Court Review

Volume 45, Issue 3

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

Recent Criminal Decisions of the U.S. Supreme Court

What Judges Think About Courtroom Stress and Safety

Apology and Settlement

Volume 45, Issue 3

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Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

Volume 45, Issue 3 2008-2009

EDITOR'S NOTE

The lead article for this issue is Professor Charles Weisselberg's annual review of the criminal-law opinions issued by the United States Supreme Court during its past Term. Since Professor Weisselberg took over this survey after the death of our long-time contributor, Professor Charles Whitebread, the survey has changed somewhat in its format. We have greatly appreciated Professor Weisselberg's addition of an overview not only of the Court's opinions from the prior Term but also his note of key issues pending during its current Term as well. In addition, in key areas, he has provided us with a review of the initial struggle faced by lower courts in applying a new decision. This year, he has done that for us with respect to the Court's new ruling on the exclusionary rule, *Herring v. United States*. That review of new cases during the first 10 months after the *Herring* decision was issued helps all of us to better gauge the impact of the ruling—a key goal of this annual review, which helps all of us to stay abreast of changes in the law and to begin to assess the significance of the changes.

I want to thank Professor Weisselberg for another great contribution in this year's article, and I also want to note one item that was out of his control—the timing of its publication. He turned in his review in a timely manner, but we had other factors that led to delays in this issue. Professor Weisselberg even updated the article significantly once after submission to reflect some of the early opinions from the present Term. Since the issue is now going to press during the rush to publish opinions near the end of the present Term, the article will necessarily omit reference to those more recent opinions. Please accept our apology for the delay, and realize that it was not Professor Weisselberg's fault. We will work to make sure that the review of the 2009–2010 Term gets to you much more quickly. Even with this year's timing, however, you will find his article of great help in keeping up to date and in assessing the importance of these cases.

Our second article will develop themes familiar to every judge related to stress and safety in the courtroom. The article reviews the research of several lawyers and social scientists regarding stress felt by judges and jurors. As always, we invite the responsive comments of our readers, either in the form of an essay or a letter to the editor. Our third article is an adaption by Professor Jennifer Robbennolt of a more extensive article she published in 2008 in the *Harvard Negotiation Law Review*. Professor Robbennolt agreed to update her article and to adapt it for a judicial audience because she believed that giving judges a better understanding of the effects that apologies may have on the decision making of both parties and their attorneys could help us to more effectively help parties resolve their disputes. We agree, and we think you'll find her article of great interest.—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 74. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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Photo credit: Mary Watkins (maryswatkinsphoto@earthlink.net). The historic Riverside County Courthouse was built in 1904; the architect was Franklin P. Burnham. Ray McDevitt notes in Courthouses of California: An Illustrated History (2001), that the design "has been described as modeled on the Grand Palais at the Paris Exposition of 1900, [but] the basic composition of its facade also recalls that of Edbrooke's United States Government Building at the Chicago Exposition of 1893.... In contrast to most 19th-century courthouses, which were oriented with a short end of the building facing the principal approach, these were oriented with a long side facing the view. This orientation made large buildings appear even larger."

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President's Column

Jim McKay

Some 27 years ago when I was first elected to the criminal bench in New Orleans, I was approached at my swearing in by a very distinguished, long-serving judge. He said to me, "Son, the first thing you have to do is become a member of the American Judges Association. It will be like having a friend on the bench because when you sit you need all the help you can get." That distinguished judge was the late Oliver Delery, who was then a member of the American Judges Association and later became its president.

I learned two things from that encounter. First, unfortunately, he was right—a presiding judge on his or her bench has very few friends. Second, and fortunately, he was also right that the American Judges Association became one of those few friends.

Being sworn in as the 48th president of the American Judges Association last fall was certainly the crowning event of my judicial career. It is more special as this is our 50th anniversary, our golden year. I appreciate the trust and confidence that my colleagues from all over this North American continent have bestowed upon me by electing me president, and can honestly confess that I felt both excitement and trepidation at the tasks ahead.

The American people seem to have a love-hate relationship with their judicial system, and maybe that's the way it should be. However, when the judiciary faces this issue, we must face it and answer it with one voice. We consider ourselves, the American Judges Association, that voice. We are the "voice of the judiciary."® This mantle was not self-bestowed, but was earned after laboring in the judicial field for more 50 years. In 1959 we started our organization with a handful of judges and have grown to almost 2,500 today.

My pledge to this association is to strive to make sure that we continue to be the voice of the judiciary in all corners of America. Attacks on the judiciary are common in this day and age. We will attempt to be at the forefront of these attacks with in-depth studies and hopefully in-depth answers.

This year is going to be especially challenging due to the downturn in our economy. The court systems of many states in this nation and many provinces in Canada will be faced with funding crises. This will impact membership and participation for our organization and similar ones as well. We will have to consider a way to economize but still maintain the level of service that our association has grown accustomed to in the past. I know that the current board of governors and the executive committee team that I have chosen are up to the task.

As the expression goes, "No rest for the weary." On the first Tuesday after I took office, my first official duty as the new AJA president was to attend the meeting of the Canadian Association of Provincial Court Judges in Calgary. I addressed the Canadian judges on problems facing the American Judges Association. I also had the opportunity to spend a great deal of time with their new president, Judge Gerald Meagher. Judge Meagher and I agreed to maintain close contact with each other to discuss similar problems facing both of our judicial organizations.

I urge all fellow AJA members to continue to faithfully read *Court Review*, our official AJA publication, as well as *Benchmark*, our newsletter, which is now produced in an electronic format in order to save costs. I look forward to all future publications of this journal to report to you the latest issues impacting our organization as well as my activities during the year.

God Bless.

BOOK REVIEW

Lyric Law:

Literature Lives in the Legal Realm

Rachel Beth Cunning

Thane Rosenbaum, LAW LIT FROM ATTICUS FINCH TO THE PRACTICE: A COLLECTION OF GREAT WRITING ABOUT THE LAW, The New Press, 2007. 296 pp. $17.95.

For those individuals whose bookshelves are lined with more than the stately rows of law treatises, *Law Lit*: *From Atticus Finch to The Practice* will function as a series of delicious appetizers that leave you satisfied yet yearning for the main entree. If literature is your forte, you will indubitably add a few more books to your reading list after perusing this anthology. If literature isn't your normal cup of tea, this anthology—brimming with iconic classics—is still immensely practical and delightful to lawyers and judges who regularly teach or speak publicly about the law and are interested in delving into the depths of what editor Thane Rosenbaum calls "the human spirit that is antiseptically left out of the legal system."

Rosenbaum suggests in his introduction that society is both intensely drawn to and repulsed by the law and that "the artist enters [at] the intersection between longing for law and the consequences." His anthology extrapolates upon this theme from the soaring rhetoric and righteous condemnations in Émile Zola's *J'Accuse*, a famous editorial condemning the French government of anti-Semitism in the Dreyfus Affair, to the dramatic declaration that "You can't handle the truth!" during the intense cross-examination scene in *A Few Good Men*. Rosenbaum has collected an outpouring of artistic creations that address the tense interplay between popular beliefs about law in its ability to transcend even the highest expectations of morality and mercy and the fetid stink of the law as a corrupt, repugnant monstrosity.

This tense interplay between society's adoration for and contempt of the judicial system is truly the crux of this anthology and where its use to teachers and public speakers becomes most evident, although literature-oriented individuals won't lack reasons to pick up this anthology as a fascinating literary insight into the public perception of the legal system. In Rosenbaum's experience as a teacher of the law and literature for more than 15 years, he has amassed quite the selection of writings that appeal across the spectrum of the legal experiences. He divides these writings into thematic parts (clearly enjoying their clever alliterative titles) that encompass: the Law Elevated, Lawless Law, the Law and Liberty, the Law Made Low, the Law Laborious, the Lawyer as Lout, the Law and the Loophole, Layman's Law, and the Law and Longing.

Rosenbaum garnishes these literary legal themes with different genres as he pulls excerpts from novels, short stories, poems, speeches, songs, letters, editorials, memoirs, television, films, plays, and even a judicial opinion. Through these divergent mediums, he views law literature as "universally fixated on the theme of law as menace [but with] the potential, in some transcendent way, to humanize the legal system, as well." For example, teachers of the law can humanize the process of the preliminary hearing with Alice Sebold's memoir *Lucky* as she endures the dehumanizing, grueling, and bewildering cross-examination by the defense attorney about the events of her rape as a college freshman. As *Law Lit* elucidates through snippets of literature, the cruel dehumanization of the individual trapped in a moribund or lethargic legal system actually humanizes all the players of that legal system. Through this anthology's humanizing effects, law ceases to be abstract and becomes instead something powerfully real, concrete, and vibrant.

And it is the vibrancy of literature that can open the floodgates of discussion and help make connections between abstract legal ideas and the practical realities that result from them. Liberty—an altogether abstract concept—becomes tangible while reading Martin Luther King Jr.'s "Letter from a Birmingham Jail" or Johnny Cash's song "Folsom Prison Blues." Infinitely quotable, these selected works appeal to emotive and intellectual responses in people because they address truths in the experiences of life. And even when reading the trial scene from Lewis Carroll's allegorical *Alice's Adventures in Wonderland*—ripe with the fantastic elements of a crazed queen of hearts, a white rabbit, and a mad hatter—we can see through the opaque veil of fantasy and identify justifiable critiques of the legal system. A good teacher or public speaker could readily make use of Carroll's caricature of jurors as a launching point for discussing a juror's potential confusion with courtroom procedures or even advocating policies for jury reform.

One particular strength of this anthology lies in the abundance of poignant and masterful selections that address issues of gender, race, and socioeconomic class. *Law Lit* provides a meaningful array of literary experiences dealing with gender and the law from the subjugation of women and the power of memory and written language in Margaret Atwood's *A Handmaid's Tale* to their infantilization and belittlement (and yet superiority) in Susan Glaspell's "A Jury of Her Peers." Likewise, Rosenbaum has included a solid collection of works that deal with race with excerpts from African-American authors like Langston Hughes, Richard Wright, and Paul Laurence Dunbar. For socioeconomic class, Bernard Malmud's character Bloostein as an impoverished immigrant is as earnest and heartbreaking as he is enlightening; as any procedural justice aficionado would note, it is critical to a person's sense of justice to be treated with common courtesy and dignity—even if and especially when you have none, no one, and nothing.

As impressive and delightful of an endeavor as this anthology is, it has shortcomings. Rosenbaum resorts to recycling authors—sometimes even the same works—throughout the anthology. For example, he pulls three excerpts from E.L.

Doctorow's *The Book of Daniel*, a fictionalized account of the Rosenberg's trial for espionage during the Cold War, and he cites Scott Turow's work three times as well. And while Charles Dickens' *Bleak House* may be replete with popular representations of the law as a laborious and soulless entity, it's unnecessary to reuse this work too when the history of literature teems with such examples of popular sentiments.

In the opening line of his introduction, Rosenbaum acknowledges this immense pool of possible material. He remarks that "[t]hroughout history and nearly all over the world, there has been no greater and more paradoxical love-hate relationship than the one between laymen and lawyers." If this querulous relationship does exist—and it definitely does—then Rosenbaum's reuse of works, however classic or interesting, is a wasted opportunity to continue demonstrating his point that "law frustrates and intoxicates every culture and every age." Despite this claim, Rosenbaum's anthology notably lacks Asian and Hispanic authors and perspectives, among others. The collection also leans heavily toward American authors who have written within the last 100 years or so. While this may have been the ultimate goal for the collection, the introduction heavily stresses the law genre as multicultural and timeless; it would've been nice to read a few more works that evoked the eternal and multicultural elements of this genre rather than reading different excerpts of the same works.

Even with these nit-picky criticisms and the literature enthusiast's desire for full works, not redacted ones, *Law Lit* is a collection of writings that is both immensely enjoyable and satisfying as legal literature and incredibly practical for use in teaching or speaking about the law. This anthology's allure derives from the human spirit that lives intertwined with the law amid the pages of this anthology—that spirit is sweet and bitter, despondent and radiant, generous and manipulative. Treat this anthology not as a collected work for one sitting but as a fine sample of a chef's specialty: savor each selection as an individual piece, slowly, with great discussion, and pauses for reflection and digestion.

Rachel Beth Cunning is the judicial assistant to Judge Steve Leben on the Kansas Court of Appeals. She has a B.A. in English from the University of Kansas, where she has also taken postgraduate English classes and is presently taking courses in Latin education.

Selected Criminal Law Cases in the United States Supreme Court in the 2008-2009 Term, and a Look Ahead

Charles D. Weisselberg

The U.S. Supreme Court's October 2008 Term gave us a number of very important criminal law and procedure cases. The Court overruled long-standing precedents on automobile searches and post-arraignment interrogation. The justices also addressed whether the use of a forensic chemist's report violates the Confrontation Clause. These three decisions affect routine police and courtroom practices; undoubtedly, there will be periods of adjustment for judges, lawyers, and police. The Term was also marked by other Fourth Amendment holdings, including one that either transforms the exclusionary rule or merely draws it closer to the rule's underlying purpose, depending on one's point of view. This article reviews some of the most significant criminal-law-related opinions of the Supreme Court's 2008-2009 Term, with an emphasis on the decisions that have the greatest impact upon the states. The article concludes with a brief preview of the current Term.

FOURTH AMENDMENT

During the 2007-2008 Term, the Court issued only one Fourth Amendment decision. Last year, the justices made up for lost time. Some of the Court's most far-reaching rulings were on Fourth Amendment issues.

Vehicle Searches

In *Arizona v. Gant*,[1] the Supreme Court revisited the scope of a vehicle search incident to an arrest. There may have been decisions by the Court last Term of broader importance, but this ruling impacts the way officers do their job every day.

The respondent in *Gant* was arrested on an outstanding warrant for driving on a suspended license. Officers saw Gant pull into his driveway. They called to him after he got out of his car, and Gant met the officers about 10-12 feet from the vehicle. He was handcuffed and eventually placed in the back of a patrol car. Afterwards, officers searched the car and found a bag of cocaine in the pocket of a jacket on the back seat. The trial court determined that the officers did not have probable cause to search the car but that the narcotics were found pursuant to a permissible search incident to an arrest. The Arizona Supreme Court reversed, saying that there was no justification for the search of the car after Gant was handcuffed and secured. The U.S. Supreme Court split 5-4, but agreed.

Writing for the majority, Justice Stevens noted the twin rationales for a search incident to an arrest set forth in *Chimel v. California*[2]—officer safety and preservation of contraband. In *New York v. Belton*,[3] the Court upheld the search of an automobile incident to an arrest where an officer had stopped a car, smelled marijuana, and observed an envelope on the floor that appeared to be associated with marijuana. The occupants of the car were not all handcuffed. Applying *Chimel*, the Court accepted the State's argument that it was reasonable for the officer to believe the arrestees could have accessed the vehicle and its contents. Nevertheless, as Justice Stevens wrote, *Belton* has subsequently been "widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search."[4] The majority in *Gant* rejected this broad reading of *Belton*, though they also went further than *Chimel* in one respect—the justices determined that officers could search a car if they believed that evidence relating to the offense of arrest was inside. *Gant* thus provides that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe that the vehicle contains evidence of the offense of arrest."[5] Justice Scalia concurred. He would have held that a vehicle search incident to arrest is reasonable only when the object of the search is evidence of crime (as opposed to officer safety) but voted with the majority so that there would be an opinion commanding five votes. The dissenting justices criticized the majority for (in their view) overruling *Belton* and *Thornton v. United States*.[6] Justice Alito wrote the primary dissent, arguing that the circumstances did not justify abandoning the general understanding of *Belton*.

In the first six months after the April 2009 decision in *Gant*, the decision was cited in over 250 reported cases.[7] A pattern has not yet emerged. Courts are applying the *Gant* criteria (officer safety and the belief that the vehicle may contain

Footnotes

1. 129 S.Ct. 1710 (2009).
2. 395 U.S. 752 (1969).
3. 453 U.S. 454 (1981).
4. *Gant*, 129 S.Ct. at 1718.
5. *Id.* at 1723.
6. 541 U.S. 615 (2004).
7. As shown in a Lexis search conducted on October 18, 2009.

evidence of the crime of arrest) to uphold vehicle searches incident to arrest[8] as well as to invalidate them,[9] depending on the relevant facts. *Gant* did not undermine the other bases for warrantless searches of automobiles, and courts have thus often considered whether evidence no longer admissible post-*Gant* may nevertheless be admitted because of a different lawful basis for the search (though some appellate courts may not be free to consider grounds to uphold a search not argued below).[10] One interesting question, which I address below after discussing *Herring v. United States* (the exclusionary rule case), is whether the good-faith exception to the exclusionary rule saves evidence seized in violation of *Gant* but obtained in reliance on *Belton*.

Another Fourth Amendment decision, *Arizona v. Johnson*,[11] may also be of interest, though it is much less momentous than *Gant*. There, the justices addressed whether officers may frisk a passenger in a car that is stopped for a traffic violation. Arizona police stopped a vehicle for a traffic infraction. The car had three occupants. Based on their observations and their conversation with a back-seat passenger, Johnson, officers suspected that Johnson had a weapon. He was asked to get out of the car and was patted down, and a gun was found.

It has been clear for some time that once a vehicle has been detained for a traffic violation, police may order the driver to get out of the automobile and may frisk him if the officer reasonably believes the driver is armed and dangerous. The Court had also previously determined that passengers may be ordered out of the vehicle following a traffic stop. In *Johnson*, the justices unanimously held that a passenger as well as a driver may be frisked if the officer reasonably suspects that the passenger is armed and dangerous.

School Searches

One of the most closely followed cases of the Term was *Safford Unified School District #1 v. Redding*,[12] which dealt with whether school officials violated the Fourth Amendment by partially strip-searching a student for drugs. School officials had found a day planner in which there were several knives, lighters, a cigarette, and several pills (four prescription-strength ibuprofens and one over-the-counter pill for pain and inflammation). The planner belonged to a 13-year old middle school student, Savana Redding. Redding told the assistant principal that the planner was hers, but that she had loaned it several days earlier to another student. She denied that any of the items in the planner belonged to her. School officials searched Redding's backpack, finding nothing. The assistant principal instructed a female administrative assistant to take Redding to the nurse's office. The assistant and the nurse told Redding to pull out her bra and the elastic on her undergarments. No pills were found. Redding's mother filed a civil-rights suit against the school district and individuals. The district court found no Fourth Amendment violation. The court of appeals reversed.

In the first six months after the April 2009 decision in *Gant*, the decision was cited in over 250 reported cases. A pattern has not yet emerged.

By a vote of 8-1, the Supreme Court ruled that school officials violated Redding's Fourth Amendment rights by conducting a strip-search. The Court did not question the ability of the school district to promulgate a rule banning all drugs, no matter how benign, without advance permission. School officials had sufficient suspicion to search the student's backpack and outer clothing. But there was insufficient evidence to support the much more intrusive additional search.[13] The opinion by Justice Souter acknowledges that, as previously held in *New Jersey v. T.L.O.*,[14] school officials do not need probable cause to conduct a search. The standard is reasonable suspicion, but the search must be reasonably related to its objectives and must not be excessively intrusive in light of the age and gender of the student and the type of infraction under investigation. In this case, there was no indication of danger to students from the power of the drugs or their quantity, nor was there any reason to believe that Redding was carrying pills in her underwear. Thus, "the content of the suspicion failed to match the degree of intrusion."[15] Further, there must be support for a reasonable suspicion of danger to the students or of resort to hiding evidence in underwear "before a search can reasonably make a quantum leap from outer clothes and backpacks to exposure of intimate parts."[16]

Although the majority found a constitutional violation,

8. *See*, *e.g.*, *United States v. Davis*, 569 F.3d 813 (8th Cir. 2009); *United States v. Grice*, 2009 U.S. App. LEXIS 14431 (11th Cir. 2009); *People v. Osborne*, 175 Cal. App. 4th 1052 (Cal. Ct. App. 2009); *McCloud v. Commonwealth*, 286 S.W.3d 780 (Ky. 2009).
9. *See*, *e.g.*, *People v. Estrada*, 2009 Ill. App. LEXIS 819 (Ill. App. Ct. 2009); *State v. Henning*, 209 P.3d 711 (Kan. 2009) (invalidating a state statute post-*Gant*); *State v. Keaton*, 2009 Kan. App. Unpub. LEXIS 761 (Kan. Ct. App. 2009); *State v. Carter*, 682 S.E.2d 416 (N.C. Ct. App. 2009); *State v. McCormick*, 2009 Wash. App. LEXIS 2240 (Wash. Ct. App. 2009).
10. *See*, *e.g.*, *United States v. Kellam*, 568 F.3d 125 (3d Cir. 2009); *United States v. Martinez-Cortes*, 566 F.3d 767 (8th Cir. 2009); *United States v. Morillo*, 2009 U.S. Dist. LEXIS 94396 (E.D.N.Y. 2009); *United States v. Gilbert*, 2009 U.S. Dist. LEXIS (W.D. Pa. 2009); *United States v. Arriaza*, 2009 U.S. Dist. LEXIS 59299 (E.D. Va. 2009); *Meister v. State*, 912 N.E.2d 412 (Ind. 2009); *State v. Canter*, 2009 Ohio App. LEXIS 4076 (Ohio Ct. App. 2009).
11. 129 S.Ct. 781 (2009).
12. 129. S.Ct. 2633 (2009).
13. While the opinion gave other reasons for this conclusion, one astute commentator (a former assistant to the solicitor general) noted: "Right off the bat, I'm suspicious of the school administrators here, because as a socially aware person who is knowledgeable about the younger generation from watching the WB, I'm fairly confident that no teenaged girl today owns a piece of clothing anywhere near big enough to conceal such a large tablet." John P. Elwood, *What Were They Thinking: The Supreme Court in Revue, October Term 2008*, 12 Green Bag 2d 429, 440 (2009).
14. 469 U.S. 325 (1985).
15. *Safford*, 129 S.Ct. at 2642.
16. *Id.* at 2643.

Another of the Court's decisions, *Herring v. United States*, may have a much wider influence.

seven justices determined that school officials were entitled to qualified immunity, particularly in light of lower-court rulings applying *T.L.O.* Justices Stevens and Ginsburg dissented from this part of the majority opinion. They would have found the law sufficiently clear to hold the school officials liable. Justice Thomas agreed with the majority's judgment on qualified immunity but dissented from the Fourth Amendment holding. He would have found no constitutional violation and would have ruled instead that judges should not second-guess the measures taken by school officials to maintain discipline and to ensure the health and safety of the students in their charge.

