and his company, Dizlnaith Graphic Design (913-865-3705, mkefair@sunflower.com), perform the design and layout work on Court Review.

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The first 90 days of my term as president of the American Judges Association have had me criss-crossing this country to attend various judicial and court-related conferences. Family, friends, and colleagues constantly pester me on my fortunes as a frequent traveler. However, the reality of traveling is rushing to the airport, long and nervous waits in security lines, subjecting one’s self to nonconsensual search and seizure, capacity-filled airplanes with cramped seats, awful microwaved hamburgers, delayed flights, irritable taxi drivers, foreign-speaking intern reservation clerks at the hotel, mini-bars, and “Save the World” notes about reusing your linens and towels. Oh yes, the glamour of travel! The fun continues with the silent ride in the hotel elevator, or until that silence is broken by the joker who quips, “I hope this is the express car!” and then, to make the elevator travel faster, proceeds to push the already lighted floor button.

Upon entering your room you unpack and soon discover the answer to your own question, “What did I forget this time?” After freshening up you take your laptop and attempt to find a wireless connection somewhere in the hotel to avoid paying the convenient $9.95 per day hookup in your room. It is always a joy to find 30 new email messages that have arrived, and require a response, between departure from home and arrival at the hotel. Answer the emails, return phone calls, check-in with the family, and head to the conference registration desk. You receive your materials and your name tag and officially begin the duties as AJA Ambassador. Finally, one finds enjoyment by meeting old friends, new acquaintances, and colleagues. It becomes a time of sharing experiences, listening to new ideas, and giving thanks for being a part of the legal profession.

Our organization, the American Judges Association, held a working lunch visionary session at our annual conference in Anchorage, Alaska. In cooperation with the National Center for State Courts, we spent the better part of a day attempting to find a focus for the future of our organization. The Executive Committee will review and discuss the results of this session at our meeting in mid-January.

Steve Leben, AJA’s president-elect, and I recently met with National Center president Mary McQueen and members of her staff at the National Center in Williamsburg, Virginia. What began as a get-acquainted visit quickly turned into a valuable brainstorming session on our need to select an issue or topic of interest to all our members. It must be a topic that our members can support, without controversy and with enthusiasm, that will invigorate our officers, Board of Governors, Delegates, and members. Steve and I are fine-tuning an idea for presentation to our Executive Committee and, with their approval, we will disseminate it to all our members. In addition to that topic, our January Executive Committee meeting discussions will include sponsorships and fundraising, membership surveys, White Paper topics, membership issues, and our involvement with “Justice at Stake” and its projects (see page 44).

In addition to determining a focal issue, I firmly believe monetary sponsorships are paramount to the success of AJA. If there is one lesson I have learned from traveling to various conferences, it is recognizing the necessity of raising money through the American Judges Foundation to underwrite the cost of our educational and conference expenditures. Sponsorships from vendors, law firms, corporations, and other foundations will allow us to budget our dues money for membership promotions and not to cover conference costs.

Our annual conference attendance has been steadily declining, resulting in budgetary losses. We must stop the financial bleeding. Obtaining outside income is the only real answer. I will be asking the Executive Committee for suggestions as to the method. Do we ask our AJF members to campaign for sponsorships or do we look to an outside professional fundraiser? One way or another, it is time to stop talking about this issue at our semi-annual meetings and begin a more aggressive approach to fundraising.

I, along with the other officers, am looking forward to a productive and meaningful Executive Committee meeting. If any members have any thoughts ideas for the betterment of the association, please contact me as soon as possible.
Judicial Accountability, Fairness, and Independence

Roger K. Warren

Editor’s Note: Roger Warren, former California trial judge and president of the National Center for State Courts, presented the Justice Robert H. Jackson Lecture at the National Judicial College on July 21, 2005. We reprint his remarks here.

Much attention has focused of late on unfair attacks on judges leveled in nominal pursuit of greater judicial accountability. In response to the refusal of the federal courts to intervene in the Terry Schiavo case, for example, House Majority Leader Tom DeLay angrily declared that Congress has for many years “shirked its responsibility to hold the judiciary accountable.”

“No longer,” the leader said. “We will look at an arrogant, out of control, unaccountable judiciary that thrombed their nose at the Congress and President when given jurisdiction to hear this case anew . . . . The time will come for the men responsible for this to answer for their behavior.”

A week later Senator John Cornyn, commenting on Supreme Court Justice Anthony Kennedy’s recent majority opinion holding unconstitutional the death penalty for juvenile offenders, speculated that recent courthouse violence might be due to public frustration with decisions of judges who “are unaccountable to the public.” Others called for Justice Kennedy’s impeachment. Not to be outdone in the pursuit of judicial accountability, author Edwin Vieira said his “bottom line” for dealing with such errant judges came from Joseph Stalin: “He had a slogan and it worked very well for him whenever he ran into difficulty,” Vieira declared: “No man, no problem.”

Much recent attention has also focused on expanded efforts to achieve judicial accountability of elected state justices through the ballot box. In 2004, for example, state supreme court incumbents faced opposition in 18 of the 20 states with contested elections on the ballot. Supreme court campaigns attracted network television ads in four times as many states as

Footnotes
4. See id.
administration of justice is as old as law.” And, clearly, there is no easier way to strike a harmonious chord with an audience of judges than to decry the increasing number of unfair personal attacks on the judiciary. Yet, many sources of dissatisfaction and threats to judicial independence are beyond our control. Unfair attacks on appointed and elected judges typically emanate from controversial judicial decisions involving issues affecting powerful special interests—or about which segments of the public hold intense or evangelical views. Justice Jackson, to whose memory this lecture series is dedicated, spoke himself of this phenomenon over a half century ago. “[W]e must not forget,” he observed, “that in our country are evangelists and zealots of many different political, economic, and religious persuasions whose fanatical conviction is that all thought is divinely classified into two kinds—that which is their own and that which is false and dangerous.”10 Despite the best efforts of judges to effectively explain and communicate their decisions, public expression of dissatisfaction with judicial decisions—and unfair attacks on judges—are inevitable.

As Pogo reminds us, however, oftentimes “we have met the enemy and it is us.” Oftentimes, we as judicial officers allow threats that originate outside the judiciary to distract us from proper focus on the much more dangerous threats that result from our own unsatisfactory performance. We become preoccupied with the external threats to judicial independence over which we have little control rather than fully accepting accountability for our own performance—over which we have almost complete control. We must examine our own performance honestly—and demonstrate the courage and ability to improve our performance when it is found insufficient.

Judicial independence concerns the judiciary’s freedom from improper control, influence, or interference in the decision of cases—and in the governance and management of the judiciary’s affairs. Sometimes we forget that judicial independence is not an end in itself but merely a means to an end. With respect to judicial decision making, the object of judicial independence is to ensure judicial fairness—that judicial decisions are based solely on evidence and law and not influenced by any improper consideration. With respect to judicial decision making, judicial independence is the freedom to be fair.

Judicial accountability refers to the accountability under democratic government of those who govern to those whom they govern—as well as to the rule of law. Unfortunately, unfair attacks on the courts—and other inappropriate acts undertaken in the name of judicial accountability—have tended to give the concept of judicial accountability itself a bad name. But unlike the concept of judicial independence, accountability is an end in itself and applies to all three branches of government. The judiciary is not exempt from the requirement of accountability to the people it serves for the proper performance of its duties.

When we as judges speak of judicial independence as if it is an end in itself, or as if it is unlimited, or intended merely for our own personal benefit as judges rather than for the benefit of litigants, we risk creating the impression that we regard ourselves as being above the law, or less accountable for our performance than other governmental officials are for theirs. The judiciary is after all a co-equal branch of government, neither lesser nor superior to any other. Judicial independence does not excuse the courts from compliance with appropriate standards of accountability: it merely helps define the standards that are appropriate.

How shall we be judged? By what standards should the courts be held accountable? It is critical that the courts themselves define and communicate the standards by which their performance may properly be judged. Unless and until we do so, we will continue to be judged by standards, oftentimes inappropriate, fashioned by others. We must define and communicate not only what the public does not have a right to expect from the courts, but also what the public and other branches do have the right to expect.

The public does not have the right to expect, for example, that judicial decisions will invariably be popular or always to its satisfaction. Cases must be decided based on facts and law, not public appeal. For the legal correctness of their decisions, courts are accountable neither to the other branches of government nor to the electorate—but to principles of law as interpreted by higher courts.

The public does have the right to expect, however, that courts will be run efficiently and in a professional manner, and that every person will be treated fairly and equally. The public also has the right to expect that judges will be competent, knowledgeable about the law, and willing and able to behave in accord with the highest ethical standards.

Many courts have adopted either trial or appellate court performance standards by which court performance may properly be measured. The National Center for State Courts has recently formulated ten basic statistical measures of court performance.11 Formal criteria for evaluation of judges exist in many states using merit selection or retention processes. The ultimate standard to which judges and courts should be held accountable, however—and the real test of judicial performance—is whether courts serve to the general satisfaction of the litigants and public whom they serve. The courts are also dependent on public trust and confidence to obtain the public resources and inter-branch cooperation that are indispensable.

11. These measures, called CourTools, are available at http://www.courtools.org. An overview can be found on the Resource Page of this issue of Court Review at page 44.
In the long run, legitimate criticism of the judiciary, left unaddressed, is a far greater threat to the independence of the judiciary than unfounded attacks.

to a functioning judiciary.

Over the last five years, the National Center for State Courts has conducted a number of state and national public opinion surveys to identify the factors that most directly affect public confidence in the courts.12 Although surprising to many, the survey findings consistently identify the direction in which courts must proceed to build greater public trust.

First, the extent of public confidence in the courts depends substantially more on the respondents’ perceptions of the extent of judicial fairness than on any other aspect of court performance or demographic factor. Whereas attorneys’ (and judges’) views of court performance depend more on their perceptions of the fairness of court outcomes (in contrast to the fairness of court procedure), the views of litigants and members of the public are influenced almost twice as much by their views of the fairness of court procedure than by their views of the fairness of court outcomes.

What do we mean by the fairness of court procedure? The most recent survey used four procedural characteristics to define the concept of procedural fairness: whether the courts (1) are unbiased; (2) treat people with respect; (3) listen carefully to what people have to say; and (4) are trustworthy, i.e., care about the people before them and take their individual needs into account. The single factor that most greatly influences respondents’ perceptions of the extent of procedural fairness is their perception of whether judges are honest and fair.

Second, although those with prior jury service experience hold more favorable views than others of the fairness of court processes, those with direct prior experience as litigants hold less favorable views of the courts’ procedural fairness. The types of cases in which respondents are most critical of procedural fairness are the high-volume cases in which ordinary citizens and unrepresented litigants most frequently appear: traffic, family, and small-claims cases.

Third, whereas two-thirds or more of white, Hispanic, and Asian-Americans believe that the courts are procedurally fair, a majority of African-Americans do not. Moreover, a majority of all respondents believe that African-Americans and Hispanic-Americans usually receive less favorable results in court than others, and about two-thirds believe that low-income people and non-English speakers receive less favorable results.

Fourth, the single area of court responsibility in which respondents’ expectations of court performance are most frequently unmet is the expectation that the court should “report to the public on its job performance,” i.e., judicial accountability.

If the courts are to reinforce and improve their standing with the public, judges need to critically self-examine the fairness of their interactions, as well as the interactions of court staff, with those who use our courts, including in traffic, family, and small-claims cases. They must also redouble their efforts to address widespread perceptions of unequal treatment in the justice system—for the poor, non-English speaking, and minorities. Finally, the courts must more clearly acknowledge their accountability to the public they serve and find more and better ways to report on their performance to the public.

In the long run, legitimate criticism of the judiciary, left unaddressed, is a far greater threat to the independence of the judiciary than unfounded attacks. And understandably so. Democracy is a system of checks and balances. How can the judiciary expect the public or other branches of government to defer to the independence of the judiciary if the judiciary cannot demonstrate its own ability to do a good job—and properly manage its own affairs? As one commentator has noted, “Part of being master of your own home is keeping your house in order.”13 In effect, our system of checks and balances strikes a bargain with the judiciary. In consideration for the judiciary’s relative independence, the public and other branches of government expect that we will do our job well and keep our house in order. If we cannot, or do not, do that, we are not in any credible position to complain about the inevitable intrusions on our independence that result.

Among the various sources of legitimate criticism, the greatest threat to judicial independence is the perception that courts do not treat people fairly and equally. The surveys show that these perceptions affect public confidence in the judiciary more than any other factor. Judicial fairness and equal justice under law are fundamental expectations of the American justice system—and of judges in particular. Unfair and unequal treatment are perceived by litigants and the public not as incidents of technical incompetence but as fundamental defects of judicial character. Lay members of the public may not believe that they have sufficient qualifications or experience to evaluate judicial competence—or determine whether judges have correctly decided the law—but they surely do believe that they are able to judge our character, our honesty and our fairness, and decide whether we are worthy of their trust.

Yes, we in the judiciary must seek to protect American courts from unfair attacks leveled in the name of judicial accountability and from other inappropriate external interfer-


Among other things, the Call to Action urged that all judicial elections be nonpartisan, that non-governmental monitoring groups be established to encourage fair and ethical judicial campaigns, and that greater information be provided to voters by state and local governments concerning judicial candidates.
ence in the independence of courts. For example, we must continue to implement the recommendations put forth in the Call to Action issued by participants in the National Summit on Improving Judicial Selection held December 2000. We must not be distracted, however, from maintaining an even firmer resolve to address legitimate criticism of our performance in administering justice fairly, equally, and effectively. In the end, the surest path to true independence is the path of judicial accountability—wherein the courts define and communicate the standards to which they may properly be held accountable—and then continuously demonstrate to the satisfaction of the public and other branches of government that their performance meets those standards. Most critically, the courts must honestly reexamine whether their day-to-day processes provide fair and equal treatment to all.

It is we the judges who must lead this charge. If we do, future external attacks on the judiciary, albeit troubling, will substantially erode neither public trust in the courts nor the courts’ continued independence.

In closing, let us be reminded that judicial independence is only a concept, an ideal. The United States enjoys the strongest and most independent judiciary in the world, and our federal and state constitutions contain provisions intended to promote the independence of our judiciaries. There is nothing in our laws, however, that guarantees judicial independence. Judicial independence has to be continually fought for—and won anew—each day. It is grounded in public respect for the courts and for the judicial function. Like respect, it cannot be demanded. It must be earned.

Roger K. Warren served as president from 1996 to 2004 of the National Center for State Courts, where he led initiatives to promote public trust and confidence, best practices, civil-justice reform, and racial and ethnic fairness. His judicial career began as a municipal judge in Sacramento, California, where he served for six years. He then became a judge on the Sacramento Superior Court, where he served from 1982 to 1996, including several years as presiding judge of the court or its divisions. A graduate of the University of Chicago Law School, Warren was named California’s jurist of the year in 1995 by the California Judicial Council. He presently serves both as a consultant to the National Center for State Courts and as a scholar-in-residence for the California Administrative Office of Courts. In addition, Warren serves as chair of the board of directors of the Justice at Stake Campaign, a coalition of state and national organizations (including the American Judges Association) committed to maintaining fair, impartial, and independent courts.
Judicial Responses to an Aging America

Max B. Rothman and Burton D. Dunlop

In 2000, the authors published a book titled *Elders, Crime, and the Criminal Justice System: Myth, Perceptions, and Reality in the 21st Century*, in which several chapters were devoted to older adults’ interactions with the court system. Those chapters revealed that these interactions could be highly problematic for elders. In follow-up, this article is based on a project designed to address the overarching issue of whether and how judicial systems in the United States ensure that older adults (60 and older) are provided effective access to the courts, including both civil and criminal jurisdictions. In order to accomplish this goal, courts need to identify and remove barriers within the judicial system, and develop or enhance linkages between elders and the courts as well as with health, mental-health, and social service systems in their communities. This article examines recent developments in judicial administration to establish the context in which this can be achieved. It then analyzes ten specific questions focused on these issues, as well as other areas of importance identified during the course of project site visits. Finally, the article proposes steps or elements necessary in the development of a model plan needed to respond to issues of aging in the courts.

Two data-collection methods were employed. The first was a survey of both state trial courts and federal courts addressing the ten central questions guiding this project. The survey of state trial courts was carried out electronically in three steps. First, the survey was sent to the National Center for State Courts, which agreed to convey the survey form to all 50 state court administrators, who in turn were requested to send the form electronically to all trial-court chief judges or court administrators within their respective states. It is very likely that all 50 states received the communication, but it seems clear that a majority neglected to or decided against sending it on to the trial courts. We received responses from one or more courts in only 13 states. A total of 30 completed forms were returned electronically and three were returned by mail or fax, for a total of 33 forms. Following negotiations with the Federal Administrative Office of the Courts to follow a similar approach with federal district courts, that office declined to participate. After consulting the *Judicial Yellow Book* for names and addresses of federal judges, we mailed a slightly modified version of the state survey form to 93 judges. Seventeen completed forms from 13 separate courts were returned by mail or fax. However, this survey elicited a poor response and provided virtually no useful or interesting findings.

Nearly half (15) of the state-trial-court forms were completed by court administrators and another two were filled out by deputy administrators. One circuit judge and two probate judges completed the forms, while the remaining 13 forms were answered by various court personnel, e.g., probate registers, directors or managers of human resources or intergovernmental relations, self-help centers, planning units, or special projects; one was even completed by a prosecutor. These surveys were utilized to obtain a general idea of what courts were doing vis-à-vis older adults but primarily to identify potential courts for site visits. Three jurisdictions visited, Reno, Nevada, Sarasota, Florida, and Wilmington, Delaware, were identified from the survey. Information provided was verified with follow-up telephone calls. Two sites, Ft. Lauderdale, Florida, and Tampa, Florida, did not respond but were known to the research team due to their proximity; and two jurisdictions, Minneapolis, Minnesota, and Phoenix, Arizona, were recommended by contacts at the National Institute of Justice and the National Center for State Courts as sites with promising innovations that either did or could relate to older adults.

The second data-collection mode consisted of extensive interviews of judges and other court and court-related personnel in seven different trial courts: Reno, Nevada; Maricopa County, Arizona; Tampa, Florida; Sarasota, Florida; Wilmington, Delaware; Broward County, Florida; and Hennepin County, Minnesota. Altogether, the research staff carried out face-to-face interviews with 53 individuals, each lasting an average of approximately one hour. Interviewees included 15 judges, nine court administrators or deputy administrators, seven professionals involved with guardianships, three directors of self-help centers, three persons from legal services or legal aid, three management information system specialists, and two public defenders. Others included a court public affairs director, a specialty courts coordinator, a corrections officer, an Americans with Disabilities Act coordinator, a director of psychological services, an Adult Protective Services representative, a performance measure/outcomes expert, a probate coordinator, an Aging Office representative, a private attorney, and an Elder Justice Center director. Once these interviews were completed, staff notes were reviewed carefully for common themes and especially innovative

Footnotes


2. The project and a more detailed report on it were funded by the Borchard Foundation Center on Law and Aging and the Quantum Foundation. The report is available at http://www.fiu.edu/~coa/downloads/elder%20justice/Borchard_Final_Report_(5-28-04).pdf (last visited Nov. 20, 2005).

arrangements for dealing with older-adult issues or other court-constituent issues with adaptation potential for older adults. Lessons learned from our ongoing technical assistance work with the Elder Justice Center in the Thirteenth Judicial Circuit of Florida (Palm Beach County) also were brought to bear in the subsequent review and analysis.

