Understanding Court Culture

The Influence of Religion on Judicial Decision Making

Problem-Solving Principles for the Generalist Judge

How to Do eCourts Right
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The lead article for this issue is an introduction to understanding court culture. In our last issue, we had a book review of the 2007 book, Trial Courts as Organizations, which provides a wealth of interesting data and insights. In this issue, two of the book’s authors, Brian Ostrom and Roger Hanson, provide an overview of the different court cultures commonly encountered, including the results of a study of one large metropolitan trial court. Our second article is part of a continuing series looking at social-science information either about the courts or that can be readily used by judges. This time, Brian Bornstein and Monica Miller look at whether a judge’s religion influences decision making. There has been a lot of research on this, and Bornstein and Miller survey the most interesting and authoritative studies.

Our third article, by Thomas Barton, is adapted from his recent book, Preventive Law and Problem-Solving: Lawyering for the Future. In this article, Barton looks both at problem-solving courts and the field called preventive law, focusing on how a general-jurisdiction judge—not necessarily one handling a specialized docket—may be able to use the same principles that have become the mainstays of problem-solving courts. Our final article comes from Oregon trial judge Michael Marcus, one of America’s most thoughtful judges. As more and more court functions go electronic, Marcus has focused on trying to have technology provide the information most needed by judges rather than having judges play a secondary role to computers and programmers. His thoughts are well worth considering.

I close by noting the death of one of the long-time members of our Editorial Board, Professor Philip Frickey. Phil helped us in many ways for more than a decade. Recently, he helped us put together a very useful Resource Page on Indian Law; he also recruited Professor Charles Weigelberg to take over the annual review of United States Supreme Court decisions of note after the death of our longtime contributor, Charles Whitebread. We will be reorganizing our Editorial Board for the next volume, so if you have an interest, please let me know. Phil will be missed.—SL.
I was elected to the Orleans Parish Criminal District Court in December 1982. A great many changes have been made in regards to the judiciary in these past 28 years.

At the time I took office the citizens’ perception of judges was that they were honorable men and women in a highly respectable position. Oh, how perceptions can change. I am still working with the same type of honorable men and women—the only thing that has changed is the public perception. What caused this you may ask; well, that could be the grist for many law review articles. Although only 30 percent of our population can tell you who the Chief Justice of our United States Supreme Court is, what is clearer today than ever before is that the public is more aware of judges and what they do.

Well before the Supreme Court’s 2000 ruling in Bush v. Gore, the press was taking a keen interest in what our job entails and what effect our decisions may have on the lives of citizens. In the many states that elect their judiciary, very rarely does a day go by that a judicial decision—either criminal or civil—is not published on the front pages of the tabloids. Even in the states that have an appointed judiciary, the public interest has multiplied ten-fold. This scrutiny has affected every level of our state judiciaries from traffic court to paid court watchers in district courts tracking cases. I think the founders of our country would be both shocked and dismayed over the microscopic approach that the press has taken toward our courts.

There are some in this country who appreciate this accountability process for the judiciary. I am sure that these folks believe that this type of scrutiny makes better citizens of us all. But when young men or women consider seeking judicial office, they should be aware of this type of scrutiny before they make their decision.

Hopefully in the future our organization will continue to grapple with these changes and public perceptions and help to educate the bench and bar, as well as the public, about the evolution of the judiciary. It will be curious to see in the future what type of judicial timber will gravitate toward the bench. With this new fishbowl approach, the ability to make just decisions while knowing that the population is looking over your shoulder will be paramount. Only time will tell what type of individuals will bloom under this type of system. I would like to be around.

God Bless all.

### AMERICAN JUDGES ASSOCIATION FUTURE CONFERENCES

<table>
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<tr>
<th>Year</th>
<th>Event</th>
<th>Location</th>
<th>Dates</th>
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<td>The Fairmont Orchid</td>
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Understanding and Diagnosing Court Culture

Brian J. Ostrom & Roger A. Hanson

A n important management truth is that there is more than one way to get things done and done well in the workplace. There is rarely a single, best way for either a private company or a public institution to organize itself to achieve high-quality outcomes for its customers. Formulating an effective strategy for a particular workplace requires a good understanding not only of the formal structure and lines of authority, but also of the unwritten rules, unofficial networks, and underlying behavioral norms that shape how work gets done. As a result, knowledge of an organization’s culture is a crucial factor when searching for ways to improve operational effectiveness.

The effort to better understand the role culture plays in shaping how courts operate is an enduring component of modern court administration research, with strong implications for both what we think courts are and what they can become. A line of research that began three decades ago contends the views of judges and attorneys are the critical determinants of the emphasis that courts place on administrative goals (e.g., timeliness) and whether they embrace new ideas and innovative procedures. Thomas Church et al. call these views “local legal culture” and argue that they account for why some cases are resolved more quickly than others. Variation among courts in the speed of litigation is not accounted for by objective characteristics, such as the number of cases assigned to each judge or the presence (or absence) of particular procedures (e.g., master or individual calendar). Rather, if practitioners believe cases can be resolved expeditiously, cases are in fact resolved expeditiously. In other words, people live up to their expectations.

A more sweeping statement on the importance of judicial views as the source of what a court does is articulated by subsequent scholars. Peter Nardulli et al. advance the proposition that there are in fact distinctive “work orientations” that account for virtually all of the key administrative differences among courts. Brian Ostrom and Roger Hanson build on this insight to show how particular views among prosecutors and criminal defense attorneys are associated with the timeliness of criminal case processing, both overall and by case type. Yet, while the existence and relevance of court culture is now more clearly recognized, the exact way the “views” influence culture and affect how work gets done remains elusive because of the lack of specification and measurement.

Unless we know more about the connection between culture and what happens in the courthouse, the explanatory power of culture is diminished and leaves the question of culture’s consequences unanswered. Building on and refining previous studies, this article has three interrelated objectives:

- **Describing court culture.** This section highlights eight key aspects of an ongoing investigation into culture assessment that is being conducted by the National Center for State Courts. The larger investigation provides a comprehensive framework for understanding court organizational culture, along with a set of steps and tools to assess and measure a court’s current and preferred culture.

- **Diagnosing court culture.** Using results from a large metropolitan court, the measurement of court culture is demonstrated, and illustrations are offered on how this type of information can interpreted.

- **Reactions from the field.** Assessing court culture is still in early stages of development, but there are already important reactions to efforts to put culture on the court community’s agenda. The receptivity of judges and administrators in several courts is discussed.

The unique contribution of culture is that it provides a road map for court leaders seeking to improve the way work gets done.

### Describing Court Culture

Court culture is conceived as the beliefs and behaviors shaping “the way things get done” by the individuals—judges and court administrators—who have the responsibility of ensuring cases are resolved fairly and expeditiously. In many ways, culture shapes and defines what is possible in the work environment. Because judges and managers can develop and mold court culture, they should attend to the assessment of their culture as deliberatively as they do when making legal decisions and issuing orders. The capacity of court culture to serve as a tool to promote and achieve successful court administration can be seen by looking at eight key aspects of this area of inquiry.

First, the concept of court culture focuses on the daily tasks and ongoing relationships among the judges as well as between judges and court staff members. As a result, it is grounded in...

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**Footnotes**


5. Brian J. Ostrom and Roger A. Hanson, Efficiency, Timeliness, and Quality (1999).

activities familiar to all courts. The effort to better understand court culture offers a practical means to make a difference in courts’ success.