The Exclusionary Rule

While *Gant* and *Redding* affect day-to-day policing, their impact appears limited to certain types of searches. Another of the Court's decisions, *Herring v. United States*,[17] may have a much wider influence.

In *Herring*, a warrant clerk called the sheriff's office in a neighboring county to determine if the defendant (who was retrieving items from an impounded truck) had an outstanding warrant. The neighboring county's computer database erroneously indicated that there was an outstanding arrest warrant for failure to appear on a felony charge. Relying upon this information, an officer arrested the defendant and found drugs and a weapon in his possession. The question for the Supreme Court was whether evidence is inadmissible under the Fourth Amendment's exclusionary rule when an officer conducts an unconstitutional search but acts on information negligently maintained by law enforcement in a database.

By a 5-4 vote, the Court held that the evidence should not be suppressed. In his opinion for the majority, Chief Justice Roberts pointed to *United States v. Leon*[18] and other cases, and he noted that the purpose of the exclusionary rule is deterrence. He wrote that "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."[19] Exclusion is not automatic. When police errors "are the result of negligence . . . rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not 'pay its way.'"[20] Justice Ginsburg wrote the primary dissent, arguing that the exclusionary rule is not as narrowly focused as presented by the majority (it has "a more majestic conception"[21]) and that the rule is essential to command respect for the Fourth Amendment. She also pointed out that the majority's suggestion of only marginal deterrence when the misconduct is merely careless runs counter to the premise of tort law: liability for negligence creates an incentive to act with greater care. Exclusion here would encourage those who maintain databases to act more carefully.[22] Justice Breyer also dissented to note that a previous case forgiving a recordkeeping error (*Arizona v. Evans*[23]) addressed an error by a court clerk, not a mistake by police.

The case is significant in a number of respects and leaves several questions unanswered. First, by holding that exclusion is not automatic and that the exclusionary rule only applies when deterrence outweighs harm to the justice system, *Herring* invites courts to consider whether exclusion is justified in a broad range of circumstances in which it may be claimed that officers acted without bad intent or recklessness, or where there was not some other sort of systemic error. While the *Herring* Court cited to *Leon*, *Herring* broadened the good-faith exception beyond instances in which officers relied in good faith on judges (as in *Leon*), court clerks or other non-law-enforcement actors. Second, though the majority wrote that "[t]he pertinent analysis of deterrence and culpability is objective" rather than subjective,[24] one may expect substantial litigation and uncertainty over these issues. Third, if exclusion is only "triggered" when there is a need for deterrence or the other requisite elements are in place, is it the defendant's burden to prove that exclusion is required, or is it the State's burden of showing that it meets a good-faith exception to the exclusionary rule?[25]

In the first ten months since *Herring* was announced, the decision has been cited in many reported cases. While there are a number of rulings applying *Herring* and finding officers' conduct sufficiently or insufficiently culpable as to require exclusion,[26] it is too early to discern trends. It is also not yet clear whether the tendency will be for courts to make the deterrence and culpability determinations case-by-case on an infinite variety of facts, or whether more categorical approaches will emerge (such as in *Hudson v. Michigan*,[27]

17. 129 S.Ct. 695 (2009).
18. 468 U.S. 897 (1984).
19. 129 S.Ct. at 702.
20. *Id.* at 704 (citation omitted).
21. *Id.* at 707 (Ginsburg, J., dissenting; citation omitted).
22. *Id.* at 707-708.
23. 514 U.S. 1 (1995).
24. 129 S.Ct. at 703.
25. *See id.* at 705 (Ginsburg, J., dissenting) ("even when deliberate or reckless conduct is afoot . . . [h]ow is an impecunious defendant to make the required showing?")
26. Conduct insufficiently culpable to support exclusion: *E.g.*, *United States v. Groves*, 559 F.3d 637 (7th Cir. 2009) (police dispatcher's mistake); *United States v. Stabile*, 2009 U.S. Dist. LEXIS 4263 (D.N.J. 2009) (at most negligent errors in coordinating among multiple agencies); *United States v. Davis*, 2009 U.S. Dist. LEXIS 83864 (D. Md. 2009) (error in retaining profile in DNA database); *Delker v. State*, 2009 Miss. App. LEXIS 597 (Miss. Ct. App. 2009) (mistaken belief that officer was still within his jurisdiction).
Conduct sufficiently culpable to support exclusion: *E.g.*, *United States v. Ryan*, 2009 U.S. Dist. LEXIS 53644 (D. Vt. 2009) (use of facially invalid warrant); *United States v. Parson*, 599 F. Supp. 2d 592 (W.D. Pa. 2009) (tactics in attempting to obtain consent to search); *United States v. Moore*, 2009 U.S. Dist. LEXIS 81547 (E.D. Tenn. 2009) (intentional conduct in searching without reasonable suspicion); *People v. Morgan*, 901 N.E.2d 1049 (Ill. App. Ct. 2009) (use of old warrant list, and failure to verify existence of warrant).
27. 547 U.S. 586 (2006).

where the justices took "knock and announce" violations out of the scope of the exclusionary rule). Some judges have, however, indicated that the burden is on the State to establish that officers acted in good faith.[28]

Finally, *Herring* has had an interesting impact on the implementation of *Gant*. A question that has already split the federal courts is whether evidence seized in violation of *Gant* should nevertheless be admitted if officers reasonably relied on *Belton* and its progeny, the law prior to *Gant*. Citing *Herring*, some courts have ruled that the evidence should not be excluded because, under these circumstances, there would not be a significant deterrent effect and the officers were not sufficiently culpable.[29] Other courts have held that the evidence must be excluded because newly announced Supreme Court decisions apply to cases then pending on direct appeal under well-established principles of retroactivity.[30] The Supreme Court recently denied a petition for writ of certiorari raising this issue.[31]

SIXTH AMENDMENT

Last Term saw very important rulings on the rights to counsel, a jury trial, a speedy trial, the Sixth Amendment exclusionary rule, and the Confrontation Clause.

Right to Counsel

In *Montejo v. Louisiana*,[32] the Court overturned *Michigan v. Jackson*,[33] which forbade police from initiating questioning of a defendant who requested counsel at an arraignment or other similar judicial proceeding. Jesse Montejo was arrested for robbery and murder. He was brought before a judge for a "72-hour hearing," a preliminary proceeding at which counsel is customarily appointed. A minute order showed that counsel was appointed, but the order did not indicate whether the defendant affirmatively asked for a lawyer or whether counsel was simply appointed as a matter of routine (as is common in a number of jurisdictions). After the proceeding, police initiated further questioning. Montejo waived his *Miranda* rights and, among other things, wrote an incriminating letter of apology to the victim's widow. The letter was introduced at trial, and Montejo was convicted and sentenced to death. On appeal, the Louisiana Supreme Court affirmed the decision, finding no *Jackson* error because the record did not indicate that the defendant actually requested a lawyer or otherwise affirmatively invoked his Sixth Amendment right to counsel at the "72-hour hearing."

The U.S. Supreme Court took the case to decide whether after the Sixth Amendment right to counsel has attached, a defendant must affirmatively ask for counsel or take steps to "accept" a lawyer to trigger *Jackson*'s protections. Montejo argued that because the appointment practices of jurisdictions vary so much, such a rule would be unworkable. After oral argument the justices called for supplemental briefing on whether *Jackson* should be overruled. By a vote of 5-4, the justices set *Jackson* aside.

Montejo represents a significant change in interrogation law and may well spur new police practices.

In an opinion written by Justice Scalia, the majority characterized *Jackson* as importing the rule of *Edwards v. Arizona*[34] into the Sixth Amendment, stating that the only way to make sense of *Jackson* is as protection from police badgering. But the majority noted that a defendant who has had counsel appointed has other protections against badgering. A waiver of the right to counsel must be voluntary, and a defendant who does not want to speak to the police without a lawyer "need only say as much when he is first approached and given the *Miranda* warnings,"[35] which will trigger the protections of *Edwards*. The majority thought that the additional protections of *Jackson* were not worth the costs and that the principles of *stare decisis* were insufficient to require *Jackson* to be retained. The primary dissent was written by Justice Stevens. The dissenters contended that the majority misrepresented *Jackson*'s underlying rationale and the constitutional interests the decision sought to protect. *Jackson*, the dissenters wrote, is not about police badgering. Rather, "it is a rule designed to safeguard a defendant's right to rely on the assistance of counsel."[36]

Montejo represents a significant change in interrogation law and may well spur new police practices. While *Montejo* does not undermine the old rule in *Massiah v. United States*[37]—*undercover* officers or informants still cannot elicit information from a defendant after the right to counsel has attached—there is no longer a bright-line rule prohibiting known officers from initiating an interrogation and seeking a waiver of the right to counsel. *Massiah* aside, the main legal issues for post-arraignment interrogations will now be the same as for interrogations prior to arraignment: compliance with *Miranda* and voluntariness.[38]

Last Term, the Court also addressed the scope of the Sixth Amendment exclusionary rule when there is a violation of the right to counsel. The defendant in *Kansas v. Ventris*[39] was in

28. *See Morgan*, 901 N.E.2d at 1060 ("the State failed to meet its burden of proof that the good-faith exception should apply, and exclusion was the proper remedy"); *People v. Pearl*, 92 Cal. Rptr. 3d 85, 88 (Cal. App. 2009) (in *Herring*, the Court "further defined the good faith exception, but did not alter the prosecution's burden of proof in the trial court.")
29. *See United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009); *United States v. Owens*, 2009 U.S. Dist. LEXIS 81378 (N.D. Fla. 2009).
30. *See United States v. Gonzalez*, 578 F.3d 1130 (9th Cir. 2009); *United States v. Buford*, 623 F. Supp. 2d 923 (M.D. Tenn. 2009).
31. *McCane v. United States*, No. 09-402 (U.S., cert. denied Mar. 1, 2010).
32. 129 S.Ct. 2079 (2009).
33. 475 U.S. 625 (1986).
34. 451 U.S. 477 (1981).
35. *Montejo*, 129 S.Ct. at 2090.
36. *Id.* at 2097 (Stevens, J., dissenting).
37. 377 U.S. 201 (1964).
38. Because a *Miranda* waiver also generally suffices as a waiver of the Sixth Amendment right to counsel (*see Patterson v. Illinois*, 487 U.S. 285 (1988)), the defendant's *Miranda* and Sixth Amendment claims will likely stand or fall together.
39. 129 S.Ct. 1841 (2009).

The majority opinion, written by Justice Scalia, placed the analysts' sworn certificates squarely within the "core class of testimonial statements" covered by the Confrontation Clause as described in *Crawford*.

the hoosegow, charged with murder and aggravated robbery. Officers planted an informant in his cell. Following a conversation with the informant, Ventris made incriminating statements, which the State conceded were the product of a violation of the right to counsel (a *Massiah* violation). These statements were excluded from the prosecution's case-in-chief but were admitted to impeach Ventris's testimony at trial. In a 7-2 decision, the Supreme Court ruled that the statement was properly admitted for impeachment. Writing for the majority, Justice Scalia determined that the constitutional violation occurred in the jail cell, and the informant spoke to the defendant without counsel. Comparing the Sixth Amendment exclusionary rule with that of the Fourth Amendment (and echoing the holding earlier in *Herring*), the majority stated that exclusion is not automatic but instead depends upon a balancing of relevant factors. In this case, the Court wrote, "the game of excluding tainted evidence for impeachment purposes is not worth the candle."[40] The interests safeguarded by exclusion are outweighed by the need to prevent perjury and assure the integrity of the trial. Justices Stevens and Ginsburg dissented. They argued that while the constitutional breach began during the questioning by the informant, the use of that evidence at trial compounded the violation. In their view, "[t]he use of ill-gotten evidence during any phase of criminal prosecution does damage to the adversarial process—the fairness of which the Sixth Amendment was designed to protect."[41]

Confrontation

Melendez-Diaz v. Massachusetts[42] is the most recent Confrontation Clause decision in the *Crawford*[43] line of cases. The defendant in *Melendez-Diaz* was charged with drug distribution offenses. Seized evidence was sent to a state laboratory. At trial, the State introduced the seized evidence as well as sworn "certificates of analysis" prepared by lab analysts. The certificates gave the weight of the substances and stated that they contained cocaine. In a 5-4 ruling, the Court held that the introduction of the chemist's notarized certificates violated the Sixth Amendment where the analysts were not called at trial.

The majority opinion, written by Justice Scalia, placed the analysts' sworn certificates squarely within the "core class of testimonial statements" covered by the Confrontation Clause as described in *Crawford*.[44] *Crawford* referred to materials such as affidavits or similar pretrial statements that prosecutors would reasonably expect to be used at a later trial,[45] and sworn "certificates" are plainly affidavits. The remainder of the lengthy majority opinion was devoted to rebutting reasons for removing affidavits about forensic evidence from the holding in *Crawford*. The Court rejected claimed differences between testimony recounting historical events and affidavits relating to "neutral, scientific testing." The majority saw this as an argument for a return to the pre-*Crawford* practice of permitting the admission of evidence bearing "particularized guarantees of trustworthiness" notwithstanding the Confrontation Clause. The justices also challenged the claims that the admission of forensic evidence through affidavits had a long pedigree, that these affidavits were akin to business records, and that requiring live testimony would unduly interfere with the criminal justice system. Finally, the majority was not persuaded by the fact that defendants could subpoena the chemists. As the opinion states, "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court."[46] The dissenting justices, led by Justice Kennedy, contested virtually every aspect of the majority opinion. The dissenters forcefully argued that requiring these forensic experts to appear at trial would have negligible benefits, threaten to disrupt forensic investigations across the country, and put prosecutions at risk.

The decision in *Melendez-Diaz* will have a substantial impact. Although the majority opinion notes that a number of states already require testimony by forensic experts, there are many jurisdictions that employ practices akin to that of Massachusetts. The majority addressed one way to lessen the impact of the decision. The Court noted that a number of jurisdictions have adopted procedures through which the prosecution gives notice of its intent to use a forensic analyst's report, and the defendant is then required to object and demand the presence of the analyst at trial.

Melendez-Diaz has thus far been cited to find Confrontation Clause violations due to the introduction of a physician's report evaluating a molestation victim,[47] a report of blood-alcohol content,[48] an autopsy report,[49] a report with results of DNA analysis,[50] a ballistics certificate,[51] and govern-

40. *Ventris*, 129 S.Ct. at 1846.
41. *Id.* at 1848 (Stevens, J., dissenting).
42. 129 S.Ct. 2527 (2009).
43. *Crawford v. Washington*, 541 U.S. 36 (2004).
44. 129 S.Ct. at 2532.
45. *Id.* at 2531 (citing *Crawford*, 541 U.S. at 51-52).
46. *Id.* at 2540.
47. *Gov't of the Virgin Islands v. Vicars*, 2009 U.S. App. LEXIS 17633 (3d Cir. 2009).
48. *People v. Lopez*, 177 Cal. App. 4th 202 (Ct. App. 2009); *Grant v. Commonwealth*, 682 S.E.2d 84 (Va. Ct. App. 2009).
49. *People v. Dungo*, 176 Cal. App. 4th 1388 (Ct. App. 2009); *State v. Locklear*, 681 S.E.2d 293 (N.C. 2009).
50. *People v. Payne*, 2009 Mich. App. LEXIS 1592 (Mich. App. 2009); *Cuadros-Fernandez v. State*, 2009 Tex. App. LEXIS 6896 (Tx. Ct. App. 2009); *but see Hamilton v. State*, 2009 Tex. App. LEXIS 6923 (Tex. Ct. App. 2009).
51. *Commonwealth v. Brown*, 2009 Mass. App. LEXIS 1209 (Mass. Ct. App. 2009).

ment certificates showing the lack of a contractor's license[52] or a motor vehicle operator's permit,[53] though these errors have sometimes been found to be harmless.

A sequel to *Melendez-Diaz* was on the docket for the Court's current Term. The Court granted certiorari in *Briscoe v. Virginia* to decide whether a prosecutor may introduce a certificate of a forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, if the state provides a statutory mechanism for the accused to call the analyst at the State's expense. The justices heard argument but then simply vacated the decision and remanded for further consideration in light of *Melendez-Diaz*.[54]

Speedy Trial

Vermont v. Brillon[55] presented the question of whether delays on the part of court-appointed counsel could be attributed to the State and thus support a dismissal for violation of the right to a speedy trial. Michael Brillon faced trial for felony domestic assault. During the almost three years that the case awaited trial, he was represented by six different lawyers. They were discharged for different reasons. The first lawyer was relieved after his motion to continue the trial was denied and the defendant fired him. One lawyer was threatened by the defendant. Others were relieved because of difficulties with their contracts with the State. But it was also clear that much of the delay was due to the inability or unwillingness of assigned counsel to move the case forward. For this reason, Vermont's Supreme Court found that the delay violated the defendant's Sixth Amendment rights.

The U.S. Supreme Court reversed. In a 7-2 decision authored by Justice Ginsburg, the Court ruled that appointed counsel are not generally state actors for the purposes of a speedy-trial claim. Thus, most of the delay caused by the lawyers must therefore be attributed to the defendant, rather than to the State. Claims of speedy-trial violations are assessed under the balancing test of *Barker v. Wingo*,[56] which includes the length and reasons for the delay, the defendant's assertion of his rights, and prejudice. With the lawyers' delays now attributed to Brillon and not the State, Brillon's claim failed. The Court did note, however, that the general rule attributing to the defendant delays caused by appointed counsel is not absolute. The State might be charged with delay if, for example, there is a systemic breakdown in the public defender system, though the record did not suggest such an institutional problem in the case at bench.

Justices Breyer and Stevens dissented, pointing out (among other things) substantial periods where it appeared that Brillon had no counsel or where it was clear that assigned counsel took no action at all and then withdrew; they also observed that the state court had substantial authority to supervise the appointment of public defenders.

Right to a Jury Trial/Sentencing

Vermont v. Brillon presented the question of whether delays on the part of court-appointed counsel could be attributed to the State and thus support a dismissal for violation of the right to a speedy trial.

Last Term also produced *Oregon v. Ice*,[57] yet another in the *Apprendi*[58] line of cases. Thomas Ice was convicted of six sexual offenses following a jury trial. At sentencing, the judge made a series of factual findings, including that Ice's conduct caused different harms to the victim, which then permitted the court to impose consecutive sentences. The issue was whether the Sixth Amendment required a jury determination of these facts. A closely divided Supreme Court found that judges may decide whether to impose consecutive sentences.

Writing for the five-justice majority, Justice Ginsburg stressed that each offense involved its own discrete sentence and that, historically, the jury played no part in assessing whether sentences were consecutive as opposed to concurrent. The Court also noted that the previous *Apprendi* cases all involved sentencing for a discrete crime and not, as in *Ice*, sentencing for multiple offenses different in character or committed at different points in time. Historical practice and respect for state sovereignty both counseled against applying *Apprendi* to the imposition of sentences for separate crimes. Justice Scalia authored the dissent. He found no room to distinguish the earlier *Apprendi* cases since the facts found by the judge were necessary to commit the defendant to a longer prison term. He argued that all of the considerations relied upon by the majority were in fact rejected in the prior decisions. He concluded that the majority's opinion "muddies the waters, and gives cause to doubt whether Court is willing to stand by *Apprendi*'s interpretation of the Sixth Amendment jury-trial guarantee."[59]

DOUBLE JEOPARDY

Last Term saw two decisions on the collateral estoppel principles relevant to the Fifth Amendment's Double Jeopardy Clause. In the more important of the two, *Yeager v. United States*,[60] the defendant was tried on a variety of offenses relating to his employment as an officer of Enron Broadband Services, including fraud and insider trading. The jury acquitted Yeager of the fraud counts but hung on the insider-trading counts. After a mistrial was declared on the latter counts, the government obtained a new indictment recharging him with some—but not all—of the insider-trading counts on which the jury had earlier hung. Yeager claimed that his reprosecu-

52. *Washington v. State*, 2009 Fla. App. LEXIS 14939 (Fla. Ct. App. 2009).
53. *Tabaka v. State*, 976 A.2d 173 (D.C. 2009).
54. No. 07-11191 (Jan. 25, 2010).
55. 129 S.Ct. 1283 (2009).
56. 407 U.S. 514 (1972).
57. 129 S.Ct. 711 (2009).
58. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).
59. *Ice*, 129 S.Ct. 711, 723 (2009) (Scalia, J., dissenting).
60. 129 S.Ct. 2360 (2009).

[T]he decision last Term in *Rivera v. Illinois* made clear that some jury-selection errors implicate only state law.

tion violated the Double Jeopardy Clause. The lower federal courts turned the claim aside, but the Supreme Court reversed.

Justice Stevens wrote the opinion for the six-justice majority. The Court first addressed the question whether the government should be permitted to retry Yeager on the insider-trading counts simply because the jury had not reached a verdict on them (and thus he could not twice be placed in jeopardy). The majority determined that that approach would not sufficiently protect the interest in preserving the finality of the jury's judgment on the fraud counts, including the jury's alleged finding (as part of that judgment) that Yeager did not possess insider information. Thus, the Court turned to *Ashe v. Swenson*[61] and its holding that the Double Jeopardy Clause precludes the government from relitigating an issue that was necessarily decided by an acquittal in a prior trial. The majority found that *Ashe* applied even though the acquittal and the failure to reach a verdict occurred during the same trial. Although the jury hung on the insider-trading counts, if the possession of insider information was critical in all of the charges against Yeager, a jury verdict that necessarily decided that issue in his favor would protect him from prosecution for any charge for which that was an essential element. The Court remanded for the court of appeals to determine what the jury necessarily determined as part of its acquittal.[62] Justice Scalia (joined by Justices Thomas and Alito) dissented, criticizing *Ashe* as departing from the original meaning of the Double Jeopardy Clause. They would have held that jeopardy is commenced and terminated charge by charge, not issue by issue, and that having never once been convicted of insider trading, Yeager could not be placed twice in jeopardy on these charges. Nor would these justices extend *Ashe* to these circumstances.