I. CHALLENGES OF AMERICA’S AGING SOCIETY

The challenges of an aging society continue to dominate the attention of policymakers, academics, particularly those in the sciences and medicine, the popular media, and the public at-large. Issues of health and long-term care, drug benefits, reduction of mortality and morbidity, social security, employment, and other economic issues are researched, legislated, and written about with increasing frequency. These matters are of great popular and political concern. As the nation’s older population (65 and older) doubles over the next 25 years from 36 million to 70 million or more, these issues and many others will be addressed much more intensively because of the impact they will have not only on older people themselves and their families, but also on the core institutions of American life.

Little is known, however, about the impact older people will have on one of the three pillars of American government: the judiciary. Although considerable work has been undertaken concerning specific substantive areas of “elder law,” notably tax and estate planning, other end-of-life issues, and guardianships, there has been little effort to examine the implications of aging in America on judicial administration, access to the courts, and resolution of the underlying issues that often precipitate court involvement for older adults. It is important today to understand more about the nature of situations that lead older people to the courts, how courts respond to them, and what policies and court administrative actions are needed to prepare for the future.

Health and Social Status

Although the demographics of aging in America are compelling judicial systems to accommodate larger numbers of older adults in the courthouse, it is the special situations of many elders that present the administrative challenge for court administrators and judges. Increasingly, older adults represent diversity of race, ethnicity, language, education, income, and living arrangements. The physiological, psychological, and social profiles of older people are becoming more complex. Greater incidence of disease occurs with increasing age, including dementia, cancer, bone and joint diseases, vision and hearing loss, memory loss, and loss of cognition. Alzheimer’s disease alone, the most common form of dementia, afflicts 10% of the U.S. population 65 and older and perhaps close to 50% of those 85 and older. Use of prescription medication tends to increase dramatically. In a broader social context, older adults experience loss of roles through retirement, widowhood and bereavement, isolation and loneliness, depression, and substance abuse.

These factors, individually or in endless panoply of combinations, result in far greater numbers of older people encountering court systems nationwide, and often presenting with much more varied and complex personal circumstances. For example, the number of petitions for guardianship are climbing as more people live longer. Likewise, numbers of arrests and jailing of older people for domestic violence, assaults, and drug-related charges are growing. Arrests for other criminal charges, including misdemeanors such as shoplifting or trespassing, also are increasing. Motor-vehicle violations of all kinds, including criminal charges and moving infractions, continue to expand. Civil matters arising from landlord-tenant and other property disputes, contracts, negligence, and a variety of other factual situations, will ensure that more older people regularly enter the courthouse. Indeed, more elders also will be selected for jury duty, called as witnesses, seek divorces, or simply look for information or assistance. Moreover, these matters may well involve persons with dementia, mental illness or substance abuse, or complex medical conditions.

Little is known . . . about the impact older people will have on one of the three pillars of American government: the judiciary.

Health and Social Services

Any one or combination of factors documented above may represent the underlying cause for an older adult to be thrust into the courts. Even if not the underlying cause, some of these conditions may well be present in a given situation and need to be taken into account by a judge to dispense justice effectively. For example, the 78-year-old man jailed for battering his spouse may be in the early stages of dementia. The 82-year-old sued for foreclosure for failure to pay her taxes may be suffering from depression and lapses in memory. Other older persons in both civil and criminal courts may have health and social services needs that challenge the typical judge’s ability to respond in a meaningful and timely manner.

The policy issue raised by these circumstances is whether the courts have the capacity for early identification of these problems as well as the practical ability to mobilize appropriate services. It is not unusual that a court may not actually see an individual until a petition for guardianship is filed, at which time any service needs simply may be delegated to the guardian. Unfortunately, many courts experience difficulty in monitoring guardians’ actions on behalf of their wards. Accountability in the guardianship process is a major ongoing challenge for these courts. In fact, the myriad of cases that may reach a given judge where an assessment and/or services are needed raises an important question about how judicial districts will plan to meet this emerging need. Increasingly, courts have been experimenting with administrative methods to obtain services for other specialized populations. These experiences may offer important lessons.

II. RECENT DEVELOPMENTS IN JUDICIAL ADMINISTRATION

In recent years, a number of developments in judicial philosophy and administration have taken place that, although not specifically related to issues of older adults, have considerable relevance to issues affecting them. It is instructive to review these developments in order to identify emerging trends and best practices in related areas that may be applicable. Although each of them has developed somewhat independently, they are all related by a common thread that seeks to improve access to the courts, build closer ties to the community, and ensure more effective use of available services to reduce recidivism. These are critically important factors in the context of older people and the courts.

Therapeutic Jurisprudence

Some courts and judges, following the lead of legal scholars, have adopted the philosophy of therapeutic jurisprudence (TJ) in their adjudicatory roles. The TJ perspective has been described by its founders as suggesting: “that the law itself can be seen to function as a kind of therapist or therapeutic agent. Legal rules, legal procedures and the role of legal actors . . . constitute social forces that like it or not, often produce therapeutic or antitherapeutic consequences.” Therapeutic jurisprudence proposes that we be sensitive to those consequences, rather than ignore them, and that we ask whether the law’s antitherapeutic consequences can be reduced, and its therapeutic consequences enhanced, without subordinating due process and other justice values. TJ has been applied primarily in criminal matters, particularly non violent drug or mental-health cases. Interested in more than criminal cases, we view TJ as a “lens” of underlying concepts that looks beyond what’s on paper for older adults engaged with the law. The value of TJ is that it attempts to identify underlying issues and to address them as appropriate within the court context.

Community problems such as substance abuse, mental illness, and familial breakdown inevitably enter the courtroom and judges search for services and treatment to respond to them. Courts sensitive to the importance of their relationships to their communities have recognized the need to be more relevant to the public and to address “the breakdown of social and family support networks.” The authors conclude that TJ is based on the principle that judges seek “the selection of a therapeutic option—an option that promotes health and does not conflict with other normative values of the legal system.”

In addition to the application in a specific case, it “may be practiced at the organizational level of the court by devising new procedures, information systems, and sentencing options and by establishing links to social services providers to promote therapeutic outcomes.”

In their most recent edited book, David Wexler and Bruce Winick, the principal architects of TJ explore its evolution and the development of problem-solving courts. They cite the 2000 resolution of the Conference of Chief Justices and Conference of State Court Administrators in support of problem-solving courts, acknowledging the importance of these courts and the principles of TJ they implement. The resolution adopts a series of agreements to further analyze and promote problem-solving courts, including:

Encourage, where appropriate, the broad integration over the next decade of the principles and methods employed in the problem-solving courts into the administration of justice to improve court processes and outcomes while preserving the rule of law, enhancing judicial effectiveness, and meeting the needs and expectations of litigants, victims and the community.

It continues by urging development of other types of courts based on similar principles. The editors then expand on how court processes affect outcomes and emphasize how specific tools and TJ principles can be used across the judiciary. Their analysis provides the essential context for consideration about how courts should address issues of an aging society.

Problem-Solving Courts

Pamela Casey and David Rottman describe four primary types of specialized or problem-solving courts: drug courts (the first was established in Miami, Florida, in 1989), mental-health courts, domestic-violence courts, and community courts.

Family courts, which may handle divorce, domestic violence, guardianship, and end-of-life matters, represent another type of problem-solving court. The creation of these courts reflects the reaction of trial court dockets filled with too many repeat cases (the “revolving door”) in which judges had worked out solutions that addressed symptoms rather than root causes or problems underlying repeated court appearances and convictions. In effect, courts have adopted a TJ approach at an organizational level by using its principles as the underlying legal theory.

7. Id. at 13.
8. Id. at 14.
It is instructive to explore the unifying themes connecting these courts. According to one judge, “One of the principal themes...is partnership. They all rely on outside agencies—to provide social services, to monitor offenders, to supervise community service sentences. How do you make inter-agency partnership work?” Indeed, given considerable variation among these courts by jurisdiction and types of cases, an analysis of trends underscored the importance of community service linkages and “stress a collaborative, multidisciplinary, problem-solving approach to address the underlying issues of individuals appearing in the court.”

More broadly, problem-solving courts share five common elements: (1) immediate intervention; (2) normative social adjudication; (3) hands-on judicial involvement; (4) treatment programs with clear rules and structured goals; and (5) team approach including judge, prosecutor, defense counsel, treatment provider, and correctional staff.

Although these types of courts are primarily used for non-violent criminal law violations (some community courts are multijurisdictional), it is their emphasis on early identification of underlying problems, collaboration with human-services providers, and individualized treatment approaches that warrant further investigation. As noted, the resolution passed by the Conference of Chief Justices and the Conference of State Court Administrators in 2000 called for “the careful study and evaluation of the principles and methods employed in problem-solving courts and their application to other significant issues facing state courts.”

The challenge is to understand how these principles and experiences of problem-solving courts can be utilized to improve how all courts address issues involving older people.

**Trial Court Performance Standards**

Still another relevant event during this same general period has been the development of the Trial Court Performance Standards (TCPS). Initiated in 1987 by the Bureau of Justice Assistance of the U.S. Department of Justice and the National Center for State Courts, the TCPS were published in 1997. They emphasize the careful conceptualization and measurement of specific indicators of input, output, and outcomes, with the ultimate goal of improving the outcome performance of the courts. Outcomes are conceptualized as changes in the well-being of the public and the community served by a court. The five performance areas of TCPS, which encapsulate the purposes or goals of the courts, are: 1) Access to Justice; 2) Expedition and Timeliness; 3) Equality, Fairness, and Integrity; 4) Independence and Accountability; and 5) Public Trust and Confidence. As of 2000, approximately one-third of state courts had adopted the TCPS to one degree or another.

The TCPS are more than simply an internal procedure for measuring a jurisdiction’s traditional operations. They are particularly useful in providing a basis for examining how courts address the need for responding to service issues.

In this context, then, they represent a shift from thinking about courts as individual judges making individual decisions (one judge, one court) to thinking about courts as organizations—as a system of structures, people, methods, and practices brought together to achieve specific ends.

Problem-solving courts, as described above, are excellent venues for the application of TCPS because one of their primary characteristics is their relationship to community providers of treatment and services. Because identification of service needs and the ability to mobilize resources in response to those needs is particularly critical in matters involving elders, the experiences of these courts need to be analyzed carefully. Although not specifically discussed in this context, nine promising components for effective court-based service coordination have been identified:

1. Acknowledged court role in service coordination;
2. Judicial and court leadership;
3. Active policy committee of stakeholders;
4. Case-level service coordinators;
5. Centralized access to service network;
6. Active court monitoring of compliance with orders;
7. Routine collection and use of data;
8. Creative use of resources; and
9. Training and education related to service coordination.

It remains to be understood whether and how these components would work in general-jurisdiction trial courts, in both civil and criminal jurisdictions. It is particularly important to learn to what extent this experience can improve how courts respond to the emerging challenges of an aging society.

**Gender, Race, and Ethnic Bias**

During the 1980s and 1990s, the supreme courts of many states initiated studies of gender, race, and ethnic bias in the courts. These efforts typically engaged the judiciary, bar associations, court administrators, private attorneys, law-school faculty, researchers, and others in producing detailed analyses of existing issues and recommendations to address them. Gender and race are protected classes under the United States Constitution, and these efforts were motivated by a desire to

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15. CASEY & ROTTMAN, supra note 11.
17. CASEY & ROTTMAN, supra note 12.
20. Keilitz, supra note 18, at 583.
22. Id.
ensure that the judiciary itself was administered fairly and equitably consistent with prevailing local standards and sound public policy. In many states, these efforts produced exhaustive reports that examined specific areas of concern in great detail and led to ongoing efforts to educate judges, administrators, attorneys, and others about problem areas and standards of appropriate conduct.

Although age has not been determined to be a protected class, the demographics of aging ensure nonetheless that courts must address similar issues in the years ahead. For example, a Massachusetts report defined gender bias as existing “when decisions made or actions taken are based on preconceived or stereotypical notions about the nature, role, or capacity of men and women.” A Pennsylvania report was not as specific but similarly studied whether individuals were “treated” differently as “a party, witness, litigant, lawyer, court employee, or potential juror based on racial, ethnic, or gender bias.”

It is instructive that these studies examine everything from jury selection, court-employment practices, and courthouse interactions, to domestic-violence process, criminal justice and sentencing disparities, family-law decisions, and civil damage awards. Recommendations are made to the judiciary, legislature, bar associations, law schools, and others as appropriate, together with specific avenues for further research and education. The courts have made significant progress in identifying problem areas and in producing vigorous efforts to rectify them. Age is the next frontier.

FLORIDA ELDER JUSTICE CENTERS

“Elder Justice Centers” (EJC) represent one model for judicial response to the complex issues presented when elders interact with the courts. This problem-solving type model has been developing in two judicial districts in Florida, where the Thirteenth Judicial District (Hillsborough County) and the Fifteenth Judicial District (Palm Beach County) have both created EJC’s to address issues of elders. The EJC in Palm Beach County was moved in 2005 for fiscal and administrative purposes to the Division of Justice Services in the county’s Department of Public Safety.

The overarching mission of each center is to remove access barriers to the judicial system and to enhance linkages between elders and the court system, as well as the legal, health, and social service systems. They differ significantly, however, in focus. Hillsborough directs two-thirds of its resources to the Probate Court to assist with establishing accountability in guardianship cases, and the balance to serving victims of abuse and other crimes and to general assistance for elders with other matters. It is prohibited by terms of its funding from serving offenders. Palm Beach has a strong focus on elders arrested for crimes, including elders placed in jail, as well as a broad variety of other legal matters that are referred to the EJC by the court. Recently EJC staff in Palm Beach County began assisting the Probate Court by reviewing guardianship reports, and conducting court-ordered investigations to ascertain the status and well-being of wards of the court.

Both EJC’s function in support of the judicial system, not as independent advocates for particular elders. They provide information and referrals to elders as appropriate, while also serving as experts to judges on the backgrounds and needs of individual defendants or victims. Both centers try to address the inevitable fear, confusion, uncertainty, and lack of confidence experienced by many elders confronting the courts for perhaps the first time, especially those with dementia or mental-health issues. These experiences can be quite traumatic regardless of an individual’s status as victim, defendant, or witness.

III. JUDICIAL RESPONSE TO ELDER ISSUES

Given this background concerning recent trends in judicial administration, the following addresses how courts are dealing with specific issues involving older adults:

Ensure physical access to the courts, including appropriate assistance for those with vision and hearing problems.

Every jurisdiction in the United States, pursuant to the Americans with Disabilities Act (ADA), is responsible for ensuring physical access to the courthouse, courtrooms, and offices within them. All jurisdictions have a designated ADA officer responsible for compliance and for meeting special needs. In Palm Beach and Hillsborough counties in Florida, the EJC’s offer one added level of assistance specifically for older persons in need, as appropriate. In general, there were no obvious ADA issues apparent during site visits.

However, the issue of hearing effectively in courtrooms was identified by a number of interviewees and was experienced firsthand by the investigators. The National Judicial College in Reno, Nevada, has a model courtroom designed to enhance listening by all parties and includes speakers throughout the room. A family-court judge in Reno said he had observed hearing problems even in new courthouses and recommended use of a dedicated courtroom specifically designed for persons with accessibility and hearing problems. The Delaware judiciary has state-of-the-art court rooms in the New Castle County Courthouse, with speakers throughout and excellent acoustics. Each courtroom has headers or “phonic ears” available for amplification. Monitors are located throughout the courtroom, including one for every two seats in the jury box, to ensure visibility of exhibits. Ramps and handrails ensure full access for jurors and witnesses.

These types of innovations will be more important as the number of older people participating in legal proceedings in already older courtrooms increase. An older person in a typical

23. Supreme Judicial Court of the Court System of Massachusetts, Gender Bias Study (1989).
24. Id.
Assess older adults who are incarcerated following arrest or booking in order to assist courts with making appropriate decisions about dementia, mental illness, or physical-health problems that could impact the next steps in legal proceedings.

This issue provided the underlying impetus for creation of the EJC in Palm Beach County, Florida. There was considerable community concern that older persons arrested and jailed should be assessed as quickly as possible, at least for the purpose of recommending a full assessment or alternative placement to the presiding judge at the first appearance. Furthermore, EJC staff are able to tap into private insurance when available to pay for assessments and services. Most jurisdictions provide some type of “pretrial services,” whether under court administration as in Washoe County, Nevada (Reno), or under county government as in Hennepin County, Minnesota (Minneapolis), for screening new arrestees. In fact, the vast majority of responding courts surveyed indicated that someone from the court carries out an initial screening to ascertain the need for a full assessment. However, only a third of these courts reported this person attends a first appearance with the arrestee. Palm Beach County is the only jurisdiction identified that has established a specific responsibility for its EJC to preliminarily screen all persons 60 and over prior to the first appearance and within 24 hours of arrest. This has resulted in court approval for hospitalization, assessment for mental illness or dementia, or alternative placement in assisted living, pending disposition. The EJC’s intervention has prevented a significant number of older people from spending unnecessary time in jail while awaiting trial.

Although addressing a later stage than booking in the judicial process, Broward County, Florida, has in operation the Broward Senior Intervention and Education program (BSIE), which is a voluntary pretrial intervention program for persons 60 and older who have been arrested for a misdemeanor for the first time. Arrestees typically are contacted, initially at arraignment or prior to arraignment, by a BSIE counselor and offered the opportunity to undergo a three-month individual counseling schedule as well as social rehabilitation, which consists of participation in a social activity at a senior center or community volunteer service. In return for completion of the program requirements, all adjudication and court costs are waived. The program is administered by a nonprofit senior-services agency, which also may refer these pretrial clients to other social services as needed. The recidivism rate for the few thousand arrestees who have completed the program since its inception in 1979 is less than 3%. The program is funded through the area agency on aging and the City of Hollywood Police Department’s Law Enforcement Trust Fund.

There is a basic question of whether law enforcement should, in appropriate situations, coordinate immediately with mental-health or dementia-specific agencies following arrest rather than booking an individual in jail in the first place. As a nurse in the Public Defender’s Office in Sarasota, Florida, argued, the stress of incarceration for some elders could be deadly. Thus, there should be a concerted effort to “analyze risk” at the earliest possible stage. In each jurisdiction, a myriad of police departments book arrestees in facilities typically operated by a separate county corrections department. Law enforcement has to coordinate with a complex health-and social-services network, a task not easily undertaken without prior working relationships and an acceptable protocol for all parties involved. Regardless of how many older people are arrested each month in a given jurisdiction, the potential implications resulting from inappropriate or unnecessary jailing warrant specialized attention to this issue and development of a community protocol.