Second, the NCSC approach to examining court culture allows judges and administrators to gain clarity on their current court culture, or the ways things are done, as well as their preferred culture, or the ways they would like to see the court operate in the future. It puts judges in the forefront of defining court administration rather than introducing a new management theory or proposed reform from the outside.

Third, the NCSC approach identifies a manageable and coherent set of cultures, which individually or in combination cover a wide range of courts. Specifically the NCSC framework identifies four distinct types of culture: communal, networked, autonomous, and hierarchical. They are defined as follows:

- **Communal**: Judges and managers emphasize the importance of getting along and acting collectively. Communal courts emphasize importance of group involvement and mutually agreed upon norms rather than established rules and firm lines of authority; flexibility is a key to management. Procedures are open to interpretation, and creativity is encouraged when it seems important to “do the right thing.”

- **Networked**: Judges and managers emphasize inclusion and coordination to establish a collaborative work environment and effective court-wide communication. Efforts to build consensus on court policies and practices extend to involving other justice system partners, groups in the community, and ideas emerging in society. Judicial expectations concerning the timing of key procedural events are developed and implemented through policy guidelines built on the deliberate involvement and consensus of the entire bench. Court leaders speak of courts being accountable for their performance and the outcomes they achieve.

- **Autonomous**: Judges and managers emphasize the importance of allowing each judge wide discretion to conduct business. Many judges in this type of court are most comfortable with the traditional adversary model of dispute resolution. Under this traditional approach, the judge is a relatively passive party who essentially referees investigations carried out by attorneys. Centralized leadership is inhibited as individual judges exercise latitude on key procedures and policies. Limited discussion and agreement exist on court-wide performance criteria and goals.

- **Hierarchical**: Judges and managers emphasize the importance of established rules and procedures to meet clearly stated court-wide objectives. These courts seek to achieve the advantages of order and efficiency, which are deemed essential goals in a world of limited resources, and calls for increased accountability. Effective leaders are good coordinators and organizers. Recognized routines and timely information are viewed as mechanisms for reducing uncertainty, confusion, and conflict in how judges and court staff make decisions.

The development of this fourfold typology is based on an analysis of how expert practitioners believe core values affect and relate to how work gets done. Sixteen values were culled from the literature on court administration including such distinct values as collegiality, continuity with the past, discretion, standard operating procedures, flexibility, rule-oriented, innovation, judicial consensus, and self-managing. Using a tightly structured questionnaire, 53 seasoned practitioners, including judges, administrators, prosecutors, and defense attorneys, compared and contrasted the values. This exercise asked the practitioners to indicate how closely each of the 16 values is related to each of the other 15 values. The results were obtained using the technique of multidimensional scaling, and the paired comparisons showed four clusters of four values each.

The clusters illustrate the core values of different types of cultures and are aligned along two dimensions called solidarity and sociability. These dimensions are intuitively understandable because solidarity refers to the degree to which a court has clearly understood shared goals, mutual interests, and common tasks while sociability refers to the degree to which people work together and cooperate in a cordial fashion.

Each of the four cultures is a particular combination of solidarity and sociability, as shown in Figure 1. Communal culture is low on solidarity and high on sociability. Its distinctive values are flexibility, egalitarianism, negotiation, and trust.

A network culture seeks both sociability and solidarity. Its values include judicial consensus, innovation, visionary thinking, and human development. An autonomous culture emphasizes neither sociability nor solidarity. Its values are self-managing, continuity, independence, and personal loyalty. And a hierarchical culture stresses solidarity but not sociability. Its values are rules, modern administration, standard operating procedures, and merit. These alternative clusters of values shape the way that work gets done, as discussed below.

The fourth key aspect of using culture as a tool for successful court administration is that culture is manifested in familiar and recognizable activities called “work areas,” such as the handling of cases, the responsiveness of courts to the concerns of the community, the division of labor and allocation of authority between judges and court staff members, and the manner in which court leadership is exercised. Each particular culture’s way of doing things is matched across four work areas in the Value Matrix (Figure 2).
Fifth, the framework does not imply any particular culture is inherently superior to another in the choice of work-related values. Every culture allows for a court to be deliberative and purposeful in its administrative decision making. Courts with different cultures simply are deliberative and purposeful in their own way.

This proposition is neither obvious nor simpliminded because it suggests every court can succeed in every work area, although some cultures might find it more difficult to excel in some areas than others. Taking case management as an example, this framework makes clear that there is no single definition or approach because how cases are handled depends on the culture that is present. Many readers will note that hierarchical case management comes closest to the traditional “best practice” model of controlling caseflow through the use of clear, uniform, and established rules enforced by administrative monitoring of standardized reports.

However, a court emphasizing a particular culture rather than another might find it harder to achieve particular goals, like effective case management. In every culture there are pitfalls that a court might encounter in translating the values into practice. With case management, a common shortcoming is the failure to monitor ongoing court performance because judges and administrators assume things are getting done as intended. Moreover, the ability to detect problems is a more serious challenge in some cultures than in others because some cultures depend more on self-monitoring.

Sixth, cultures are measurable. A Court Culture Assessment Instrument, developed by the NCSC, can be used to determine how individual judges and administrators believe work gets done in key areas. Because each culture manifests itself differently, the instrument asks individuals to indicate how closely each of four ways of getting work done corresponds to what happens in their court (current culture) and what they would like to see as the work style in the future (preferred culture). The survey is available upon request.

An application of the framework to courts in California, Colorado, Florida, Maryland, Minnesota, Ohio, Oregon, Utah, Washington, and the Tax Court of Canada finds examples of each of the four cultures, although the autonomous culture is the most frequent. This balanced distribution suggests courts are not monochromatic in their work orientations. On the other hand, each culture can achieve administrative efficiency.

<table>
<thead>
<tr>
<th>Case Management Style</th>
<th>COMMUNAL</th>
<th>NETWORKED</th>
<th>AUTONOMOUS</th>
<th>HEIRARCHICAL</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Judge and Court Staff Relations</strong></td>
<td>Flexibility: Judges follow accepted principles for the timing of key procedural events but are comfortable fashioning their own approach to “do the right thing.”</td>
<td>Judicial Consensus: Judicial expectations concerning the timing of key procedural events are developed and implemented through policy guidelines built on the deliberate involvement and consensus of the entire bench.</td>
<td>Self-managing: Individual judges are relatively free to make their own determinations on when and how key procedural events are to be completed.</td>
<td>Rule oriented: Judges are committed to the uniform use of standard caseflow management techniques (e.g., early case control, case coordination, and firm trial dates) with the support of administrative and courtroom staff. Written court rules and procedures govern what judges do.</td>
</tr>
<tr>
<td><strong>Change Management Negotiation</strong></td>
<td>Flexibility: Judges follow accepted principles for the timing of key procedural events but are comfortable fashioning their own approach to “do the right thing.”</td>
<td>Judicial Consensus: Judicial expectations concerning the timing of key procedural events are developed and implemented through policy guidelines built on the deliberate involvement and consensus of the entire bench.</td>
<td>Self-managing: Individual judges are relatively free to make their own determinations on when and how key procedural events are to be completed.</td>
<td>Rule oriented: Judges are committed to the uniform use of standard caseflow management techniques (e.g., early case control, case coordination, and firm trial dates) with the support of administrative and courtroom staff. Written court rules and procedures govern what judges do.</td>
</tr>
<tr>
<td><strong>Courthouse Leadership</strong></td>
<td>Trust: Leadership in the court is generally considered to exemplify building personal relationships and confidence among all judges and court employees and seeking to reconcile differences through informal channels.</td>
<td>Visionary: Leadership in the court is generally considered to exemplify preserving individual judicial discretion, allowing judges to use their own criteria in defining success, and not necessarily relying on the same indicators of achievement.</td>
<td>Independence: Leadership in the court is generally considered to exemplify preserving individual judicial discretion, allowing judges to use their own criteria in defining success, and not necessarily relying on the same indicators of achievement.</td>
<td>Standard Operating Procedures: Leadership in the court is generally considered to exemplify centralizing control and organization to achieve administrative efficiency. A presiding judge and/or court management team typically has authority to establish a clear division of labor and set courthouse expectations.</td>
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</tbody>
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![FIGURE 2: VALUE MATRIX](image-url)
hand, regardless of the current culture, the vast majority of
courts under study indicate a similar mosaic-like preference for
the future. Specifically, they tend to desire hierarchical orienta-
tions to dominate in the work areas of case management and
change management, networked orientations to dominate
judge-staff member relations, and a communal culture to domi-
nate the area of courthouse leadership.