The other case, *Bobby v. Bies*,[63] addressed whether the lower federal courts erred in preventing the state courts from considering Bies' mental capacity. Bies was convicted and sentenced to death. On direct review, the Ohio Supreme Court considered the balance of aggravating circumstances and mitigating factors and affirmed, but it observed that Bies' mild to borderline retardation was entitled to some weight. The U.S. Supreme Court later decided *Atkins v. Virginia*,[64] which barred the execution of mentally retarded offenders. An Ohio court then set a hearing on the question of Bies' mental capacity. The federal courts, however, intervened, determining that the Ohio Supreme Court had definitively established Bies' mental retardation and that relitigation would violate the Double Jeopardy Clause. In a unanimous decision, the U.S. Supreme Court reversed. As Justice Ginsburg wrote for the Court, Bies was not twice put in jeopardy of a death sentence. Nor did the opinion of the Ohio Supreme Court provide a basis for preclusion under *Ashe*. Bies' appeal in the Ohio Supreme Court did not involve a determination of an issue of ultimate fact in his favor in the way contemplated in *Ashe*; determining his mental capacity was not necessary to the Ohio court's affirmation of the sentence. Moreover, mental retardation as a mitigator and mental retardation for the purposes of *Atkins* present discrete issues.

DUE PROCESS AND JURY SELECTION

While there are, of course, many constitutional dimensions to the jury process, the decision last Term in *Rivera v. Illinois*[65] made clear that some jury selection errors implicate only state law. The defendant in *Rivera* was on trial for murder. His lawyers sought to exercise a peremptory challenge. The trial judge disallowed it, raising a concern under *Batson v. Kentucky*.[66] The challenged juror eventually served as foreperson. The Illinois Supreme Court found that the trial court should have allowed the peremptory challenge but that the error was harmless.

The U.S. Supreme Court unanimously agreed. In an opinion by Justice Ginsburg, the Court noted that the Constitution does not require states to provide peremptory challenges. These challenges can be withheld altogether without infringing the constitutional right to an impartial jury and a fair trial. Denying a defendant a state-law right to a peremptory challenge is not structural error. The juror was not challenged for cause, nor was there any claim that the individual juror was biased. The Court took care to point out, and it is important to note here, that this was not a case of an erroneous denial of a for-cause challenge (which would deprive the defendant of an impartial jury). Nor was this an erroneous *denial* of a *Batson* objection (which would violate the Equal Protection Clause) or an instance of a dismissal of an otherwise death-eligible juror in violation of *Witherspoon v. Illinois*.[67] Nevertheless, *Rivera* established that erroneously *granting* a *Batson* objection does not implicate federal law. A state might provide for automatic reversal under such circumstances as a matter of its own law, but no federal principle requires it to do so.

CAPITAL PUNISHMENT

In *Harbison v. Bell*,[68] the Supreme Court resolved a federal statutory question that has important implications for the way that both state and federal prisoners are represented toward the end of capital litigation. At issue was a federal statute, 18 U.S.C. § 3559, which provides for the appointment of counsel for both state and federal capital defendants who bring federal habeas corpus proceedings. The statute also provides that

61. 397 U.S. 436 (1970).
62. On remand, the Fifth Circuit decided that the jury had made a finding that precluded further prosecution. *United States v. Yeager*, 2009 U.S. App. LEXIS 22958 (5th Cir. 2009).
63. 129 S.Ct. 2145 (2009).
64. 536 U.S. 304 (2002).
65. 129 S.Ct. 1446 (2009).
66. 476 U.S. 79 (1986).
67. 391 U.S. 510 (1968).
68. 129 S.Ct. 1481 (2009).

unless the appointed lawyer is replaced, the attorney shall represent the defendant through every subsequent stage of available judicial proceedings "and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant."[69] The question was whether Harbison, who was sentenced to death by a Tennessee state court, was entitled to have his federal habeas corpus counsel continue to represent him in state clemency proceedings at federal expense. The government argued that the statute only covered compensation for federal clemency proceedings, which are available only to federal and not state defendants.

In a 7-2 decision, the Court ruled that the appointment continues through state clemency proceedings. The opinion for the Court, written by Justice Stevens, relies on the plain language of the statute for this conclusion. The majority noted that the statute refers to clemency proceedings that "may be available" and that only state clemency proceedings are available to defendants convicted in a state court. Moreover, the reference to "executive or other clemency" indicates that Congress meant to include state proceedings, since some states but not the federal government provide forms of clemency that are other than executive. The majority turned aside the claim that this construction of the statute might also require federally appointed counsel to continue to represent clients in later state habeas petitions or retrials, determining that these are not subsequent stages of the federal habeas corpus proceedings. Chief Justice Roberts and Justice Thomas concurred, but each provided somewhat different reasoning. Justices Scalia and Alito dissented, contending that the federal statute provides federally funded counsel for federal proceedings only. The dissenters also rejected the majority's attempt to distinguish subsequent state habeas corpus litigation.

This is a significant ruling for courts and counsel that handle capital post-conviction proceedings. It ensures continuity in representation and enables the federal post-conviction lawyers to pursue clemency. Since clemency is typically sought near the end of the process, after federal habeas corpus litigation has concluded, these lawyers have likely been representing the petitioner for a number of years and at this point probably know the case and client best. Even in states that otherwise provide their own funding for capital clemency proceedings, it may be best for federal habeas counsel to make the case for clemency, rather than appoint new lawyers so late in the day.

FEDERAL CRIMINAL LAW

The Supreme Court decided a number of federal criminal cases last Term. Here are several that may be of particular interest.

Federal statutes have long prohibited felons from possessing firearms. Congress later extended this prohibition to people convicted of "a misdemeanor crime of domestic violence."[70] The question in *United States v. Hayes*[71] was whether a misdemeanor battery conviction counts as a "crime of domestic violence" when the victim was the offender's spouse, but the predicate offense statute did not require a domestic relationship as an element of the offense. In a 7-2 decision that looked closely at the language of the statute, the majority ruled that the government must prove beyond a reasonable doubt that the victim of the predicate offense was the accused's current or former spouse or related to the defendant in another specified way. That relationship, though it must be established as a matter of fact, need not be denominated an element of the predicate offense. Dissenting, Justices Roberts and Scalia would require domestic violence to be an element in the predicate offense. They found the text of the statute ambiguous and would have applied the rule of lenity. The holding may be of broad interest as it makes clear some of the consequences of a conviction for even a misdemeanor offense where the facts involve acts of domestic violence.

In a 7-2 decision, the Court ruled that the appointment [of habeas counsel in capital cases] continues throgh state clemency proceedings.

Corley v. United States[72] afforded the Court the opportunity to determine whether the rule in *McNabb v. United States*[73] and *Mallory v. United States*[74] had been abrogated by statute. The *McNabb-Mallory* rule generally makes inadmissible confessions obtained during periods of detention that do not comply with Federal Rule of Criminal Procedure 5(a); Rule 5(a) requires an officer who arrests a suspect on a federal charge to bring the defendant before a judicial officer without unnecessary delay, though there are some exceptions. The *McNabb-Mallory* rule was based on the Court's supervisory power. In 1968, Congress enacted 18 U.S.C. § 3501. Section 3501(a) provides that a confession is admissible if voluntarily given, and § 3501(b) describes the factors that relate to voluntariness. Section 3501(c) provides that a confession is not inadmissible because of delay if it is voluntary and made within six hours of arrest; the subsection provides exceptions for reasonable delay. Did 18 U.S.C. § 3501(a), with its seemingly unequivocal command that voluntary confessions be admitted, displace *McNabb-Mallory*? In a 5-4 decision, the Court said no.

Writing for the majority, Justice Souter examined the whole statute. He noted that §§ 3501(a) and (b) were a (failed) legislative attempt to eliminate *Miranda* for federal criminal prosecutions,[75] while § 3501(c) had an altogether different purpose. The government's argument, which placed full weight on subsection (a), would render subsection (c) superfluous. Taking the statute as a whole, the Court concluded that § 3501 narrowed *McNabb-Mallory* but did not displace it. Thus, a district court with a suppression claim must determine

69. 18 U.S.C. § 3559(e).
70. 18 U.S.C. § 922(g)(9).
71. 129 S.Ct. 1079 (2009).
72. 129 S.Ct. 1558 (2009).
73. 318 U.S. 332 (1943).
74. 354 U.S. 332 (1957).
75. *See Dickerson v. United States*, 530 U.S. 428 (2000) (declining to

The majority opinion contains one provocative suggestion. [T]he Court said there was no need to "confront today the question whether Santobello's automatic-reversal rule has survived our recent elaboration of harmless-error principles" in other cases.

whether the defendant confessed within six hours of arrest, unless a longer delay was reasonable. If the confession was made during that time, it would be admissible (subject to other rules), so long as it was voluntary. If the confession occurred before the defendant was brought before a judicial officer and beyond six hours, the trial court must determine whether the delay was unreasonable or unnecessary under the *McNabb-Mallory* rule. Justice Alito authored the dissent. The dissenting justices would have applied § 3501 to displace *McNabb-Mallory* even though it would have made part (c) superfluous. One other point of the dissent is worth mentioning. The four dissenters noted that the Court has never held that the prompt presentment requirements are backed by an automatic exclusionary sanction. They also suggested that there was little need for *McNabb-Mallory* given *Miranda*'s protections, a refrain that recalls the holding in *Montejo*.

Puckett v. United States[76] addressed whether a forfeited claim that the government violated the terms of a plea agreement is subject to review on appeal as plain error. Puckett pled guilty and agreed to be truthful about his criminal activities. At the time of the plea, the government agreed to recommend a reduction in his offense level under the Federal Sentencing Guidelines for acceptance of responsibility. Puckett was sentenced several years later. In the meantime, he had helped another person defraud the government. The probation officer recommended that Puckett not receive any reduction for acceptance of responsibility, and the prosecutor then decided to oppose any such reduction. Defense counsel failed to object to the prosecutor's changed position, and Puckett did not receive the reduction. The question on appeal was whether the legal issue was forfeited or whether it could be raised as plain error despite the failure to object.

In a 7-2 decision, the Supreme Court found that the plain-error test of Federal Rule of Criminal Procedure 52(b) did not apply and that the issue could not be raised. The majority opinion, written by Justice Scalia, points out the reasons for requiring a contemporaneous objection: including avoiding sandbagging and giving the judge and the parties an opportunity to resolve the mistake. The Court rejected a number of arguments raised by the defendant, including that a failure to require the government to abide by the deal made the guilty plea involuntary and that the government's failure amounted to structural error, affecting the framework within which the proceeding operated. Justices Souter and Stevens dissented. While they did not find Puckett particularly sympathetic, they argued that the prejudice to him was not the higher sentence he ultimately received, but the loss of his right to a trial that he waived as part of the agreement. Even if the sentence would have been the same, the government's failure to live up to its word branded Puckett a criminal without a trial because he entered a guilty plea induced by a promise that the government refused to honor. This was plain error, said the dissenters.

The majority opinion contains one provocative suggestion. While acknowledging that *Santobello v. New York*[77] held that automatic reversal is warranted when there is a timely objection and the prosecution has breached a plea agreement, the Court said there was no need to "confront today the question whether *Santobello*'s automatic-reversal rule has survived our recent elaboration of harmless-error principles" in other cases.[78]

FEDERAL HABEAS CORPUS

Ineffective Assistance of Counsel

Knowles v. Mirzayance[79] raised the question whether a federal habeas corpus petitioner was entitled to relief when his counsel advised him to withdraw his insanity defense. Mirzayance pled not guilty and not guilty by reason of insanity. California, where he was tried, adjudicates such cases in bifurcated proceedings. Mirzayance was convicted of first-degree murder in the guilt phase. His lawyer advised Mirzayance to withdraw the insanity defense prior to the insanity phase. Counsel concluded that the defense would fail. The Ninth Circuit granted relief, finding that failure to pursue the insanity defense was deficient performance since there was no tactical advantage in withdrawing the plea—in essence, counsel had "nothing to lose" by presenting the defense.

The Supreme Court unanimously reversed. Justice Thomas wrote for the Court that the state court's rejection of the ineffective-assistance-of-counsel claim was consistent with *Strickland*.[80] Counsel is not required to have a tactical reason for dropping a weak claim, above and beyond a reasonable appraisal of the claim's prospects for success. Nor is counsel required to raise every non-frivolous defense. And under these circumstances, Mirzayance could not show prejudice. There was no reasonable probability that he would have prevailed on the insanity defense had he pursued it. In addition, in a part of the opinion that commanded six votes, the Court also ruled that Mirzayance could not show that the state-court decision was contrary to or involved an unreasonable application of "clearly established Federal law, as determined by the Supreme Court," which is the showing mandated by the Anti-Terrorism and Effective Death Penalty Act (AEDPA).[81] No U.S. Supreme Court decision had previously

find that the statute overruled *Miranda*).

76. 129 S.Ct. 1423 (2009).

77. 404 U.S. 257 (1971).

78. *Puckett*, 129 S.Ct. at 1432 n.3 (citing *Arizona v. Fulminante*, 499 U.S. 279 (1991) & *Neder v. United States*, 527 U.S. 1 (1999)).

79. 129 S.Ct. 1411 (2009).

80. *Strickland v. Washington*, 466 U.S. 668 (1984).

81. 18 U.S.C. § 2244(d)(1).

established a "nothing to lose" standard. Under the "doubly deferential" standard that applies to *Strickland* allegations evaluated under AEDPA, Mirzayance could not prevail with a generalized *Strickland* claim.[82]

Jury Instructions

The issue in *Hedgpeth v. Pulido*[83] was whether a particular instructional error is structural or whether it is subject to harmless-error analysis. Pulido was charged with felony murder. The jury was instructed on alternative theories of guilt, one of which was invalid, and may have relied on the invalid theory to convict (though that was not certain, as the jury returned a general verdict). The district court granted Pulido's federal habeas corpus petition, finding that the flawed instruction had a "substantial and injurious effect" or influence on the verdict, the standard set forth in *Brecht v. Abrahamson*.[84] The State appealed. The Ninth Circuit affirmed but rather than apply *Brecht*, the court of appeals determined that the error was structural and not subject to harmless-error review.

The Supreme Court reversed in a 6-3 per curiam decision. The majority distinguished several earlier rulings[85] that supported Pulido because those cases were decided before the Supreme Court determined in *Chapman v. California*[86] that constitutional errors can be harmless. The Court was more persuaded by recent holdings that other forms of instructional error are subject to harmless-error review. The matter was remanded for the court of appeals to assess whether the error was harmless under *Brecht*; the majority declined to apply *Brecht* in the first instance. Justices Stevens, Souter, and Ginsburg dissented, contending that the court of appeals' analysis and the record clearly show that the error was not harmless under *Brecht*.

Timeliness/Default

In *Jimenez v. Quarterman*,[87] the Court addressed a not uncommon question: whether a federal habeas corpus petition was timely filed under AEDPA's one-year statute of limitations, 28 U.S.C. § 2244(d)(1). Section 2244 provides that the year begins to run on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Jimenez's state appellate lawyer filed an *Anders*[88] brief, which he left for Jimenez at the county jail. Unfortunately, Jimenez was no longer at the jail, and so he received neither the brief nor the subsequent order of dismissal. When he later learned of the error, he filed a state habeas corpus petition and asked the Texas Court of Criminal Appeals for leave to file an out-of-time appeal. That court granted him leave. The appeal was filed, and the conviction was affirmed. Jimenez later filed a federal habeas corpus petition within a year of the conclusion of his reopened avenue of appeal. The lower federal courts, however, considered the one-year period to begin to run from the conclusion of the initial appeal, not Jimenez's reopened path of review.

The majority distinguished several earlier rulings that supported Pulido because those cases were decided before the Supreme Court determined in *Chapman v. California* that constitutional errors can be harmless.

The Supreme Court reversed in a unanimous opinion written by Justice Thomas. The Court held that direct review does not conclude until the availability of direct appeal to the state courts and to the U.S. Supreme Court has been exhausted. Once the Texas Court of Criminal Appeals reopened the direct review of the conviction, the petitioner's conviction was no longer final for purposes of the federal habeas corpus statute. This construction furthered AEDPA's goal of promoting comity, finality, and federalism since it permitted the state court the first opportunity to review the claim and to address any constitutional errors.

Cone v. Bell[89] dealt with an issue of procedural default. Cone raised an insanity defense in his murder trial but was convicted and sentenced to death. His defense was based in part upon his drug use, which the prosecution discredited at trial. Years afterwards, Cone learned that the State had suppressed evidence of his drug use, and he then asserted a violation of *Brady v. Maryland*.[90] The case had a complicated procedural history, but the bottom line was that due to the late disclosure of this evidence and the way the case was litigated, the state courts never considered the merits of the *Brady* claim in light of this newly disclosed evidence (and in fact the state courts had found that the claim was waived or otherwise defaulted). The State reasserted its arguments of default in federal court.

In a 6-3 decision, the Supreme Court ruled that the claim was not barred. In federal habeas corpus litigation, the adequacy of state procedural bars is itself a federal question. The majority determined that the state courts had not passed on the merits of the claim, and that the state courts had erred in finding that the *Brady* claim was defaulted or waived. The majority went on to consider the merits of the claim. The Court decided that the likelihood was remote that the suppressed evidence would have affected the jury's verdict on the issue of insanity but that the evidence may have been material to the jury's assessment of the proper punishment. The majority remanded to the district court to consider the merits of the claim with respect to the sentence. Justices Thomas and Scalia dissented. While they agreed that the claim was

82. 129 S.Ct. at 1420.
83. 129 S.Ct. 530 (2008).
84. 507 U.S. 619 (1993).
85. *Stromberg v. California*, 283 U.S. 359 (1931) and *Yates v. United States*, 354 U.S. 298 (1957).
86. 386 U.S. 18 (1967).
87. 129 S.Ct. 681 (2009).
88. *Anders v. California*, 386 U.S. 738 (1967).
89. 129 S.Ct. 1769 (2009).
90. 373 U.S. 83 (1963).

Four civil-rights cases from last Term may also be of interest to criminal-court judges and practitioners.

not defaulted, they would have rejected the entire *Brady* claim on the merits. Justice Alito would have remanded for further proceedings, including a question of whether the *Brady* claim was fully exhausted or barred.

CIVIL RIGHTS

Four civil-rights cases from last Term may also be of interest to criminal-court judges and practitioners. Three of the rulings underscore some of the difficulties for federal civil-rights plaintiffs in suing prosecutors and law-enforcement officers. The fourth case addresses whether § 1983 may be used to obtain DNA evidence and also contains important holdings about *Brady*, the Due Process Clause, and claims of actual innocence.

The trio of civil-rights cases are *Van de Kamp v. Goldstein*,[91] *Pearson v. Callahan*,[92] and *Ashcroft v. Iqbal*.[93] *Van de Kamp* was a suit against a county district attorney and a supervising prosecutor alleging that the defendants failed to train prosecutors, supervise them, or establish a system so that exculpatory information relating to jailhouse informants would be disclosed to defense counsel. A unanimous Court determined that the prosecutors were absolutely immune from liability, turning aside an argument that the defendants should not receive absolute immunity as these alleged failures were administrative and not prosecutorial conduct.

Pearson overruled *Saucier v. Katz*,[94] which had instructed federal courts to follow a two-step process in determining whether government officials were entitled to qualified immunity: first, whether there was a constitutional violation, and second, whether the unconstitutionality of the officers' conduct was clearly established. *Pearson* now gives judges the discretion to determine which prong should be addressed first (and thus a case may be dismissed on qualified-immunity grounds by going to the second prong without deciding whether there was a constitutional violation at all). The *Pearson* Court thus determined that officers were entitled to immunity without deciding an interesting Fourth Amendment question about the constitutionality of a warrantless entry into a home when consent to enter was given to an undercover informant (sometimes called "consent-once-removed").

Iqbal, which may be the most significant of the trio, involved allegations that the plaintiff was selected for pretrial detention in a federal maximum security unit and subjected to beatings and other abuses on the basis of his race, religion, and national origin. He alleged that Attorney General Ashcroft and FBI Director Mueller knew about and condoned this discriminatory treatment and may even have been instrumental in adopting and executing the discriminatory policy. A closely divided Court found that there can be no supervisory liability for knowledge of and mere acquiescence in an unconstitutional action by a subordinate. Next, the majority decided that the allegations against the two officials were insufficiently detailed to meet ordinary pleading requirements, that of presenting plausible (and not merely conceivable) claims of invidious discrimination. *Iqbal* has enormous importance with respect to civil-pleading standards and, of course, the principles of supervisory liability.

The final case, *District Attorney's Office for the Third Judicial District v. Osborne*,[95] was the government's appeal from a ruling in a § 1983 civil-rights action granting a former defendant access to evidence for DNA testing. Osborne was convicted of a violent sexual assault in a state court in Alaska. Before his trial, the State tested a sperm sample found at the crime scene using a somewhat nondiscriminating test. In postconviction proceedings, Osborne sought access to better and more discriminating DNA testing, but access was denied. The lower federal courts, however, found that he had a potentially viable claim of actual innocence and that he had a right of access to evidence to perform DNA testing. The Supreme Court reversed.

In a 5-4 decision authored by Chief Justice Roberts, the Court emphasized that the dilemma of figuring out how to harness DNA's power to prove innocence without unnecessarily interfering with the criminal justice system belongs primarily to the legislatures of the various states. The majority noted that Osborne had a state-created liberty interest in demonstrating his innocence (since Alaska law provides that those who use newly discovered evidence to establish innocence may vacate their conviction or sentence) but that Alaska's procedures were adequate under the Due Process Clause. The justices underscored the differences between the process due an individual before conviction and after conviction and noted that *Brady* did not apply. Several justices concurred to emphasize a few additional concerns, such as the use of civil-rights actions to bring claims that potentially might be brought on habeas corpus, as well as the burdens that postconviction DNA testing imposes upon federal and state governments. Justice Stevens wrote the main dissent. Four justices would have found that the State's procedures did not comport with the Due Process Clause. Three of the dissenting justices would also have found a substantive due-process right of access to evidence for purposes of previously unavailable DNA testing.

A LOOK AHEAD

The October 2009 Term also promises to be quite significant. As the Term opens, the justices plan to revisit some issues that have commanded a fair amount of attention in recent years; cases involving the Second Amendment, *Apprendi,* and the Confrontation Clause are again on the docket. The Court also will address several aspects of *Miranda*, as well as an assortment of other matters. Here are some of the most interesting cases.

91. 129 S.Ct. 855 (2009).
92. 129 S.Ct. 808 (2009).
93. 129 S.Ct. 1937 (2009).
94. 533 U.S. 194 (2001).
95. 129 S. Ct. 2308 (2009).