In an ongoing effort to address issues involving adults with special needs, the Hennepin County Police/Mental Health Roundtable has published a “Protocol to Request Assessment of Adults with Special Needs Who Are Inmates of the Hennepin County Adult Detention Center.” It is designed to inform mental-health professionals, county adult-protective-services workers, and social-services case managers about procedures for special handling or release from jail. Although it does not focus on the immediate aftermath of arrest and booking, and requires that the professional already have knowledge that a given individual is in detention, it is very useful as an example of the type of written protocol essential for addressing this issue in any jurisdiction. Increasingly, availability of services for special populations, particularly elders with dementia and/or mental-health problems who may have committed a crime, is problematic. This underscores even more dramatically the importance of close linkages among the judiciary, law enforcement, corrections, and health-care professionals.

Educate the judiciary and courthouse staff about issues of aging and the special concerns and problems of elders engaged in the legal system.

The president of the National Judicial College in Reno, Nevada, William Dressel, believes that it is important to create a “field of knowledge” about elders and the courts since none exists at this time. He is joined in this assessment by many of the judges, administrators, and human services professionals interviewed during site visits. In fact, many of them believe that judicial education about aging is a primary issue that needs to be addressed in order to improve access and justice for older people.

A probate judge in Maricopa County, Arizona, underscored the importance of this issue by focusing on the need to have knowledge of clinical and medical issues in order to be more effective. A drug-court judge in Hennepin County, Minnesota, emphasized the need to be knowledgeable about health- and social-services systems in order to coordinate services and estab-
[Judicial education about aging and health-care systems is a priority need in most jurisdictions.

Lish accountability for outcomes. The chief judge in Hennepin County noted that the biggest problem is that the age issue is not yet on “the radar screen, but should become the focus of judicial education if the demographics justified it.” The chief judge of the Family Court in Delaware believes that the courts “have to start looking at these issues as a jurisdiction.” Interestingly, a number of judges and professionals argued that education about the facts of aging, i.e., the physiological, psychological, and social dimensions, is a critical first step in fostering greater “judicial sensitivity” to elders and their special issues, thereby increasing its priority within the judicial system. An attorney in Reno observed that family-court judges who handle guardianship cases gain expertise over time, are more respectful, treat elders better, and humanize a process in which elders often feel intimidated. In general, a judge who has a more sophisticated understanding of aging will be more sensitive to underlying issues and can manage cases more effectively and efficiently.

Because jurisdictions differ significantly among the states, particularly in their use of problem-solving or specialty courts, education should not be limited to one type of court or judge. Judges in most sites believe that education about aging would enhance all judges’ knowledge and sensitivity about aging as well as improve their abilities to manage cases. Some particularly emphasize its importance in problem-solving courts such as a mental-health or family court in terms of increased knowledge, and ability to speak with and relate more effectively to older people on all issues affecting their lives. In this context, a mental-health court judge in Broward County, Florida, emphasized the specialty-court judge’s ability to overcome barriers to services and to ensure accountability for delivering them effectively. Despite this near consensus of sentiment, however, two-thirds of respondents to the electronic survey reported that no formal training was offered and all indicated that any training that occurred was voluntary.

Ensure that older adults who otherwise come into contact with the court system are referred, as appropriate, to publicly funded or private attorneys, and to health, mental-health, and social-services organizations to address nonlegal problems that may affect their participation in the legal system.

The issue of referral ranges from providing a referral to a private attorney or a legal-services program to offering more support. Most states report that an attorney is available in most jurisdictions and practiced in the state, available in most jurisdictions and practiced elsewhere. The first example, a court may need to harness extensive external services in order to respond effectively to an offender’s needs. All of these situations will continue to grow in number and complexity as most communities’ experience population aging in the coming years. In this context, it is notable that more than 20% (22%) of or less responding to the survey said their court did not refer older adults to any community entity. The challenge to the judiciary lies in how each jurisdiction and individual judge responds in order both to manage cases more efficiently and to dispense justice fairly and effectively in each case to the satisfaction of the broader community.

The self-help center is a primary tool many jurisdictions utilize to address some of these issues. Although outreach to the community is typically quite limited, these centers provide extensive materials on community resources, legal forms to access probate and family courts, for example, and technical assistance on how to proceed with certain types of litigation. Phoenix, Reno, Wilmington, and Minneapolis have state-of-the-art centers that render referrals to attorneys and service agencies and deliver services intended to facilitate effective access to the courts. Palm Beach County has established through its EJC an additional office of professionals specializing in assistance to elders. The EJC in Tampa, although not connected to a self-help center, also provides the same type of “special expertise” on behalf of elders, particularly victims. These offices are people oriented and staffed by professionals trained to negotiate complex legal and health-care systems. The director of the Maricopa County Court’s Phoenix Guardian Review Project favors an “elderly advocate” who can navigate within and among courts as needed to help achieve positive outcomes through effective communication and coordination of effort. Phoenix is now studying the best way to organize current efforts in self-help, probate and mental-health, family, and perhaps, criminal court, into a “Senior Law Resource Center” to achieve this objective.

As noted above, judicial education about aging and health-care systems is a priority need in most jurisdictions. Complex criminal cases present substantial challenges to courts struggling to ensure justice, for example, in a domestic-violence case involving a frail older victim and a spouse or companion perpetrator who is in the early stages of dementia. The Palm Beach County EJC was designed “to develop and enhance linkages” for this purpose and to advise and assist judges who want to coordinate service plans as part of a sentence or case disposition. Judges need quality information on options available and the capacity to design and implement plans unique to each case. The experiences of mental-health, drug, and other problemsolving courts are analogous in many respects and, according to one judge in Minneapolis, represent precedents for enabling courts to alter the traditional paradigm, focus on people’s total needs, and bring new levels of passion, commitment, and coordination to resolution of complex human problems. In Reno, the administrator of the drug court and a new mental-health court has a dedicated budget to fund providers of services, and, therefore, an enhanced capacity to hold them accountable for specified outcomes in court-ordered plans.

Educate law-enforcement, health, mental-health, and social-service organizations about issues and barriers affecting elder’s involvement with the court system.

There is near uniform agreement that law enforcement and service providers need to be educated about aging and the inter-
section between elders and the courts. This is an objective of the Palm Beach County EJC, and progress has been made concerning arrests of elders. In Tampa, the EJC works collaboratively with law enforcement to ensure services for victims are delivered promptly and responsively. As discussed previously, the Hennepin County Police/Mental Health Roundtable has developed a protocol regarding adults with special needs in jail and maintains an ongoing dialogue outside the judicial system. Although there are initiatives around the country to educate law enforcement and health-care professionals on issues of elder abuse, neglect, and exploitation, there does not appear to be any community-based, sustained effort to assemble these groups, together with court administrative staff, to address issues affecting elders and the criminal law. Most of those interviewed, with the exception of a few mental-health-court judges, did not view such an assembly as a pressing need at this time.

The issue of educating health-care and social-services providers is an intriguing one. For the most part, except for adult-protective-services offices and mental-health and substance-abuse providers already linked to problem-solving courts, most agencies have few relationships with law enforcement and the courts, particularly regarding elders. As a result, services in most communities are not designed for an offender population and are typically unavailable when needed. In this context, the EJC concept offers potential to serve as a catalyst for addressing issues affecting procedures and services for both victims and offenders.

Educate older adults and the general community about issues of access to the courts and typical legal issues that may affect them.

Courts can take a proactive role in educating different constituencies concerning the judicial system and typical areas of the law that may affect them. This can improve access and help prevent legal issues from ever reaching the courts. Because court systems are ultimately accountable to the public for support, elections of judges (in many jurisdictions), and funding for operations, they display an enlightened self-interest in wanting to reach out to diverse segments of the community. Four-fifths of courts responding to the survey indicated their court provided education to older adults regarding court access and common legal issues as part of a general effort to educate their communities.

The EJCs in Tampa and Palm Beach counties regularly speak to groups of older residents about legal issues, the courts, and services available. In effect, they take the self-help center concept one step further by making information available beyond the courthouse and by placing it directly into the hands of potential users of court services. This is of great value to older adults because it eliminates the need to travel to the courthouse. Older people may receive information on how to avoid consumer fraud; reporting abuse, neglect, and exploitation; family matters; understanding guardianship; and planning for long-term care and end-of-life issues. Information also may address landlord-tenant and mortgage-foreclosure situations. In general, information can increase understanding and demystify the court system for potential older participants.

The Phoenix courts conduct outreach meetings in various communities with judges and administrators as speakers. They have learned personally of the high level of interest and concern about probate issues of guardianship and civil commitment. A Family Court Advisory Council, including elders, has raised issues about grandparents’ rights such as custody and visitation. The court is considering creation of an elder website. The chief judge in Minneapolis believes court liaisons to the elder community, particularly in minority communities with less experience in the courts and fewer resources to purchase legal assistance, are increasingly important. A probate judge in Minneapolis stressed the importance of community awareness about legal requirements concerning end-of-life decision making, i.e., available choices to avoid ending up in court. The director of the self-help center in Wilmington emphasized the importance of engendering trust by elders in the judicial process by working with them through community groups, especially in minority communities. In Reno, the director of the self-help center wants to take information and materials to courts to senior centers and libraries using a “Self-Help Center on Wheels” model to maximize outreach. This concept is also supported by Guardian Review Project professionals in Phoenix.

Address the availability of sufficient numbers of guardians and the court’s capacity to review and monitor guardianship reports.

The president of the National Judicial College characterizes the area of guardianship and conservatorships as the “ticking time bomb” of the courts because of their general lack of capacity to establish accountability for the actions of guardians. However, he perceives little interest outside of Arizona and Florida in these issues, and judges in other jurisdictions agree with that assessment. This is the single largest area of judicial activity involving elders and large sums of money, but nonetheless is referred to by many respondents as the judiciary’s “stepchild.” For various reasons, analysts have found that years of effort to achieve legislative reform have yielded little in positive outcomes.26 Marshall Kapp urges a guardianship system that is founded on principles of therapeutic jurisprudence and argues for more research to assess outcomes based on the actual impact of the system on elders’ lives. Israel Doron goes even further in recommending a change from the current concept of guardianship to a new legal model of “long-term legal care.” This is a novel idea that conceptualizes guardianship law as a component of home and community-based care and utilizes shared decision making as a way to empower elders to help choose appropriate care.

of three investigators, three accountants, one probate examiner, and two paralegals. These resources are unequaled in any other jurisdiction visited and perhaps in any other jurisdiction in the United States. The priority assigned to this area, and the corresponding area of civil commitment, reflects an understanding not only of current and future demographics, but also the importance and value of these cases in both personal and financial terms. This is a model worthy of further evaluation of outcomes in order to assess potential replicability.

Absence of resources available to support this responsibility is a major barrier in most jurisdictions. Leadership of the probate judge in Tampa, who originally sought to create an “Elder Court,” led to creation of the EJC and attracted funding from private foundations to support two full-time court counselors who review case files, initial and annual reports, and guardian and attorney billings. Both the judge and a special master recognize the need for establishing financial accountability, and the clerk’s office will be hiring an auditor to help address this gap. Together, judges and EJC professionals are working to attract more guardians, improve training and licensure requirements, establish standards for selecting committee members assessing an individual’s need for a guardian, and, as in Minneapolis, are exploring implementation of the emerging concept of mediation in guardianship cases.

The probate judge in Ft. Lauderdale, a well-recognized leader in the field, receives funding from county government to support a Probate and Guardian Services Counsel. He has the capacity to audit and review files and reports similar to that conducted by the EJC in Tampa (and well underway by the EJC in Palm Beach). The judge is working with his staff on a new state-of-the-art data-management system essential for establishing oversight and accountability. He is seeking to interest local law schools in working on these issues and is participating on a state task force to help establish improved standards for guardians and the guardianship system.

These programs, as noted, are models. Most jurisdictions do not report having this level of priority or resources in the area of guardianships and conservatorships. A full 90% of survey respondents indicated their courts reviewed guardianship reports for timeliness and reasonableness, but only one-third reported that in-depth monitoring takes place. Individual judges and administrators recognize the importance of the issues but have not yet elevated it sufficiently to attract resources. By contrast, in Reno, the court allocates space to SAFE, a private not-for-profit organization that recruits and trains volunteers to act as companions, not guardians, for wards referred from judges in family court. Similar to a guardian ad litem program for children, this state-funded program (from tobacco-settlement money) relies on court orders to gather information on the situation and on the well-being of wards, while volunteers file reports with the court. Fifty-six volunteers from ages 25 to 82 carry one to five cases, averaging 100 hours a year per case. These volunteers receive university-level training and have access to the program’s forensic psychologist for consultation. In the absence of dedicated court staff as described above, SAFE represents an imaginative alternative to responding to at least some of the issues identified in rapidly growing caseloads involving guardians.

A final note on guardianships involves self-help centers that are expanding in size and in the types of matters addressed. Minneapolis and Reno both have identified the issue of grandparents seeking guardianship or custody over grandchildren when parents are no longer able to function as parents. Both are preparing informational and self-help materials to address this relatively new and growing body of cases.

Maintain an information system capable of tracking the case status of individual older adults, documenting outcomes, and compiling summary data on the legal, health, and social-service needs of older adults entering the judicial system in order to help identify patterns or issues for legislative, programmatic, and/or budgetary improvements.

As expected, no jurisdiction routinely captures data on elders in the court system. None of the survey respondents indicated that his or her court tracked demographics, health and medical data, or financial data on older adults—even though 90% reported that their computer systems did allow tracking of older adults. The two Florida EJCs are developing their own information systems to track clients and improve management of caseloads, report case trends, and identify service needs of elders in court. Because of the singular importance of this issue, it was the primary focus of technical assistance provided to the EJC in Palm Beach County. As noted above, the Probate Court in Ft. Lauderdale is directing a circuit-court project on data management that is intended to be state-of-the-art in the belief that automation is the key element for improved oversight and accountability in guardianship cases.

The more typical response in sites visited, however, is that information systems in general are primitive and in need of modernization. Nonetheless, a system, regardless of its level of sophistication, will produce useful data and reports on elders only when it is programmed to do so. This will not occur unless a jurisdiction (i.e., chief judge, court administrator, or perhaps,

an individual judge) establishes aging as a legitimate priority area of concern and requests information on elder-related indicators on a regular basis. This does not happen, however, in any of the jurisdictions visited. The directors of management information services and court statisticians interviewed were all in various stages of improving their systems to keep pace with the state of technology but had never been asked to produce data on older adults. They agree that there are no legal impediments to recording and capturing data on age and producing reports useful for judges, administrators, and professionals on a regular basis.

These data are useful for case tracking and for understanding legal areas of significant involvement by elders by type of case, length, monetary value, levels of jury participation, or any other desired measure. Data on service needs of elders can be utilized to help mobilize health-care and social-service agencies and professionals to work collaboratively to address service-delivery issues and to identify priorities for future funding. Initiatives of this nature are invaluable in raising the profile of elders in the courts and in building momentum for improved access, responsiveness of judges, and collaboration with others in the community. Finally, timely and relevant data are essential for applying Trial Court Performance Standards to issues of older adults.

**Utilize technology to help improve access and effective participation by older adults in the court system.**

Technology is essential to addressing issues of access and information systems, as discussed above. Interestingly, about one-half (16 of 33) of survey respondents indicated their court did not use any media or technology to help improve access and effective participation in the court system specifically for older adults. Perhaps the most important use of technology is in the courtroom itself. The “technology court” in Wilmington is state-of-the-art and responds meaningfully to the needs of older adults. Video conferencing is now a reality there and has great potential for reducing travel and expense to reach centralized courthouses. Phoenix is expanding its self-help center’s capacity to offer legal forms online. It is possible that a court’s website could have useful information about typical areas of legal or court involvement by older people and instructions and checklists on how to be prepared for participation in court proceedings. Mobile vans can transport self-help centers and even courthouses to distant locations.

Although the state of courthouse technology will undoubtedly continue to evolve, leadership is still required to establish priorities for purposes not only of management efficiency but also of effective use by everyone in the community. The director of the Minneapolis self-help center argues that “people need to have confidence in the courts,” and be assured that they are listened to throughout the process. If people, including elders, understand what is happening to them in the courthouse, especially in the courtroom, confusion and anxiety will be reduced. There is widespread agreement that in the courts, as in health care, high tech cannot replace high touch.

**Obtain resources and staff to appropriately carry out any or all of these functions.**

It is the challenge of leadership to assemble resources to meet organizational priorities. Roughly 90% of court survey respondents indicated that designated court staff carry out one or more of the functions covered in the survey. More than half reported that volunteers carry out these functions as well. These same respondents also reported that these functions are funded from multiple sources: from 42% citing court administration to one respondent identifying a national foundation as a funding source. As issues of older adults increasingly affect the courts, chief judges and court administrators will be expected to respond appropriately, even in a difficult fiscal environment. The probate judge in Tampa joined funding from private foundations with the state’s Office of the Attorney General (using funds designated to assist crime victims) to establish the state’s first EJC. In Palm Beach County, the chief judge and court administrator secured county funds to launch the EJC. The probate judge in Ft. Lauderdale leveraged a newspaper exposé about the lack of judicial oversight of guardians to generate county funding for professional staff and design of a model information system.

Other examples abound. In Phoenix, the former court administrator created a study group on probate issues to help overcome the common perception of probate as the stepchild of so many jurisdictions, resulting in the establishment of the Guardian Review Project, as discussed previously. The Reno SAFE project reflects an ongoing and unique collaboration between the family court, which handles guardianships in Nevada, and a private, not-for-profit organization (described earlier) that utilizes volunteers as “companions” for wards in cases referred by the court. In Minneapolis, the probate court processes 1,500 civil commitment cases a year and works closely with the county’s human-services department to provide case-management services under the state’s civil-commitment law and to file reports with the court at the end of the six-month commitment period. In effect, county professional staff function as a court-related resource to ensure accountability for mandated services. In Broward County, Florida, the court benefits from a pre-trial intervention program, run by a local aging services provider, that is funded by a local police department trust fund as well as the area agency on aging.

Courts are challenged to respond to increasing numbers of cases involving older people, often with complex underlying problems. Funding, trained professional staff, and motivated volunteers are all necessary resources for the courts to respond effectively. Likewise, courts will have to develop imaginative ways to attract students in law, social work, and other disciplines to assist in these efforts. As the director of the EJC in Palm Beach County states, “when you enter the courthouse, you enter a foreign country.” For elders, often without resources, the experience can be traumatic. The director of the Reno self-help center in Reno agrees that most elders “don’t know the language.” It is the responsibility of court systems to prepare themselves to meet this challenge with passion and innovation.
IV. ELDER JUSTICE CENTERS, ELDER COURTS, AND OTHER RESPONSES TO AN AGING SOCIETY

The judiciary, as this article has documented, will have to respond creatively to the demographics of aging just as other institutions in American life are adjusting. Older adults are living longer and bringing more complex underlying issues into the courthouse, challenging judges and court administrators to find ways to identify problems early, establish effective linkages with the health and social-services community, and ensure accountability for judicial orders. This article has cited experiences in Florida and elsewhere that are beginning to achieve these objectives. The emerging concept of therapeutic jurisprudence, the experience of problem-solving courts, the development of Trial Court Performance Standards, and progress made with identifying and eliminating race, ethnic, and gender bias are indicative of the judiciary’s capacity to respond to changing conditions and new challenges. Given the diversity of jurisdictions and judges, there is no simple approach to achieve this objective.