Seventh, culture is found to have direct effects on a court's
ability to achieve legal ideals, such as timeliness, access, fairness,
and managerial effectiveness, but this empirical relationship
does not presume any one culture is more desirable than
another. A reason why some cultures might come closer than
others is because judges and managers in some courts act to
avoid the limitations associated with their present culture.

Eighth, the difference between a current culture and a pre-
ferred culture is a natural basis for defining “planned change.”
Judges and managers who take the culture survey can see where
they are now and where they would like to be. The task then
becomes looking at and determining what existing policies, pro-
cedures, and practices require adjustment to move to a more
preferred state of affairs.

**DIAGNOSING COURT CULTURE**

The study of culture provides a way to understand the most
fundamental administrative concerns and goals that are shared
by most of the people in a court, that tend to shape judge and
staff behavior, and that often persist over time. Culture is not just
a set of views, beliefs, and perspectives. It is the grounds for how
work gets done. Each culture reflects alternative ways that
responsibilities can be carried out and provides a means to com-
work gets done. Each culture—and the val-
ues it espouses—shapes in a distinctive manner the way cases are
handled, how the court responds to its environment, how the
court uses staff members, and the overall direction of the court.

Culture focuses attention on aspects of the work environment
exercising a strong, independent influence on the completion of
the tasks vital to the maintenance and functioning of the legal
process. Values composing a court’s culture shape the how, why,
and when of decisions made by judges and the activities con-
ducted by staff members. Because these individuals are responsi-
ble for putting policies and procedures into place, they are the
key ingredients for ideas to take hold. Until a court’s values are
incorporated into daily routines and work habits, they stand very
little chance of influencing court performance. For this reason,
cultural values are more important to assess as indicators of the
current state of affairs than virtually any other aspect of a court,
such as structure, organization, process, or resources.

The assessment of current and preferred cultures provides a
realistic picture of what is both a feasible and meaningful degree
of change in how a court does business. By capturing a court's
preferred culture, insight is gained into what judges and admin-
istrators aspire to achieve. The aspirations are not purely ideal-
istic, however, because they are views on how judges and admin-
istrators would like to see business conducted in the common
work areas of case management, change management, and so
forth.

This approach to assessing court culture is illustrated with
results from a large US metropolitan court. Following comple-
tion of the *Court Culture Assessment Instrument* in this court, the
results showed there to be important difference between judges
and senior staff members on the most appropriate kind of case
management the court should seek to implement. Their current
and preferred views are displayed below in the form of “kites.”
Figure 3A focuses on judges, and Figure 3B focuses on senior
staff.

Both have fairly similar views on the current style of case
management, which is that judges tend to fashion their own
approaches (a primarily autonomous style). In addition, going
forward, both would like to reduce the degree of autonomy in
case management. Differences emerge on the direction of the
future change. The shape of the darker superimposed preferred
kites shows that judges tend to favor loosely enforced case-pro-
cessing norms (what is referred to as a Communal culture),
while senior staff have a strong preference for the handling of
cases to be governed by a relatively uniform application of the
rules (a more Hierarchical culture).

This particular pair of contending perspectives is a useful
prism through which to understand the nature of contemporary
courts as they seek to determine the right balance between dis-
cretion and the uniform application of rules. Several important
patterns and implications are seen in Figures 3A and 3B.

First, and foremost, the data suggest serious, dedicated, and
knowledgeable practitioners in the same court hold to different
views or definitions on how cases should be handled in the
future. Both the judges and senior court managers in this court
realize the legal process involves the effective scheduling, arrang-
ing, and conducting of a series of key procedural events. The
work involved in discharging that function is called case man-
agement. But alternative views do exist on the exact manner of
HOW this critical area of work should be carried out. And to suc-
cessfully implement a workable case management plan, a court
must understand and address these differences in perspective.

In addition, it is hardly surprising that judges and managers
have different opinions on the steps necessary to improve case
management. Because judges are in the courtroom or chambers
every day, and managers generally are not present in these set-
tings, judges are more sensitive to and aware of the raw human
drama and emotion surrounding individual cases. Consequently,
they are more likely to view uniformity as a goal but not a uni-
versally appropriate way to deal with real-world circumstances
in the courtroom. Judges are much more likely to discern the
need for “improvisation” and individually tailored methods that
downplay formalities and standardization.

The somewhat weak embrace of uniform case management
by judges also is a natural product of a general desire by judges
to retain collegiality when they have it (or think they have it).
Judges who otherwise might see the benefits in a more standard
case-handling practice are understandably reluctant to give up a
sense of friendly relations with colleagues in exchange for a
more austere work atmosphere, which they associate with a uni-
form rule application style of managing. As one judge in the
court under study observed about case management, “I have the
sense that the culture of our judiciary is that no one is going to
force any judge to do it in a certain way. There is a high degree
of collegiality that we want to keep.”
To the extent that this sentiment is representative, the data in Figures 3A and 3B provide a clue on what inhibits judges from accepting the form of case management that leading experts in the field advocate as the way, and perhaps the only way, to achieve efficiency and timeliness. The benefits of a standardized case management scheme are not by themselves sufficient to lure judges to consider moving from a combination of an autonomous and communal system to a more hierarchical one. An implication from this situation is that a system of uniform rules has its drawbacks or limitations despite its promise of a more timely resolution process. Timeliness by itself is not appealing enough to attract adherents of uniform rules even among judges who might see limitations in their current circumstances. This possibility helps to explain why most American courts have not adopted uniform rules and put them in practice despite over 30 years of advocacy by judicial administration leaders.

Finally, the results from Figures 3A and 3B point out how courts can both reconcile conflicting preferences and generally chart a course of cultural change and accompanying practices. Specifically, reconciliation between the bench and senior staff members in this court became the mutual agreement to move toward a more networked orientation of case management. The judges can retain the value of collegiality and avoid a straitjacket prohibiting deviations when and where necessary by moving toward a networked culture. Similarly, court managers can move in the same direction and gain the value of guidelines in managing cases over unfettered judicial discretion, which they see as a clear deficit.

Moreover, the joint move to a more networked, case-management-oriented culture reduces the problems of initial implementation and increases abilities of both groups to suggest corrective action to remove any administrative friction they experience in trying out a new approach to handling cases. In fact, both groups gain from the experience of working smoothly together under a new regime and can use it as a stepping-stone to a potential move toward a more hierarchical approach. Judges can see how friendship is not necessarily sacrificed by moving away from an autonomous and communal position whereas managers can see how an appreciable increase in efficiency is achievable without tightly prescribed rules. Such knowledge facilitates the transition for the consideration of any additional moves in the future. For all these reasons, the NCSC recommended such a move to the court under study, which in fact accepted and began implementing this advice. Thus, by examining its culture, a court is in a prime position to define its future through a series of planned steps from its current to its preferred culture and is able to accomplish this task even when there are internal differences within the institution.