The blockbuster case of two Terms ago was *District of Columbia v. Heller*,[96] where the justices ruled that the Second Amendment protects an individual's right to keep and bear arms. Now the Court has granted review in *McDonald v. Chicago*[97] to determine whether this right is incorporated as against the states through the Privileges and Immunities or Due Process clauses.

The Court will take on yet another *Apprendi* issue, deciding in *United States v. O'Brien*[98] whether the fact that a firearm is a machine gun must be charged and proved to a jury beyond a reasonable doubt before a defendant may be given a 30-year mandatory minimum sentence.

Miranda is front-and-center. *Maryland v. Shatzer*,[99] a closely watched case, concerns how long the *Edwards v. Arizona* prohibition against reinterrogation may last. While in prison on one charge, Shatzer invoked his right to counsel during an investigation of a different sexual abuse charge. Still in prison more than 2-1/2 years later, he was re-interrogated by a different detective. The Maryland Court of Appeals ruled that the *Edwards* prohibition remained effective and that there had been no break in custody. The state court determined that it would apply *Edwards* absent further guidance from the Supreme Court. Another *Miranda* issue is presented in *Florida v. Powell*,[100] which addresses whether *Miranda* warnings are defective if they fail to include advice of the right to talk to a lawyer during questioning (as opposed to *before* questioning). The ruling may have broad implications because the social science literature has reported a remarkable variation in the form, language, and understandability of warnings used by law-enforcement agencies.[101]

But perhaps the most important of the three *Miranda* cases is *Berghuis v. Thompkins*,[102] where officers continued to question a suspect who remained largely silent for the first two hours and 45 minutes of his interrogation. The case has great practical and theoretical implications. With a number of law-enforcement agencies regularly seeking implied and not express waivers of *Miranda*,[103] the case should help clarify the role of officers when a suspect simply does what the warnings promise him he may do: remain silent. The case may provide an opportunity to determine whether the *Davis v. United States*[104] "clear invocation" rule should be extended to the right to remain silent as well as the right to counsel, and whether the rule should also be extended to the initial waiver stage (as opposed to coming into play only to determine whether a defendant who initially waived his rights has changed his mind and is now invoking them). The matter is before the Court on a habeas corpus petition, however, and the resolution of these questions may be complicated by the standard of review under AEDPA.

[T]he justices will decide if a lawyer who gives erroneous advice about the immigration consequences of a conviction is constitutionally ineffective.

Other issues about the federal habeas corpus statute post-AEDPA will also occupy the Court. Among the cases this Term are *McDaniel v. Brown*,[105] which addresses how a federal habeas corpus court can adjudicate a "sufficiency-of-the-evidence" claim under AEDPA, and *Berguis v. Smith*,[106] which concerns the review of an alleged violation of the Sixth Amendment's fair cross-section requirement post-AEDPA. Also on the docket is *Holland v. Florida*,[107] which relates to the circumstances in which a petitioner may be entitled to equitable tolling to excuse the late filing of a petition.

Two other much anticipated cases are *Graham v. Florida*[108] and *Sullivan v. Florida*.[109] They deal with whether the Eighth Amendment's ban on cruel and unusual punishments forbids imposing life without parole sentences on juveniles who are not convicted of homicide offenses.

Another case that may be of wide interest is *Padilla v. Kentucky*,[110] where the justices will decide if a lawyer who gives erroneous advice about the immigration consequences of a conviction is constitutionally ineffective. The Court might additionally consider whether a lawyer representing a non-citizen has a duty to give advice about those immigration consequences.

The Court also plans to decide the constitutionality of several federal statutes. *United States v. Stevens*[111] asks whether a federal law criminalizing the creation, sale, and possession of "depiction[s] of animal cruelty" is facially invalid under the Free Speech Clause of the First Amendment. The Third Circuit overturned the conviction of the defendant, a filmmaker, and the government sought Supreme Court review. *Carr v. United States*[112] asks whether a federal law that imposes registration requirements on sex offenders can be applied to individuals whose predicate offenses and proscribed travel took place before the statute was passed.

96. 128 S.Ct. 2783 (2008).
97. No. 08-1521.
98. No. 08-1569.
99. No. 08-680.
100. 08-1175.
101. *See* Richard Rogers, Kimberly S. Harrison, Daniel W. Shuman, Kenneth W. Sewell, Lisa L. Hazelwood, *An Analysis of* Miranda *Warnings and Waivers: Comprehension and Coverage*, 31 LAW & HUM. BEHAV. 177 (2007); Richard Rogers, Lisa L. Hazelwood, Kenneth W. Sewell, Kimberly S. Harrison & Daniel W. Shuman, *The Language of* Miranda *Warnings in American Jurisdictions: A Replication and Vocabulary Analysis*, 32 LAW & HUM. BEHAV. 124 (2008).
102. No. 08-1470.
103. *See* Charles D. Weisselberg, *Mourning* Miranda, 96 CAL. L. REV. 1519, 1577-90 (2008).
104. 512 U.S. 452 (1994).
105. No. 08-559.
106. No. 08-1402.
107. No. 09-5327.
108. No. 08-7412.
109. No. 08-7621.
110. No. 08-651.
111. No. 08-769.
112. No. 08-1301.

Finally, white-collar-crime aficionados might note the bevy of mail-fraud questions that are on the docket. *Black v. United States*[113] concerns whether a person may be convicted under the federal mail-fraud statute for depriving another of "the intangible right of honest services," even if there is no finding that the defendant contemplated economic harm to the party to whom "honest services" were owed. The Court also granted review in *Weyhrauch v. United States*,[114] another case interpreting the same statute. There the question is whether a state official may be convicted of depriving the public of the defendant's honest services for allegedly failing to disclose conflicts of interest without proof of a separate duty of disclosure imposed by state law. And the conviction of former Enron executive Jeffrey Skilling is before the Court in a case that raises an issue of the meaning of honest-services fraud as well as how the prosecution may rebut a presumption of jury prejudice that may arise from massive pretrial publicity.[115]

The present Term will be quite interesting to watch.

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113. No. 08-876.
114. No. 08-1196.
115. *Skilling v. United States*, No. 08-1394.

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Judges' Perspectives on Stress and Safety in the Courtroom:

An Exploratory Study

David M. Flores, Monica K. Miller, Jared Chamberlain, James T. Richardson, & Brian H. Bornstein

The courtroom represents a critical component of the American justice system. The legal system asks judges and juries to deliver justice for injured parties through the cases that they decide. The assumption is that these legal decision-makers can perform these tasks rationally and fairly. This is not always an easy task, however, as the process can expose judges and jurors to a number of stressors that can have negative consequences for both the individuals and the legal system as a whole. First, some trials contain graphic evidence regarding crimes and personal injuries. Judges and jurors are captive audiences and have no choice about viewing photographs and hearing testimony concerning such violent crimes as murder, abuse, and rape. Second, the safety of both judges and jurors can sometimes be compromised during trial. For instance, a defendant in a recent trial in Boston punched a juror, leading the judge to declare a mistrial. During the defendant's second trial, the defendant threatened to kill the jurors.[1] Judges also have safety concerns: a judge in New York barely avoided being shot when a former defendant fired a sawed off rifle in the courtroom.[2] Other judges have been threatened,[3] injured,[4] or killed[5] while on the job. Some judges have also experienced violence outside of the courtroom; for instance, in 2005, a man killed U.S. District Judge Joan Lefkow's husband and mother as an act of retribution for her rulings.[6]

Stress and safety concerns have the potential to affect judges' and jurors' performances. For instance, jurors selected for a trial involving a violent crime may experience strong emotions that make it difficult to follow the jury instructions. Judges could also let emotions affect their sentencing judgments or prevent them from making proper decisions (e.g., about impermissible testimony).[7] Fear of retribution could affect the decisions of both judges and jurors, for example, in gang-related cases. Because stress has the potential to negatively impact the judicial system, researchers have begun to study courtroom stress.[8] The majority of research concerns juror stress,[9] although several studies have examined judicial stress or judges' perceptions of their safety.[10]

The present research is designed to expand on previous research by asking research questions concerning five related areas. First, are judges concerned about juror stress? To the

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Footnotes

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7. Jared Chamberlain & Monica K. Miller, *Stress in the Courtroom: A Call for Research* (Sept. 19, 2007) (unpublished manuscript, on file with the author) [*hereinafter* Chamberlain, *Call for Research*].
8. For a review, *see* Monica K. Miller & Brian H. Bornstein, *Juror Stress: Causes and Interventions*, 30 T. MARSHALL L. REV. 237 (2004) [*hereinafter* Miller, *Causes and Interventions*]; Monica K. Miller, & David M. Flores. *Addressing the Problem of Courtroom Stress*, 91 JUDICATURE 60 (Sept./Oct. 2007) [*hereinafter*, Miller, *Courtroom Stress*].
9. *E.g.*, Brian H. Bornstein, Monica K. Miller, Robert J. Nemeth, Gregory L. Page, & Sarah Musil, *Juror Reactions to Jury Duty: Perceptions of the System and Potential Stressors,* 23 BEHAV. SCI. & L. 231 (2005) [*hereinafter* Bornstein, *Juror Reactions*]; Theodore B. Feldmann & Roger A. Bell, *Crisis Debriefing of a Jury After a Murder Trial,* 42 HOSPITAL & COMMUNITY PSYCHIATRY 79 (1991) [*hereinafter* Feldmann, *Crisis Debriefing*]; Roger A. Bell & Theodore B. Feldmann, *Crisis Debriefing of Juries: A Follow-Up*, 4 AM. J. PREVENTATIVE PSYCHIATRY 2 (1992) [*hereinafter* Bell, *Crisis Debriefing Follow-Up*]; Thomas L. Hafemeister & W. Larry Ventis, *Juror Stress: What Burden Have We Placed on Our Juries?*, 16 ST. CT. J. 35 (1992) [*hereinafter* Hafemeister, *Juror Stress*]; National Center for State Courts, THROUGH THE EYES OF THE JUROR: A MANUAL FOR ADDRESSING JUROR STRESS 1 (1998 ed.)[*hereinafter* NCSC, *1998 Manual*].
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degree that they are, what steps are they taking to protect jurors? Second, how do judges experience stress personally? What experiences are most stressful and how do judges cope? Third, how do judges feel about personal safety, and what do they do to protect themselves and their families? Fourth, is there a relationship between judges' perceptions of safety and their experiences of stress? Finally, are there differences in judges' perceptions? Specifically does one gender experience greater stress than the other? Do judges who have experienced a stressful work event (e.g., a threat) have different perceptions from those who have not? By answering these important questions, the current exploratory research can help determine what steps can be taken to protect judges and jurors from excessive stress that can impede their performance.

STRESS IN THE COURTROOM

A number of researchers have studied the stress that judges and jurors experience.[11] These studies (reviewed below) have determined that jurors do experience stress as a result of a variety of stressors. As a result, some courts have taken measures (e.g., posttrial debriefings) to protect jurors.[12] Somewhat less attention has been given to the study of judicial stress and safety, although there is some evidence that judges also experience negative effects associated with their duties.[13] A review of the literature in both areas provides a foundation for the current study.

Evidence of juror stress. Serving as a juror can be difficult or stressful for a variety of reasons. Some of these stressors are fairly obvious, such as deciding on a verdict/sentence, being involved in heated jury deliberations, and hearing about violent or gruesome crimes.[14] In highly sensationalized cases involving "notorious" defendants (e.g., O.J. Simpson, Martha Stewart), there can also be stress due to intense media scrutiny and/or sequestration.[15] Less obvious and more mundane stressors occur in more run-of-the-mill cases as well. For example, Bornstein and colleagues[16] found that in a sample of mostly routine cases, stress levels were relatively low overall. Nonetheless, jurors still reported experiencing some stress associated with the experience. The most stressful elements of jury duty involved: trial complexity (e.g., difficulty understanding the law or testimony), the decision-making process (e.g., having limited input), and disruption to daily life (e.g., long days in court). Although courts can do relatively little about some of these concerns (e.g., the nature of the crime or the necessity of reaching a verdict), others can be addressed by procedural reforms, such as allowing jurors to ask questions, modifying judge's instructions, and providing more frequent breaks.[17]

Several studies have documented significant, albeit subclinical, stress reactions among jurors, especially in cases involving gruesome testimony, high media interest, or severe penalties for defendants.[18] Documented stress symptoms among jurors include anxiety, sleeplessness, headaches, hives, and high blood pressure.[19] Very few studies have examined the duration of juror stress posttrial; those few studies indicate that symptoms can last for several months after trial,[20] though they do abate somewhat.[21]

Courts have a number of tools available to reduce juror stress, which can be implemented at various stages of the process.[22] For example, courts can (1) inoculate jurors against stress through pretrial orientation; (2) lessen stress during trial by reducing complexity and being more sensitive to jurors' routine needs (e.g., work schedules); and (3) address stress posttrial through debriefings. There is little systematic research on debriefing's effectiveness, but jurors do tend to perceive it as helpful.[23]

Judges can be highly involved in all of these stress-reduction methods, especially those occurring during and after trial.[24] There are a number of practical issues surrounding interventions designed to reduce juror stress, such as who pays for them, who conducts them, etc.[25] For example, posttrial debriefings can be conducted by either the judge (or other court personnel) or a mental-health professional. The National Center for State Courts (NCSC) study found that judges themselves perceived debriefings led by judges as more beneficial than those led by mental-health professionals.[26] Although no

11. For a review, *see* Miller, *Causes and Interventions, supra* note 8; Miller, *Courtroom Stress*, *supra* note 8.
12. Bell, *Crisis Debriefing Follow-Up, supra* note 9; Feldmann, *Crisis Debriefing, supra* note 9; Hafemeister, *Juror Stress, supra* note 9; National Center for State Courts, KING COUNTY SUPERIOR COURT: EVALUATION OF THE JURY DEBRIEFING PROGRAM: FINAL REPORT 1 (2000) [hereinafter, NCSC, *Jury Debriefing*].
13. Jared Chamberlain & Monica K. Miller, *Evidence of Secondary Traumatic Stress, Safety Concerns, and Burnout Among a Homogeneous Group of Judges in a Single Jurisdiction*, 37 J. AM. ACAD. PSYCHIATRY & L. 214 (2009) [hereinafter, Chamberlain, Stress Triad]; Jaffe, *Vicarious Trauma in Judges, supra* note 10; Monica K. Miller, *Using Constructivist Self-Development Theory to Explain Judges' Reactions to the Shooting of a Colleague*, (Sept. 19, 2007) (unpublished manuscript, on file with the author) [*hereinafter*, Miller, *Judges' Reactions*].
14. NCSC, *1998 Manual*, *supra* note 9, at 30.
15. *See generally*, Timothy R. Murphy, Genevara K. Loveland & G. Thomas Munsterman, MANAGING NOTORIOUS CASES (1992).
16. Bornstein, *Juror Reactions, supra* note 9, at 331.
17. Miller, *Causes and Interventions, supra* note 8, at 262.
18. Feldmann, *Crisis Debriefing*, supra note 9, at 80; Theodore B. Feldmannn & Roger A. Bell, *Juror Stress: Identification and Intervention*, 21 BULL. AM. ACAD. PSYCHIATRY L., 409, 412 (1993); Stanley M. Kaplan, & Carolyn Winget, *The Occupational Hazards of Jury Duty*, 20 BULL. AM. ACAD. PSYCHIATRY L. 325, 327 (1992) [*hereinafter*, Kaplan, *Occupational Hazards*]; James E. Kelley, *Addressing Juror Stress: A Trial Judge's Perspective*, 43 DRAKE L. REV. 97 (1994) [hereinafter Kelley, *Judge Perspective*]; Daniel W. Shuman, Jean A. Hamilton & Cynthia E. Daley, *The Health Effects of Jury Service*, 18 LAW & PSYCHOL. REV. 267, 290 (1994) [hereinafter Shuman, *Health Effects*].
19. Kaplan, *Occupational Hazards, supra* note 18, at 328.
20. Bell, *Crisis Debriefing Follow-Up, supra* note 9, at 4; Shuman, *Health Effects, supra* note 18, at 295.
21. Bornstein, *Juror Reactions, supra* note 9, at 333.
22. Miller, *Causes and Interventions, supra* note 8, at 246.
23. Bornstein, *Juror Reactions, supra* note 9, at 334.
24. *See generally*, NCSC, *1998 Manual*, *supra* note 9; NCSC, *Jury Debriefing*, *supra* note 12.
25. Miller, *Causes and Interventions, supra* note 8, at 252.
26. NCSC, *1998 Manual*, *supra* note 9, at 83.

study has assessed the effectiveness of debriefing as a function of who conducts it, it is certainly plausible that judges would be more effective, by virtue of their authority and having lived through the same experience as jurors; nonetheless, this approach begs the question: Who debriefs the judge?

Evidence of judicial stress. Judges experience a number of stressors, such as substantial workloads, traumatic cases, pressure of making significant decisions, and safety concerns.[27] As a result, judges can experience stress symptoms such as sleep disturbances, intolerance of others, depression, and isolation.[28] The NCSC study found that 50% of judges report experiencing high levels of stress during a trial.[29] Although this question was quite general, other studies and theoretical models have investigated more specific aspects of judicial stress.

Miller and Richardson[30] propose a model suggesting that stress can have a number of causes and consequences. The model predicts that a variety of factors can cause stress and safety concerns, which in turn can then lead to various outcomes. The model suggests three types of factors that can cause stress and safety concerns: Personal (e.g., gender), job (e.g., high number of stressful trials), and environmental characteristics (e.g., awareness of violent acts against other judges). The model suggests that some of these characteristics have a direct effect on stress; however, they may also affect stress indirectly. Specifically, a factor can affect safety concerns, which in turn lead to stress. Stress can lead to a variety of outcomes, including problems with health, personal relationships, and job performance.

This model is based on previous research with other groups (e.g., counselors, emergency medical personnel), and relies on previous studies researching secondary traumatic stress, work-related burnout, vicarious trauma, and Constructivist Self-Development Theory.[31] Although the model itself has yet to be tested, other research supports its basic propositions. For instance, Chamberlain and Miller[32] conducted interviews and found that judges experience vicarious trauma, resulting from witnessing victimization of others.[33] Jaffe and colleagues[34] also found support for the notion that judges experience vicarious trauma; 63% of the 105 judges included in the study reported experiencing at least one symptom of vicarious trauma. Judges who play the role of caretaker (e.g., deciding whether a child should remain with parents) are especially likely to experience vicarious trauma due to witnessing the traumas experienced by the individuals under the judge's care.

As a result of their work experiences, judges can also face unfavorable effects as predicted by Constructivist Self-Development Theory (CSDT). Applied to judges, CSDT would posit that trauma affects a judge's psychological needs; these needs are related to the individual's sense of safety, trust, esteem, independence, power, and intimacy.[35] If these needs are unmet, the judge's view of the world and the self will change. Miller[36] found at least moderate evidence that judges who had experienced a traumatic event had also experienced symptoms in accord with CSDT. Occupational burnout is also a risk for judges. Judges report difficulty making decisions, work blocks, and negative feelings about their profession,[37] which could indicate work-related burnout. Judges also experience a variety of other symptoms associated with burnout.[38]

Judges experience a variety of safety issues as well. Harris and colleagues[39] surveyed judges about their experiences with work-related safety issues. Over half (52%) of the 1,112 judges questioned had been threatened in some way. Seventy percent of these incidents occurred outside the courthouse, indicating that threatening situations are not limited to the workplace. Fifty-eight percent of judges felt it was necessary to change their behavior in light of these threats. Similarly, Chamberlain and Miller[40] found that many judges had significant concerns for their safety, both in and out of the courthouse.

Finally, there is evidence that judges are sensitive to jurors' stress.[41] A national survey of judges indicated that most believe that jurors typically experience low to moderate stress levels. Nevertheless, 29% of judges felt that stress affects the ability of at least some jurors. Additionally, 65% of judges believe that people avoid jury duty because they fear stress, and 77% had excused a potential or actual juror because of the juror was experiencing or would likely experience stress. Nearly all (97%) judges said that they believed courts have a responsibility to prevent, address, or minimize stress; 78% said they had used at least one strategy to do so. The most common strategies were (1) attempting to maintain a positive rapport with jurors, (2) explaining the trial process to jurors before trial, (3) limiting delays, (4) asking jurors their wishes about lunchtime, etc., and (5) instructing court officials to be sensitive to juror needs.

27. Chamberlain, *Stress Triad, supra* note 13.
28. Jaffe, *Vicarious Trauma in Judges, supra* note 10, at 5.
29. National Center for State Courts, THROUGH THE EYES OF THE JUROR: A MANUAL FOR ADDRESSING JUROR STRESS 20 (2002 ed.), *available at* http://www.ncsconline.org/WC/Publications/Res_Juries_JurorStressIndexPub.pdf [hereinafter, NCSC, *2002 Manual*].
30. Monica K. Miller & James T. Richardson, *A Model of Causes and Effects of Judicial Stress*, 45 JUDGES' J. 20 (2006).
31. Karen W. Saakvitne, Howard Tennen & Glenn Affleck, *Exploring Thriving in the Context of Clinical Trauma Theory: Constructivist Self-Development Theory*, 54 J. SOC. ISSUES 279. (1998) [*hereinafter,* Saakvitne, *Constructivist Self-Development Theory*].
32. Chamberlain, *Stress Triad, supra* note 10.
33. *See* Laurie A. Pearlman & Paula S. MacIan, *Vicarious Traumatization: An Empirical Study of the Effects of Trauma on Trauma Therapists*, 26 PROF. PSHCHOL., RES. & PRACTICE 558 (1995).
34. Jaffe, *Vicarious Trauma in Judges, supra* note 10, at 4.
35. Saakvitne, *Constructivist Self-Development Theory*, *supra* note 31, at 293.
36. Miller, *Judges' Reactions, supra* note 13,.
37. Tracy D. Eells & Robert Showalter, *Work-Related Stress in American Trial Judges*, 22 BULL. AM. ACAD. PSYCHIATRY & L. 71, 74 (1994).
38. E.g., overload of responsibility, workplace conflict, *see* Chamberlain, *Stress Triad, supra* note 13.
39. Harris, *Judicial Workplace, supra* note 10.
40. Chamberlain, *Stress Triad, supra* note 13.
41. NCSC, *2002 Manual*, *supra* note 29, at 3.