During site visits, Elder Justice Centers in Florida and the concept of an Elder Court generated extensive discussion. Some judges and administrators argued that no special efforts by the courts were justified on the basis of age and that all persons in the court system should be treated the same, consistent with ADA requirements. However, most liked the EJC concept, and many favored creation of a problem-solving elder court.

In general, those who supported the EJC concept endorsed it as an entry point for elders who would have an advocate assisting with negotiation of a very complex judicial system. Elders would receive relevant information concerning legal matters, obtain referrals to legal and social services as appropriate, and be assigned, if needed, a case manager whether in probate, mental-health, family, or criminal court. Social-services professionals would recruit, train, and supervise volunteers and students to expand coverage and provide additional support. They would be a source of technical support to judges in various divisions, particularly with respect to health, mental-health, and social-services systems. They would be “boundary spanners” who establish linkages with service providers and assist judges with development of treatment plans. They can tap into elder’s insurance coverage and seek out other sources of support for services. As the Tampa probate judge noted, dedicated staff are “invaluable” in guardianship matters because their efforts allow the court to establish accountability for activities of guardians and their attorneys. Finally, as noted by a court administrator in Phoenix who is working to shape a senior law resource center, this concept can be designed to build on a jurisdiction’s unique organization and strengths and respond to identified community needs.

For similar reasons, many of those interviewed favored creation of an elder court. Specialty-court judges and professionals, particularly in mental-health and drug courts, underscored the importance of being able to harness the composite of services needed to help affect human behavior and generate positive outcomes. Judges with specialized training and experience may recognize the absence of family and social support and can mobilize services in support of treatment decisions. The key is the court’s connection to services and its ability to mobilize agencies and to hold the system accountable.

Jurisdictions with an integrated family court, perhaps including responsibility for probate and mental-health matters involving guardianships and civil commitments, family matters, and domestic-violence cases, could shape dockets and designate one judge to preside in an “Elder Court.” As one judge in Minneapolis concluded, under a “one person, one judge” concept, an Elder Court could punish, commit, order services, or designate a guardian. The key is a “judge with passion, not just a case processor, but a judge who wants to deal with people, not just lawyers!” The paradigm needs to shift to manifest a willingness to integrate and address all relevant issues affecting an individual through caring, good judgment, and persistence.

In the future, it is possible to imagine jurisdictions with large older constituencies making strategic decisions to implement either or both of these concepts. Jurisdictions will differ based on state constitutions and laws, local history and organization, and judicial leadership. The availability of resources undoubtedly will be an important factor, but allocation of resources may be equally as important. Although courts are always subject to community pressure to respond to issues of crime and safety, individual judges with passion and commitment can shape the judicial landscape. As courts have responded creatively to issues of race and gender, in the early years of the 21st century they will be equally challenged to respond to the issues of an aging America.

V. A MODEL APPROACH

As the analysis of experiences described above demonstrates, there is no single approach to how an individual jurisdiction should address issues of older adults. In fact, although most courts consider the age of 60 as a threshold for consideration of age, the experiences of Florida’s EJCs suggest most of their work focuses on people 70 and over. Inevitably, there will be wide variability in how jurisdictions approach these issues in the coming years. Nonetheless, a model approach should include the following elements:

1. An analysis of the jurisdiction’s demographics, including numbers and percentages of older adults 60 and over, by-10-year cohorts.
2. An analysis of state constitutional and legal requirements concerning the organization and administration of local court systems.
3. An internal review of how the jurisdiction’s judges and professional staff perceive issues affecting older people and their recommendations to address these issues.
4. An external review by a community task force or advisory group consisting of representatives from: the bar, including prosecutor, public defender, and private bar; health-and-human-services organizations, including adult-protective services and mental-health and dementia-specific agencies; older advocates; and law enforcement.
5. A review of the experiences of other jurisdictions, especially focusing on EJCs and problem-solving courts.
6. Analysis of existing or potential resources to support any new initiative.
7. Decision on a course of action tied to the availability of resources.
8. Establishment of goals, objectives, and strategies to implement decisions over a 3-year period.
9. A strategic plan to address each of the 10 specific issues described above in order to implement desired programs and activities.
10. Inclusion of an evaluation component from the beginning in order to track progress and measure outcomes.

The evaluation component is critical to courts’ capacity to make policy decisions surrounding issues raised in this report. Kapp emphasizes the importance of research that applies the TJ approach described above, “which is concerned with measuring outcomes or results on the intended beneficiaries.” He is concerned about evaluating the effects of laws, programs, or judicial action on those intended to benefit from them.

Each community, of course, is unique and by engaging in “community mapping,” each jurisdiction can assemble data and mobilize resources to respond most effectively to its own special circumstances. Courts in this country, although subject to the ebb and flow of broader political and fiscal currents, have the ability to set agendas, attract resources, and exercise moral authority to meet new challenges. The next frontier for most institutions in American life, including the judicial system, is older age!

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In 2000, Rothman coedited a book, Elders, Crime, and the Criminal Justice System: Myth, Perceptions, and Reality in the 21st Century, addressing the increasingly complex issues of elders, crime and criminal justice, published by Springer Publishing Co. He is currently coauthoring a report for a project funded by the State Justice Institute on “Adapting Trial Court Performance Standards to an Aging Society.”

Burton Dunlop is director of research at the Center on Aging at The Robert Stempel School of Public Health, College of Health and Urban Affairs, Florida International University. He earned his Ph.D. in sociology from the University of Illinois at Urbana-Champaign. Dr. Dunlop has more than 25 years of experience in directing research and evaluation on issues and programs in aging, health, disability, social services, long-term care, and elder justice. His most recent publications include an entry on “Elder Abuse and Neglect” in the Corsini Concise Encyclopedia of Psychology and Behavioral Sciences (in press); and the 2000 book, Elders, Crime, and the Criminal Justice System: Myth, Perceptions, and Reality in the 21st Century, which he coedited with Max Rothman and Pamela Entzel. He is currently coauthoring a report for a project funded by the State Justice Institute on “Adapting Trial Court Performance Standards to an Aging Society.”

29. Id.
DWI Courts: The Newest Problem-Solving Courts

Victor E. Flango

Problem-solving courts—more accurately, specialized dockets—are established to deal with problems that may benefit from focused and sustained attention. These courts include a treatment component in an effort to reduce recidivism, which in turn reduces the number of future arrests, prosecutions, and court cases.

Specialized drug courts appeared in the late 1980s in response to the dramatic increase in drug offenses. Some drug courts, often referred to as “drug-treatment courts,” emphasize treatment as the way to reduce recidivism. Essential elements of drug courts include: (1) immediate intervention; (2) non-adversarial adjudication; (3) hands-on judicial involvement; (4) treatment programs with clear rules and structured goals; and (5) a team approach that brings together the judge, prosecutor, defense counsel, treatment provider, and correctional staff.

Although there are variations, the drug-treatment courts usually include judicial supervision of community-based treatment, timely referral to treatment, regular status hearings to monitor treatment progress, mandatory and periodic drug testing, and a system of graduated sanctions and rewards.

The success of drug courts has renewed interest in other types of problem-solving courts, such as community courts, domestic-violence courts, and mental-health courts. The newest such court to gain acceptance in many communities handles alcohol-impaired drivers.

**DWI COURTS**

The high incidence of crimes committed while under the influence of alcohol, including driving while impaired, has prompted several jurisdictions to develop sobriety or DWI (Driving While Impaired or Driving While Intoxicated) courts, most based on the drug-court model. Specialized DWI courts are reputed to be better equipped to handle DWI cases, which permits swifter resolutions, reduces backlog, and improves outcomes.

Common characteristics of sobriety and DWI courts include intense alcohol-addiction treatment and heavy court supervision, with jail sentences as a last resort. Compliance with treatment and other court-mandated requirements is verified by frequent alcohol and drug testing, close community supervision, and interaction with the judge in non-adversarial court review hearings.

DWI courts were established to protect public safety and to reduce recidivism by attacking the root cause of impaired driving—impairment caused by alcohol and substance abuse. The mission of sobriety and DWI courts is “to make offenders accountable for their actions, bring about a behavioral change that ends recidivism, stop the abuse of alcohol, and protect the public; to treat the victims of DWI offenders in a fair and just way; and to educate the public as to the benefits of sobriety and DWI Courts for the communities they serve.”

In other words, the DWI courts treat the problem as well as punish the offender, because threats of punishment alone are not likely to be sufficient to change the behavior of individuals.

DWI courts allow experienced judges to use treatment resources and other sentencing options together, and thus to sanction or reward offenders with greater consistency. Although the DWI offenders share some characteristics with drug offenders (for example, they each share substance-abuse problems that require treatment and a strong support system to succeed), they also have differences. DWI offenders tend to be male, employed, and slightly older than drug offenders; they are more often able to draw on emotional resources, including family, that are helpful to recovery.

Unlike drug offenses, DWI offenses are not perceived as “victimless” crimes because public safety and community impact are more of an issue. Monitoring DWI offenders is more difficult than monitoring drug-court participants because alcohol goes through the body quickly and is more difficult to detect than drugs. Alcohol is also legal and easier to obtain than drugs.

**HOW MANY DWI COURTS ARE THERE?**

The National Association of Drug Court Professionals provided a list of 68 courts that were listed as specialized DWI courts operational in 2003, some in conjunction with drug courts. All 68 were contacted in early 2004, and asked to provide information about the year they were established, the types of cases they heard, the volume of cases heard, and recidivism

**Footnotes**

8. The author is grateful to Kristen Daugherty of the National Association of Drug Court Professionals for providing the initial list of DWI Courts and to Katherine Knorr, an intern at National Center for State Courts, for contacting each of the courts.
rates. Five of the courts turned out to be specialized courts, but not DWI courts, and are not included in the analysis.

The table found at the end of this article presents this basic information on these 63 courts as a baseline from which the growth in specialized DWI courts can be monitored. It is clear that many new DWI courts were created recently, after this article was written and submitted for publication. Indeed, the latest information from the National Drug Court Institute suggests that 176 DWI courts were in operation by the end of 2004, and that is not counting “hybrid” DWI courts—drug courts that also accept DWI offenders.9 Although the National Association of Drug Court Professionals is conscientious about conducting regular surveys of all drug-court-related specialty dockets, it is a daunting task to maintain an accurate, up-to-date catalog of problem-solving courts.

Most of the DWI courts appear to have been developed from drug courts, but there are exceptions. Of the 63 DWI courts, seven reported being established as separate courts. More than a third of adult drug courts in the United States are in California, New York, Missouri, or Florida.10 Half of the family drug courts are in the large states of California, New York, and Florida and a third of the juvenile drug courts are found in these three states plus Ohio. A third of the DWI courts, however, are in Michigan (10), Idaho (6), and Indiana (6).11 Thus, although DWI courts were created from drug courts, the states with the largest number of drug courts do not have the most DWI courts. DWI courts are also not prevalent in states that have an unusually high number of alcohol-related fatalities.

All of the courts were established rather recently (after 1994), except for the Los Angeles Superior Court DUI Program and the Hancoc County, Indiana, DWI Court, both established in 1971. Forty of the 63 were established in 2000 or later.

Most DWI courts (54 of 63) do not accept violent offenders into the program. A much smaller number do not accept juvenile offenders (14) or sex offenders (8) into their programs. Caseloads are, and perhaps need to be, small. The vast majority of DWI courts (49 of the 63) handle fewer than 100 cases per year.

**DWI COURT ISSUES**

Several issues that are not unique to DWI courts, but arise to varying degrees with all problem-solving courts, would benefit from further research as DWI courts mature.

**Role of the Judge.** Despite the use of problem-solving courts in many arenas, the concern persists that judges are more involved with defendants, so it is more difficult for them to remain impartial. Judges need to praise and sanction defendants, but must avoid getting so involved personally that their impartiality is at risk. As problem-solving courts proliferate, however, these concerns appear to be lessening as is the countervailing concern that DWI court sanctions may appear to be more coercive than those used in traditional courts. Use of sanctions that have judges telling a defendant where to live or where to work; that require defendants to use prescription drugs, such as Naltrexone and Antabuse; or that require invasive treatments, like acupuncture, may be perceived as going beyond the scope of traditional judicial authority.

**Resources.** Would non-specialized courts perform as well if given the same resources and access to treatment as specialized DWI courts? Critics may argue that specialized DWI courts are indeed more successful than other courts because they have so many more resources, which they require if they are to have frequent review hearings, frequent testing for alcohol use, progress reports from probation officers and addiction counselors, etc. To determine the appropriate workload levels for specialized DWI courts as well as for other courts having jurisdiction over DWI cases, workload assessments are necessary.12

A workload assessment measures more than just caseload; rather, it is a measure of the amount of judge time necessary to dispose of cases properly. The best way to assess the need for judges and court support staff is to do a full workload assessment, which takes into account the amount of time it takes to resolve the “mix” of cases each judge hears, both currently and ideally.13 Doing so will measure not only the average amount of time it takes to dispose of DWI cases, but also the amount of time it takes to keep current with the entire docket.

Another cost for some courts is the integrated information system required to track individuals through case-processing stages and to determine whether they have met the various screening, treatment, and other requirements imposed by the court.

**Effectiveness.** At a national conference of Mothers Against Drunk Driving, Dr. Jeffrey Runge announced that one of the three impaired-driving priorities for NHTSA was DWI adjudication and supervision.14 Part of this priority is to establish DWI courts, expand drug courts, or apply the drug-court model to DWI cases.

9. C. West Huddleston III, et al., Nat’l Drug Ct. Inst., Painting the Current Picture: A National Report Card on Drug Courts and Other Problem Solving Court Programs in the United States (2005) Table VI, p. 16. Note that the National Association of Drug Court Professionals includes in their totals DWI courts that are planned, but not yet operational. DWI courts not in operation are not counted in this study.


11. Since this article was written, the number of DWI courts in Michigan has increased to 16 and the number of DWI courts in Idaho has reached 10. California now has at least 10 DWI courts, Georgia 7, and Pennsylvania 5. An up-to-date list of operational DWI courts is being kept on the National Center for State Courts website. Please view this list online http://www.ncsconline.org/D_KIS/DWI/index.html and report any additions or corrections to gflango@ncsc.dni.us.


Do DWI courts differ from other courts in DWI recidivism rates? Is there a difference in recidivism between DWI cases resolved in special DWI courts as compared with DWI cases handled in more general drug courts? What decrease in recidivism would be necessary to justify the additional resources needed by a specialized docket? What resources and treatment options would a traditional court require to produce the same results as a specialized DWI court?

All DWI courts use particular criteria to screen offenders eligible for drug court. It appears that DWI courts are most successful with more habitual offenders rather than with first-time offenders, who may deny that they have an alcohol problem. How do screening criteria affect the success rates of DWI courts? Are DWI courts most effective with nonviolent offenders? Nonsex offenders? Felons or misdemeanants? An impartial evaluation of special DWI courts is needed to determine just how effective they are in reducing recidivism over time and the practices that most contribute to the decrease in recidivism.

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**SPECIALIZED DWI COURTS, 2003**

<table>
<thead>
<tr>
<th>STATE</th>
<th>COURT</th>
<th>YEAR STARTED</th>
<th>CASE TYPE</th>
<th>CASELOAD</th>
<th>REPORTED RECIDIVISM RATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>DWI Courts. No stated restrictions on clients</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>AZ</td>
<td>Maricopa County DUI Court</td>
<td>1998</td>
<td>Both</td>
<td>20</td>
</tr>
<tr>
<td>2</td>
<td>ID</td>
<td>Power County DUI/Drug Court</td>
<td>2000</td>
<td>Both</td>
<td>34</td>
</tr>
<tr>
<td>3</td>
<td>IN</td>
<td>Hancock County DWI Court</td>
<td>1971</td>
<td>Both</td>
<td>600</td>
</tr>
<tr>
<td>4</td>
<td>MI</td>
<td>43rd District Court - Ferndale Division**</td>
<td>2003</td>
<td>Misdemeanor</td>
<td>126</td>
</tr>
<tr>
<td>5</td>
<td>NH</td>
<td>Merrimack County DWI Court</td>
<td>2004</td>
<td>Misdemeanor</td>
<td>280-300</td>
</tr>
<tr>
<td>6</td>
<td>OH</td>
<td>Richland County Substance Abuse Treatment Court</td>
<td>1995</td>
<td>Felony</td>
<td>12</td>
</tr>
<tr>
<td>7</td>
<td>TN</td>
<td>Shelby County DUI Court</td>
<td>2002</td>
<td>Misdemeanor</td>
<td>48</td>
</tr>
<tr>
<td>8</td>
<td>VA</td>
<td>Fredricksburg Regional DUI Court</td>
<td>1999</td>
<td>Both</td>
<td>N/A</td>
</tr>
<tr>
<td>9</td>
<td>WA</td>
<td>Clark County Drug Court</td>
<td>1995</td>
<td>Both</td>
<td>15</td>
</tr>
</tbody>
</table>

| DWI Courts. Do not accept violent offenders |
| 10    | AK    | Wellness Court | 2004 | Both | 35 | 12% |
| 11    | CA    | Los Angeles Superior Court - Metropolitan Courthouse DUI Program | 1971 | Both | N/A (estimate several hundred in program) | N/A |
| 12    | CA    | Butte County Superior Court DUI Program | 1996 | Both | 77 | 8% |
| 13    | CO    | 7th Judicial District DUI/Drug Court | 2004 | Misdemeanor | 12 | N/A |
| 14    | GA    | Athens/Clarke County DUI/Drug Court | 2003 | Misdemeanor | 100 | N/A |
| 15    | GA    | Chatham County DUI Court | 2003 | Misdemeanor | 140 | N/A |
| 16    | GA    | Hall County DUI Court | 2003 | Misdemeanor | 119 | N/A |
| 17    | ID    | Merrimack/DUI Drug Court (Madison County) | 2000 | Both | 30 | N/A |
| 18    | IN    | Vigo County OVWI/DUI Court | 2000 | Both | 16 | 0%, none rearrested in county |
| 19    | ME    | 56A District DUI Court* | 1997M/2000F | Both | 35 | 14% |
| 20    | MI    | 46th District Court | 2003 | Misdemeanor | 6 | N/A |
| 21    | MI    | 55th District Court Mason OUIL** | 2004 | Misdemeanor | N/A (anticipate several hundred) | N/A |
| 22    | MI    | 67th District Court | 2004 | Both | 40-50 | N/A |
| 23    | MI    | 86th District Court | 2001 | Misdemeanor | 100 | N/A |