**REACTIONS FROM THE FIELD**

Because it is possible to measure the four cultures and because the difference between current culture and preferred culture is an internally inspired basis for reform, cultural analysis is now being accepted by many judicial leaders as a sufficiently promising idea to explore and to test out in the real world. For this reason, the NCSC has been engaged with a variety of courts ranging widely in size (i.e., 2 to 140 judges) and location (i.e., many different states and Canada) to take a cultural inventory and to use the results to chart a new course of direction. Despite the early stage of development, there are already important reactions to efforts to putting culture on the court community’s agenda.

- A striking reaction is that judges and administrators welcome the opportunity to see their culture in a more explicit light and the way it shapes choices about the way work gets done. Because many administrative decisions might be made by a small leadership, the inclusive opportunity for each judge to contribute to the definition of their court’s culture is an invitation many judges accepted. Also, due to the relatively widespread nature of an autonomous component in most courts, many judges appreciate the opportunity to discuss how work is done in chambers and on the bench with their colleagues.

- The vocabulary and the structure provided by the culture framework are well received. Judges and administrators grasp the
meaning of the cultures quickly and talk freely about what the culture survey reveals. They are adroit in noticing the shape of their current and preferred culture rites, and they comfortably describe themselves as being one or a particular combination of the four cultures in each work area.

- Every court appreciates the nuance underlying the array of four cultures. In fact, the values and practices of communal and networked cultures seem most intriguing to judges who perhaps are most familiar with the circumstances of an autonomous culture and perhaps envision a hierarchical court as its only alternative. For example, judges frequently ask questions about how judges agree upon “norms” and what do the norms cover.

- Even courts that are performing well see the value of cultural analysis. Group discussions raise areas that warrant improvement even in high performing courts. For example, a communal culture might seek to maintain a collegial and cooperative approach but find cultural analysis a fruitful means to strengthen formal communication channels to ensure everyone is informed of collective decisions and thereby expected to follow them. The dimension of solidarity reminds court leaders of the need to avoid the results of collective decisions from inadvertently being lost, misplaced, or forgotten due to the lack of standardized record-keeping and communication procedures.

- Courts are interested in culture as a tool to use in conjunction with other initiatives that are already underway, such as strategic planning and reengineering. A court may learn very quickly from the culture survey and subsequent discussions that it is overcommitted by having too many projects for the members of the court to juggle, lacks a sense of clear priorities, fails often to complete projects before taking up new ones, and might even treat projects as successful with limited evidence of positive performance.

These reactions show that judicial leaders in many courts see culture analysis as an essential prerequisite to successful innovation and reform. As more experience with this approach is gained, it will be possible to more clearly see the extent to which court culture in fact produces meaningful and lasting change in the real court world.

**CONCLUSION**

Court leaders and managers know, at least intuitively, that culture affects court operations. A long line of literature from the field of court administration clarifies that differences in court culture are a key factor in explaining differences in court performance. A contribution of the current research is the development of a conceptual framework and set of measurement tools that permits the variation in court culture to be described in a coherent and comprehensible manner. The four cultures of communal, networked, autonomous, and hierarchical are sufficiently broad to capture the way work gets done in the real world. Moreover, courts are spread across the four categories instead of being bunched up in one or two ambiguous categories, such as well and not so well managed.

In addition, the combination of cultures is measurable, avoiding the classification of courts into rigid, wooden, and unrealistic “pure” types. There might be some courts with very dominant cultures, but the culture framework accommodates this possibility without assuming it holds true everywhere. The results of measuring culture are a valid and reliable basis for changing the behavior of judges and managers. By comparing current and preferred cultures, practitioners can begin to explore a path, which they control, to greater institutional excellence and a more hospitable work environment for everyone.

The capacity of a court to see the differences between where it is today and where it wants to be tomorrow enables it to reduce the problem of changing the way things get done to manageable proportions. A preferred culture provides a clear and meaningful target to shoot at and also sets the distance from where the court presently stands to suggest a timetable for making changes in goals and practices. Simply stated, a preferred culture is the basis for internally inspired reform that members of a court can understand.

Finally, the existence of alternative cultures is a prudential note of caution to externally inspired reform. Outside experts tend to propound the idea that reforms take on a fairly strict, programmatic form containing specific elements and prescribed relationships. Court improvement programs might mention the possibility of tailoring reforms to local needs and circumstances, but such a modest concession does not take into account the realities of alternative cultures. This concession fails to accommodate the fact that every court sees reforms through its own particular lenses. Consequently, if a reform incorporates only a particular cluster of values on how work should get done, receptivity to the reform will be limited to particular types of cultures and diminish the prospects for widespread diffusion of new ideas. Hence, reformers need to consider how courts can proceed in alternative ways to approximate a desired goal and practice.
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Does a Judge’s Religion Influence Decision Making?

Brian H. Bornstein & Monica K. Miller

Like many other Americans, judges can have deep-seated religious convictions. Although their religious beliefs certainly do not interfere with their job performance most of the time, judges’ religion can occasionally become problematic. Witness, for example, the case of Alabama Supreme Court Chief Justice Roy Moore, who was removed from office in 2003 after he placed a 5,300-pound monument of the Ten Commandments in the rotunda of the state judicial building and refused to remove it despite being ordered to do so. He installed the monument “in order to remind all Alabama citizens of, among other things, his belief in the sovereignty of the Judeo-Christian God over both the state and the church.” Religion, and its relationship to judges’ attitudes, also comes up in the judicial nomination and confirmation process. This is especially true with regard to the U.S. Supreme Court, which for many years had purported Catholic and Jewish seats.

An emphasis on religion in choosing judges naturally presupposes the existence of a relationship between the particular religion that a judge practices and the judge’s decisions. For example, will Jewish judges be more lenient toward criminal defendants than Protestant judges? Will evangelical judges favor the death penalty? One might expect judges, as professionals deciding a large number of cases, to be able to ignore extralegal factors such as their religious beliefs, yet two aspects of judges’ religion suggest that it is a significant concern and at least as likely to influence their decisions as jurors’ decisions. First, judges are solitary decision makers, so any influence of a judge’s religion would not be diluted by countervailing religious (or nonreligious) influences as it would be for one juror among many. Second, judges rule on matters of law as well as determining factual matters. This opens up a new arena for possible religious influence as the legal questions might themselves contain explicit or implicit religious elements (e.g., separation of church and state).