To date, there is considerably more research concerning jurors' stress than judges' stress.[42] This is a concern because judges have to deal with more potentially stressful evidence than jurors as they have to determine the admissibility of evidence that jurors might not see (e.g., gruesome evidence).[43] In addition, judges have to deal with such hassles daily, while jurors experience such trials very infrequently. Frequent experiences with such stressors could be detrimental and could lead to mental-health issues (e.g., vicarious trauma) or desensitization. Just as with jurors, some of the stressors that affect judges are obvious and hard to remediate (e.g., presiding over cases with disturbing evidence, sentencing in capital cases), while others are more mundane and more amenable to remediation (e.g., workload, lack of training/preparation[44]).

As Chamberlain & Miller[45] point out, more research is needed to understand judges' experiences with stress. The literature on jury and judge safety and stress has some limitations. The first concern this exploratory study addresses is the limited scope of previous studies. While previous studies concerning judicial stress[46] investigate very specific types of stressors or symptoms (e.g., vicarious trauma, occupational burnout, Constructivist Self-Development Theory), the current study is much broader in scope. Second, the current study expands on previous research by using more formal measures of stress, depression and anxiety. Shuman and colleagues[47] and Bornstein and colleagues[48] used clinical measures (e.g., scales measuring Post-Traumatic Stress Disorder, depression, and anxiety) with jurors, but these measures have yet to be used with judges. Third, the current study fills a gap in the research by identifying differences based on individual factors. That is, does gender, experience with a work-related stressful issue (e.g., violence), or the type of cases a judge typically handles affect his/her perceptions and behaviors? In addition, the current study links stress and safety to determine the relationship between the variables. Finally, not much is known about what steps judges take to address their safety and stress needs or the needs of jurors. This is important, yet largely unknown, information that can help courts protect these legal decision makers.

In an effort to address this void, this exploratory study surveyed judges to gather tentative evidence on five major research questions:

Research Question 1: How do judges feel about juror stress? What have they done to protect jurors?

Research Question 2: How do judges experience stress personally? What aspects of their occupational duties are most stressful, and how do they cope?

Research Question 3: How do judges feel about personal safety? What do they do to protect themselves and their families?

Research Question 4: Is there a relationship between judges' perceptions of safety and their experiences of stress?

Research Question 5: Are there differences in experiences of stress or perceptions of safety with respect to gender, the type of cases that the judge typically presides over, or the experience of a workplace safety issue?

METHOD

Participants

A convenience sample of 163 American trial judges participated in the current study. The responders included 95 (58%) males, 65 (40%) females, and 3 (2%) who chose not to indicate gender. Sixty-six (40.2%) indicated they had experienced a "work-related stress/safety incident," answering affirmatively to the question "In the past year, did you experience any work-related event that caused you stress (e.g., a violent or threatening event)?"

When asked what type of trial they typically presided over, 35 respondents (21%) indicated civil trials, 21 (12%) criminal, 74 (45%) both, and 33 (20%) responded "Other." The respondents included 67 (41%) from general jurisdiction courts, 48 (29%) from family courts, 46 (28%) from state supreme courts, and 2 (1%) from appellate courts. Analyses revealed no significant differences with respect to the type of trial a judge typically presided over or the classification of judge. As a consequence, these distinctions are omitted from the discussion of results.

Procedure

Participants were affiliated with either the University of Nevada Reno Judicial Studies graduate program for trial judges or the National Council of Juvenile and Family Court Judges (NCJFCJ). Prospective participants were sent an email requesting their participation in a study about the causes and implications of judicial stress. The correspondence included a brief description of the study and a link to a secure online survey site that hosted the survey.

Materials

The online survey consisted of 167 items, which took participants approximately 30-45 minutes to complete. In order to address the individual research questions, numerous instrument items targeted respondents' perceptions of jury stress and judges' own experiences with stress and safety issues (a more detailed discussion of which is included in the foregoing analyses). In an effort to build upon previous research, the instrument also included several clinical measures for use as dependant variables, including the Center for Epidemiology Studies Depression Scale,[49] a brief form of the Speilberger State

42. *For a review, see* Miller, *Courtroom Stress, supra* note 8; Miller, *Causes and Interventions, supra* note 8.
43. Brian H. Bornstein & Robert J. Nemeth, *Jurors' Perception of Violence: A Framework for Inquiry*, 4 AGGRESSION & VIOLENT BEHAV. 77, 78 (1999).
44. *See* Celeste F. Bremer, *Reducing Judicial Stress through Mentoring*, 87 JUDICATURE 244 (2004).
45. Chamberlain, *Call for Research, supra* note 7.
46. *E.g.,* Chamberlain, *Stress Triad, supra* note 13; Jaffe, *Vicarious Trauma in Judges, supra* note 10; Miller, *Judges' Reactions, supra* note 13.
47. Shuman, *Health Effects, supra* note 18, at 288.
48. Bornstein, *Juror Reactions, supra* note 9, at 328.
49. Lenore S. Radloff, *The CES-D Scale: A Self-report Depression Scale for Research in the General Population*, 1 APPLIED PSYCHOL. MEASUREMENT 385, (1977).

Anxiety Inventory developed by Chlan and colleagues,[50] and seven items from a Post-Traumatic Stress Disorder diagnostic tool[51] utilized by Bornstein and colleagues[52] in their work on jury stress. Demographic questions including gender and nature of the respondents' judicial positions were also included. Finally, judges indicated whether they had experienced any work-related event that caused stress in the past year.

RESULTS

Dealing with Juror Stress

The first research question focused on whether judges feel responsible for juror stress. Judges were asked their general level of responsibility and what strategies they have used to reduce jurors' stress. Differences based on gender and experience with a work-related stress/safety incident were investigated to address Research Question 5.

Responsibility for Juror Stress. Judges were asked to indicate if they believed the court has a responsibility to prevent, address, or minimize juror stress on a seven-point scale (1 = no responsibility; 7 = full responsibility). Descriptive statistics revealed that judges assume a moderate to high amount of responsibility for juror stress ($M = 5.47$, $Mdn = 6.0$, $SD = 1.15$). Independent-sample t-tests revealed no significant differences based on gender or experience with a work-related stress/safety incident (all ps > .51).

Stress-Reduction Strategies. Judges were also asked to indicate what steps they had taken to reduce juror stress by checking items on a list of 41 potential strategies (compiled by the researchers). Some examples of strategies included "encourage or grant a change of venue" and "shorten length of court days for jurors." Thirty-six judges were not included in this analysis because they indicated that they did not work with juries. The most commonly used strategies were (in order): (1) Explaining the trial process to jurors before the trial; (2) attempting to maintain positive rapport with jurors; (3) instructing court officials to be sensitive to jurors' needs; (4) asking jurors about their wishes about lunchtime, quitting time, etc., (5) explaining jury instructions; and (6) limiting delays. Seven judges also indicated other strategies that they used to prevent juror stress, many of which focused on establishing a good relationship with jurors, instilling confidence in jurors, and reassuring jurors about any uncertainties about the trial. A full summary of the frequency of strategies used by judges to prevent juror stress is provided in Table 1.

An aggregate "strategy use" variable was created to determine if there were any differences in frequency of strategy use

TABLE 1: NUMBER AND PERCENTAGE OF STRATEGIES USED TO REDUCE JUROR STRESS

Strategy	Number & Percentage
Encourage or grant a change of venue	n = 2; 1.6%
Encourage or grant a delay in beginning of trial	n = 13; 10%
Specifically address possible trial stress during voir dire	n = 44; 34%
Permit attorneys to address trial stress during voir dire	n = 37; 29%
Explain the trial process to jurors before trial	**n = 87; 68%**
Encourage attorneys to change trial strategy	n = 11; 8.6%
Encourage attorneys to alter evidentiary presentation	n = 16; 13%
Require attorneys to alter evidentiary presentation	n = 2; 1.6%
Refuse to allow certain evidence	n = 21; 16%
Instruct witnesses to modify their testimony	n = 0; 0%
Instruct witnesses to clarify their testimony	n = 14; 11%
Permit jurors to take notes during trial	**n = 67; 52%**
Permit jurors to ask questions during trial	n = 30; 23%
Permit jurors to discuss case among themselves during trial	n = 14; 11%
Alter typical order of trial	n = 16; 13%
Limit delay	**n = 73; 57%**
Shorten length of court days for jurors	n = 43; 37%
Provide additional breaks for jurors	**n = 71; 56%**
Ask jurors their wishes about lunchtime, quitting time, etc.	**n = 75; 59%**
Encourage attorneys to make motions when jurors not present	n = 36; 28%
Require attorneys to make motions when jurors not present	n = 46; 36%
Personally address stress with jurors during trial	n = 12; 9%
Discourage side bar conferences	n = 15; 12%
Provide special seating for jurors	n = 20; 16%
Control public access to court room	n = 12; 9%
Empty court room	n = 3; 2.3%
Shield jurors from media	n = 30; 23%
As judge, attempt to maintain positive rapport with jurors	**n = 83; 65%**
Instruct court officials to be sensitive to juror needs	**n = 83; 65%**
Designate court official to monitor jurors during trial	n = 52; 41%
Designate court official to discuss stress with jurors during trial	n = 3; 2.3%
Explain jury instructions clearly	**n = 73; 57%**
Provide special amenities in jury room	n = 45; 35%
Accept hung jury sooner than usual	n = 3; 2.3%
Contact family member to ascertain juror's well-being	n = 6; 4.7%
Permit family contacts during sequestration	n = 6; 4.7%
Make available posttrial debriefing by a court official	n = 10; 7.8%
Make available posttrial debriefing by a judge	n = 48; 38%
Make available posttrial debriefing by a mental-health expert	n = 6; 4.7%
Refer jurors to available mental-health counseling	n = 7; 5.5%
Offer to pay for mental-health counseling	n = 2; 1.6%
Others (please specify)	n = 7; 5.5%

Note: Numbers in bold indicate frequency over 50%.

50. Linda Chlan, Kay Savik, & Craig Weinert, *Development of a Shortened State Anxiety Scale from the Spielberger State-Trait Anxiety Inventory (STAI) for Patients Receiving Mechanical Ventilatory Support*, 11 J. NURSING MEASUREMENT 283 (2003) [hereinafter, Chlan, *Short STAI*].
51. Edna B. Foa, Laurie Cashman, Lisa Jaycox & Kevin Perry, *The Validation of a Self-Report Measure of Posttraumatic Stress Disorder: The Posttraumatic Diagnostic Scale*, 9 PSYCHOL. ASSESSMENT 445 (1997) [hereinafter, Foa, *PTSD Scale*].
52. Bornstein, *Juror Reactions, supra* note 9, at 328.

based on gender or experiencing a work-related stress/safety incident. Although judges utilized an average of nearly 10 different strategies to reduce jurors stress (M = 9.71; Mdn = 12; SD = 7.13), independent-sample t-tests revealed no significant differences based on these two variables (all ps > .39).

Judge Stress

The second research question focused on judges' own experiences with stress. Judges were asked about general and occupational stress, the effects of stress on work performance, specific stressful situations, and physical and emotional manifestations of stress. Respondents also completed clinical scales designed to measure PTSD, depression, and anxiety. In addition, analyses were conducted to determine whether individual differences affected stress levels, as stated in Research Question 5.

General Stress. Judges indicated the amount of stress they had experienced over the past year on a seven-point scale (1 = no stress; 7 = extreme stress). In general, judges indicated that they had experienced a moderate amount of stress (M = 4.29, Mdn = 4.0, SD = 1.31). Analysis revealed a gender difference in the reporting of general stress (t (151) = -3.66; p = .00). Specifically, women reported experiencing higher levels of stress (M = 4.75; SD = 1.20) than men (M = 3.99; SD = 1.29). Experiencing a work-related stressful incident was also related to general stress (t (152) = 2.76; p = .01). Not surprisingly, judges who experienced a work-related stress/safety incident were significantly more likely to experience general stress (M = 4.63; SD = 1.28) than those who did not experience such an event (M = 4.04; SD = 1.29).

Trial Stress. Judges were also asked to indicate the amount of stress they experienced during a typical trial on a seven-point scale (1 = no stress; 7 = extreme stress). Similar to results regarding general stress, judges reported experiencing a moderate amount of stress during a typical trial (M = 3.83, Mdn = 4.0, SD = 1.21).

A marginally significant gender effect was found on reports of trial stress (t(145) = -1.78, p = .08). Consistent with trends in reports of general stress, women (M = 4.06; SD = 1.2) reported higher levels of stress than males (M = 3.09; SD = 1.21). Experiencing a work-related stress/safety incident was not related to trial-related stress (p = .23).

Symptoms of Stress. Judges were asked to indicate how their stress had manifested itself by checking items on a list. Items included on the list were: "anxiety," "sleep disturbances," "nervousness," "irritability," "other emotional symptoms," and "other." Judges who checked "other" were also asked to specify the emotional form that stress had taken. Of the judges, 99 (61% of the total sample) reported feeling irritable, 79 judges (48%) reported anxiety, 72 judges (44%) reported sleep disturbances, and 24 judges (15%) reported nervousness. A total of 31 judges (19%) indicated that they experienced other emotional forms of stress, the most common of which were eating problems, depression, and anger.

Differences in emotional stress based on gender and experiencing a work-related stress/safety incident were examined by combining all reported emotional forms of stress (from the list) into one numerical value ranging from zero to six. Descriptive statistics revealed that judges typically reported more than one emotional manifestation of stress (M = 1.86; Mdn = 2; SD = 1.21). Independent-sample t-tests revealed no significant difference in reported emotional stress between males and females (p = .52). Judges who had experienced a stress/safety incident (M = 2.17; SD = 1.14) were more likely to report emotional manifestations of stress than judges who had not (M = 1.71; SD = 1.2; t(159) = 2.44, p = .02).

Similar to emotional symptoms of stress, judges were asked to indicate which physical forms of stress they had experienced. The list compiled by the authors included "headaches," "muscle tension," and "other." Judges who checked "other" were also asked to specify the physical form that stress had taken. Of the judges, 89 (55% of all judges in the sample) indicated that they had experienced muscle tension, 43 judges (26%) indicated that they had experienced headaches, and 55 judges (34%) indicated they had experienced some other form of physical stress. Of the judges who indicated that they suffered other physical forms of stress, 13 reported feeling exhausted or fatigued, 9 reported eating problems, 7 reported stomach problems, and 5 reported back, chest, or muscle pain. Other reported physical manifestations of stress included shingles, hypertension, rashes, and diabetes.

Differences in physical manifestations of stress based on gender and experience with a work-related stress/safety incident were examined by combining all reported physical forms of stress (from the list) into one numerical value ranging from 0 to 3. Descriptive statistics revealed that judges typically experience one physical manifestation of stress (M = 1.14; Mdn = 1; SD = .83). Independent-sample t-tests revealed no significant differences based on gender or on experiencing a work-related stress/safety incident (all ps > 1.29).

Judges' Daily Experiences. Respondents were given seven statements from Foa, Cashman, Jaycox, and Perry's Post-Traumatic Stress Disorder diagnostic scale[53] to rate on a five-point scale (1 = not at all; 5 = extremely) indicating how descriptive each symptom was of their daily experiences as a judge. On average, "feeling distant or cut off" and "feeling irritable or angry" were most descriptive of judges' daily experiences (see Table 2 for a full summary).

TABLE 2: JUDGES EXPERIENCES WITH STRESS SYPMTOMS

Statement	M, Mdn, SD
Having upsetting thoughts or images about the trial	1.56; 1.00; .79
Feeling distant or cut off from people around you	2.29; 2.00; 1.09
Feeling emotionally numb	1.64; 1.00; .90
Feeling irritable or having fits or anger	2.15; 2.00; .95
Having trouble concentrating	1.87; 2.00; .87
Being overly alert	1.68; 1.00; .97
Being jumpy or easily startled	1.57; 1.00; .93
Note: (1 = not at all; 5 = extremely)	

53. Foa, *PTSD Scale, supra* note 51.

Numerical responses were combined from each of the seven statements to create a measure of PTSD-type symptoms with scores ranging from 7 to 35. On average, judges exhibited moderately low scores on this measure of stress (M = 12.74; Mdn = 12; SD = 4.56). Differences in stress scores based on gender and experience were examined through independent-sample t-tests. Consistent with the self reported measure of general stress, females were more likely to experience these symptoms of stress (M = 13.79; SD = 5.05) than males (M = 11.97; SD = 3.96; $t(136) = -2.36$, $p = .02$). Analysis also revealed that judges who had experienced a work related stress/safety incident (M = 13.98; SD = 5.17) were more likely to report higher levels of stress than judges who had not (M = 11.81; SD = 3.88; $t(100) = 2.70$; $p = .01$).

Depression and anxiety. Respondents also completed two clinical measures which assessed depression and anxiety. The first was the Center for Epidemiology Studies Depression Scale (CESDS), a 20-item self-report scale intended to measure depressive symptoms in community populations.[54] Items emphasize affect (e.g., feelings of depressed mood, guilt, hopelessness) and psychomotor impairment (e.g., loss of appetite, sleep disturbances) and require respondents to report how often they experienced each symptom in the previous week on a four-point scale (0 = rarely or none of the time; 3 = most or all of the time). Scores range from 0 to 60, and the average of the general population is approximately 8.7.[55] Twenty percent of the general population falls above a score 16, which has often been used as a cutoff suggesting depressive impairment.[56]

Overall, judges' average score on the CESDS was 15.52 (SD = 5.72, Mdn = 14). This number exceeds the mean score in the general population and also falls close to one generally utilized cutoff score of 16. Significant gender differences were found with respect to scores on the CESDS. Females' scores exceeded the impairment cutoff score of 16 and were significantly higher (M = 17.69; SD = 6.28) than those of male respondents (M = 14.01; SD = 4.62; $t(121) = 3.71$; $p < .001$), whose scores fell below the cutoff. Additionally, those judges who had previously experienced a work related stress/safety incident also scored above the impairment cutoff of 16 (M = 17.41; SD = 6.05), scoring significantly higher than those lacking such an experience (M = 14.26; SD = 5.15; $t(122) = 3.12$; $p < .003$).

Participants also completed a shortened 6-item form of the Spielberger State Anxiety Inventory[57] developed by Chlan and colleagues.[58] Spielberger's STAI has been widely utilized as a measure of both enduring (trait) and changing (state).[59] The brief form employed in the current study targets trait anxiety and has been demonstrated to be highly correlated (0.92) with the full 20-item version, with a Cronbach's alpha of 0.78.[60] Participants responded on 4-point scales in the 6-item version, with possible cumulative scores ranging from 4 to 24. The average score of judges was 18.56 (SD = 4.20, Mdn = 19), falling in the moderately high end of the range of possible scores. Analyses did not reveal a significant gender difference on participant scores on the shortened STAI ($p > .22$). There was, however, a significant difference with regards to previous experience with a work related stress/safety incident. Judges who had experienced such an incident scored significantly higher on the brief STAI (M = 12.55; SD = 4.23) than those who had not (M = 10.71; SD = 4.04; $t(132) = 2.54$; $p < .02$).

Effects of Stress. Judges were asked to indicate the degree to which their ability to fulfill responsibilities had been compromised by high levels of stress on a seven-point scale (1 = not compromised; 7 = very compromised). In general, judges indicated that their ability to fulfill responsibilities had been only slightly compromised by stress (M = 2.23; Mdn = 2.0; SD = 1.52). However, a total of 27 judges (17% of the total sample) indicated that their responsibilities had been at least moderately compromised (rating of 4 or higher) due to high levels of stress.

Independent-sample t-tests were used to determine if there were any differences in the reporting of compromised responsibilities based on gender and/or experience with a work related stress/safety incident. Females (M = 2.80; SD = 1.18) reported that their responsibilities had been significantly more compromised by stress than males (M = 2.80; SD = 1.18; $t(81) = -3.37$, $p < .01$). However, experiencing a work related stressful incident had no statistically significant effect on the reporting of compromised responsibilities ($p = .11$).

Judges were also asked an open ended question about how their functions were specifically compromised. Judges commonly reported a decrease in productivity resulting from stress and heavy workloads (n = 26). Many of these judges reported a decrease in efficiency stemming from procrastination, avoidance of workplace duties, loss of energy, and fatigue. Twenty-one judges also reported that stress had compromised their ability to maintain appropriate courtroom demeanor. Specifically, judges indicated that they had become irritable, angry, and impatient with courtroom actors, especially lawyers. Thirteen judges indicated stress had compromised their ability to concentrate in the workplace, suggesting that case outcomes may have been compromised because judges were distracted or unable to focus. A total of eight judges explicitly stated that stress had compromised decisions that had been made. One judge explained that stress had led to "sloppy decision making," and several other judges indicated

54. Lenore S. Radloff, *The CES-D Scale: A Self-report Depression Scale for Research in the General Population*, 1 Applied Psychol. Measurement 385 (1977).
55. Myrna M. Weissman, Diane E. Sholomskas, Margaret Pottenger, Brigitte A. Prusoff, & Ben Z. Locke, *Assessing Depressive Symptoms in Five Psychiatric Populations: A Validation Study*. 106 Am. J. Epidemiology 203 (1977).
56. Lenore S. Radloff & Ben Z. Locke, *The Community Mental Health Assessment Survey and the CESD Scale*, *in* Community Surveys of Psychiatric Disorders 177 (Myrna Weisman ed., 1986). (However, cutoff scores of 23 or greater have also been utilized , *see* Ian McDowell & Claire Newell, Measuring Health: A Guide to Rating Scales and Questionnaires 87 (1996).)
57. Charles D. Spielberger, Manual for the State-Trait Anxiety Inventory (STAI) 1 (1983).
58. Chlan, *Short STAI, supra* note 50.
59. *Id,* at 285.
60. *Id,* at 290.

that they were not able to remain impartial when deciding cases.

Stressful Situations. Judges were asked to rate the level of stress they experienced stemming from several scenarios on a five-point scale (1 = not at all; 5 = extremely). The highest levels of reported stress stemmed from crimes against children (*M* = 3.0), sexual crimes (*M* = 2.85), and violent crimes (M = 2.74). Sixty-six percent of judges reported that crimes against children were at least moderately stressful, 61% of judges reported that sexual crimes were at least moderately stressful, and 57% of judges reported that violent crimes were are least moderately stressful.