15. This debate is parallel to the debate over a strategy to reduce alcohol- or drug-related crashes. Is it better to focus on the relatively small proportion of the driving population responsible for a large percentage of alcohol/drug-related crashes, i.e., the hard-core offenders, or on the much larger number of moderate-drinking drivers whose very numbers contribute significantly to the problem, although their individual risk of crashes is relatively low?
<table>
<thead>
<tr>
<th>STATE</th>
<th>COURT</th>
<th>YEAR STARTED</th>
<th>CASE TYPE</th>
<th>CASELOAD</th>
<th>REPORTED RECIDIVISM RATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>MI</td>
<td>Livingston County Adult Drug**</td>
<td>1999</td>
<td>Felony</td>
<td>25</td>
<td>2%</td>
</tr>
<tr>
<td>NC</td>
<td>Mecklenberg County DWI Treatment Court</td>
<td>2000</td>
<td>Both</td>
<td>123</td>
<td>11%</td>
</tr>
<tr>
<td>NC</td>
<td>25th District DWI Treatment Court</td>
<td>1995</td>
<td>Misdemeanor</td>
<td>25</td>
<td>2%</td>
</tr>
<tr>
<td>NC</td>
<td>26th Superior Court District DWI Drug Treatment Court</td>
<td>2000</td>
<td>Both</td>
<td>123</td>
<td>11%</td>
</tr>
<tr>
<td>ND</td>
<td>South Central Judicial District DUI Court</td>
<td>2001</td>
<td>Both</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>NM</td>
<td>Municipal Court of Santa Fe DUI Court</td>
<td>1998</td>
<td>Misdemeanor</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>NY</td>
<td>Otsego County Drug Treatment</td>
<td>2000</td>
<td>Both</td>
<td>34</td>
<td>14%</td>
</tr>
<tr>
<td>NY</td>
<td>North Tonawanda City Court</td>
<td>1995</td>
<td>Both</td>
<td>100</td>
<td>10%</td>
</tr>
<tr>
<td>NY</td>
<td>Washington County Superior Court - DUI Court</td>
<td>2003</td>
<td>Both</td>
<td>25</td>
<td>N/A</td>
</tr>
<tr>
<td>OK</td>
<td>Muskogee Nation DUI/Drug Court</td>
<td>1981</td>
<td>Both</td>
<td>3</td>
<td>N/A</td>
</tr>
<tr>
<td>OR</td>
<td>Ninth Judicial District DUI Court</td>
<td>2001</td>
<td>Both</td>
<td>6</td>
<td>N/A</td>
</tr>
<tr>
<td>UT</td>
<td>City of Taylorsville Municipal Justice Substance Abuse Court</td>
<td>1998</td>
<td>Misdemeanor</td>
<td>N/A</td>
<td>16/17</td>
</tr>
<tr>
<td>WY</td>
<td>Lincoln County Circuit Court DUI/Drug Court</td>
<td>2000</td>
<td>Both</td>
<td>12</td>
<td>N/A</td>
</tr>
</tbody>
</table>

** DWI Courts. Do not accept violent offenders or sex offenders**

<table>
<thead>
<tr>
<th>STATE</th>
<th>COURT</th>
<th>YEAR STARTED</th>
<th>CASE TYPE</th>
<th>CASELOAD</th>
<th>REPORTED RECIDIVISM RATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>AL</td>
<td>34th Judicial DUI Court</td>
<td>2001</td>
<td>Felony</td>
<td>5</td>
<td>N/A</td>
</tr>
<tr>
<td>ID</td>
<td>Kootenai County DUI Court</td>
<td>2001</td>
<td>Misdemeanor</td>
<td>40</td>
<td>5%</td>
</tr>
<tr>
<td>IN</td>
<td>Clark County OVWI/DUI Court</td>
<td>N/A</td>
<td>Both</td>
<td>5</td>
<td>N/A</td>
</tr>
<tr>
<td>IN</td>
<td>Dearborn/Ohio County OVWI/DUI Court</td>
<td>2002</td>
<td>Felony</td>
<td>12</td>
<td>N/A</td>
</tr>
<tr>
<td>NY</td>
<td>Fulton County Drug Court</td>
<td>1998</td>
<td>First Felony</td>
<td>25-30</td>
<td>5%</td>
</tr>
</tbody>
</table>

** DWI Courts. Do not accept violent offenders or juvenile offenders**

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<thead>
<tr>
<th>STATE</th>
<th>COURT</th>
<th>YEAR STARTED</th>
<th>CASE TYPE</th>
<th>CASELOAD</th>
<th>REPORTED RECIDIVISM RATE</th>
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</thead>
<tbody>
<tr>
<td>AZ</td>
<td>Coconino County DUI/Drug Court</td>
<td>2004</td>
<td>Both</td>
<td>55</td>
<td>7%</td>
</tr>
<tr>
<td>IN</td>
<td>Johnson County/Greenwood City OVWI/DUI Court</td>
<td>1999</td>
<td>Both</td>
<td>50 (estimate)</td>
<td>N/A</td>
</tr>
<tr>
<td>IN</td>
<td>Monroe County DUI Court</td>
<td>1999</td>
<td>Felony</td>
<td>27</td>
<td>5%</td>
</tr>
<tr>
<td>MI</td>
<td>35th District Court Plymouth Sobriety Court**</td>
<td>2004</td>
<td>Misdemeanor</td>
<td>8</td>
<td>N/A</td>
</tr>
<tr>
<td>MI</td>
<td>51st District DUI Court**</td>
<td>2001</td>
<td>Misdemeanor</td>
<td>600</td>
<td>17%</td>
</tr>
<tr>
<td>MI</td>
<td>52-1 District Sobriety Court**</td>
<td>2001</td>
<td>Misdemeanor</td>
<td>88</td>
<td>3%</td>
</tr>
<tr>
<td>MI</td>
<td>52-4 District Drug Therapy Court</td>
<td>2001</td>
<td>Misdemeanor</td>
<td>40</td>
<td>14%</td>
</tr>
<tr>
<td>MO</td>
<td>St. Charles County DWI Court</td>
<td>2000</td>
<td>Felony</td>
<td>60-70</td>
<td>4%</td>
</tr>
<tr>
<td>MS</td>
<td>14th District DUI Court</td>
<td>2002</td>
<td>Felony</td>
<td>15</td>
<td>N/A</td>
</tr>
<tr>
<td>NM</td>
<td>Las Cruces Municipal DWI Court</td>
<td>1994</td>
<td>Misdemeanor</td>
<td>500-600</td>
<td>N/A</td>
</tr>
<tr>
<td>NM</td>
<td>Bernallillo County DWI Court</td>
<td>1997</td>
<td>Misdemeanor</td>
<td>95</td>
<td>8%</td>
</tr>
<tr>
<td>NM</td>
<td>11th Judicial Circuit DWI Court</td>
<td>1995</td>
<td>Misdemeanor</td>
<td>50</td>
<td>2%</td>
</tr>
<tr>
<td>OK</td>
<td>Creek County DUI/Drug Court</td>
<td>1997</td>
<td>Both</td>
<td>75</td>
<td>35%</td>
</tr>
<tr>
<td>PA</td>
<td>Berks County DUI Court</td>
<td>2003</td>
<td>Misdemeanor</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>PA</td>
<td>Lackawanna County DUI Court</td>
<td>2002</td>
<td>Misdemeanor</td>
<td>30-40</td>
<td>N/A</td>
</tr>
<tr>
<td>TN</td>
<td>Unicoi-Washington County Alcohol and Drug Court</td>
<td>2001</td>
<td>Misdemeanor</td>
<td>30</td>
<td>5%</td>
</tr>
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</table>

** DWI Courts. Do not accept violent offenders, mental-illness cases, or clients previously receiving treatment**

<table>
<thead>
<tr>
<th>STATE</th>
<th>COURT</th>
<th>YEAR STARTED</th>
<th>CASE TYPE</th>
<th>CASELOAD</th>
<th>REPORTED RECIDIVISM RATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>ID</td>
<td>7th Judicial District Juvenile DUI/Drug Court</td>
<td>2000</td>
<td>Juvenile</td>
<td>10</td>
<td>N/A</td>
</tr>
<tr>
<td>ID</td>
<td>7th Judicial District Misdemeanor DUI/Drug Court (Bingham Bonneville)</td>
<td>2000</td>
<td>Misdemeanor</td>
<td>17</td>
<td>5%</td>
</tr>
<tr>
<td>ID</td>
<td>7th Judicial District Felony DUI/Drug Court</td>
<td>2000</td>
<td>Felony</td>
<td>15</td>
<td>7%</td>
</tr>
</tbody>
</table>

** DWI Courts. Do not accept violent offenders, sex offenders, or mental-illness cases**

<table>
<thead>
<tr>
<th>STATE</th>
<th>COURT</th>
<th>YEAR STARTED</th>
<th>CASE TYPE</th>
<th>CASELOAD</th>
<th>REPORTED RECIDIVISM RATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>AK</td>
<td>Bethel Therapeutic Court</td>
<td>2001</td>
<td>Misdemeanor</td>
<td>35</td>
<td>N/A</td>
</tr>
<tr>
<td>TN</td>
<td>23rd Judicial District DWI Court</td>
<td>2001</td>
<td>Felony*</td>
<td>12</td>
<td>0%</td>
</tr>
</tbody>
</table>

** DWI Courts. Do not accept violent offenders, sex offenders, or juvenile cases**

<table>
<thead>
<tr>
<th>STATE</th>
<th>COURT</th>
<th>YEAR STARTED</th>
<th>CASE TYPE</th>
<th>CASELOAD</th>
<th>REPORTED RECIDIVISM RATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>ME</td>
<td>Isabella County DUI Court</td>
<td>2004</td>
<td>Both</td>
<td>9</td>
<td>N/A</td>
</tr>
</tbody>
</table>

Both = Felonies and Misdemeanors

* Court has jurisdiction over felonies and misdemeanors, but DWI Court serves only people accused of felonies.

** Indicates a court that began independently from a drug court.

*** Does not accept clients who had previous treatment.

**** Rate reported for misdemeanors; recidivism rate for felons 0%, but 20% of those eligible did not participate.
Recent Criminal Decisions of the United States Supreme Court: The 2004-2005 Term

Charles Whitebread

The 2004-2005 Term of the Supreme Court offered no blockbuster rulings. Nonetheless, in what turned out to be the final year for the Rehnquist Court, there were rulings of note on topics ranging from securities fraud to sentencing guidelines. In one case, the Court looked to foreign law as a model for determining whether to prohibit the death penalty as a sentence for juvenile criminal offenders. It will be interesting to see, with changes in the Court's membership, whether this trend to look toward foreign law in constitutional or other criminal cases continues. In this article, I will review the Court's criminal-law decisions from the past term. In the next issue of *Court Review*, I will review the Court's civil decisions.

**FOURTH AMENDMENT**

In *Devenpeck v. Alford,* Justice Scalia, writing for all the justices except Chief Justice Rehnquist, who took no part in the decision, held that there is no additional limitation on the Fourth Amendment's probable cause requirement that the offense giving rise to probable cause be "closely related" to the offense to which the officer refers at the time of arrest. Using wig-wag headlights, respondent stopped to assist a disabled vehicle, and left quickly as a Washington state patrolman pulled up. When questioned, the occupants of the disabled vehicle informed the patrolman that they thought respondent was a police officer. The patrolman pursued respondent and was later joined by his supervisor. The patrolmen discovered wig-wag lights on respondent's car, that he was listening to a Kitsap County Sheriff's Office on a special radio, and that he had handcuffs and a hand-held police scanner in his car. The patrolmen also noticed that respondent was recording the conversation. They arrested respondent for violation of the Washington Privacy Act despite respondent's claim that he could by law record his conversation with the officers.

The patrolmen, after speaking with a state prosecutor, charged respondent with violating the Act and issued a ticket to respondent for his flashing lights. Under the law, "respondent could be detained on the latter offense only for the period of time 'reasonably necessary' to issue a citation." The state trial court dismissed both charges and respondent then filed a cause of action under 42 U.S.C. section 1983 "and a state cause of action for unlawful arrest and imprisonment, both claims resting upon the allegation that petitioners arrested him without probable cause in violation of the Fourth and Fourteenth Amendments." A divided panel for the Court of Appeals for the Ninth Circuit determined that the patrolmen "could not have had probable cause to arrest because they cited only the Privacy Act charge" and tape recording the conversation was not a crime. It rejected petitioner's claim that probable cause existed because respondent was impersonating a police officer or obstructing law enforcement on the grounds that "those offenses were not 'closely related' to the offense invoked by Devenpeck as he took respondent into custody."

The Court began its opinion by reciting the basic principles of Fourth Amendment jurisprudence: "The Fourth Amendment protects 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' A warrantless arrest is considered reasonable if "there is probable cause to believe that a criminal offense has been or is being committed." Probable cause is measured by "the reasonable conclusion[s] . . . drawn from the facts known to the arresting officer at the time of arrest." The Court has made clear in prior decisions that "an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause." It has repeatedly explained that "the fact that the officer does not have the state of mind which is hypothesized by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." The Court concluded "the rule that the offense establishing probable cause must be 'closely related' to, and based on the same conduct as, the offense identified by the arresting officer at the time of arrest is inconsistent with this precedent." This rule "makes the lawfulness of an arrest turn upon the motivation of the arresting officer—eliminating, as validating probable cause, facts that played no part in the officer's expressed subjective reason for making the arrest."

Otherwise, the constitutionality of the arrest will "vary from place to place and from time to time." An arrest by a "veteran officer would be valid, whereas an arrest made by a rookie in precisely the same circumstances would not."

Justice Stevens, writing for a 6-2 Court, held in *Illinois v. Caballes* that a dog sniff during a routine traffic stop does not violate the Fourth Amendment because it does not prolong the stop, and does not implicate any legitimate privacy interest a driver carrying contraband may have. Chief Justice Rehnquist took no part in the decision.

Respondent was stopped by an Illinois state trooper for traveling at 71 m.p.h. in a 65 m.p.h. zone. While the first state trooper was in the process of issuing a warning ticket, a second trooper arrived and walked his narcotics-detection dog around

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**Footnotes**

respondent’s car even though the first trooper had not reported suspicion of drugs. The dog alerted the troopers and marijuana was discovered in the trunk of respondent’s car. The entire episode took less than ten minutes. Respondent was arrested and convicted of a narcotics offense after the trial judge denied his motion to suppress the marijuana. The appellate court affirmed, but the Illinois Supreme Court reversed, concluding that “because the canine sniff was performed without any ‘specific and articulable facts’ to suggest drug activity, the use of the dog ‘unjustifiably enlarge[d] the scope of a routine traffic stop into a drug investigation.”

The Supreme Court reversed and based its opinion on the following assumptions: (1) respondent was stopped solely for a traffic violation and there was no suspicion that he possessed marijuana; (2) the traffic stop, or initial seizure of respondent, was based on probable cause and legitimate; and (3) even though the initial stop was legitimate, the stop “can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution.” The Court also recognized the legitimacy of a prior Illinois Supreme Court ruling that a search would be illegal where a routine traffic stop was prolonged beyond a reasonable time because of a dog sniff. However, it finds that the stop in this case did not exceed ten minutes, a time “justified by the traffic offense and the ordinary inquiries incident to such a stop.” The Court indicated that the Illinois Supreme Court’s decision was erroneous in this case because it determined that the state trooper unconstitutionally turned a lawful traffic stop into a drug investigation without reasonable suspicion that respondent possessed any drugs. The Fourth Amendment, however, is violated only when a search compromises a legitimate privacy interest. The Court has previously determined that an individual does not have any legitimate privacy interest in possessing contraband. In keeping with this reasoning, the Court held in United States v. Place, that “a ‘canine sniff’ by a well-trained narcotics-detection dog” is “sui generis,” in a class all itself because it “discloses only the presence or absence of narcotics, a contraband item.” The Court concluded that a narcotics-detection dog that only reveals the existence of contraband, and “does not expose noncontraband items that otherwise would remain hidden from public view,” during a lawful traffic stop, generally does not implicate legitimate privacy interests.”

Chief Justice Rehnquist delivered the opinion of the Court in Muehler v. Mena, which held that the use of handcuffs to detain an individual during the execution of a search warrant for weapons and gang-affiliation paraphernalia is not an unreasonable use of force. No justices dissented, but Justice Stevens filed an opinion concurring in the judgment.

During an investigation into a gang-related drive-by shooting, police obtained a search warrant. They used a Special Weapons and Tactics (SWAT) team for the search because they believed there was a “high degree of risk involved in searching a house” given the gang affiliations. While the police executed the warrant, respondent, among others, was placed and remained in handcuffs at gunpoint in a converted garage during the entire search. The police had also informed the Immigration and Naturalization Service (INS), and during the search, an INS agent asked each occupant of the house for their name, date and place of birth, and immigration status. The search yielded various weapons, some marijuana, and gang paraphernalia.

Respondent filed an action under 42 U.S.C. section 1983 against the officers, claiming that “she was detained ‘for an unreasonable time and in an unreasonable manner’ in violation of the Fourth Amendment.” A jury determined that the officers had violated Mena’s Fourth Amendment right “by detaining her both with force greater than that which was reasonable and for a longer period than that which was reasonable.” The court of appeals affirmed the judgment on two grounds: (1) that the officers were not entitled to qualified immunity because “it was objectively unreasonable to confine her in the converted garage and keep her in handcuffs during the entire search”; and (2) the questioning of Mena regarding her immigration status was a separate Fourth Amendment violation. The Supreme Court disagreed.

The Court began by citing to Michigan v. Summers, in which it held “that officers executing a search warrant for contraband have the authority to detain the occupants of the premises while a proper search is conducted.” The Court found these detentions “appropriate . . . because the character of the additional intrusion caused by detention is slight and because the justifications for detention are substantial.” Applying Summers to this scenario, the Court concluded that Mena’s detention for the duration of the search was “plainly permissible.” The Court stated that “[i]nherent in Summers’ authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention.” The Court recognized that the use of handcuffs was more of an intrusion than was recognized in Summers, but believed that it was justified as “this was no ordinary search” but an “inherently dangerous situation[,]” since the police were searching for weapons and believed that gang members were present on the property. The Court further concluded that the amount of time Mena was in handcuffs was not unreasonable given the danger of the search.

Finally, the Court also believed Mena’s rights were not violated by the INS agent’s questioning while she was detained. The Court disagreed with the lower court’s premise that the police “were required to have independent reasonable suspicion in order to question Mena concerning her immigration status because the questioning constituted a discrete Fourth Amendment event.” It stated: “We have held repeatedly that

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mone police questioning does not constitute a seizure.”

FIFTH AMENDMENT
A 5-4 Court, in Smith v. Massachusetts, held that under the Double Jeopardy Clause of the Fifth Amendment, a trial court’s midtrial dismissal of a charge against a defendant for lack of evidence is final and cannot be reconsidered unless there is a law in place that allows for such reconsideration. Petitioner Melvin Smith was tried before a jury on three counts. At the conclusion of the prosecution’s case, the court, on a motion filed by petitioner, dismissed the third count on the grounds that “there was ‘not a scintilla of evidence’” to prove one element of the crime. After the close of defendant’s case but prior to closing argument, the prosecution asked the judge to reevaluate her decision dismissing the third count on the grounds that a prior Massachusetts court decision had held that the evidence he presented was sufficient. The judge agreed and reversed her decision. Petitioner was convicted on all three counts.