Most of the research that has been conducted on the relationship between judges’ religion and their decisions focuses on appellate judges. There is a growing consensus that appellate judges’ attitudes and beliefs are important predictors of their decisions. This attitudinal model holds that an appellate court, such as the U.S. Supreme Court, “decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices.” The attitudinal model is closely related to the social background and extralegal models of judicial decision making, which encompass a wide variety of demographic and experiential variables, such as religion. Religion is undoubtedly one important factor—albeit only one of many social back-

Footnotes

3. See, generally, Brian H. Bornstein & Monica K. Miller, God in the Courtroom: Religion’s Role at Trial (2009), Ch. 6. The present article is an abbreviated summary of work contained therein.
4. On religion’s role in juror decision making, see Bornstein & Miller, supra note 3, Ch. 3-5.
5. This is obviously less true for appellate judges, who decide cases as a group. Although judicial conferences might resemble jury deliberations in some respects, individual judges are nonetheless considerably more autonomous than individual jurors (e.g., each judge can write his own opinion).
6. For a discussion of the relationship between trial court judges’ religion and their decision making, see Bornstein & Miller, supra note 3 at 98; Glen Schubert, Judicial Behavior: A Reader in Theory and Research (1964).
8. Segal & Spaeth, supra note 7 at 65. Segal and Spaeth contrast the attitudinal model with the legal model of judicial decision making, whereby the court decides disputes “in light of the facts of the case vis-à-vis precedent, the plain meaning of the Constitution and statutes, the intent of the framers, and a balancing of societal versus constitutional interests.” Id. at 64.
ground characteristics— influencing judges’ attitudes, values, personalities, and ideologies. The most obvious examples are probably the Catholic Church’s stances on abortion and the death penalty, but religion doubtless influences case-relevant attitudes in more subtle ways as well.11

EMPIRICAL FINDINGS

Several quantitative analyses of appellate court decisions—including, but not limited to, the U.S. Supreme Court—provide support for the attitudinal model in general. Attitudes are important not only in determining the disposition of cases, but also in the selection of cases (i.e., granting of certiorari) and assignment of majority-opinion writing duties. Attitudes are especially likely to matter in certain types of cases or ones in which the appellate court is closely divided. For example, Wrightsman found that ideology (i.e., liberalism vs. conservatism) predicted Supreme Court justices’ votes better in cases involving criminal defendants’ or prisoners’ rights than in other kinds of cases.15

Not all of these studies included judges’ religion as a social background variable, but several have. Nagel conducted a study of judicial decisions as a function of judges’ religion (among other social background variables), using as a sample 313 judges of state and federal supreme courts for the year 1955. There were too few Jewish judges in the sample for comparison purposes, so the comparison was limited to Protestant (mostly Methodist, Presbyterian, Episcopalian, and Baptist) versus Catholic judges. He found that Catholic judges were significantly more likely than Protestant judges to show a liberal voting pattern in nonunanimous cases for 4 (of 15 total) types of cases: those involving criminal matters, business regulation, divorce settlement, and employee injury. Protestant judges were more liberal in none of the case types.

Goldman likewise compared Catholic and Protestant appellate judges, using as a database all nonunanimous decisions by U.S. Courts of Appeals from 1965 through 1971. He categorized the legal issues somewhat differently from Nagel, but the results were generally consistent: Catholic judges were more liberal in certain types of cases, in the sense of being more likely to side with injured persons and to vote for the economic underdog. Protestant judges were never more liberal, and religion exerted no influence in a number of types of cases. Again, there were too few Jewish judges to include in the statistical analyses, but their median scores were more liberal than both Catholics and Protestants for virtually all kinds of cases.

Other studies have focused on a narrower spectrum of cases. For example, Pinello analyzed all published appellate court decisions (state and federal; N = 468) from 1981-2000 that dealt with issues falling under the rubric of “gay rights.” The findings varied somewhat depending on the legal issue and type of court (e.g., intermediate appellate court vs. court of last resort), but overall, Jewish judges were relatively liberal compared to Protestant judges, whereas Catholic judges were relatively conservative in dealing with these issues.

Senger and Tabrizi examined the votes of state supreme court justices on three issues—death penalty, gender discrimination, and obscenity—from 1970 to 1993. They classified judges as Evangelical Christian, mainline Protestant, Catholic, or Jewish. Even after controlling for a number of other variables (e.g., party affiliation, prosecutorial experience), judges


10. See Champagne & Nagel, supra note 7; Stephen M. Feldman, Empiricism, Religion, and Judicial Decision-making, 15 WM. & MARY BILL RTS. J. 43 (2006); Raul A. Gonzalez, Climbing the Ladder of Success: My Spiritual Journal, 27 TEX. TECH L. REV. 1139 (1996); Kent Greenawalt, Private Consciences and Public Reasons (1995); Ulmer, “Social Background,” supra note 9. There are several difficulties with attempting to use judges’ religious identification as a predictor of their decisions. See Tracey E. George, Court Fixing, 43 ARIZ. L. REV. 9 (2001). For example, adherents of any religion vary widely in their degree of observance and particular beliefs, often going against their religion’s official doctrine (e.g., many American Catholics’ pro-choice stance on abortion), and religious groups’ status and perspective change over time (e.g., the Catholic church’s evolving stance on capital punishment).

11. Recent Catholic nominees for federal judgeships, including Supreme Court nominees, have been questioned about their position on issues where the Catholic Church has taken an official stance, such as abortion and capital punishment. E.g., Sanford Levinson, The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices, 39 DEPAUL L. REV. 1047 (1990); reprinted in SANFORD LEVINSON, WRESTLING WITH DIVERSITY [2003]); Sanford Levinson, Is It Possible to Have a Serious Discussion about Religious Commitment and Judicial Responsibilities? 4 UNIV. ST. THOMAS L.J. 280 (2006). As a rule, they have been evasive and/or relied on legal precedent in responding, refusing to allow their personal beliefs to become part of the process.


13. SEGAL & SPAETH, supra note 7.

14. WRIGHTSMAN, supra note 12.

15. WRIGHTSMAN, supra note 12.


17. “More liberal” was defined as voting for the criminal defendant, the administrative agency, the wife, and the employee, respectively.


19. DANIEL R. PINELLO, GAY RIGHTS AND AMERICAN LAW (2003). The cases covered lesbian/gay family matters (including same-sex marriage), sexual orientation discrimination, gays in the military, consensual sodomy and solicitation laws, and free speech/association of gays and lesbians.

religion was strongly associated with their voting behavior. Evangelical judges were significantly more conservative than judges from other religious backgrounds in all three types of cases—that is, they more often voted to uphold the death penalty, maintain the gender gap, and restrict free speech in obscenity cases. Jewish judges were consistently the most liberal; mainline Protestant judges were liberal on the death penalty and obscenity, but less so on gender discrimination (though they were still more liberal than evangelical judges).

Of the various groups, Catholic judges’ behavior varied the most depending on the issue: They were liberal on gender discrimination, in the middle on the death penalty, and nearly as conservative as the evangelical judges on obscenity. Thus, there are differences among Protestant Christian faiths as well as between the major religious classifications. This finding makes sense in light of the wide diversity of beliefs among different Protestant denominations.

The U.S. Supreme Court receives special scrutiny in many respects, and the relationship between judges’ personal attributes and their decisions is no exception. At a superficial level, there seems to be little evidence that Supreme Court justices’ religion is directly associated with their decisions. Catholic justices have ranged from very conservative (e.g., Butler, Scalia, Thomas, Alito) to very liberal (e.g., Murphy, Brennan), and Perry maintains that “Catholics on the Court have exhibited an exaggerated degree of religious impartiality.” For example, Frank Murphy, perhaps the most devout of the 19th and early 20th century Catholic justices, upheld the doctrine of church-state separation even when it went against Church doctrine.

However, empirical studies that have focused on specific issues suggest the existence of a relationship between judges’ religion and case outcomes. For example, Ulmer analyzed the voting behavior of the 14 justices who sat on the U.S. Supreme Court from 1947-1956. He found that non-Protestant justices were less likely than Protestant justices to support the government (means of 28% and 48%, respectively). This pattern of findings has been replicated cross-nationally. Catholic U.S. Supreme Court justices differ from their Protestant brethren in some procedural respects as well as on substantive matters in that Catholic justices are more likely to write dissenting opinions.