Judges reported that media coverage during a trial was somewhat stressful (*M* = 2.15), and 37% believed that is was at least moderately stressful. Judges also reported that they were a little stressed (on average) over public identification (*M* = 2.0) and, more generally, safety concerns (*M* = 2.2). Twenty-three percent of judges reported that they were at least moderately stressed about being publicly identified, while 33% percent of judges experienced stress stemming from safety concerns. Characteristics of the parties, victims, and court officials were all somewhat stressful for judges on average (*M* = 2.07, 2.05, and 2.15, respectively). Thirty-three percent of judges reported at least moderate amounts of stress from characteristics of the parties, 29% of judges were at least moderately stressed from characteristics of the victims, and 33% of judges were at least moderately stressed from characteristics of court officials.

Factors specifically related to trial were also significant sources of stress for judges. Long trials, boring trials, and trial interruptions were all reported (on average) to be at least somewhat stressful (*M* = 2.38, 2.40, and 2.71, respectively). Forty-four percent of judges reported at least marginal stress from long trials, and many judges reported at least moderate stress stemming from boring trials (41%), and trial interruptions (53%). A summary of the means and percentages of stressful situations experienced by judges is provided in Table 3.

Numerical responses were combined from each of the 41 situations provided by the researchers in the instrument to create another measure of stress with scores ranging from 41 to 205. On average, judges scored 77.85 on this stress scale (*Mdn* = 75; *SD* = 19.53), indicating only a mild to moderate stress as a result of these situations. Analysis revealed a marginal effect for gender in the expected direction ($t(59) = -1.76$, $p = .08$). Consistent with the other measures of stress in the survey, females were (marginally) more likely to experience stress (*M* = 85.93; *SD* = 20.08) than males (*M* = 75.46; *SD* = 19.32) as a result of these situations. There was no statistically significant effect found for experience with a work-related stress/safety situation on this measure ($p = .17$).

Judges were asked to report additional stressful situations that were not on the list of potential stressful situations. Heavy workload (n = 20) was the most commonly mentioned source of stress among judges. Similarly, judges reported that lack of time, resources, and staff led to stress (n = 15). Other sources of stress included the attitudes and behavior of parties (n = 19), the nature of the political process (n = 9), tension among colleagues and staff (n = 4), pressures related to campaigning for election (n = 3), and balancing family and work (n = 3).

TABLE 3: STRESSFUL SITUATIONS EXPERIENCED BY JUDGES

Situation	Mean; Percentage
Jury selection (i.e., voir dire)	1.72; 18%
Pre-existing medical or psychological problems	1.43; 9%
Troubles at home	1.96; 24%
Media coverage of the trial	2.15; 37%
Cameras in the courtroom	1.78; 10%
Being publicly identified as a judge	1.96; 23%
Fear of reprisal/concerns for personal safety	2.20; 33%
Characteristics of the criminal defendant	1.74; 17%
Characteristics of the parties	2.07; 34%
Characteristics of the victims	2.05; 30%
Interactions with court officials (e.g., rude behavior)	2.15; 34%
Crimes against children	3.00; 67%
Sexual crimes	2.85; 61%
Violent crimes	2.74; 58%
Issues/Evidence with a personal impact/meaning	2.19; 41%
Disturbing/Grisly evidence	2.33; 37%
Complex or technical evidence	2.17; 31%
Expert testimony	1.79; 17%
Long trials	2.38; 44%
Boring trials	2.40; 41%
Trial interruptions/delays	2.71; 54%
Side bars/Discussions outside hearing of jurors	1.63; 15%
Attorneys' behavior during trial	2.74; 56%
Objections/Arguments by attorneys	1.96; 24%
The adversarial system	1.71; 17%
Instructions to disregard evidence/testimony	1.38; 5%
Explaining jury instructions	1.33; 8%
Deciding which jury instructions to give	1.76; 19%
Jury deliberations (e.g. waiting, fear of arguments)	1.26; 1%
Fear of making a mistake in giving instructions	1.64; 13%
Fear of making a mistake in deciding motions	2.04; 24%
Dissension/Differences among jurors	1.31; 3%
Hung jury	1.46; 12%
Sentencing a criminal defendant	2.08; 32%
Determinations regarding jurors' decisions about death penalty	1.60; 20%
Concerns about community reactions to verdict	1.82; 18%
Photographs or videos presented as evidence	1.77; 21%
Verbal testimony presented as evidence	1.52; 10%
Your feelings for the victim (or plaintiff) and the victim's family	1.92; 21%
Your feelings for the defendant and the defendant's family	1.82; 15%
Fear of making a mistake and reaching the wrong verdict	2.28; 33%

Note: "Mean percentage" indicates the percentage of judges who indicated that they experienced at least moderate amounts of stress from the situation *(1 = Not at all; 5 = extremely)*.

Suggestions for reducing the stress of judges. Respondents were also asked an open-ended question requesting that they provide coping strategies that judges could use to reduce stress (see Table 4).

TABLE 4: SUGGESTIONS FOR REDUCING STRESS

Strategy	#	% (of total)
Exercise	15	13.19
Time off/sabbatical	12	12.09
Interaction with professional colleagues	11	10.99
Social interaction (outside of work)	10	10.99
Increase courthouse security	10	10.99
Stress-management training	10	7.69
Balance in life	7	6.59
Reduce workloads	6	4.40
Prayer/Religion	4	2.20
Greater psychological awareness	2	2.20
Time management	2	2.20
More resources (staff, technology)	2	2.20
TOTAL	**91**	**100**

Of the 91 total suggestions, exercise and time off/sabbaticals were the most commonly suggested means of addressing judicial stress (n = 15). Interaction with professional colleagues (e.g., through mentoring, support groups, and collaboration) and involvement with nonoccupational social networks (e.g., family, friends) were both also among the more commonly suggested strategies (n = 12 and 11, respectively). Increased court house security (10) and stress-management training (10) were also advocated by respondents.

Safety Concerns

To address Research Question 3, concerning judges' perceptions of safety and what measures they take to protect themselves, respondents were asked a variety of questions regarding safety issues. These items related to perceptions of safety, sources of safety concern, and experiences with safety-related incidents. Individual differences, including gender and experience with a work-related stress/safety incident, were also assessed to address Research Question 5.

Personal Safety. Judges specified their level of concern for their personal safety on a seven-point Likert-type scale (1 = no concerns; 7 = extremely concerned). Overall, judges exhibited moderate amounts of concern for personal safety (M = 2.80; SD = 1.41; Mdn = 2.00). Further analyses revealed significant gender differences with regards to personal-safety concerns, with females (M = 3.20; SD = 1.19) reporting greater levels of concern than their male counterparts (M = 2.51; SD = 1.53; $t(141) = 3.00$, $p < .01$). Additionally, those judges who had previously experienced a work-related stress/safety incident also expressed greater concern for personal safety (M = 3.15; SD = 1.56) than those lacking such an experience (M = 2.55; SD = 1.24; $t(142) = 2.51$; $p < .02$).

Safety of One's Family. Respondents also specified their individual levels of concern with respect to the safety of their family on a similar seven-point scale. Taken together, judges expressed moderate amounts of concern for family safety (M = 3.11; SD = 1.61; Mdn = 3.00). A two-tailed paired-sample t-test revealed that concern for family was significantly greater that concern for personal safety ($t(144) = 3.94$, $p < .001$). Analyses revealed no significant gender differences ($p > .10$); however, judges who had previously experienced a work-related stress/safety incident, exhibited greater concern for family safety (M = 3.48; SD = 1.80) than judges who had not (M = 2.85; SD = 1.40; $t(141) = 2.32$; $p < .03$).

Specific Safety Concerns. Judges were also asked to rate their concern for 19 different work-related safety threats on five-point scales (1 = not at all to 5 = extremely). Results are displayed in Table 5.

TABLE 5: RATINGS OF CONCERN FOR SPECIFIC SAFETY-RELATED THREATS

Specific Threat	M, Mdn, SD
Inappropriate letters	1.74; 2.00; .68
Inappropriate phone calls	1.83; 2.00; .68
Inappropriate faxes	1.59; 1.00; .75
Threatening letters	2.13; 2.00; .99
Threatening phone calls	2.10; 2.00; 1.03
Threatening faxes	1.90; 2.00; 1.03
Receiving a bomb or anthrax in the mail	1.52; 1.00; .89
Being inappropriately approached	2.46; 2.00; .97
Being followed	2.06; 2.00; 1.05
Being confronted face-to-face	2.26; 2.00; .99
Being physically assaulted	2.06; 2.00; .95
Being seriously injured by a defendant	1.85; 2.00; .95
Being seriously injured by a defendant's family	1.82; 2.00; .93
Being seriously injured by court personnel	1.13; 1.00; .18
Being seriously injured by random person in the courtroom	1.60; 1.00; .74
Having a gun pulled on you	1.88; 2.00; .95
Having a knife pulled on you	1.82; 2.00; .90
Bomb threats in the courthouse	1.74; 2.00; .98
Anthrax in the courthouse	1.35; 1.00; .71

Note: *(1 = not at all; 5 = extremely)*

The specific threats judges were most concerned about were being inappropriately approached (M = 2.46; SD = .99), being confronted face-to-face (M = 2.26; SD = .99), receiving threatening letters (M = 2.13; SD = .99) or phone calls (M = 2.10; SD = 1.03), being followed (M = 2.06; SD = 1.05), and being physically assaulted (M = 2.06; SD = .99). Alternatively, respondents were least concerned about being seriously injured by court personnel (M = 1.13; SD = .18) and anthrax in the courthouse (M = 1.35; SD = .71).

Only one gender difference emerged in these analyses. Female respondents (M = 2.35; SD = 1.07) were significantly more concerned about being followed than males (M = 1.83; SD = .91; $t(141) = 3.07$; $p < .01$). Additionally, those judges who had previous experience with a safety/stress incident at work rated being significantly more concerned with receiving inappropriate letters (M = 1.92; SD = .91) than their counterparts who had never experienced such an event (M = 1.65; SD = .59; $t(141) = 2.32$; $p < .04$).

Experiences with Safety Incidents. Judges reporting that they had previously experienced a threatening event were asked to specify what types of threats they had encountered. A total of 26 different types of events were reported (see Table 6).

Inappropriate or threatening letters were the most common (55, 33.5%), followed by inappropriate or threatening phone calls (27, 16.5%), and death or bomb threats (13, 7.9%, each).

TABLE 6: EXPERIENCES WITH THREATENING SITUATIONS/EVENTS

Incident	#	% (of total)
Inappropriate/Threatening letters	55	25.82
Inappropriate/Threatening calls	27	12.68
Death threats	19	8.92
Bomb threats	13	6.10
Face-to-face confrontation (with litigant or family member)	13	6.10
Verbal threats in court	12	5.63
Inappropriately approached	11	5.16
Threats to home or family	10	4.69
Physically attacked in court	10	4.69
False accusations	10	4.69
Other incident	7	3.29
Weapons seized at courthouse/in courtroom	6	2.82
Had a gun pointed at	4	1.88
Target of pranks	4	1.88
Anthrax threats	2	0.94
Threats against staff members	1	0.47
Physically assaulted outside of courthouse	1	0.47
Fellow judge shot	1	0.47
Personal residence attacked (arson)	1	0.47
Threat requiring personal police escort	1	0.47
Escape attempt by defendant in court	1	0.47
Followed outside of courthouse	1	0.47
Public postings discouraging reelection	1	0.47
Tires slashed	1	0.47
Witness attacked in court	1	0.47
TOTAL	**213**	**100**

Face-to-face confrontations involving either a litigant or a relative of a litigant (12, 7.3%), verbal threats in court (9, 5.5%), and being inappropriately approached (8, 4.9%) were also among the more frequently reported incidents reported by respondents.

Precautionary Measures. Judges were asked what measures they had taken to address their safety concerns by checking items from a checklist of 14 possible measures. Seventy percent of judges indicated they had taken at least one precautionary measure and nearly one-third (31.9%) specified taking over three. Respondents listed a total of 336 precautionary measures (see Table 7).

TABLE 7: PRECAUTIONARY MEASURES TAKEN TO ADDRESS SAFETY CONCERNS

Safety Precaution	#	% (of total)
Purchased a cellphone	65	18.84
Added more security in the courtroom	54	15.65
Increased home security (e.g., alarms, motion sensitive lighting, etc.)	49	13.24
Purchased cellphones for family	46	13.33
Purchased a firearm	36	10.43
Varied schedule	28	8.12
Bought mace/pepper spray	11	3.19
Stopped working late hours	10	2.90
Changed locks at personal residence	10	2.90
Purchased a guard dog	10	2.90
Enrolled in self-defense classes	7	2.03
Take additional measures to protect family (e.g., create emergency plans)	6	1.73
Enlisted security detail/police escort	4	1.16
Increased general awareness of personal surroundings	4	1.16
Changed travel route	2	0.57
Wore bulletproof vest	1	0.28
Changed personal phone number	1	0.28
Other	1	0.28
TOTAL	336	100

The most frequently reported response was the purchase of a cellphone (65, 17.6% of total), followed by adding to existing courtroom security (54, 14.6%), increasing security at personal residence (49, 13.2%), buying cellphones for family members (46, 12.4%), and purchasing a firearm (36, 9.7%). The number of precautionary measures taken (e.g., installing safety alarms in home, buying a gun) was positively associated with stress experienced during a trial (r = .18, $p < .05$), concerns about personal safety (r = .38, p < .01), and safety of family (r = .36, p <.01). Overall, judges adopted an average of 2.07

safety precautions (*SD* = 1.91, *Mdn* = 2.00). There were no significant differences between individuals who had experienced a work-related stress/safety incident and those who had not, or between male and female judges (all *p*s > .4)

Relationship between Stress and Safety

Research Question 4 focused on the potential relationship between judges' perceptions of safety and their experiences of stress. Analyses revealed significant positive associations between ratings of general experiences of stress and concerns about one's own personal safety ($r = 0.36$, $p < .01$) and safety of family ($r = 0.29$, $p < .01$). A similar positive relationship was found between stress experienced during a trial and concerns about personal ($r = .24$, $p < .01$) and family ($r = .27$, $p < .01$) safety. The number of physical and emotional symptoms of stress was positively correlated with both concern of personal ($r = 0.22$, $p <.05$) and family ($r = 0.27$. $p < .01$) safety. Scores on the CESD were also positively associated with personal- and family-safety concerns ($r = 0.371$, $p <. 001$; $r = .302$; $p < .001$, respectively). Conversely, scores on the STAI short form were negatively correlated with safety concerns (personal: $r = -0.357$, $p < .001$; family: $r = -0.312$, $p < .001$).

Concern for personal safety was positively correlated with ratings on each of the PTSD symptom measures. These items, on which respondents reported the extent to which a variety of negative psychological experiences were judged to be "descriptive of daily experience as a judge," included: having upsetting thoughts/images ($r = 0.20$, $p < .05$), feeling distant or cut off ($r = 0.26$, $p < .01$), feeling emotionally numb ($r = 0.21$, $p < .01$), feeling irritable ($r = 0.27$, $p < .01$), experiencing difficulties concentrating ($r = 0.23$, $p < .01$), being overly alert ($r = 0.60$, $p < .01$), and being jumpy or easily startled ($r = 0.54$, $p < .01$).

Likewise, concerns about the safety of one's family were also positively correlated to a variety of these experiences, including: feeling distant or cut off ($r = 0.23$, $p < .01$), feeling irritable ($r = 0.20$, $p < .05$), having difficulties concentrating ($r = 0.23$, $p < .01$), being overly alert ($r = 0.60$, $p < .01$), and being jumpy or easily startled ($r = 0.54$, $p < .01$).

DISCUSSION

The overarching purpose of the current exploratory study was to add to the relative paucity of research related to the judicial perspective on stress and safety by addressing five major research questions. Research Question 1 concerned judges' perceptions of jury stress and what measures they have taken to protect jurors. Analyses revealed judges believe that it is their responsibility to protect jurors from stress, and they often take steps to reduce stress among jurors. Judges' beliefs about the court's responsibility to address juror stress, as well as the frequency of strategies used for reducing such stress, were unaffected by either gender or experience with a work-related stress/safety event. In general, judges used a variety of different strategies to reduce juror stress. The most commonly employed measures paralleled previous research by the NCSC[61] suggesting the protection of jurors from potential stress is accepted among judges as a requisite occupational duty. Regardless of gender or experience with a work-related stress/safety incident, the belief that jurors should be protected, and the propensity to protect jurors, is strong among members of the judiciary surveyed.

Research Question 2 shifted the focus to the stress experienced by judges, what aspects of their occupational duties were most stressful, and how they sought to cope with stress. Results provide support for the notion that members of the judiciary are susceptible to occupational stress. Moreover, the study allowed for the more detailed examination of the nature of stress experienced by judges by integrating numerous dependant measures not utilized in previous research. Three separate measures of stress provide a relatively stable pattern of reporting in which judges reported experiencing moderate levels of stress, both in general and during the course of a given trial. Judges also reported several emotional and physical manifestations of stress, the most prevalent of which were irritability, anxiety, sleep disturbances, muscle tension, and anger. Importantly, several judges believed that occupational stress resulted in more serious emotional and physical maladies, such as eating problems, depression, hypertension, and diabetes. Scores on the CESDS also indicated potential depressive impairment in the responding judges as their scores were almost double that of the average of the general population. Stress did not, however, appear to greatly impact judges' self-reports of their abilities to perform their occupational duties.

The current study also revealed the specific sources of stress for judges. The highest levels of stress for judges stemmed from experiencing cases involving crimes against children, sexual crimes, and violent crimes. Fear over public identification, characteristics of the parties, and safety concerns were all moderately stressful. Judges also reported stress stemming from long and boring trials, trial interruptions, heavy workload, the nature of the political process, and tension among colleagues and staff.

In light of the increasing frequency of accounts of violence at the courthouse and against members of the judiciary, Research Question 3 addressed how judges felt about their personal safety and what protective measures they had adopted in response to safety concerns. Although nearly three in five respondents (58.9%) indicated previous experience with a work-related threatening situation/event (see Table 6), in general, judges did not report being excessively concerned with safety. They did express greater fear for family safety than personal safety ($M = 3.11$ and $M = 2.80$ respectively, rated on seven-point scales), though these ratings suggested only modest levels of concern. In addition, judges did not report being deeply concerned with any of the 19 specific threats listed in the survey. Even the individual threats with the highest ratings did not average above 2.5 (the scale midpoint).

The most frequent safety-related incidents experienced by respondents were threatening letters and phone calls,[62] though more serious threats—such as death threats and face-to-face confrontations—were also among the more frequently

61. NCSC, *2002 Manual*, *supra* note 29.

62. *See also,* Harris, *Judicial Workplace, supra* note 10, at 43.

reported incidents. The most common precautionary measures taken in response to safety concerns were the purchase of a cellphone, increasing security (both at the courthouse and at one's personal residence), and the purchase of a firearm. Over half (54.6%) of all respondents reported adopting multiple precautionary measures in response to safety issues.

Our fourth research question bridged two of the aforementioned points of interest by exploring the relationship between judges' perceptions of safety and their experiences of stress. Analyses revealed a generally consistent relationship between safety concerns and measures of stress. Concern for personal and family safety were, for example, positively associated with general stress and stress experienced during the course of a trial, deleterious physical and emotional symptoms, and numerous negative psychological experiences (e.g., irritability, difficulty concentrating) characterized as being descriptive of daily experience as a judge.

The fifth and final research question focused on individual differences in judges' experiences of stress and perceptions of safety in relation to gender and experience of a stress/safety-related work incident. In many respects, female judges reported experiencing greater stress and being more concerned with safety issues than their male counterparts. For example, based on several measures of stress, females were consistently more likely to report experiencing general and trial-related stress. In addition, female judges were more likely to report that their responsibilities had been compromised by stress than were male judges. This trend parallels findings from previous judicial stress research, such as that of Jaffe and colleagues,[63] which found that females exhibited more symptoms of vicarious trauma than males. Females also reported greater levels of concern for personal safety, a finding of considerable interest.

In addition, judges who had previously experienced a work-related stress/safety incident, such as a threatening or violent act, also consistently reported greater stress and concerns for personal safety on virtually all measures. There were no differences, however, among judges of different types (e.g., criminal vs. civil judges) on any variable. This indicates that all judges in this exploratory study, without regard to their specific duties (e.g., criminal or civil court) experience stress and safety needs similarly.

Several caveats warrant consideration in the current study. The first relates to socially desirable responding. Various design features of the study attempted to encourage unbiased and accurate responses. For example, the amount of personal information asked of the judges was intentionally limited to reduce the possibility that there would be a concern that answers could later be connected to the individual. Moreover, internet surveys have been suggested to have some advantages in eliciting more honest responses in comparison to other methods, such as face-to-face interviews.[64]

Nevertheless, it is possible that the respondents' answers were susceptible to social desirability. For example, the self-report measure of compromised responsibilities resulting from experiences of stress may have been flawed in that judges were likely to under-report the negative impact of stress on their responsibilities. This is plausible given that: (1) judges may not fully recognize the negative impact of stress; and (2) reporting such vulnerability is not socially desirable because such an admission would have negative implications for their personal legal decisions as well as for the integrity of the legal system. This idea seems to gain credibility when considering judges' specific explanations about how their responsibilities had been compromised. A number of judges reported that stress led to decreased productivity, inappropriate courtroom demeanor, decreased concentration, and compromised courtroom decisions. These explanations do not seem to correspond with the overall low scores seen in the close-ended self-report measures. Thus, when asked directly about the negative effects of stress, judges were apprehensive to report, but when given the opportunity to explain in open-ended fashion, it did appear that judges' were able to list specific ways in which their responsibilities were seriously compromised by stress.

In addition, it is also possible that socially desirable responding may have factored into ratings of safety concerns. That is, respondents may have been less inclined to acknowledge concern about certain threats and safety issues, for example, because such a concession may be perceived as communicating the effectiveness of threats they encounter, which could encourage future acts. While responses did not indicate high levels of fear, a substantial proportion of judges (70.56%) reported having adopting at least one precautionary measure to address perceived safety issues, suggesting concern was sufficient to motivate reactions among those surveyed.

It should also be noted that the respondents to the survey represented a convenience sample, recruited by their affiliation with either the NCJFCJ, or the University's Judicial Studies program. This sample may not necessarily be representative of the general population of judges and their experiences of stress or perceptions of safety. Future research should build upon the current work by employing a systematic, nationwide sampling plan.

CONCLUSIONS AND RECOMMENDATIONS

The judicial system in our society is grounded on an assumption that both judges and jurors can function effectively under sometimes severely trying circumstances. Recent research on juror stress has revealed that there are significant impediments to juror functioning under some circumstances. The limited research on judicial stress, including that reported herein, suggests that problems of stress effects are shared by judges as well.