Under the common law, “double jeopardy . . . applied only to charges on which a jury had rendered a verdict.” However, the Court has long since held that the Double Jeopardy Clause “prohibits reexamination of a court-decree acquittal to the same extent it prohibits reexamination of an acquittal by jury verdict.” The Court has recognized only a “single exception to the principle that acquittal by judge precludes reexamination of guilt no less than acquittal by jury.” This exception occurs when “a jury returns a verdict of guilty and a trial judge (or an appellate court) sets aside that verdict and enters a judgment of acquittal.” In that case, the prosecution can appeal to reinstate the jury verdict. However, “if the prosecution has not yet obtained a conviction, further proceedings to secure one are impermissible.”

The Court believed that when the judge in this case dismissed the third count, the judge’s dismissal of the count was in fact “a judgment of acquittal,” since no jury verdict had been returned and further “factfinding proceedings going to guilt or innocence” were prohibited. The Court rejected the prosecution’s argument that double jeopardy did not attach because the court’s decision was “purely a legal determination” and that the “factfinding function” was reserved to the jury. The Court previously rejected similar reasoning in United States v. Martin Linen Supply Co. In Martin Linen, the Court determined that an acquittal under Federal Rule of Criminal Procedure 29 “is a substantive determination that the prosecution has failed to carry its burden[,]” and thus, “even when the jury is the primary factfinder, the trial judge still resolves elements of the offense in granting a Rule 29 motion in the absence of a jury verdict.”

The Court next addressed “whether the Double Jeopardy Clause permitted [the judge] to reconsider that acquittal once petitioner and his codefendant had rested their cases.” The Court stated “that the facts of this case gave petitioner no reason to doubt the finality of the state court’s ruling.” The Court recognized that “as a general matter state law may prescribe that a judge’s midtrial determination of the sufficiency of the State’s proof can be reconsidered.” However, it found no such law in Massachusetts. The Court determined that “[i]t may suffice for an appellate court to announce the state-law rule that midtrial acquittals are tentative in a case where reconsideration of the acquittal occurred at a stage in the trial where the defendant’s justifiable ignorance of the rule could not possibly have caused him prejudice.” That was not the case here, however, because “the possibility of prejudice” arose. The defendant could have presented evidence to rebut the element, but he ran the risk of bolstering the prosecution’s case.

A 7-2 Court, in an opinion written by Justice Breyer, determined that the Fifth and Fourteenth Amendments forbid the use of visible shackles during the penalty phase of a capital murder trial unless the use is justified by an essential state interest. The petitioner in Deck v. Missouri was tried and convicted in state court for robbing and killing an elderly couple. He was sentenced to death but the Missouri Supreme Court set aside the sentence. During the new sentencing proceeding, “Deck was shackled with leg irons, handcuffs, and a belly chain.” His numerous objections to the shackles were overruled and the jury was aware that Deck was shackled during the entire proceeding. Deck was again sentenced to death and appealed again, claiming “that his shackling violated both Missouri law and the Federal Constitution.” The Missouri Supreme Court affirmed the sentence.

Under common law, “[t]he law has long forbidden routine use of visible shackles during the guilt phase; it permits a State to shackle a criminal defendant only in the presence of special need.” The Court stated that more recently, it “has suggested that a version of this rule forms part of the Fifth and Fourteenth Amendments’ due process guarantee.” The Court took this opportunity to state with certainty that this rule identifies “a basic element of the ‘due process of law’ protected by the Federal Constitution.” The Court recognized, however, that the penalty phase of a trial might dictate a different rule because “the reasons that motivate the guilt-phase constitutional rule . . . [may not] apply with similar force in this context.” The Court recognized “[j]udicial hostility to shackling may once primarily have reflected concern for the suffering—the ‘torments’ and ‘torments’—that ‘very painful’ chains could cause.” More recently, the Court has “emphasized the importance of giving effect to three fundamental legal principles”: (1) the presumption of innocence; (2) the right to counsel and a meaningful defense; and (3) the maintenance of a dignified judicial process sought by judges.

The Court reasoned that the “considerations that militate against the routine use of visible shackles during the guilt phase of a criminal trial apply with like force to penalty proceedings in capital cases.” While the innocence phase of the trial is concluded, and therefore the use of shackles has no bearing on this consideration, “shackles at the penalty phase threaten related concerns.” The jury is “deciding between life and death,” which is a decision that has the same “severity” and “finality” as guilt. According to the Court, a defendant in shackles conveys to the jury “that court authorities consider the offender a danger to the community[,]” and “inevitably affects adversely the jury’s perception of the character of the defendant.”

SIXTH AMENDMENT: COUNSEL

In Florida v. Nixon,9 the Court held that conceding guilt during the first phase of a capital trial is not tantamount to entering a guilty plea on behalf of the accused; therefore, counsel’s failure to obtain defendant’s express consent to such a strategy does not automatically render counsel’s performance deficient. Justice Ginsburg delivered the opinion of the Court, in which all the justices joined, except Chief Justice Rehnquist who took no part in the decision of the case.

Respondent Joe Elton Nixon was indicted for the brutal murder of Jeanne Bickner. Assistant Public Defender Michael Corin was assigned to Nixon and filed a plea of not guilty. Corin deplored all the State’s witnesses and determined that “Nixon’s guilt was not ‘subject to any reasonable dispute.’” Corin commenced plea negotiations, which were unsuccessful, and then decided to focus on the penalty phase of the trial, “believing that the only way to save Nixon’s life would be to present extensive mitigation evidence centering on Nixon’s mental instability.” As an experienced attorney, Corin believed that contesting Nixon’s guilt in the first phase of the trial would compromise his ability to persuade the jury that Nixon’s actions were a product of the mental illness. Corin attempted to explain the situation to Nixon on three occasions. Nixon generally was unresponsive and never approved or protested the attorney’s strategy. In fact, Nixon showed little interest in the trial and “intelligently and voluntarily waived his right to be present at trial.” During the trial, Corin admitted Nixon’s guilt and asked the jury to focus on the penalty phase of the trial. He only questioned the State’s witnesses to the extent he wanted to clarify their statements but did not present a defense. During the penalty phase, Corin argued that Nixon was mentally ill. The jury, however, recommended that Nixon be given the death penalty.

After a direct appeal, Nixon sought state postconviction relief arguing that Corin provided ineffective assistance of counsel because he conceded “Nixon’s guilt without obtaining Nixon’s express consent.” Relying on United States v. Cronic,10 Nixon argued that Corin’s actions were “presumed prejudicial because it left the prosecution’s case unexposed to ‘meaningful adversarial testing.’” The Court did not agree. It recognized the basic principle that “[a]n attorney . . . has a duty to consult with the client regarding important decisions,” including questions of overarching defense strategy. However, this obligation “does not require counsel to obtain the defendant’s consent to ‘every tactical decision.’” Some decisions that affect basic rights cannot be waived through a surrogate; for instance, the basic right to a trial. By pleading guilty, “a defendant waives constitutional rights that inhere in a criminal trial, including the right to trial by jury, the protection against self-incrimination, and the right to confront one’s accusers.” Therefore, while it may be tactically advantageous, an attorney may not make a guilty plea on behalf of a client, and “a defendant’s tacit acquiescence in the decision to plead is insufficient to render the plea valid.”

The Court determined that Corin’s concession of guilt was not a “guilty plea” and did not “waive” Nixon’s rights in a criminal trial. Therefore, Corin did not need explicit approval. The Court rested its decision on the following facts. First, the prosecution was still required to prove its case. Second, Corin still could cross-examine witnesses and move to exclude prejudicial evidence, which he did. The Court also noted that, as required, Corin did attempt to discuss his strategy with Nixon on several occasions. The Court concluded “[g]iven Nixon’s constant resistance to answering inquiries put to him by counsel and court . . . Corin was not additionally required to gain express consent before conceding Nixon’s guilt.” According to the Court, Corin fulfilled his duties. The Court recognized that in a more standard trial, the decision might be closer. However, in a death penalty case, counsel faces very different decisions, “not least because the defendant’s guilt is often clear.” The Court deemed it reasonable for counsel, therefore, “to focus on the trial’s penalty phase, at which time counsel’s mission is to persuade the trier that his client’s life should be spared.” When defendant is “unresponsive” to counsel’s strategic discussions, “counsel’s strategic choice is not impeded by any blanket rule demanding the defendant’s explicit consent.”

A 5-4 Court, in Rompilla v. Beard,11 held that counsel provided ineffective assistance when it failed to review the files the prosecutor stated it would use as evidence to prove aggravating factors in the sentencing phase of a capital trial, despite the fact that defendant and his family indicated that no mitigating evidence existed. Justice Souter wrote the opinion of the Court, while Justice Kennedy dissented.

Petitioner Ronald Rompilla was found guilty of murder. In the penalty phase of the proceedings, “the prosecutor sought to prove three aggravating factors to justify a death sentence.” Prior to trial, the prosecutor indicated that he would use the

A 6-3 Court . . . held that an indigent defendant who has pleaded guilty or nolo contendere is entitled to the appointment of appellate counsel when seeking access to a direct appeal.

files from Rompilla’s prior convictions as evidence. Despite that warning, defense counsel did not obtain a copy of the files and, instead, merely questioned Rompilla and his family about possible mitigating evidence. Rompilla and his family members indicated that there was none. In reality, if defense counsel had looked at the file “they would have found a range of mitigation leads that no other source had opened up.” The file included records of Rompilla’s childhood and mental-health history, including test results that pointed to schizophrenia and other disorders. The defense’s mitigating evidence merely consisted of relatively brief testimony of Rompilla’s family members, who argued in effect for residual doubt and beseeched the jury for mercy, and three mental-health officials, who were consulted prior to trial. Rompilla was sentenced to death.

After denial of relief in his state postconviction proceedings, Rompilla sought a federal writ of habeas corpus. The District Court, applying the necessary standard under 28 U.S.C. section 2255, determined “that the State Supreme Court had unreasonably applied Strickland v. Washington12 as to the penalty phase of the trial, and granted relief for ineffective assistance of counsel.” A divided panel for the Court of Appeals for the Third Circuit reversed.

The Supreme Court recognized that the standard of reasonableness in this scenario has “few hard-edged rules, and the merits of a number of counsel’s choices in this case are subject to fair debate.” While the Court recognized that defense counsel need not “scour the globe on the off-chance something will turn up,” it also believed that there are certain lines of inquiry which must be followed. It believed it is “clear and dispositive” that counsel was “deficient in failing to examine the court file on Rompilla’s prior conviction.” The Court gave the “obvious reason” as “[c]ounsel knew that the Commonwealth intended to seek the death penalty by proving Rompilla had a significant history of felony convictions indicating the use or threat of violence.” It is clear from the record that counsel did not review the transcripts from Rompilla’s prior convictions and that failure to examine them seriously compromised the opportunity to respond to a case for aggravation.

The Court believed that it did not, as the dissent argued, create a “rigid, per se” rule that requires defense counsel to do a complete review of the file on any prior conviction introduced. “It only requires counsel “to make reasonable efforts to review the prior conviction file” if it knows that the prosecution intends to introduce it and will quote damaging testimony from the victim. The Court stated: “Other situations, where a defense lawyer is not charged with knowledge that the prosecutor intends to use a prior conviction in this way, might well warrant a different assessment.” The Court also concluded, examining the matter de novo, that counsel’s deficient performance was prejudicial in this instance under the standard that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”

In Halbert v. Michigan,13 the Court considered the constitutionality of Michigan’s amendment to its Constitution: “In every criminal prosecution, the accused shall have the right . . . to have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court.” Under this amendment, “[a] defendant convicted by plea who seeks review in the Michigan Court of Appeals must now file an application for leave to appeal.” Further, a defendant who pleads guilty or nolo contendere is not entitled to court-appointed appellate counsel except by leave of court, grant of application for leave to appeal, or in certain specific instances. Petitioner pleaded nolo contendere to two counts of second-degree criminal sexual conduct. The day after he was sentenced, “Halbert submitted a handwritten motion to withdraw his plea.” The court denied it stating “that Halbert’s ‘proper remedy is to appeal to the Michigan Court of Appeals.’” Petitioner requested the aid of counsel twice but the requests were denied. Petitioner then filed a pro se application for leave to appeal, claiming a sentencing error and ineffective assistance of counsel. The Court of Appeals denied the application “for lack of merit in the grounds presented.” The Michigan Supreme Court, in a divided panel, “denied Halbert’s application for leave to appeal to that court.”

A 6-3 Court, in an opinion written by Justice Ginsburg, held that an indigent defendant who has pleaded guilty or nolo contendere is entitled to the appointment of appellate counsel when seeking access to a direct appeal. “The Federal Constitution imposes on the States no obligation to provide appellate review of criminal convictions.” However, once the State has provided such an avenue it “may not ‘bolt the door to equal justice’ to indigent defendants.” The Court believed this case must be aligned with one of its two prior cases: Douglas v. California14 or Ross v. Moffitt.15 In Douglas, the Court held that “in first appeals as of right, States must appoint counsel to represent indigent defendants.” In Ross, the Court held “a State need not appoint counsel to aid a poor person in discretionary appeals to the State’s highest court, or in petitioning for review in this Court.” The Supreme Court stated that two considerations were key to its holding in Douglas, which did not exist in Ross: (1) “such an appeal entails an adjudication on the ‘merits’”; and (2) “first-tier review differs from subsequent appellate stages ‘at which the claims have once been presented by [appellate counsel] and passed upon by an appellate court.’” As to the latter consideration, in second-tier discretionary appeals:

[A] defendant who had already benefited from counsel’s aid in a first-tier appeal as of right would have, “at

the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case.”

In the end, the Court believed “that Douglas provide[d] the controlling instruction” because of “[t]wo aspects of the Michigan Court of Appeals’ process following plea-based convictions”: (1) “in determining how to dispose of an application for leave to appeal, Michigan’s intermediate appellate court looks to the merits of the claims made in the application”; and (2) “indigent defendants pursuing first-tier review in the Court of Appeals are generally ill equipped to represent themselves.” The Court believed “[o]f critical importance” is the fact that “the tribunal to which he addresses his application, the Michigan Court of Appeals” sits to correct errors in individual cases. The court of appeals can respond to an application in various ways, “[b]ut” the court’s response to the leave application by any of the specified alternatives—including denial of leave—necessarily entails some evaluation of the merits of the applicant’s claims.” The Court also focused on Halbert’s specific situation to support its conclusion. The Court believed that “[n]avigating the appellate process without a lawyer’s assistance is a perilous endeavor for a layperson, and well beyond the competence of individuals, like Halbert, who have little education, learning disabilities, and mental impairments.” The Court recognized Michigan’s legitimate interest in “reducing the workload of its judiciary,” but believed providing “counsel will yield applications [for leave to appeal] easier to comprehend.”

**SIXTH AMENDMENT: JURY TRIAL**

In *United States v. Booker*, the Court held that the Federal Sentencing Guidelines are subject to the jury requirement of the Sixth Amendment. The Court also invalidated the provisions of the Guidelines that make them mandatory (18 U.S.C. section 3553(b)(1)), and the accompanying appellate review standard (18 U.S.C. section 3742(e)), stating that instead courts should treat them as advisory. Justice Stevens delivered the opinion of the Court as to the first holding and Justice Breyer delivered the opinion as to the second. Based on the Court’s prior decision in *Blakely v. Washington*, lower courts, in the companion cases of *United States v. Booker* and *United States v. Fanfan*, rejected application of the Guidelines “because the proposed sentences were based on additional facts that the sentencing judge found by a preponderance of the evidence.” The judge sentenced respondent Booker to 30 years, instead of the 21 years and 10 months that it could have sentenced Booker, solely based on the findings by the jury. The Court of Appeals for the Seventh Circuit reversed based on the Court’s decision in *Blakely*. With regard to respondent Fanfan, the trial judge determined at a sentencing hearing that additional facts existed that authorized a sentence of 188 to 235 months. However, based on the Court’s decision in *Blakely*, the trial judge sentenced Fanfan solely on the facts reflected in the jury verdict. The Government appealed.

The Court began its opinion by restating the following basic principles: (1) “the Constitution protects every criminal defendant ‘against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute a crime with which he is charged’”; and (2) a defendant has “a right to demand that a jury find him guilty of all the elements of the crime.” In *Apprendi v. New Jersey*, the Court held “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” The Court’s opinion was reaffirmed in *Ring v. Arizona*, where it held that it was “impermissible for ‘the trial judge, sitting alone’ to determine the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty.” And most recently, the Court, in *Blakely*, held that a trial judge could not increase a sentence beyond the statutory “standard” based on his finding of “deliberate cruelty,” even if Washington law authorized the increased sentence for that type of felony and the time to which the defendant was sentenced was still below the statutory “maximum.” The Court determined that the “statutory maximum” for the purposes of *Apprendi* is the maximum the judge can impose “solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” According to the Court, the Guidelines, by their own terms, are mandatory and “impose binding requirements on all sentencing judges.” It concluded, therefore, that it runs afoul of the Sixth Amendment since many of the factors that mandate an increased sentence are not determined by the jury.

In the second part of its opinion, the Court found that there are provisions within the Guidelines that make them “mandatory” and, therefore, incompatible with the Court’s holding today. The Court believed, however, that instead of reading a jury requirement into the Guidelines, it should instead strike the provisions of the Guidelines making them mandatory (18 U.S.C. sections 3553(b)(1) and 3742(e)), leaving the Guidelines “effectively advisory.” The Court supported its decision by looking at the legislative history and concluded that if its constitutional holding was “added onto the Sentencing Act as currently written, the requirement would so transform the scheme that Congress created that Congress likely would not have intended the Act as so modified to stand.” Second, the Court recognized that “Congress’ basic statutory goal—a system that diminishes sentencing disparity—depends for its success upon judicial efforts to determine . . . the real conduct that underlies the crime of conviction.” According to the Court, it appeared that Congress would have intended that this system continue and to allow the jury a role

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in this “system” would “destroy” Congress’s intent. Finally, the Court stated that if the Guidelines were read to include the Sixth Amendment requirement, it “would create a system far more complex than Congress would have intended.”

Justices Stevens, Scalia, and Thomas agreed that the Guidelines are subject to the Sixth Amendment, but disagreed with the Court’s decision to excise only portions of the Guidelines and make them discretionary. Justice Stevens would “simply allow the Government to continue doing what is has done since this Court handed down Blakely—prove any fact that is required to increase a defendant’s sentence . . . to a jury beyond a reasonable doubt.” Justice Scalia believed that the Court essentially has created a scheme that existed prior to the Guidelines enactment. He criticized the Court, however, for establishing an “unreasonableness” standard for appellate review. Justice Thomas agreed with Justice Stevens’ “proposed remedy and much of his analysis,” but wrote separately because he disagreed with “[Justice Stevens’] restatement of the severability principles and reliance on legislative history.”

Justice Breyer dissented from part of the Court’s opinion. He wrote: “I find nothing in the Sixth Amendment that forbids a sentencing judge to determine (as judges at sentencing have traditionally determined) the manner or way in which the offender carried out the crime of which he was convicted.” He distinguished “sentencing facts” from facts that prove the “element of the crime” and believed that history does not “support a ‘right to jury trial’” for the former.