**JUDGES’ RELIGION AND RELIGIOUS-FREEDOM CASES**

The empirical studies described above suggest that judges’ religion matters in some types of cases but not others. One might reasonably expect it to matter most in cases that are directly concerned with religion, such as those that deal with the religious-liberties clauses of the First Amendment (i.e., Free Exercise and Establishment). Several studies of judicial decisions in religious-liberties cases have addressed, among other factors, the role played by a judge’s own religion.

In what is perhaps the earliest such study, Sorauf analyzed 67 church-state separation cases decided by high appellate courts (both state and federal) from 1951-1971. Sorauf found that judges’ religion was strongly associated with their behavior in these cases: “Nothing explains the behavior of the judges in these church-state cases as frequently as do their own personal religious histories and affiliations. Jewish judges vote heavily separationist, Catholics vote heavily accommodationist, and Protestants divide.” The pattern was strongest in nonunanimous appellate cases, where Jewish judges voted for separation 82.4% of the time, compared to 56.1% for conservative Protestants (e.g., Baptist, Methodist), 48.7% for liberal Protestants (e.g., Episcopalians, Presbyterians), and 15.6% for Catholics; but the trend was present in unanimous appellate cases and for trial court judges as well.


21. **RECOMMENDED READING**


26. Catholic justices on the Canadian Supreme Court were more liberal than non-Catholic justices in both civil-rights and economics cases. C. Neal Tate & Panu Sittiwong, *Decision Making in the Canadian Supreme Court: Extending the Personal Attributes Model Across Nations*, 31 *J. POL.* 900 (1989).

25. Although this result supports the social background model, it should be noted that the sample was relatively small (14 justices), and only 3 of the justices were non-Protestant. Two were Catholic (Murphy and Brennan), and one was Jewish (Frankfurter).

22. **PERRY, supra note 2 at 46.**


27. S. Sidney Ulmer, *Disent Behavior and the Social Background of Supreme Court Justices*, 32 *J. POL.* 580 (1970). The behavior of some of the current Catholic justices, such as Thomas and Scalia, would appear to continue this tradition.


29. Id. at 220.

Catholicism, Judaism, and a number of Protestant denominations. The dependent variable was whether the decision was beneficial to religion, in the sense of promoting litigants—regardless of which side they were on—ability to practice their faith. Yarnold found that, except for Lutherans, all judges (including the nonreligious ones) generally adopted a pro-religion position.\(^3\) However, Catholic and Baptist judges were significantly more likely than other groups to rule in a pro-religion fashion.

Sisk and colleagues partially confirmed these findings in a similar, more recent study that examined all published decisions (\(N = 729\)) in religious-liberties cases in the federal courts (district courts and Courts of Appeals) from 1986-1995.\(^3\) They categorized judges as Catholic, mainline Protestant (e.g., Presbyterian, Episcopalian, Methodist), Baptist, Other Christian, Jewish, Other, or having no religious affiliation.\(^3\) In addition to coding judges’ religion, they also coded claimants’ religion and the religious demographics of the community where the judge maintained chambers (specifically, the Catholic and Jewish percentages in the community, the total adherence rate to any religious group, and a score for the community’s religious homogeneity).

They concluded that “the single most prominent, salient, and consistent influence on judicial decision making was religion—religion in terms of affiliation of the claimant, the background of the judge, and the demographics of the community.”\(^3\) Specifically, Jewish judges and judges from “non-mainstream” Christian denominations (i.e., neither Catholic nor mainline Protestant) were significantly more likely to approve of accommodation requests in free-exercise cases. Jewish judges were also significantly more likely to uphold claims challenging governmental acknowledgment of religion under the Establishment Clause, even when controlling for variables such as party affiliation and ideology.\(^3\) The behavior of Catholic judges was less straightforward. Catholic judges differed from mainline Protestant judges but only in cases raising certain kinds of issues, such as school-accommodation cases (where they were more receptive) and cases challenging government aid to parochial schools (where they were less receptive). With respect to the community variables, Sisk and colleagues found that judges living in more religious communities were more liberal, in the sense of voting for claimants in both free-exercise and establishment cases (i.e., supporting accommodation in the former and separation in the latter).\(^3\) Judges were also more liberal as the percentage of Jews in their community increased.\(^3\)

**CONCLUSION**

Judging is often portrayed as a dispassionate exercise based on facts and legal precedent; but empirical scholarship on judges shows that psychological, attitudinal, and background factors play a part in the process as well. On the whole, there appear to be systematic differences in judges’ decision making as a function of their religion. Jewish judges, on average, are consistently more liberal, arguably because of their stronger identification with the downtrodden and disenfranchised, owing to their own outsider status.\(^3\) Catholic judges’ liberalism varies more as a function of the individual (compare, e.g., Brennan vs. Scalia) and the issue, with Catholic judges being more liberal than non-Catholics on some issues but more conservative on others. One explanation of this pattern is that the Catholic Church has taken an explicit position on many social policy issues, to which the majority of pious Catholics adhere. Yet there is no “official Jewish position” on these same issues, freeing Jewish judges to side with the underdog across a range of different types of cases. Evangelical judges are relatively conservative. Mainline Protestants, who serve as the reference group in the majority of studies, are harder to characterize, which is not surprising given the high diversity of denominations and beliefs in such a broad classification. The pattern of findings characterizes both cases where religion is explicitly at issue, as in religious-freedom cases, and cases where religion is totally irrelevant. Thus, religion is yet another factor to consider in trying to understand and predict judges’ decisions.

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31. Lutheran judges’ tendency to take an anti-religion position in deciding these cases was not statistically significant.
33. Most “other Christians” simply identified themselves as Protestant, whereas “other” religions included Unitarians and Mormons.
34. Sisk et al., supra note 32 at 614.
35. Id. at 582.
36. Id. at 585-91.
37. Id. at 590.
Problem Solving and Prevention by General-Jurisdiction Judges

Thomas D. Barton*

State court systems have done much in recent years to deepen their “problem-solving” qualities. Across the country, courts have adopted court-annexed mediation programs and developed a variety of specialty courts tailored to drug and alcohol abuse, domestic violence, mental health, homelessness, and sexual offenders. These innovations have broadened the scope in which legal problems are understood and deepened the level of engagement between legal system personnel and litigants. They have spawned thoughtful reflections by judges and lawyers about the impact and effectiveness of legal institutions and methods as exemplified by the Therapeutic Jurisprudence and Comprehensive Law movements.

“Preventive Law” could be considered the next frontier for American courts. Although Preventive Law is making steady progress within the practicing Bar, implementation of its concepts are especially challenging for the judiciary. Yet its simple truths are enduringly appealing for every part of the legal system. Why should the pain and expense of an injury be endured if it could have been averted? It is almost always easier and cheaper to prevent a dispute than to fight over it. This essay explores the prospects and obstacles for general-jurisdiction judges to participate in the movement toward preventing legal problems as well as in resolving them well and creatively.

The essay begins by connecting problems with procedures generally, describing the importance of a good fit. Part II suggests, however, that in recent years, legal problems have taken on new shapes that strain the seams and buttons of traditional adjudication. ADR and Problem-Solving Courts may have evolved precisely as a way of grafting new procedures onto changing legal problems. Part III identifies how Preventive Law differs from Problem Solving, and some rule-of-law obstacles that confront judges who may wish to employ stronger preventive methods. Finally, the essay explores how judges might participate in Preventive Law within their traditional powers and jurisdictional authority.