There are a number of conclusions and recommendations that flow from this exploratory study, not the least of which is that much more research is needed in this area, which has received little attention from researchers dealing with occupational stress or those focusing on the functioning of judges within the judicial system. Future research can be guided somewhat by our tentative findings derived from the five research questions we addressed.

63. Jaffe, *Vicarious Trauma in Judges, supra* note 10, at 4.

64. Martin Schonlau, Ronald D. Fricker, Jr. & Marc N. Elliot, CONDUCTING SURVEYS VIA E-MAIL AND THE WEB 17 (2002).

Concerning judges' feelings of responsibility toward jurors, judges commonly take small steps, such as being sensitive to juror needs and explaining trial procedures. However, more formal procedures (e.g., debriefings) may also be needed.[65] Such interventions could not only help jurors directly, but might also help judges, who will experience less stress because they are able to better fulfill their occupational duty of protecting jurors.

The issue of stress felt by judges was also examined, revealing a number of stressors and effects, although most judges claimed that these did not affect their functioning as judges. Nevertheless, high amounts of depression or anxiety can affect personal and work life, suggesting that interventions may be needed. A workplace-wide attitude change should take place in courthouses, making therapeutic measures, such as time off or professional help, acceptable for judges.[66]

While interventions have been employed to address juror stress, judges have largely been ignored, though they may benefit from similar measures. For example, posttrial debriefings following difficult trials may also be necessary for judges. In addition, court administrators should be aware of other occupational stressors, such as heavy workload and tension among colleagues, in order to develop policies to relieve any ill effects. These are likely very specific to each court (e.g., each court has specific problems), but the finding that so many judges reported general problems in this domain suggests that courts should consider procedural changes to reduce these stressors.

Judges' concerns about personal safety and precautionary measures taken revealed an interesting pattern. The ratings of concern found were in some ways contradictory to the somewhat high prevalence of measures respondents reported adopting in response to safety threats, suggesting judges may have been hesitant to openly disclose personal concern about safety issues. Harris et al.[67] discovered a similar phenomenon, finding that even though judges reported altering both personal and occupational behaviors after experiencing a safety-related event, many claimed not to have been affected by the threat of violence. This issue needs more study to discern if these findings represent reality, or if judges are simply not reporting accurately.

On the question of the relationship of perceptions of safety and stress, our results revealed considerable reason for concern. These results reinforce assertions regarding the importance of safety-related issues for the judiciary and the need to address these concerns[68] so that the functioning of the judicial system is not negatively impacted.

The findings suggesting that women are either more susceptible to stress or are more open about reporting stress and safety concerns demand more study. If females are more affected by safety concerns and stress, then intervention efforts may benefit female judges by incorporating specific measures tailored to the needs of female judges into the design of the intervention. Alternatively, if these differences are the product of a self-report bias, male judges should be encouraged to more openly acknowledge their experiences of stress and seek help without fear of stigmatization since their female counterparts are already more likely to do so. This underscores the importance of a general attitudinal change discussed by Miller and colleagues,[69] in which the judicial system would come to support stress interventions as a necessary and important part of the trial process.

These results from our exploratory research suggest that any stress or safety interventions should equally focus on the protection and well-being of all judges. The results should contribute to a broader understanding of the nature of judicial stress, providing insight to into individual differences associated with both experiences of stress and safety concerns. Our research focus emphasizes how maintaining a safe and secure environment is important not only for judges, but ultimately also for the proper functioning of the American trial system. We hope that the work reported herein will encourage others to pursue research in this important area of study.

A number of caveats were noted for the research reported herein, including especially the possibility of socially desirable responses, and the fact that our sample was not representative. These caveats notwithstanding, this study represents an expansion on the research on courtroom stress and safety in particular in relation to judicial perspective. Through the incorporation of new dependant measures, including clinical instruments, this study builds on previous research by allowing for a more detailed examination of the nature of the stress experienced by judges. Moreover, this study represents the first research effort integrating both judicial stress and safety, allowing for the examination of the relationship between two important factors encountered by members of the judiciary. This research also adds to previous studies of judicial stress by examining individual differences, more specifically gender and experience with a work-related stressful incident, and their relation to both perceptions of stress and safety.

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65. Miller, *Courtroom Stress, supra* note 8, at 9.
66. *Id,* at 9.
67. Harris, *Judicial Workplace, supra* note 10, at 50.
68. Chamberlain, *Stress Triad, supra* note 13; Don Hardenbergh, *The Future of Court Security and Judicial Safety*, *in* FUTURE TRENDS IN STATE COURTS (Tracy Peters, Neal Kauder, Chuck Campbell, & Carol Flango, eds., 2005), available at http://www.ncsconline.org/WC/Publications/Trends/2005/CtSecuJudclSafetyTrends2005.pdf.
69. Miller, *Courtroom Stress, supra* note 8, at 8.

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NOTICE FOR AMERICAN JUDGES ASSOCIATION MEMBERS

The newsletter of the American Judges Association, *Benchmark*, has been moved from print to electronic publication. If we have your email address on file, we will send *Benchmark* to you each time it is published. *Benchmark* is the official newsletter of the AJA, and it contains notice of AJA activities, elections, awards, and events. This move will help us make sure that you get timely notice of AJA information, and it will also help us in keeping AJA dues as low as possible.
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Apologies and Settlement

Jennifer K. Robbennolt

When one person allegedly injures another, he or she will often attempt to provide an account for the conduct that led to the injury. Specifically, he or she might attempt to disavow, explain, excuse, or justify the behavior that purportedly led to the injury. Alternately, he or she might offer an apology to the injured person. Apologies can be distinguished from other forms of accounting in that they acknowledge responsibility for the conduct that caused the harm. Accepting blame and expressing regret for one's behavior signals a recognition of the norm or rule that was violated and of the harm caused to the other.[1]

Such acknowledgment can be complicated in the context of litigation. When the offense is such that it raises the possible involvement of the legal system, defendants, defense counsel, and insurance companies have traditionally worried that apologizing will only make things worse for the defendant; specifically, that any apology will be viewed as an admission and will lead to more certain legal liability.[2] Indeed, there is evidence that although civil defendants, such as physicians in medical malpractice cases, may sometimes desire to offer apologies, they are also concerned that disclosure or acceptance of responsibility would increase the possibility for legal liability.[3]

As a general matter, of course, an apology by a party to litigation is potentially admissible under the exception to the hearsay rule that allows admission of a party's own statements. Other rules of evidence may prevent the admission of certain apologetic statements in some circumstances – for example, statements made in settlement discussions may be protected under Rule 408. However, apologies that are made outside of these contexts are potentially admissible. Consequently, many defendants avoid apologizing and are so counseled by their attorneys and insurers.

Despite the potential risks, however, there has been growing interest in the possibility that clients might benefit, legally and otherwise, from apologizing.[4] Indeed, empirical studies examining the impact of apologies in a variety of contexts have demonstrated a range of positive effects that flow from apologizing. These effects include more favorable attributions, more positive and less negative emotion for both apologizer and recipient, improved physiological responses for both parties, improved future relations, decreased need to punish, and more likely forgiveness. In addition to the potential physical, psychological, and relational benefits of apologies, commentators have argued that apologies have the potential to facilitate the settlement of legal disputes—breaking impasse to allow productive negotiation, allowing resolution to occur more quickly, addressing parties' non-legal concerns, or resulting in financial settlement terms that are more favorable to the one who has apologized.

Some proponents of encouraging apologies in litigation have considered how defendants who desire to apologize might do so "safely" given the patchwork of evidentiary protection traditionally available. One recommendation has been that defendants consider offering statements that express sympathy for the other party, but that stop short of admitting responsibility for having caused injury (i.e., "I'm sorry you were hurt" rather than "I am sorry I hurt you."). These sympathetic expressions are not complete apologies by most definitions—lacking, in particular, an acknowledgment of responsibility for the behavior that led to the harm. However, it is argued that by offering at least an expression of sympathy, defendants can reap some of the benefits of apologizing while simultaneously minimizing any increase in liability risk.

Concurrently, many states have recently enacted statutes that are intended to encourage and protect certain apologetic expressions by making them inadmissible in court. Massachusetts enacted the first statute preventing the admission of some apologies in 1986.[5] Since then, over two-thirds

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Footnotes

1. *See generally* Nicholas Tavuchis, Mea Culpa: A Sociology of Apology and Reconciliation (1991).
2. It is worth noting that, empirically, it is not clear whether, under what circumstances, or to what degree an apology might alter the risk of an adverse liability determination. Whether apologies influence liability decision making in civil cases has not been examined in empirical studies. On one hand, in the criminal context, confession evidence has been shown to exert a powerful effect on decision making. *See e.g.*, Saul Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 Psychol. Sci. Pub. Int. 33 (2004); Saul M. Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 Law & Hum. Behav. 469 (1997). On the other hand, studies examining attributions of responsibility in nonlegal contexts have found that offenders who apologize are seen as having acted *less* intentionally and are blamed *less*. *See e.g.*, Steven J. Scher & John M. Darley, *How Effective Are the Things People Say to Apologize? Effects of the Realization of the Apology Speech Act*, 26 J. Psycholinguistic Res. 127 (1997).
3. Thomas H. Gallagher et al., *Patients' and Physicians' Attitudes Regarding the Disclosure of Medical Errors*, 289 JAMA 1001 (2003).
4. *See, e.g.*, Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. Cal. L. Rev. 1009 (1999); Erin Ann O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 Wash. L. Rev. 1121 (2002); Aviva Orenstein, *Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where You Would Least Expect It*, 28 Sw. U. L. Rev. 221 (1999); Daniel Shuman, *The Role of Apology in Tort Law*, 83 Judicature 180 (2000); Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 Yale L.J. 1135 (2000).
5. Mass. Gen. Laws Ann. Ch. 233, § 23D (West 1986).

of the states have followed suit and have enacted statutes that explicitly provide some apologies with evidentiary protection (see Appendix). Many of these statutes apply to civil litigation generally; others apply specifically to cases of medical error. In addition, these statutes vary as to the type of apologetic statements that are protected. For example, some statutes only prevent the admission of those statements that express sympathy (i.e., "I'm sorry that you were hurt."), while preserving the admissibility of any statement that acknowledges fault (i.e., "It was my fault."). Other statutes have gone further, also providing protection to statements that express "fault," "error," or "mistake." Still other statutes protect "apologies" without clearly defining the term.

Proponents of these protected apologies suggest that if the law prevents the admission of apologetic expressions, defendants will be more likely to offer them. However, whether these apology statutes will result in more apologies and what form such apologies might take are open empirical questions. Many argue that apologies are impeded by the fear of litigation generally, and the fear that an apology will increase the risk of liability more specifically. However, other cultural and psychological barriers to apologizing operate as well. Apologies are difficult to make—admitting that one's behavior has caused harm and apologizing for it is embarrassing and injurious to one's pride. Nancy Berlinger recognizes the role that these other obstacles to apologies may play when she notes that "merely protecting apologies is not the same as encouraging them. Genuine apologies are never fun to make."[6]

Critics of providing evidentiary protection for apologies recognize the possibility that allowing apologies to be introduced against the apologizer in a subsequent legal proceeding could have a "chilling effect" on such expressions of remorse, but argue that removing the legal consequences of apologizing would diminish the moral content of the apology.[7] Others, however, argue that even legally protected apologies are socially useful, can promote settlement, and should be encouraged (or at least not discouraged).

Recent empirical work has begun to explore the role of apologies in the civil justice system and to examine the nuances of the ways in which apologies may influence the resolution of legal disputes. This body of work suggests that apologies have a role to play in fostering settlement, but that the complexities of the apologies, the context in which they are offered, and whether the apology is being evaluated by a claimant, attorney, or judge, may moderate the ways in which apologies influence settlement.

EXAMPLES OF APOLOGY LEGISLATION

- Statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action. MASS. GEN. LAWS ANN. CH. 233, § 23D (West 1986).
- The portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident and made to that person or the family of that person shall be inadmissible as evidence of an admission of liability in a civil action. A statement of fault, however, which is part of, or in addition to, any of the above shall not be inadmissible pursuant to this section. CAL. EVID. CODE § 1160(a) (2000).
- In any civil action brought by an alleged victim of an unanticipated outcome of medical care, or in any arbitration proceeding relating to such civil action, any and all statements, affirmations, gestures, or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence which are made by a health care provider or an employee of a health care provider to the alleged victim, or a representative of the alleged victim and which relate to the discomfort, pain, suffering, injury, or death of the alleged victim as the result of the unanticipated outcome of medical care shall be inadmissible as evidence of an admission of liability or as evidence of an admission against interest. COLO. REV. STAT. § 13-25-135 (2003).

I. CLAIMANTS AND APOLOGIES

As an initial matter, people anticipate that they would desire an apology if they were injured by another. A number of studies have found that medical patients report that they would want to receive an apology from their physician if the physician made a mistake.[8] In addition, studies that have asked litigants about their motives for bringing suit find that many of these plaintiffs believe that an apology from the other side is one factor that might have changed the course of the litigation.[9]

6. NANCY BERLINGER, AFTER HARM: MEDICAL ERROR AND THE ETHICS OF FORGIVENESS 62 (2005).
7. Taft, *supra* note 4.
8. *See, e.g.*, Gallagher et al., *supra* note 3; Kathleen M. Mazor et al., *Health Plan Members' Views About Disclosure of Medical Errors*, 140 ANNALS INTERNAL MED. 409 (2004); Amy B. Witman et al., *How Do Patients Want Physicians to Handle Mistakes? A Survey of Internal Medicine Patients in an Academic Setting*, 156 ARCHIVES INTERNAL MED. 2565 (1996).
9. Gerald B. Hickson et al., *Factors that Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries*, 267 JAMA 1359 (1992); John Soloski, *The Study and the Libel Plaintiff: Who Sues for Libel?*, 71 IOWA L. REV. 217 (1985); Charles Vincent et al., *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 LANCET 1609 (1994).

Since implementing this policy, the hospital reports that patients are less angry following adverse events and are more likely to maintain a good relationship with the hospital.

Similarly, particular institutions have successfully adopted polices of disclosing errors, apologizing for them, and compensating for the resulting injuries. For example, at the Veterans Affairs Medical Center in Lexington, Kentucky, patients are informed that there has been an adverse event whether or not they are already aware that there has been an incident. If the hospital determines that there has been an error, an apology is proffered and an offer of settlement made. Since implementing this policy, the hospital reports that patients are less angry following adverse events and are more likely to maintain a good relationship with the hospital. The hospital also reports that cases settle more quickly, self-reporting of errors by the medical professionals has increased, the hospital has received positive publicity, and litigation costs have declined.[10] Other institutions (e.g., University of Michigan Health System, John's Hopkins, Children's Healthcare of Atlanta, Sturdy Memorial Hospital in Boston) as well as private insurers (e.g., COPIC) have adopted similar policies and report similarly positive results.[11]

In addition to this data from the field, experimental research has provided insight into the processes by which apologies can influence the ways in which injured parties construe an injury-producing incident and, thus, their willingness to settle. Specifically, these experiments find that apologies influence a variety of litigation related judgments and decisions, including the inclination to seek legal advice, the positions taken in settlement negotiations, and the likelihood of accepting a particular settlement offer.

In one study, Kathleen Mazor and her colleagues explored patients' decisions about whether to obtain legal advice following a medical injury.[12] Members of an insurance plan were asked to take the perspective of a patient who had been injured by a medical error. Participants were either told that following the error the physician provided little information and did not take responsibility for the error (the "nondisclosure" condition) or were told that the physician provided information about what had happened, apologized, and took responsibility for the error, and detailed steps that would be taken to prevent recurrence (the "full disclosure" condition). Patients who were told that the physician had provided full disclosure and an apology following the error expressed greater satisfaction and fewer negative emotions, reported more trust in the physician, were less likely to indicate that they would change doctors, and were less likely to indicate that they would seek legal advice in response to the incident than were patients whose physician had not disclosed and apologized.

Professors Russell Korobkin and Chris Guthrie conducted an experimental investigation of the effects of an apology on litigants' settlement decisions in a landlord-tenant dispute.[13] Participants were asked to assume the role of the tenant in a dispute between a landlord and tenant over a broken heater and to evaluate a particular offer of settlement from the landlord. Participants who were told that the landlord had apologized to them were marginally more likely to accept the landlord's offer than were participants who had not received an apology.

Similarly, I conducted a series of studies to examine how laypeople in the role of an injured party respond to apologies in making settlement decisions.[14] Participants were asked to respond to a scenario in which they were injured in a bicycle-pedestrian collision. The other party offered either a partial apology, which consisted of an expression of sympathy but no acceptance of responsibility, a full, responsibility-accepting apology, or no apology. Apologies, particularly those that accepted responsibility for having caused injury, favorably influenced a variety of attributions made about the situation and the other party, including perceptions of the character of and the degree of regret experienced by the other party, expectations about the way in which the other party would behave in the future, and expectations about the relationship between the parties going forward. Similarly, apologies influenced the emotions that participants reported they would feel—decreasing anger toward the other party and increasing sympathy for the other's position. Full, responsibility-accepting apologies showed these effects consistently. Apologies that merely expressed sympathy were more context dependent, favorably influencing these attributions under some circumstances, but not in others.

These studies also found that apologies influence judgments that are directly related to legal-settlement decision making. Many studies have demonstrated that the value that a negotiator sets as his or her reservation price (or "bottom-line"), the negotiator's aspirations, and the negotiator's judgment about what a fair settlement would entail, all influence

10. *See* Jonathan R. Cohen, *Apology and Organizations: Exploring an Example from Medical Practice*, 27 FORDHAM URB. L.J. 1447 (2000); Steve S. Kraman, *A Risk Management Program Based on Full Disclosure and Trust: Does Everyone Win?*, 27 COMPREHENSIVE THERAPY 253 (2001); Steve S. Kraman & Ginny Hamm, *Risk Management: Extreme Honesty May Be the Best Policy*, 131 ANNALS INTERNAL MED. 963 (1999).
11. *See* Rae M. Lamb et al., *Hospital Disclosure Practices: Results of a National Survey*, 22 HEALTH AFF. 73 (2003); Virginia L. Morrison, *Heyoka: The Shifting Shape of Dispute Resolution in Health Care*, 21 GA. ST. U. L. REV. 931 (2005); Rachel Zimmerman, *Medical Contrition: Doctors' New Tool to Fight Lawsuits: Saying 'I'm Sorry,'* WALL STREET J., May 18, 2004, at A1; *see also* Sorry Works!, http://www.sorryworks.net (last visited Feb. 9, 2009).
12. Mazor et al., *supra* note 8; Kathleen M. Mazor et al., *Disclosure of Medical Errors: What Factors Influence How Patients Respond?* 21 J. GEN. INTERNAL MED. 704 (2006).
13. Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107 (1994).
14. Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460 (2003); Jennifer K. Robbennolt, *Apologies and Settlement Levers*, 3 J. EMPIRICAL LEGAL STUD. 333 (2006).

final negotiated outcomes. In my studies, there were circumstances under which claimants who received an apology had lower aspirations and set lower values for their judgments about what would be a fair settlement value.

Similarly, apologies influenced how individuals evaluated a settlement offer in terms of its ability to make up for the harm suffered, how they appraised their need to punish the other party, and how they assessed their willingness to forgive the other party. Participants receiving apologies judged an offer as being more adequate, felt less need to punish the other party, and were more willing to forgive than were participants who did not receive apologies. Finally, full, responsibility-accepting apologies increased the tendency of recipients to accept a particular settlement offer. Interestingly, none of these judgments or decisions were systematically influenced by variations in the evidentiary rule governing apologies.

Thus, there is evidence that apologies are valued by claimants and that apologies may help to facilitate settlement. However, in addition to the hope that apologies may facilitate settlement, much concern has been expressed about the possibility that plaintiffs will be taken advantage of by insincere apologies or that plaintiffs are not attentive enough to law (e.g., evidentiary rules) and will improvidently forfeit legal entitlements. In particular, there is concern that plaintiffs will be "duped by communication strategies into relinquishing valuable legal rights, which can actually exacerbate the economic dimension of suffering."[15] While strategic or insincere apologies may still serve some goals that plaintiffs have (e.g., serving to acknowledge the wrong), such apologies may fail to serve other plaintiff goals (e.g., achieving a change in behavior).

If litigants are able to detect and reject insincere apologies, there might be less cause for concern. This is because the perceived sincerity of an apology can matter to its recipients. People do not have the same favorable responses to explicitly insincere apologies that they have to sincere apologies,[16] and insincere apologies may actually cause people to react negatively.[17] Thus, as Professor Dale Miller has argued, when injured parties "perceive apologies to be insincere and designed simply to 'cool them out,' they often react with more rather than less indignation."[18]

It is not clear, however, how well injured litigants are able to detect and respond to insincerity, particularly when efforts are made to appear sincere.[19] On the one hand, claimants are sensitive to the differences in content conveyed by apologies that accept responsibility for having caused harm and statements that only express sympathy for injuries.[20] Similarly, the effectiveness of apologies is influenced by a variety of factors that might be seen as signals to the sincerity of the apology. Thus, apologies that include promises to forbear from similar wrongful conduct in the future, apologies that are accompanied by offers of compensation, and apologies that are properly timed all produce more favorable reactions than apologies without these features. These factors may operate, at least in part, by altering the perceived sincerity of the apology.

[T]here is evidence that apologies are valued by claimants and that apologies may help to facilitate settlement.

On the other hand, there is also evidence that people respond favorably even to apologies that seem to be insincere and that those who reject apologies, even unconvincing apologies, are judged less favorably than those who accept them.[21] Thus, an apology "script" that contemplates that an apology will be followed by acceptance of that apology may hold sway over apology recipients' behavior. In addition, norms of reciprocity may prescribe the acceptance of apologies. The reciprocity norm demands "that we should try to repay, in kind, what another person has provided us."[22] Concessions offered by one party to a negotiation trigger, under this norm, the obligation to make a reciprocal concession. If an apology offered by a defendant is viewed as a "concession," victims and observers may respond favorably because they feel an obligation to respond with a reciprocal "concession" of their own.