In Johnson v. California,20 a second case this term concerning Batson v. Kentucky,21 an 8-1 Court invalidated a California law requiring a defendant to make a prima facie showing that it was “more likely than not” the prosecutor used discriminatory reasons to exercise a peremptory challenge, finding that this test does not fall within the framework set forth in Batson. Petitioner Jay Shawn Johnson, a black male, was convicted of second-degree murder and assault resulting in death. The prosecutor used three of his twelve peremptory challenges to remove all the remaining black prospective jurors, leaving a jury that was entirely white. Petitioner objected twice during the process, but both objections were overruled by the trial court without asking the prosecutor to offer a reason. Instead, the trial judge found that “petitioner had failed to establish a prima facie case under the governing state precedent.”

In an opinion written by Justice Stevens, the Court determined that California’s test, as set forth in Wheeler, does not fit within the framework of Batson. The Court enumerated three steps in Batson “which together guide trial courts’ constitutio-
the death sentence.” The State argued that Stumpf was the principal offender and he was sentenced to death.

At Wesley’s trial, the prosecutor introduced the testimony of Wesley’s cellmate, who testified that Wesley had admitted to firing the shots that killed Mary Jane Stout. Wesley took the stand in his own defense and “testified that Stumpf had shot Mrs. Stout.” Wesley was sentenced “to life imprisonment with the possibility of parole after 20 years.” After Wesley’s trial, “Stumpf, whose direct appeal was still pending in the Ohio Court of Appeals, returned to the Court of Common Pleas with a motion to withdraw his guilty plea or vacate his death sentence.” He argued that the prosecutor’s argument and evidence that Wesley shot Mrs. Stout “cast doubt on Stumpf’s conviction and sentence.” The prosecutor claimed that the cellmate’s testimony “was belied by certain other evidence (ballistics evidence and Wesley’s testimony in his own defense) confirming Stumpf to have been the primary shooter.” These arguments were in direct conflict with his arguments at Wesley’s trial. After Stumpf exhausted his state remedies, he filed a federal petition for a writ of habeas corpus, raising the same claim. The Sixth Circuit reversed on two grounds: (1) “Stumpf’s guilty plea was invalid because it had not been entered knowingly and intelligently” because “Stumpf had pleaded guilty to aggravated murder without understanding that specific intent to cause death was a necessary element of the charge under Ohio law”; and (2) “Stumpf’s due process rights were violated by the state’s deliberate action in securing convictions of both Stumpf and Wesley for the same crime, using inconsistent theories.”

The Court disagreed. Precedent has established that “[a] guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences.” However, the record reflects that Stumpf’s attorneys “represented . . . that they had explained to their client the elements of the aggravated murder charge; Stumpf himself then confirmed that this representation was true.” The Court has never held that the trial court must explain the elements on the record. The Court also rejected Stumpf’s arguments that it was clear he did not understand the specific intent element of the crime because he maintained throughout “his denial of having shot the victim.” Ohio law does not require that Stumpf himself shoot Mrs. Stout because “aiders and abettors [are] equally in violation of the aggravated murder statute, so long as the aiding and abetting is done with the specific intent to cause death.” According to the Court, “Stumpf has never provided an explanation of how the prosecution’s post-plea use of inconsistent arguments could have affected the knowing, voluntary, and intelligent nature of his plea.” The Court did recognize that “[t]he prosecutor’s use of allegedly inconsistent theories may have a more direct effect on Stumpf’s sentence . . . for it is at least arguable that the sentencing panel’s conclusion about Stumpf’s principal role in the offense was material to its sentencing determination.” However, it is not clear if the lower court “would have concluded that Stumpf was entitled to resentencing had the court not also considered the conviction invalid.” Therefore, the Court expressed no opinion as to this matter and remanded the case.

**Eighth Amendment**

In a 5-4 opinion in *Roper v. Simmons*, the Court held that the Eighth and Fourteenth Amendments forbid the death penalty for offenders who were under the age of 18 when they committed the crime. Justice Kennedy delivered the opinion of the Court, in which Justices Stevens, Souter, Ginsburg, and Breyer joined. Chief Justice Rehnquist and Justices O’Connor, Scalia, and Thomas dissented.

Respondent Christopher Simmons committed murder at the age of 17, and was tried after he had turned 18. There “is little doubt” that Simmons committed the murder. He was tried as an adult because he was 17 and outside the criminal jurisdiction of Missouri’s juvenile court system. During the sentencing phase of the trial, the jury was instructed they could use age as a mitigating factor to the death penalty. However, Simmons was sentenced to death. After this case had run its course in the state court system, the Court decided *Atkins v. Virginia*, which held that the Eighth and Fourteenth Amendments prohibit the execution of mentally disabled persons. Simmons then filed a new petition for state postconviction relief, “arguing that the reasoning of *Atkins* established that the Constitution prohibits the execution of a juvenile who was under 18 when the crime was committed.” The Missouri Supreme Court agreed and set aside Simmons’ death sentence. The Supreme Court granted certiorari.

To reach its decision, the Court followed a line of its prece- dent. In *Thompson v. Oklahoma*, a plurality of the Court determined that “our standards of decency do not permit the execution of any offender under the age of 16 at the time of the crime.” The plurality stressed that “the reasons why juveniles are not trusted with the privileges and responsibility of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.” The following year, in *Stanford v. Kentucky*, the Court “concluded the Eighth and Fourteenth Amendments did not proscribe the execution of juvenile offenders over 15 but under 18.” The Court believed that “there was no national consensus ‘sufficient to label a particular punishment cruel and unusual.’” That same day, the Court also decided *Penry v. Lynaugh*, and held that there was no “categorical exemption from the death penalty for the mentally retarded.” Three years ago, the Court reconsidered its *Penry* decision in *Atkins*. It held that “standards of decency

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Justice Scalia . . . criticized the Court for proclaiming “itself sole arbiter of our Nation’s moral standards . . . .”

have evolved . . . and now demonstrate that the execution of the mentally retarded is cruel and unusual punishment.” The Atkins Court “returned to the rule, established in decisions predating Stanford, that ‘the Constitution contemplates that in the end . . . [the Court’s] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.” In this case, the Court reconsidered the decision in Stanford and wrote that to do so it will apply the following factors: (1) state consensus and practice and (2) its own independent judgment.

The Court stated that the evidence of the “national consensus” for the death penalty for juveniles is similar to that for mentally disabled. Essentially, its prohibition among the States is increasing and its use is decreasing. The Court concluded that the majority of States have prohibited the imposition of the death penalty for juveniles under the age of 18, “and . . . now holds this is required by the Eighth Amendment.” There are “[t]hree general differences between juveniles under 18 and adults . . . [that] demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders”: (1) there is “a lack of maturity and an underdeveloped sense of responsibility.”; (2) juveniles are more susceptible to “negative influences and outside pressures, including peer pressure”; and (3) “the character of a juvenile is not as well formed as that of an adult.” These differences “render suspect any conclusion that a juvenile falls among the worst offenders.” The Court also stated that “[o]nce the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty [retribution and deterrence] apply to them with lesser force than to adults.” The Court did not overlook “the brutal crimes too many juvenile offenders have committed[,]” and recognized that in some cases a juvenile might have sufficient psychological maturity to merit the sentence of death. However, the Court believed that “a line must be drawn” somewhere.

In the last part of its opinion, the Court reinforced its decision based upon its views and its “task of interpreting the Eighth Amendment.” Citing numerous facts, the Court concluded “that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.” The Court believed it “proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty.”

Justices O’Connor and Scalia wrote dissenting opinions. Justice O’Connor found no evidence of a “national consensus” to categorically exclude the execution of individuals under the age of 18, “no matter how deliberate, wanton, or cruel the offense.” Justice Scalia wrote separately about “the mockery” today’s decision has on the traditional role of the judiciary by “announcing the Court’s conclusion that the meaning of our Constitution has changed over the past 15 years.” He also criticized the Court for proclaiming “itself sole arbiter of our Nation’s moral standards.” Finally, in reference to the Court’s reliance on international law, he wrote, “Though the views of our own citizens are essentially irrelevant to the Court’s decision today, the views of other countries and the so-called international community take center stage.”

FOURTEENTH AMENDMENT

Justice O’Conner delivered the opinion of a 5-3 Court in Johnson v. California,29 in which the Court held that the proper standard of review for the California Department of Correction’s (CDC) policy separating new or newly transferred inmates by race is strict scrutiny. The CDC houses all new inmates and inmates transferred from other state facilities in “reception centers” for up to 60 days. Double-cell assignments in the reception centers are predominantly based on race. The CDC justifies its actions on the grounds “that it is necessary to prevent violence caused by racial gangs.” The rest of the facility’s areas are fully integrated. Petitioner Garrison Johnson is an African-American inmate who has been incarcerated since 1987 and has been in many prison facilities. Each time he is transferred, he is held at a reception center and double-celled with another African-American. He filed a pro se complaint in the district court “alleging that the CDC’s reception-center housing policy violated his right to equal protection under the Fourteenth Amendment by assigning him cellmates on the basis of race.”

The Court began its analysis with its holding in Adarand Constructors, Inc. v. Pena,29 in which it held that “all racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny.” Under this standard, “the government has the burden of proving that racial classifications ‘are narrowly tailored measures that further compelling governmental interests.’” The purpose behind this policy is that “[r]acial classifications raise special fears that they are motivated by an invidious purpose.” The CDC argued “that its policy should be exempt . . . because it is ‘neutral—that is, it neither benefits nor burdens one group or individual more than any other group or individual.’” The Court stated that it rejected a similar argument—that separate could be equal—in Brown v. Board of Education.30 It refused to change its opinion today.

The Court believed the need for strict scrutiny is as important here as in its other cases despite the argument that the policy is necessary to control racial violence: “racial classifications ‘threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility.’” The Court stated that “[v]irtually all other States and the Federal Government manage their prison systems without reliance on racial segregation.” The CDC has not made it clear why it, like the Federal Bureau of Prisons, cannot address prison security issues on individual bases. The Court continued by stating that “[i]n the prison context, when the government’s power is at its


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apex, we think that searching judicial review of racial classifications is necessary to guard against invidious discrimination.” The Court rejected the CDC’s argument that “[d]isference to the particular expertise of prison officials in the difficult task of managing daily prison operations requires a more relaxed standard of review.” It hasn’t seen the need in other circumstances and won’t here. The Court concluded its opinion by stating that its decision does not necessarily preclude a policy that is based on race, rejecting the argument that “[s]trict scrutiny is . . . ‘strict in theory, but fatal in fact.’” Prison officials still have the opportunity to show a compelling interest and a narrowly tailored policy to reach that end. It remedied the case for a determination of whether the CDC policy survives strict scrutiny.

Justice Kennedy delivered the opinion of a unanimous Court in Wilkinson v. Austin, 31 which held that the procedures set forth in Ohio’s New Policy are sufficient to protect an inmate’s procedural due-process rights when he is being considered for placement in Ohio’s Supermax security prison (OSP). Supermax prisons are the highest security prisons. In OSP, inmates are confined for 23 hours a day, their cells are lit at all times though sometimes dimmed, there is no contact between inmates in different cells, and meals are solitary. According to the Court, “[i]t is fair to say OSP inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact.” The New Policy was implemented in 2002 to provide “more guidance . . . [and] more procedural protection against erroneous placement in OSP.” The procedures are summarized as follows: (1) a prison official completes a three-page form called a “Security Designation Long Form”; (2) “[a] three-member Classification Committee (Committee) convenes to review the proposed classification and to hold a hearing”; (3) at least 48 hours prior to the hearing, the inmate is provided with written notice detailing the charges and can also request a copy of the Long Form; and (4) the inmate may attend the hearing and defend himself or provide a written statement but cannot call witnesses. If the committee determines that the inmate should not be put in OSP, the inquiry ends. If it decides otherwise, it documents its decision and sends the report to the warden of the prison in which the inmate is being held. If the warden disagrees with the classification, the matter is ended. If he agrees, “he indicates his approval” and forwards the annotated report to the Bureau of Classification (Bureau). The inmate also receives a copy and has 15 days to file his objection with the Bureau. The Bureau reviews the report and makes a final determination. If it agrees with the recommendation, the inmate is transferred and the report is annotated again with the Bureau’s reasons. The inmate receives another automatic review of his file by an OSP staff member within 30 days of his transfer. His file is reviewed yearly.

Prior to the implementation of the New Policy, a group of OSP inmates brought suit against various prison officials under 42 U.S.C. section 1983, alleging “that Ohio’s Old Policy . . . violated due process . . . On the eve of trial Ohio promulgated its New Policy.” Both the district court and the court of appeals “evaluated the adequacy of the New Policy.” The district court issued a detailed remedial order based on its determination that “the inmates have a liberty interest in avoiding assignment to OSP.” The Court of Appeals for the Sixth Circuit affirmed this finding and the district courts “procedural modifications” of the New Policy. However, “it set aside the [d]istrict [c]ourt’s far-reaching substantive modifications, concluding they exceeded the scope of the [courts] authority.”

The Supreme Court agreed with the lower courts that inmates have a liberty interest in avoiding assignment to OSP. The Due Process Clause of the Fourteenth Amendment “protects persons against deprivations of life, liberty, or property.” A “liberty interest may arise from the Constitution itself . . . or it may arise from an expectation or interest created by state laws or policies.” The Court has already held that “the Constitution itself does not give rise to a liberty interest in avoiding transfer to more adverse conditions of confinement.” However, the Court has also held that this liberty interest “may arise from state policies or regulations, subject to the important limitations set forth in Sandin v. Conner.” In Sandin, the Court “abrogated the methodology of parsing the language of particular regulations[]” to identify state-created liberty interests and returned to the “real concerns undergirding the liberty protected by the Due Process Clause.” Thus, “the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of the regulations regarding those conditions but the nature of those conditions themselves in relation to the ordinary incidents of prison life.” The Court has not, and stated that it will not, identify “the baseline from which to measure what is atypical and significant in any particular prisoner’s system[]” because it is clear that “under any plausible baseline[,]” assignment in OSP imposes an atypical and significant hardship.

The Court next turned to the question of which process then is due to the inmates to protect their liberty interest. “Because the requirements of due process are ‘flexible and call for such procedural protections as the particular situation demands,’ we generally have declined to establish rigid rules and instead have embraced a framework to evaluate the sufficiency of particular procedures.” The Court referred to Mathews v. Eldridge, 33 where it identified three distinct factors for consideration: (1) “the private interest that will be affected by the official action”; (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedures safeguards”; and (3) “the Government’s interest, including the

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function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” The Court believed that although inmates have an interest in avoiding confinement in OSP, the “procedural protections to which they are entitled are more limited than in cases where the right at stake is the right to be free from confinement at all.” The Court concluded that the procedures in place are sufficient to protect against erroneous deprivation of the inmates’ liberty interest. Inmates are entitled to “notice of the factual basis leading to consideration for OSP placement and a fair opportunity for rebuttal[]” in two instances during the entire process. Further, if at any point “one reviewer declines to recommend OSP placement, the process terminates.”

**CRIMINAL STATUTORY INTERPRETATION**

In *Whitfield v. United States,* the Court interpreted 18 U.S.C. section 1985(h) of the federal money-laundering statute, which provides: “Any person who conspires to commit any offense defined in [§ 1956] or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.” A unanimous Court, in an opinion written by Justice O’Connor, held that conviction for conspiracy to commit money laundering under section 1956(h) does not require proof of an overt act in furtherance of the conspiracy. Petitioner and other co-defendants were charged under section 1985(h) in connection with a fraudulent investment scheme. The indictment only described in “general terms” the “manner and means” used to accomplish the objects of the conspiracy and “did not charge the defendants with the commission of any overt act in furtherance thereof.” Petitioners asked the trial court to instruct the jury that it must find “beyond a reasonable doubt that at least one of the co-conspirators had committed an overt act in furtherance of the money laundering conspiracy.” The court denied the request. Petitioners were found guilty and appealed. The Court of Appeals for the Eleventh Circuit upheld the conviction. It determined that the jury instructions were proper “because § 1956(h) does not require proof of an overt act.” The Supreme Court granted certiorari to resolve a split among the Circuits.

According to the Court, the language of the statute shows that Congress did not intend that proof of an overt act was necessary for a conviction. Its interpretation relied primarily on *United States v. Shabani,* a case in which it interpreted similar language in a drug-conspiracy statute. In *Shabani,* the Court relied on its previous decisions in *Nash v. United States* and *Stinger v. United States,* and held the statute did not require proof of any further act: “where Congress had omitted from the relevant conspiracy provision any language expressly requiring an overt act, the Court would not read such a requirement into the statute.” Basic principles of statutory interpretation dictate that “absent contrary indications, Congress intends to adopt the common law definition of statutory terms.” The Court has continually stated that the common-law understanding of conspiracy “does not make the doing of any act other than the act of conspiring a condition of liability.”

The Court interpreted the use of the word “any” in two different statutes this term. In *Small v. United States,* the Court interpreted “any” as it is used in the federal unlawful gun-possession statute, 18 U.S.C. section 922 (g) (1). Section 922(g)(1) makes it “unlawful for any person . . . who has been convicted in any court . . . to . . . possess . . . any firearm.” Petitioner Gary Small was convicted in a Japanese court for having tried to smuggle firearms and ammunition into Japan. When Small returned to the United States, he purchased a firearm. The federal government charged Small for “unlawful possession” under section 922(g)(1). Small pled guilty to the charge but reserved his right to challenge his conviction based on the fact that his prior conviction fell outside the scope of the statute because it was a foreign conviction. The District Court and the United States Court of Appeals for the Third Circuit both rejected Small’s argument that “any” court did not refer to foreign courts.

In a 5-3 decision, written by Justice Breyer, the Court held that the word “any” as used in the statute does not include foreign courts. The Court began by stating that “[t]he word ‘any’ considered alone cannot answer this question” because “[i]n ordinary life, a speaker who says, ‘I’ll see any film,’ may or may not mean to include films shown in another city.” Similarly, “[i]n law, a legislature that uses the statutory phrase ‘any person’ may or may not mean to include a ‘persons’ outside the jurisdiction of the state.” Instead, the Court must draw the meaning of “any” from the legislative use of the word. The Court first recognized that there is a “commonsense notion that Congress generally legislates with domestic concerns in mind.” Therefore, the Court has adopted “the legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application.” This presumption would result in prohibiting unlawful gun possession domestically, not internationally. The Court believed a “similar assumption is appropriate when we consider the scope of the phrase ‘convicted in any court.’”