I. THE CO-EVOLUTION OF PROBLEMS AND PROCEDURES

Problem Solving and Preventive Law have much in common. They share the premise that the demands made by problems shape the procedures that evolve to solve those problems. Both ways of thinking, in other words, assume that procedures develop their particular methods so as to respond to the features of particular sorts of problems. Ideally, for every human problem, a procedure has been developed that will provide an effective, efficient, and just resolution of that problem.

Here is an example of a procedure that is nicely adapted to a problem. Most sporting events face the initial question of whom should begin the action and whom should respond to that starting initiative. Which team, in other words, should kick off and which team should receive? One procedure for addressing this problem is broadly accepted: an umpire flips a coin at the center of the field, while being observed by representatives of both teams. The coin-flip is effective because although the procedure produces only a crude outcome (either Team A or Team B kicks off), that is all the problem demands. However humble, the procedure of flipping a coin adequately addresses the demands of this simple problem. It is also efficient: it requires little time and is available even in sand-lot games by children. It is fair, just, and trustworthy because it uses a transparently generated random selection that cannot readily be manipulated.

Flipping a coin works well for starting athletic events, but obviously is not suitable for all problems nor all problems that require a solution with a clear selection between two opposing possibilities. The choice of electing the President of the United States demonstrates the limitations of the appropriateness of the coin-flip procedure. Although (realistically) choosing a President is a binary choice between the Republican and the Democratic party candidates, no one would imagine a coin-flip to be appropriate in addressing this particular problem. We instead rely on another breakthrough in the invention of procedures to address problems: Democracy.

Most adjudicated legal problems are resolved by a binary judgment between plaintiff/prosecutor and defendant. In that

Footnotes

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2. See, e.g., David B. Wexler and Bruce J. Winick, Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence (1996); Judging in a Therapeutic Key, supra, note 1.


5. This example is discussed Id., at 33–36.
respects we could employ a coin-flip. But of course we do not do so because just as in the election of our leaders, we value the quality of information and deliberation that a coin-flip cannot supply. For problems traditionally set before our courts, the rules of civil procedure have evolved so as to resolve those problems accurately, fairly, and transparently.

Traditional litigation is an especially elaborate and refined procedure. It addresses an immensely broad swath of human problems and is a foundation for the rule of law. Like democracy, the rule of law is a seminal achievement in the history of human governance. And judges are its primary guardians. To my mind, procedural experiments in addressing legal problems must always heed this cautionary warning: they must not compromise the operation or social trust in the rule of law. 8

Also to my mind, the developments in ADR and Problem-Solving Courts have not undermined the general-jurisdiction courts. If anything, both of these developments have arguably advanced the rule of law. I shall return to this touchstone issue at the end of this essay, but for now I will simply assert that recent procedural innovations respond appropriately to a changing mix of problems presented to the legal system.

II. PROBLEMS PRESENTED TO COURTS: THEY AIN’T WHAT THEY USED TO BE

The legal system has been expanding its capacity and flexibility in responding to human problems and has done so in ways that have preserved the public trust in the rule of law. ADR and Problem-Solving Courts are characterized by stronger reliance on consent of the parties than on state power; by informal narratives for problem-identification and information rather than formal pleadings and rules of evidence; by understanding problems and solutions within broader contexts than those suggested by a strict application of legal rules; by more orientation toward workable relationships for the future than exclusive concern for the etiology of past injuries; and by remedies that depend more on personal accountability than on transfer payments or incarceration. 7 All of these qualities arguably cope better with the demands of many (not all) of the sorts of problems that increasingly make their way to the legal system.

A. Changing Attributes of Legal Problems

Make no mistake: more and more, we are asking our judges to resolve problems that are harder and harder to resolve. As I elaborate below, legal problems are increasingly volatile, novel, intimate, or recurring. Or, they require complex choices among regulatory alternatives. All of these properties make a problem harder to decide, especially with the methods of traditional litigation. That is because traditional courtroom procedures evolved in response to the problems of simpler times and places: transactions in agrarian or gradually industrializing societies in which customary beliefs were stronger and more widely held. ADR and Problem-Solving Courts are being developed and accepted because they have procedural features that cope better with these structurally challenging problems that increasingly characterize modern life.

1. VOLATILITY AND NOVELTY

More contemporary problems are volatile or novel simply because the rate of social, economic, and technological change continues to accelerate. To demonstrate this, imagine the sorts of legal problems that are likely to be more prevalent 20 years from now. How should, or can, the judicial branch respond to legal issues raised by global warming; severe misallocations of water; natural resource depletion; severe immigration pressures on national boundaries and human trafficking; genetic manipulation; terrorists armed with weapons of mass destruction; the effects of the steady disintegration of extended and even nuclear families; and the demands for access to effective and affordable health care, especially among baby boomers who by then will be entering frail old age?

Where the background conditions to a problem are volatile, a judgment rendered based upon the conditions prevailing at any given moment is like characterizing a video according to a few still-shots out of the moving context. Capturing the truth out of any given moment risks failing to see recurring patterns. Worse, it risks failing to perceive how the justness in applying legal rules might fluctuate from party to party. And yet the methods of traditional adjudication are better designed for discrete transactions, for snapshots rather than dynamic environments. Further, where issues are novel, the legal rules that ground the authority of the court may be sketchy, vague, or even absent.

The historical genius of the common law is its ability to propose and test proposed solutions to changing circumstances through a flexible but guiding stare decisis. Yet it is sometimes difficult for the common law to keep pace. Of course, modern legislative and executive branch regulations carry much of the load in dealing with newly emerging problems. Nonetheless, the judiciary sees its share of these swirling problems, and they may be without precedent.

2. INTIMACY

More legal problems also now seem intimate, i.e., embedded in long-standing basic human relationships. Many components contribute to this: the decline of the family harmony doctrine, higher divorce rates, the rise of more complex standards for awarding child custody, and an increased willingness within our culture to address problems such as sexual abuse, domestic violence, and elder abuse.

These problems are more difficult on a number of dimen-

6. The tension between Problem-Solving Courts and “core judicial values—certainty, reliability, impartiality and fairness” is identified and well explored by Greg Berman and John Feinblatt in Problem-Solving Courts: A Brief Primer, originally published in 23 LAW AND POLICY #2, excerpted in JUDGING IN A THERAPEUTIC KEY, supra note 2, at 81–85. As the authors caution, these core values “have been safeguarded over many generations largely through a reliance on tradition and precedent. As a result, efforts to introduce new ways of doing justice are always subjected to careful scrutiny.” Id., at 81.

7. See generally, LAWYERING FOR THE FUTURE at 252–278.

8. The changing nature of legal problems is discussed Id., at 254—256.
sions. First, it is harder to take in appropriate evidence on these problems because the witnesses may be underage or intimidated. Further, evidentiary relevance and materiality are problematic because of the give-and-take and emotional episodes that occur within most intimate relationships. Unlike judging criminal episodes or singular tortious interactions, judging the relative health or pathology of relationships is unreliable when the judge has evidence of only a tiny percentage of the interactions in a long-term or dense relationship. Finally, often the task at hand in resolving these problems is to create an environment for moving forward. Judges are being asked to manage relationships for the future, entailing predictions and interventions that are far more within the normal realm of psychologists than judges.