Finally, as noted above, there is no evidence that laypeople distinguish among apologies that are offered in the face of differing rules of evidence.[23] Litigants may focus on personal factors (e.g., this person must be sorry) to the neglect of situational factors (e.g., this apology didn't cost them anything) when making causal attributions about the apologetic behav-

15. Lee Taft, *On Bended Knee (With Fingers Crossed)*, 55 DePaul L. Rev. 601, 609 (2005-2006).
16. *See* Edward C. Tomlinson et al., *The Road to Reconciliation: Antecedents of Victim Willingness to Reconcile Following a Broken Promise*, 30 J. Mgmt. 165 (2004).
17. *See, e.g.,* Daniel P. Skarlicki et al., *When Social Accounts Backfire: The Exacerbating Effects of a Polite Message or an Apology on Reactions to an Unfair Outcome*, 34 J. Applied Soc. Psychol. 322 (2004). *See also* Robbennolt, *Apologies and Legal Settlement, supra* note 14.
18. Dale T. Miller, *Disrespect and the Experience of Injustice*, 52 Ann. Rev. Psychol. 527, 538 (2001).
19. *Compare* William Ian Miller, Faking It 78 (2003) (arguing that apologies are easy to "fake") and Jeffrie G. Murphy, *Remorse, Apology, and Mercy*, 4 Ohio St. J. Crim. L. 423 (arguing that remorse and repentance are easy to fake) *with* Orenstein, *supra* note 4 (arguing that "the emotion of contrition is hard to fake in person").
20. Robbennolt, *Apologies and Legal Settlement, supra* note 14.
21. *See* Mark Bennett & Christopher Dewberry, *"I've said I'm sorry, haven't I?" A Study of the Identity Implications and Constraints that Apologies Create for Their Recipients*, 13 Current Psychol. 10 (1994); Jane L. Risen & Thomas Gilovich, *Target and Observer Differences in the Acceptance of Questionable Apologies*, 92 J. Personality & Soc. Psychol. 418 (2007).
22. *See* Robert B. Cialdini, Influence: Science and Practice 19 (1993).
23. Robbennolt, *Apologies and Legal Settlemen, supra* note 14; Robbennolt, *Apologies and Settlement Levers, supra* note 14. Note, however, that an apology can be sincerely offered even though it is subject to a rule protecting it.

Importantly, there are a number of reasons that attorneys might be expected to have different responses to apologies than do laypeople.

ior. Accordingly, they may not be sensitive to variations in the evidentiary value of apologies that result from these different evidentiary rules.

II. ATTORNEYS AND APOLOGIES

In any case, there is growing empirical evidence to support the notion that claimants tend to respond favorably to apologies offered in settlement negotiation. The litigants themselves, however, are not the only legal actors involved in legal-settlement decision making. Legal negotiation is often characterized by the involvement of attorneys in the negotiation process. While the client, not the attorney, is supposed to make the ultimate decision about whether to accept or reject a settlement offer, attorneys are likely to have considerable influence on the client's settlement decisions. Clients look to their attorneys for advice and rely on them for knowledge of the substantive rules governing the case, their understanding of the processes involved, and their expertise as negotiators.

Given the presence of lawyers in much legal negotiation and their influence on client decision making, it is important to understand the effects that apologies might have on the settlement recommendations that attorneys make to their clients. Importantly, there are a number of reasons that attorneys might be expected to have different responses to apologies than do laypeople.

First, attorneys may respond differently to apologies for reasons attributable to their role as agent, rather than as a party to the underlying dispute. Attorneys as agents are likely to be more detached from the interpersonal aspects of the dispute as they have neither been injured nor alleged to have done the injuring, and the relationships at issue are not their own. This detachment may enable the attorney to manage the conflict in a way that avoids the barriers to settlement that may result from an emotionally charged atmosphere, and may also lead the attorney to respond differently than the client would have to the psychological and emotional aspects of the dispute and to place different emphasis on the importance of an apology. Moreover, recent research that has shown that observers are more likely to distinguish between sincere and insincere apologies than are the direct recipients of apologies. In contrast to direct recipients, observers do not feel obligated to credit insincere apologies, and when observers do reject such apologies they do not expect to be and are not judged more harshly.[24] Thus, the social constraints that may limit recipients' responses to apologies do not appear to operate the same way when it comes to third-party observers.

A separate set of role effects may be related to the ways in which attorneys are compensated. Plaintiffs' attorneys, who are often compensated by a contingency fee, may not be inclined to negotiate lower monetary settlements in light of apologies, while defense attorneys, who are more likely to be compensated by an hourly fee, may not be eager to speed settlement of a case with an apology. At the same time, however, it is argued that contingency fee lawyers have incentives to settle cases quickly, and apologies may be consistent with that end.

Second, there is evidence that attorneys are selected and trained to be more analytical and less emotional in their general approach to settlement than are their clients.[25] Of particular relevance to how attorneys and clients will respond to apologies in litigation, there is evidence that lawyers may be less influenced by concerns for equity or vindication and more concerned with expected value analysis in responding to settlement offers than are litigants.[26]

Third, attorneys may have a more heightened focus on protecting legal rights than do their clients. Indeed, one study found that the lawyers studied believed that one of the most fundamental roles they served as legal professionals was their service as "watchdogs" who are concerned with protecting their clients' legal entitlements.[27] In particular, attorneys may have a better sense of the evidentiary value of an apology and may be more attuned to the ramifications of evidentiary rules prohibiting or allowing apologies into evidence than are their clients. Thus, the evidential value of an apology and the rules of evidence that determine an apology's admissibility may have a relatively greater impact on how apologies are viewed by attorneys.

Using the pedestrian-bicycle accident scenario described above, I examined the effects of apologies on attorney perceptions and judgments.[28] The study asked attorneys to assume that they represented the client described in the scenario. Attorneys were then asked about their perceptions of the situation and to give their reservation prices, aspirations, and assessments of the fair settlement value of the case.

Attorneys' responses to apologies in the context of this case paralleled the responses of laypeople in previous studies in a number of ways. First, attorneys assessed apologies and the information communicated by the apologies in ways that were similar to the assessments made by claimants—assessing full, responsibility-accepting apologies more positively than they did partial, sympathy-only apologies and assessing both of these more positively than they did no apology. This suggests that attorneys and laypeople made similar judgments about the relative sufficiency of the different types of apologies and

24. Risen & Gilovich, *supra* note 21.
25. *See* Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 Am. U. L. Rev. 1337 (1997); Chris Guthrie, *The Lawyers' Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 Harv. Negot. L. Rev. 145 (2001); Leonard L. Riskin, *Mediation and Lawyers*, 43 Ohio St. L.J. 29 (1982).
26. Korobkin & Guthrie, *supra* note 13.
27. Craig A. McEwen et al., *Lawyers, Mediation, and the Management of Divorce Practice*, 28 L. & Soc'y Rev. 149 (1994).
28. Jennifer K. Robbennolt, *Attorneys, Apologies, and Settlement Negotiation*, 13 Harv. Negot. L. Rev. 349 (2008).

that the apologies conveyed similar information to both groups about the degree to which the offender thought he or she was responsible, the offender's regret, the degree to which the offender would be careful in the future, the degree to which the offender's conduct was offensive, the degree to which the offender respected the client, and the offender's moral character.

In contrast, however, apologies had differing impacts on attorney and claimant evaluations of the offender's responsibility, the client's anger, their own sympathy for the offender, the client's inclination to forgive the offender, and their own judgment that the offender should be punished. While claimants' evaluations tended to be more favorable to the offender following an apology, attorneys' evaluations were *not* influenced by apologies.

In addition, apologies influenced attorneys' settlement levers in ways that diverge from the ways in which apologies have been shown to influence claimants' settlement levers. Recall that apologies have been shown to *decrease* laypeople's aspirations and estimates of fair settlement value under some circumstances. In contrast, attorneys whose clients received a full apology set somewhat *higher* aspirations and made somewhat *higher* estimates of a fair settlement value than did attorneys whose clients received no apology. For plaintiff's attorneys, this pattern only held when the applicable evidentiary rule made such apologies admissible. That is, settlement levers were higher only when full apologies were offered *and* those apologies were not made inadmissible by the rules of evidence. This may suggest that attorneys are more attendant to the legal effects of the evidentiary rules than are litigants.

These findings suggest that attorneys have instincts about the functions of apologies that are different from the ways in which their clients react to apologies. Such a divergence is consistent with concerns about a disconnect between the perceptions and interests of attorneys and clients. Many commentators are concerned about the risk that attorneys' focus on the relevant legal rules will dominate the negotiation process and the ultimate settlement of the dispute, to the exclusion of the non-legal interests of the parties. In particular, many have argued that attorneys are inclined to dismiss apologies, despite evidence that they are valued by clients. This may lead attorneys on both sides to resist settlement or to push for trial where their clients might otherwise prefer to settle. Conversely, attorneys may not entirely understand their clients' or opposing clients' resistance to settlement in the absence of apologies. This may lead attorneys on both sides to dismiss claimant requests for apology and may result in a reduced ability to "bring [the] client along" to accept a settlement.[29] In addition, defense attorneys may advise their clients against apologizing because their perspective suggests that apologies will lead to *less* favorable settlement terms in addition to any increased liability risk. Any of these disconnects may interfere with attorneys' ability to settle cases to the best satisfaction of their clients.

These findings suggest that attorneys have instincts about the function of apologies that are different from the ways in which their clients react to apologies.

At the same time, however, it is possible that that the differences in the ways in which apologies affect claimant and attorney settlement levers could serve to bring attorney and client expectations closer in line with each other. Many have argued that plaintiffs sometimes bring with them unrealistic expectations about the value of a case and that plaintiffs' attorneys work to manage such expectations and to "sell" proposed settlements to clients. If this is true, then a decrease in plaintiffs' aspirations and a corresponding increase in their attorneys' aspirations could serve to bring attorney and client aspirations closer together, at least in some cases.

Whether their differing responses to apologies ultimately push attorneys and clients closer together or pull them apart, such divergences are likely to affect the discussion between attorney and client about settlement. Thus, attorneys must give special consideration to how to appropriately advise clients about settlement when an apology is at issue, balancing respect for the interests that clients have that are addressed by apologies while also providing a perspective that helps clients to evaluate the credibility and legal consequences of an apology offered in the context of litigation.

III. JUDGES AND APOLOGIES

Judges, of course, also play a role in the settlement of cases. Thus, understanding the ways in which judges respond to apologies is also important. Like the attorneys described above, judges are trained as lawyers, are skilled analysts, and are attentive to legal rights and responsibilities. However, unlike attorneys who represent one side or the other, judges are neutral participants in the dispute.

Judge Andrew Wistrich and Professors Jeff Rachlinski and Chris Guthrie recently conducted a series of studies to examine the effect of apologies on trial judges' decision making.[30] In two studies, they asked judges to consider the details of a case and to give their assessment of the appropriate settlement value of the case. In both cases, the defendants admitted responsibility for having caused the injuries to the plaintiff, but disputed the amount of damages at issue. Half of the judges were told that the defendant had offered a full, responsibility-accepting apology to the plaintiff during the settlement conference. In both studies, an apology by the defendant did not influence the settlement values provided by the judges. In a third study, the researchers examined the effect of an apology on judges' inclination to discharge a debtor's bankruptcy debt. Again, there were no effects of apology on judges' decisions.

29. *See* Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1, 24-25 & n.75 (finding that in 53% of cases that went to trial, settlement failed due to lawyer inability to "bring [the] client along").

30. Andrew J. Wistrich, et al., *Humans Judging Humans: Attribution and Blame in Trial Judges* (unpublished manuscript on file with author).

[I]t is also important for judges conducting settlement conferences to understand how their responses to apologies may differ from both those of the parties and their attorneys.

Thus, unlike other attorneys, judges did not appear to inflate their assessment of the appropriate settlement amounts in the face of an apology. Conversely, unlike claimants, judges did not appear to moderate their assessment of the appropriate settlement amounts in response to a defendant's apology. One important caveat to note in this regard is that in each of these cases, all judges were told that the defendant had accepted responsibility for having caused the harm. To the extent that either attorneys' expectation of a higher settlement amount or claimants' expectation of a lower settlement are driven by the acknowledgment of responsibility attendant to a full apology, it remains unclear what effect an apology might have on judges' assessments in cases in which liability was not already conceded.

Just as it is important for attorneys to understand how their responses to apologies may differ from those of their clients, it is also important for judges conducting settlement conferences to understand how their responses to apologies may differ from both those of the parties and their attorneys. An awareness of the ways in which apologies are valued by parties and understood strategically by attorneys may enable judges to assist the parties in crafting effective settlements. For example, a judge might simply raise the possibility of an apology with the parties. Or, a judge might structure a settlement conference to provide a context within which a discussion of apologies can occur, paying attention to the functions of apologies for the various parties as well as to the legal implications of apologies.

A judge who introduces the possibility of an apology into the discussion ought to have an understanding of the relevant jurisdiction's apology provisions (see Appendix). This knowledge of the relevant law, combined with an understanding of the potential value of apologies to claimants, the barriers to apologizing for defendants, the potential for manipulation posed by some apologies, and the differing perspectives of claimants, defendants, and attorneys, can position the judge to effectively guide the settlement discussions.

When considering whether to encourage an apology, attention ought to be paid to the context of the dispute. For example, while apologies may have beneficial effects regardless of the state of the evidence, apologies may be both quite valuable to claimants *and* less risky for defendants to offer when the evidence pointing to liability is relatively clear. Similarly, while apologies are potentially useful in disputes between relative strangers, apologies may be even more valuable and effective when the dispute at hand involves a close or a potentially ongoing relationship—for example, a doctor-patient relationship, a family relationship, or an employment relationship. Initial conversations might carefully explore the parties' willingness to offer or to receive apologies. The judge can listen for signals that one or both parties would be receptive to such an exchange. It may be wise to tentatively explore the possibility of an apology with the defendant before raising the matter directly with the plaintiff to avoid disappointment if it turns out that the defendant is adamantly opposed to offering one. Consideration might also be given to whether it might be appropriate and productive for both parties to apologize to each other.

In addition, appreciation of what makes an apology effective can be useful in guiding such discussions. Apologies that accept responsibility for having caused harm are more likely to have positive effects and to have bigger impacts than are expressions of sympathy. Apologies may be more effective when offered directly by a defendant to a plaintiff than when mediated through their attorneys. The timing of an apology is also an important consideration. However, the effects of timing on the effectiveness of apologies are complex. On one hand, an apology offered quickly after an injury has occurred may prevent an injury from developing into a grievance or conflict. On the other hand, an apology may ring hollow if it is offered too quickly and without reflection. By the time of a settlement conference, the possibility of an early apology may have passed. Nonetheless, it may be possible to jump start the negotiations with an apology that is offered early in the discussions. Importantly, however, experimental studies have found that apologies can be most satisfactory when the recipient has had a chance to express his concerns and the apologizer has been able to articulate an understanding of the nature of the offense and its consequences.[31] Thus, the judge might attempt to structure the discussion leading up to an apology with this in mind. Alternately, if it is not possible to secure an apology before reaching a financial settlement, it might be appropriate for a judge to introduce the possibility of arranging for an apology that would come *after* the financial terms of the deal have been agreed to in principle.[32]

Judges might also consider mediation as a process within which apologies can be usefully addressed. Because many states provide that statements made in mediation are not admissible in subsequent legal proceedings, defendants and defense attorneys may be more comfortable offering apologies in mediation. Moreover, the mediation process was designed, in part, to allow parties to play a central role in the negotiation process and to determine for themselves the norms that would govern the resolution of their dispute.

In mediation, the parties themselves can participate directly in the settlement negotiation discussions, assisted by the mediator and while still being advised by their attorneys. A skilled mediator may be able to help create the opportunity for a discussion among the disputants that involves acknowledgment

31. Cynthia McPherson Frantz & Courtney Bennigson, *Better Late Than Early: The Influence of Timing on Apology Effectiveness*, 41 J. EXPERIMENTAL SOC. PSYCHOL. 201 (2005).

32. *See* Howard Raiffa, *Post-Settlement Settlements,* 2 NEGOT. J. 1 (1985).

and apology, to facilitate that discussion, and to facilitate the negotiation that may need to occur between attorney and client. The process allows disputants to introduce non-monetary factors—such as apology—into the discussion. And, the attorneys are still available to advise clients as to the legal consequences of apologies or particular settlement proposals. Mediation, then, can provide either party with an occasion to communicate to the other side their desire to give or to receive an apology and can be a process that is designed to facilitate such conversations.

CONCLUSION

Apologies may have a role to play in the settlement of legal disputes. Claimants, attorneys, and judges, however, respond to apologies made in the context of litigation in different ways. Judges who understand the nuanced effects that apologies have on the decision making of parties and their attorneys, and who are aware that their own responses may differ from both, will be in a better position to effectively assist in the resolution of legal disputes.

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APPENDIX: STATE APOLOGY STATUTES

Ariz. Rev. Stat. Ann. § 12-2605
Cal. Evid. Code § 1160(a)
Colo. Rev. Stat. § 13-25-135
Conn. Gen. Stat. § 52-184(d)
Del. Code Ann. tit. 10, §4318
D.C. Code Ann. § 16-2841
Fla. Stat. § 90.4026(2)
Ga. Code Ann. §24-3-37.1; 735
Haw. Rev. Stat. § 626-1
Idaho Code § 9-207
Ind. Code Ann. § 34-43.5-1
Iowa Code § 622.31
La. Rev. Stat. Ann. § 13:3715.5
Me. Rev. Stat. Ann. tit. 24, § 2907
Md. Cts. & Jud. Proc. Code Ann. § 10-920
Mass. Gen. Laws Ch. 233 §23D
Mo. Rev. Stat. § 538.229
Mont. Code. Ann. § 26-1-814
Neb. Rev. Stat. § 27-1201
N.H. Rev. Stat. Ann. § 507-E:4
N.C. Gen. Stat. § 8C-4, Rule 413
N.D. Cent. Code § 31-04-12
Ohio Rev. Code Ann. §2317.43
Okla. Stat. Ann. tit. 63, § 1-1708.1H
Or. Rev. Stat. §677.082
S.C. Code Ann. §19-1-190
S.D. Codified Laws § 19-12-14
Tenn. R. Evid. § 409.1
Tex. Civ. Prac. & Rem. Code Ann. § 18.061
Utah Code Ann. § 78-14-18
Vt. Stat. Ann. tit. 12, §1912
Va. Code Ann. § 8.01-581.20:1
Wash. Rev. Code § 5.66.010(1)
W. Va. Code § 55-7-11(a)
Wyo. Stat. Ann. § 1-1-130

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- Prof. Erwin Chemerinsky's review of the past Term of the U.S. Supreme Court
- Challenging the Rise in Non-Stranger Violence, with Casey Gwinn
- Making a Better Judge Through Procedural Fairness
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The Resource Page

RECENT BOOKS

Brian J. Ostrom, Charles W. Ostrom, Jr., Roger A. Hanson & Matthew Kleiman, TRIAL COURTS AS ORGANIZATIONS, Temple University Press, 2007. 190 pp. $56.50.

Courts face many challenges, and one of the criticisms that has been made against courts is that they are not well managed. Many of us have heard the common refrain that leading judges is like herding cats, an image that certainly would not be the model for management in the business world.

A group of researchers at the National Center for State Courts and in academia have made a significant contribution to the understanding of how trial courts are—and can be—managed in this book. They begin the book by noting the importance of this subject: "Courts are independent bodies only if they administer justice effectively. They administer justice effectively only if they have a sound management culture. Therefore, courts will be independent and effective only if they operate with a sound management culture."

But getting a sound management culture in a trial court is easier said than done. Local legal cultures and those of their courts vary greatly. In the absence of some way to describe and measure those cultures—and then to compare how court cultures may affect court performance—it would be impossible to make comprehensive suggestions for improvements in court management.

These researchers developed a Court Culture Assessment Instrument, based on a similar instrument used in business. They administered that instrument to judges handling criminal cases in 12 different courts in 4 states, and they simultaneously evaluated court performance through standardized data showing time to case disposition as well as through surveys of prosecutors and defense attorneys on issues like access to justice, fairness, and managerial effectiveness.

The authors ultimately describe four different court cultures that are characterized by high or low levels of two variables: solidarity and sociability. Solidarity reflects the extent to which a court has clearly understood and shared goals, while sociability refers to the degree to which people work together in a cooperative and cordial way. The book provides a great deal of detail about these cultures, but here's a quick overview:

- *Networked*: high solidarity, high sociability. This culture values consensus but strives toward innovation, visionary thinking, and personal development.
- *Communal*: low solidarity, high sociability. This culture provides flexibility and values egalitarianism, negotiation, trust, and collegiality.
- *Autonomous*: low solidarity, low sociability. This culture is self-managing and values personal loyalty, independence, and autonomy.
- *Heirarchical*: high solidarity, low sociability. This culture has an explicit chain of command and is rule-oriented, with a high value placed on merit, modern administration, and standardized procedures.

While many courts had divergent cultures within them, a dominant culture could generally be found, and all courts dominated by each of the four cultures were found within a single state, Minnesota.

So does court culture affect court performance? Yes. The courts that emphasized solidarity (networked and hierarchical court cultures) processed their criminal cases faster—more closely reaching ABA time standards—than courts that did not emphasize solidarity.

Does that mean that all courts should move toward a hierarchical or networked approach? Maybe not. Surveys of prosecutors and defense attorneys showed that the attorneys working in these courts rated hierarchical and networked courts lower in areas like promoting access, fairness, and managerial effectiveness. The attorneys preferred autonomous court cultures and seemed to view timeliness as strictly for the court's benefit, not that of the attorneys or the parties.

The authors conclude with a paraphrase of a famous line from literature. Anna Karenina begins, "Happy families are all alike; every unhappy family is unhappy in its own way." The authors' version for the courts: "Happy Courts are all alike; every unhappy court is unhappy in its own way." As in many other areas, they conclude that there is no single key to success for a court but that any number of factors may cause failure: "To be successful across all . . . trial court work areas, courts must pay attention simultaneously to multiple, and often competing, values. . . . [T]here are many ways in which court leaders can fail."

We've only scratched the surface of the interesting data and insights presented in the book. Political science professor Susette Talarico called the authors' work "the most innovative study of trial courts in the past 10 or 15 years." We think you will find it quite interesting too. The authors have reviewed research on organization and management in the private sector, and they have adroitly adapted it to trial courts. They conclude that there is no single "right" answer to court culture—none of the cultures is by definition good or bad, but there are consequences to performance. If you're interested in the differences in cultures between courts and how these differences may affect performance, you should take a look at this book.

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