To support the application of this presumption, the Court stated that “as a group, foreign convictions differ from domestic convictions in important ways”: (1) “foreign convictions . . . may include a conviction for conduct that domestic laws would permit;” (2) they might “include a conviction from a legal system that is inconsistent with an American understanding of fairness”; and (3) “they would include a conviction for conduct that domestic law punishes far less severely.” Therefore, the Court believed that “the key statutory phrase ‘convicted in any court . . . ’ somewhat less reliably identifies

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36. 229 U.S. 373 (1913).
37. 323 U.S. 338 (1945).
dangerous individuals for the purposes of U.S. law where foreign convictions, rather than domestic convictions, are at issue.” The Court also believed that “it is difficult to read the statute as asking judges or prosecutors to refine its definitional distinctions where foreign convictions are at issue.” The statute does not require courts or prosecutors to “weed out” inappropriate foreign convictions, nor does the Court believe courts and prosecutors are capable of doing this. Finally, the Court concluded the language of the statute “does not suggest any intent to reach beyond domestic convictions.” In fact, the Court believed that if the statute applied to foreign conviction, “the statute's language creates anomalies.” It gave five examples drawn specifically from the express language of the statute. For instance, the statute specifically provides an exception if a person has been convicted of federal or state antitrust or regulatory offenses. It does not provide an exception, however, if a person has been convicted of a foreign antitrust or regulatory offense.

Justice Thomas, writing a dissenting opinion, conceded that the phrase “any court,” like all other statutory language, must be read in context.” However, he does not believe section 922(g)(1) suggests a “geographic limit on the scope of ‘any court,’” whereas, in contrast, “other parts of the firearms-control law” do. Justice Thomas concluded his dissent by stating: “The Court never convincingly explains its departure from the natural meaning of § 922 (g)(1).” He found that instead, the Court “institutes the troubling rule that ‘any’ does not really mean ‘any;’ but may mean some subset of “any,” even if nothing in the context so indicates.”

InPasquantino v. United States, the Court interpreted the word “any” as used in the federal wire-fraud statute, 18 U.S.C. section 1343. In a 5-4 decision written by Justice Thomas, the Court held that a scheme to defraud a foreign government of tax revenues qualifies as “any scheme” under the federal wire-fraud statute. Petitioners were “indicted for and convicted of federal wire fraud for carrying out a scheme to smuggle large quantities of liquor into Canada from the United States.” Petitioners ordered liquor from a discount store over the telephone and drove it into Canada without declaring it. The purpose was to avoid Canadian taxes, which were almost double the liquor’s purchase price. Prior to trial, petitioners moved to have the charges against them dropped on the grounds “that it stated no wire fraud offense.” Section 1343 “prohibits the use of interstate wires to effect ‘any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.’” Petitioners claimed that “the Government lacked sufficient interest in enforcing the revenue laws of Canada, and therefore that they had not committed wire fraud.” The district court rejected the petitioners’ argument and the Court of Appeals for the Fourth Circuit, on a rehearing en banc, affirmed.

The Court stated that two elements of the crime are in dispute: (1) whether petitioners engaged in any “scheme or artifice to defraud”; and (2) whether “the ‘object of the fraud . . . be [money or] property’ in the victim’s hands.” In its opinion, the Court addressed the second element first and stated that “Canada’s right to uncollected excise taxes on the liquor petitioners imported into Canada is ‘property’ in its hands.” As to the second element, the debate focused on petitioners’ “revenue rule argument,” which briefly stands for the proposition that domestic courts are prohibited from enforcing the collection of tax obligations of foreign nations. Petitioners argued that “to avoid reading § 1343 to derogate from the common-law revenue rule, we should construe the otherwise-applicable language of the wire fraud statute to except frauds directed at evading foreign taxes.” The Court wrote that at the time the wire-fraud statute was enacted, there was no “well-established revenue rule principle” at common law. Instead, courts “treated the common-law revenue rule as a corollary of the rule that . . . [t]he Courts of no country execute the penal laws of another.” It stated: “The basis for inferring the revenue rule from the rule against foreign penal enforcement was an analogy between foreign revenue laws and penal laws.” Various courts first drew this inference “in a line of cases prohibiting the enforcement of tax liabilities of one sovereign in the courts of another sovereign.”

The Court believed that “[t]he revenue rule’s grounding in these cases shows that, at its core, it prohibited the collection of tax obligations of foreign nations.” The Court recognized that this case is unlike the “classic examples of actions traditionally barred by the revenue rule[.]” and believed that the revenue rule jurisprudence is not a clear bar to this prosecution. The Court stated: “A prohibition on the enforcement of foreign penal law does not plainly prevent the Government from enforcing a domestic criminal law.” Further, petitioners did not cite to any case that “barred an action that had as its primary object the deterrence and punishment of fraudulent conduct—a substantial domestic regulatory interest entirely independent of foreign tax enforcement.” The Court believed that “the wire fraud statute advances the Federal Government’s independent interest in punishing fraudulent domestic criminal conduct, a significant feature absent from all of petitioners’ revenue rule cases.”

In a per curiam opinion, the Court, inMedellin v. Dretke, after a proclamation issued by the president that the United States would “discharge its international obligations” under the Vienna Convention, dismissed the writ of certiorari as improvidently granted, stating that petitioner must pursue his rights via state court. Jose Ernesto Medellin, a Mexican national, “confessed to participating in the gang rape and murder of two

The Court concluded that “[o]nly persons conscious of wrongdoing can be said to ‘knowingly . . . corruptly persuade.’” girls in 1993.” He was convicted and sentenced to death in a Texas state court. Medellin filed a state habeas petition, “claiming for the first time that Texas failed to notify him of his right to consular access as required by the Vienna Convention.” The state court rejected this argument and the Texas Court of Criminal Appeals affirmed. Subsequently, Medellin filed a federal habeas petition. The District Court denied the petition. While the petition was pending before the Court of Appeals for the Fifth Circuit, the International Court of Justice (ICJ) “issued its decision in Case Concerning Avena and other Mexican Nationals . . . in which the Republic of Mexico had alleged violations of the Vienna Convention with respect to Medellin and other Mexican nationals facing the death penalty in the United States.” The ICJ “determined that the Vienna Convention guaranteed individually enforceable rights, that the United States had violated those rights, and that the United States must ‘provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals . . . .’” The Fifth Circuit “denied Medellin’s application for a certificate of appealability[,]” based on “its prior holdings that the Vienna Convention did not create an individually enforceable right.” The Supreme Court granted certiorari. While the writ of certiorari was pending, President George W. Bush “issued a memorandum that stated the United States would dischage its international obligations under the Avena judgment.” Medellin relied on this memorandum as “separate bases for relief that were not available at the time of his first state habeas action . . . [and filed a] successive state application for a writ of habeas corpus just four days before oral argument [here].” The Court stated that “[t]his new development, as well as the factors discussed below, leads us to dismiss the writ of certiorari as improvidently granted.”

The Court offered additional reasons for its holding: First . . . [i]n Reed v. Farley, this Court recognized that a violation of federal statutory rights ranked among the “nonconstitutional lapses we have held not cognizable in a postconviction proceeding” unless they meet the “fundamental defect” test announced in our decision in Hill v. United States. . . .

Second, with respect to any claim the state court “adjudicated on the merits,” habeas relief in federal court is available only if such adjudication “was contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court. . . .” Third, a habeas corpus petitioner cannot enforce a “new rule” of law. . . . Fourth, Medellin requires a certificate of appealability in order to pursue the merits of his claim . . . which may be granted only where there is “a substantial showing of the denial of a constitutional right. . . .” [And] [f]ifth, Medellin can seek federal habeas relief only on claims that have been exhausted in state court.

Chief Justice Rehnquist, writing for a unanimous Court in *Arthur Andersen LLP v. United States,* held that “corrupt persuasion,” as used in 18 U.S.C. section 1512(b)(2)(A), requires consciousness of wrongdoing. This case stemmed from the Securities Exchange Commission’s investigation of Enron’s activities during the 1990s and through 2001. At that time, petitioner Arthur Andersen LLP “audited Enron’s publicly filed financial statements and provided internal audit and consulting services.” In August 2001, the SEC opened an informal investigation into Enron’s accounting activities. The SEC did not open a formal investigation until October 30, 2001, and did not serve subpoenas on Arthur Anderson until November 9. Until that time, various meetings were held between the top people at Arthur Andersen and memoranda were sent among the “Enron engagement team” urging “everyone to comply with the firm’s document retention policy[,]” even if it meant destroying documents that would clearly be relevant to any SEC investigation and any potential litigation. In fact, the document destruction didn’t stop until November 9, when the head of the engagement team sent a memorandum to the team stating “No more shredding . . . We have been officially served for our documents.” Arthur Andersen then was indicted for corruptly persuading another to withhold documents in the investigation:

In March 2002, petitioner was indicted in the Southern District of Texas on one count of violating 18 U.S.C. § 1512(b)(2)(A) and (B). These sections make it a crime to “knowingly use intimidation or physical force, threaten, or corruptly persuade another person . . . with intent to . . . cause” that person to “withhold” documents from, or “alter” documents for use in, an “official proceeding.”

The District Court relied on a Fifth Circuit Pattern Jury Instruction to define “corruptly,” which defined it as “‘knowingly and dishonestly, with the specific intent to subvert or undermine the integrity’ of a proceeding.” However, complying with the Government’s request, the District Court changed the word “dishonestly” to “impede.” The jury eventually returned a guilty verdict and the Court of Appeals for the Fifth Circuit affirmed.

In its opinion, the Court focused on “what it means to ‘knowingly . . . corruptly persuade.’” The Court believed that the word “knowingly” is as important as the word “corruptly” because the statute “punishes not just ‘corruptly persuading’ another, but ‘knowingly . . . corruptly persuading’ another.” The Court wrote that “the natural meaning of these terms provides a clear answer[]” to interpretation of the statute: (1) “‘Knowledge’ and ‘knowingly’ are normally associated with awareness, understanding, or consciousness”; (2) “[c]orrupt’ and ’corruptly’ are normally associated with wrongful, immoral, depraved, or evil”; and (3) “[j]oining these meanings together here makes sense both linguistically and in the statu-

42. 368 U.S. 424 (1962).
tory scheme." The Court concluded that "[o]nly persons conscious of wrongdoing can be said to ‘knowingly . . . corruptly persuade.’" The Court believed that "[t]he outer limits of this element need not be explored here because the jury instructions at issue simply failed to convey the requisite consciousness of wrongdoing." As modified, "[n]o longer was any type of ‘dishonesty’ necessary to a finding of guilt, and it was enough for petitioner to have simply ‘impeded’ the Government’s factfinding ability." The instructions were also wrong because "[t]hey led the jury to believe that it did not have to find any nexus between the ‘persuasion’ to destroy documents and any particular proceeding."

**CRIMINAL APPELLATE PROCEDURE**

In *Bell v. Thompson*, the Court held that even if Federal Rule of Appellate Procedure 41(b) authorized a stay of mandate by the circuit court following the denial of a writ of certiorari and even if an appellate court could stay the mandate without entering an order, a delay of five months is an abuse of discretion. In 1985, respondent Gregory Thompson was sentenced to death for the abduction and murder of a woman. After exhausting his state remedies, Thompson raised a claim of ineffective assistance of counsel in a federal habeas petition. He presented evidence from a psychologist, Dr. Faye Sultan, who examined him 13 years after the offense and who "contended that Thompson’s symptoms indicated he was ‘suffering serious mental illnesses at the time of the 1985 offense.’" The District Court dismissed the petition. While appeal was pending in the Court of Appeals for the Sixth Circuit, Thompson "filed a motion in the District Court under Federal Rule of Civil Procedure 60(b) requesting that the court supplement the record with Sultan’s expert report and deposition[, ]” which he claimed was erroneously omitted. He also filed a motion with the Sixth Circuit to hold the appeal in abeyance. Both the District Court and the Sixth Circuit denied his motions. The Sixth Circuit affirmed the dismissal of the petition. The Supreme Court denied certiorari. Thompson then filed a motion with the Sixth Circuit "seeking to extend the stay of mandate pending disposition of his petition for rehearing." In the Supreme Court. The Sixth Circuit granted the motion.

The Supreme Court denied rehearing; however, the Sixth Circuit did not issue its mandate pursuant to Rule 41(b). Meanwhile, the Tennessee Supreme Court set the execution. "From February to June 2004, there were proceedings in both state and federal courts related to Thompson’s present competency to be executed." On June 23, 2004, the Sixth Circuit "issued an amended opinion in Thompson’s initial federal habeas case[,]” which vacated the district court’s dismissal and "remanded the case for an evidentiary hearing on Thompson’s ineffective-assistance-of-counsel claim.” The Sixth Circuit "relied on its equitable powers to supplement the record on appeal with Dr. Sultan’s 1999 deposition after finding that it was ‘apparently negligently omitted’ and ‘probative of Thompson’s mental state at the time of the crime.’" The Court “explained its authority to issue an amended opinion five months after this Court denied a petition for rehearing: ‘We rely on our inherent power to reconsider our opinion prior to the issuance of the mandate, which has not yet issued in this case.’"

A 5-4 Court, in an opinion written by Justice Kennedy, reversed. According to Rule 41(b), once a petition for writ of certiorari is denied, “[t]he court of appeals must issue the mandate immediately.” The Court did not answer whether the Rule “authorizes a stay of the mandate following the denial of certiorari.” But or without an order. Instead it finds that even if it could issue such a stay, “the Court of Appeals abused its discretion in doing so” by waiting five months. A court speaks through its judgments and orders. “Without a formal docket entry neither the parties nor this Court had, or have, any way to know whether the court had stayed the mandate or simply made a clerical mistake.” It states that in *Calderon v. Thompson*, it held that federalism concerns, arising from the unique character of federal habeas review of state-court judgments, and the policies embodied in the Antiterrorism and Effective Death Penalty Act of 1996 required an additional presumption against recalling the mandate. These “finality and comity concerns” are implicated in this case regardless of whether “a dedicated judge discovered what he believed to have been an error.”

Justice Breyer dissented, claiming that this case presented a set of unusual “circumstances of a kind that I have previously experienced in the 25 years I have served on the federal bench.” He focused on the fact that a judge discovered an error and sought to correct that error because it “could affect the outcome of what is, and has always been, the major issue in the case.” He believed it is not an abuse of discretion to “correct a decision that it perceived to have been mistaken.” He believed this case presents three questions: (1) a legal question—whether the court of appeals abused its discretion; (2) an epistemological question—“[h]ow, in respect to matters involving the legal impact of the Sultan report and deposition, can the Court replace the panel’s judgment with its own[,]” and (3) a question about jurisprudence—even though the “legal system is based on rules; it also seeks justice in the individual case.”

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The Resource Page: Focus on Electronic Discovery

Federal Judicial Center Resources

The Federal Judicial Center has a web page devoted to resources concerning the discovery of electronic information (e.g., computer files, e-mail, hidden computer information, etc.). Federal Judicial Center staff member Ken Withers, who spoke at the AJA's Anchorage conference, keeps an updated and annotated summary of case law regarding electronic discovery on this page. In addition, you can review Power Point presentations used to educate other judges about this subject, proposed federal rules changes, relevant articles, forms orders, and relevant state and local court rules.

The Sedona Conference
http://www.thesedonaconference.com

The Sedona Conference, a nonprofit research and education institute, has organized a working group of attorneys, judges, academics, and others to develop detailed guidelines regarding electronic discovery. Their work has probably been the most extensive in this area and an 82-page monograph providing their principles applicable to electronic discovery and detailed help in applying them is available online. A detailed presentation on their work was made at the AJA's Anchorage conference; attendees received a free copy of the 194-page annotated version of these principles, which sells commercially for $129. A limited number of additional copies of that book are available to AJA members. They can be ordered while supplies last from the Association Management Division at the National Center for State Courts, (757) 259-1841.

Conference of Chief Justices
Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information

In September 2005, the Conference of Chief Justices released a working draft of a set of guidelines for handling electronic discovery issues in state courts. Most of the guidelines are based on case law or are similar to guidelines developed elsewhere, including those of the Sedona Conference or the American Bar Association. This CCJ endorsement, even in draft form, may help to garner further use and support for the guidelines in practice and in the courts.
By now, we all know that the messages of politicians and political parties are carefully crafted and honed based on focus-group sessions and opinion polls. Messages have become coordinated and sophisticated—including ones being used to gain support for various causes at the expense of public support for the court system.

Justice at Stake, a nonpartisan national partnership of groups supporting fair and impartial courts, has taken on the valuable task of developing similar research and message development in support of the court system and its values. Their work product has been condensed into a 22-page monograph available on the web. It is a “must read” for judges at all levels.

Justice at Stake hired the Beldon Russonello & Stewart firm to conduct focus-group research and a July 2005 national survey. John Russonello was one of the key speakers at the American Judges Association’s National Forum on Judicial Independence and wrote a 2004 Court Review article that serves as a precursor to this report: “Speak to Values: How to Promote the Courts and Blunt Attacks on the Judiciary,” available at http://aja.ncsc.dni.us/courtrv/cr41-2/CR41-2Russonello.pdf. The 2005 survey is summarized in this monograph. It showed that the public has a strong belief in the courts’ role in protecting individual rights by upholding the Constitution and a strong desire for fair and impartial courts that are free from political influence or pressure once judges take the bench.

Based on this research—and the admonition contained in the prior Court Review article to speak directly to these core values represented by the courts—Justice at Stake has developed detailed suggestions for tailoring effective messages. For example, they urge arguments for “fair and impartial courts” rather than the more theoretical call for “judicial independence.”

They suggest emphasis on how courts uphold the Constitution and protect everyone’s rights: the Beldon Russonello survey showed that the two most important qualities the public wants in its court system were being guardians of constitutional rights (33%) and being fair and impartial (31%). A bipartisan majority of Americans supports the court’s role in protecting individual rights and providing access to justice: 84% strongly agreed that “we need strong courts that are free from political influence.” And just as Roger Warren suggests in his article in this issue of Court Review (see page 4), Justice at Stake urges that courts and judges embrace the concept of accountability. Included are key talking points, model op-ed pieces, and sample letters to the editor.

The American Judges Association has joined the list of Justice at Stake partners. We encourage you to read this monograph. If you have thoughts about it, share them in a letter to the editor of Court Review.

**USEFUL INTERNET SITES**

“CourTools” for Measuring Trial-Court Performance
http://courtools.org

The National Center for State courts has released a set of trial-court performance-measurement tools called CourTools, a set of 10 trial-court performance measures. These are based on—but are intended to improve upon—the Trial Court Performance Standards issued in 1990. (For a review of those standards, take a look at Pamela Casey’s 1998 Court Review article, “Defining Optimal Court Performance: The Trial Court Performance Standards,” available at http://aja.ncsc.dni.us/courtrv/cr35-4/CR35-4CASEY.pdf.)

Many courts adopted the Trial Court Performance Standards and used periodic measurement under them to justify funding requests to local-government bodies with responsibility for court funding. The new CourTools have taken many of the Trial Court Performance Standards and have integrated them with successful performance-measurement systems used in both the public and private sectors. And while the Trial Court Performance Standards were accompanied by comprehensive, but daunting, materials that could be used in applying them to individual courts or court systems, CourTools have been designed for ease of understanding and measurement.

CourTools allow for performance measurement in 10 key areas: access and fairness, clearance rates, time to disposition, age of active caseload, trial outcome certainty, reliability and integrity of case files, collection of monetary penalties, effective use of jurors, court workforce strength, and cost per case. CourTools can be downloaded at the website noted above. In addition, printed copies can be obtained from the National Center for State Courts.