3. CHRONIC OR RECURRING PROBLEMS

Although I lack data, my impression is also that more problems are being presented to the judiciary that are recurring. Examples would be criminality and civil-disorder problems stemming from drug or alcohol addiction, mental illness, gang membership, homelessness, or sexual predation. Obviously illegal behaviors are being performed, and these are the direct prompts for legal system involvement. But the people engaging in these illicit activities are doing so for reasons that are particularly resistant to traditional legal remedies. The courthouse and jailhouse become revolving doors for these folks to enter and leave repeatedly. Addressing the underlying causes of these problems is a very different enterprise than traditional legal judging. Once again they are more in the realm of therapy, social work, or perhaps urban planning.

4. PLANNING DECISIONS: PROBLEMS OF THE REGULATORY STATE

The mention of urban planning leads me to speculate on one final category that may be increasing in trial court dockets. These are problems that stem from the initiatives of the modern regulatory state. Examples would include the siting of a new highway, or preservation of wetlands and open spaces, or the planned allocation of medical resources. These problems are especially tricky for the judiciary because they cannot easily be reduced to yes or no answers about liability. The nature of the problems demands a processing of information and a form of resolution that do not correspond to structures traditionally available in adjudication. Planning decisions entail multiple variables that play against one another to produce multiple possible outcomes. Problems like this are better suited to the expertise of planners or the decentralized valuations of the market.

B. Changing Attributes of People Who Have Legal Problems

The paragraphs above explain the emergence of ADR and Problem-Solving Courts by focusing on the attributes of the problems presented to the courts. The same phenomenon could be explained instead by looking at the people who have those problems, and asking whether the underlying assumptions of traditional adjudication will lead to just outcomes for those people.11

1. RATIONALITY

For example, the law assumes in its resolution of problems that the people before them are rational in their choices and ability to comport with the law. The law has special provisions for those who are mentally ill, but the underlying compulsions of drug or alcohol addiction also impair rationality. The widespread acceptance of drug courts reflects the law’s attempt to fashion a procedure that better matches these challenges. But what about problems held by people who are involved in intensely emotional relationships like sexual intimacy or parenting? Do they display the detached rationality that is necessary for informed choice? Family courts may represent an institutional response to these situated human qualities, as well as to particular legal aspects of marital dissolution and child custody.

2. SEPARATION

As it addresses problems and pronounces remedies, the law also assumes that people can be separated one from another. That is, the law assumes that people are free to move from whatever troubled relationships may have brought them to court. These assumptions about the dissolution of social ties are not always warranted, however, and if so the legal judgment or remedy may be neither effective nor just. This is another reason why child custody issues, for example, are so difficult. The court is pronouncing a legal separation of one (or both) parents from some or all aspects of the child’s life. Emotionally, however, separation is not so easy. This same limitation on separation also accounts for some of the difficulty of domestic violence cases. Separating the parties through a restraining order is a primary tool of what the law has to offer, but it may not be what either party really wants. Or, more commonly, separation may not be economically feasible.

In yet other cases, pronouncing a separation may paradoxically undermine the reasons why people sought legal help for the problem. Immigration and asylum issues may be examples, or problems that arise within religious organizations or within indigenous ethnic groups. The parties may be seeking more peaceful affairs within a relationship—a relationship of location or a relationship of religious or tribal belonging—rather than a severing of that relationship. But the traditional methods of adjudication are not easily suited to supply that. They lack the proper techniques for getting at the truth within the relationship, or the power to order or supervise an effective remedy.

III. HOW PREVENTIVE LAW AND PROBLEM SOLVING DIVERGE

A. Moving Earlier in the Life-Cycle of a Legal Problem

For the sorts of problems described within Part II above, the techniques of ADR and Problem-Solving Courts may be effec-


Decisional Institutions, 63 N.C. L. Rev. 519 (1985).
11. See LAWYERING FOR THE FUTURE at 177-180
tive and appropriate. These innovations differ from traditional litigation in how issues are defined, information gathered, decisions reached, and remedies effected.\textsuperscript{12} Even though they rely less on legal rules and employ different understanding of the truth and how it is achieved, neither ADR nor Problem-Solving Courts seem to conflict with the meaning or strength of the rule of law. Preventive Law shares much with Problem Solving, but what separates the two helps to explain why acting preventively is easier for practicing lawyers than for sitting judges.

Preventive Law seeks to address risks before they become problems. Preventive Law differs from Problem Solving, in other words, by intervening earlier in the life cycle of a problem.\textsuperscript{13} To do so, the preventive thinker must understand the underlying causes of problems. Those causes are often complex and subtle, emerging from systemic interactions of personal, social, and nonsocial environments. Ironically, the more complex the system that generates a risk, the more alternative initiatives might be available to disrupt that potential pathology.\textsuperscript{14}

A biological analogy may be helpful. If a cold virus has infected Person A, then Person B who is in close contact with Person A is at risk of sneezing in the near future. If Person B recognizes the risk in time, however, preventive measures may be taken that will stave off actual illness. Even in this simple example, however, a variety of interventions could be effective. Person B could ask that Person A cover his or her mouth when coughing. Person B could wear a mask, or simply move out of range of Person A. Person B could take steps to build up his or her immune system.

For the preventive thinker, every human problem is nested originally in a set of interacting connections. The deeper the understanding of the various social, financial, civic, organizational, moral, or physical connections, the earlier and easier prevention becomes. Prevention depends on knowledge. The mechanisms of risks must be understood, the seriousness of the risks must be assessed, and alternative possible interventions must be generated and attempted.

The entire preventive inquiry and intervention is done ahead of any injury. This is crucial for general-jurisdiction judges and the extent to which they can act preventively because for legal problems, effective prevention would precede any claim that a legal rule has been violated. In that respect, Preventive Law diverges from ADR and Problem-Solving Courts. ADR assumes the existence of a dispute, which typically erupts out of a claim of the breach of some legal duty. Problem-Solving Courts similarly presuppose that a problem exists. Indeed, the problem may have long persisted before the defendant cooperates with a Problem-Solving Court.

This is not to say that ADR mechanisms and Problem-Solving Courts do not prevent problems. They do.\textsuperscript{15} Frequently, they address an immediate injury, claim, or criminal behavior in such a way that the problem does not recur.\textsuperscript{16} Problem-Solving Courts especially make a conscious effort to address the deeper causes of the addiction or violence.\textsuperscript{17} These courts then attempt to open up opportunities to break the destructive cycle in which the defendant seems trapped. The court may put the defendant in touch with social services, therapists, and potential employers. The court will monitor progress (or backsliding) by periodic reappearances to the court.

But something—a proper legal claim or criminal arrest—must initially prompt the courts to exercise their jurisdiction. In both court-annexed mediation and Problem-Solving Courts, the state has properly invoked its power. Thereafter, the matter is diverted to an alternative format that almost invariably is accompanied by some form of consent by the defendant or parties.

The traditional aim of Preventive Law, by contrast, is to gain some ability to examine and intervene in an environment at the risk stage before any matter is brought before the court. That is what Louis M. Brown, the father of Preventive Law, referred to as getting the matter while the facts were still “hot.” By that he meant that the environment was still manipulatable, so as to avert the path that seems to be leading to actual injury. When the facts grow cold, generally following actual injury, the range of possible alternatives shrink. They shrink in part because at this stage the damage has been done: a cognizable legal claim has been created.

To some extent, facts are always cold by the time they make it to a court. How could a court otherwise exercise jurisdiction? If the facts are still hot, a “case or controversy” may not yet have arisen. And if Preventive Law is effective, it never will.

Preventive Law is traditionally practiced within a law office as a lawyer counsels a client based on far-ranging conversations between lawyer and client.\textsuperscript{18} When those conversations begin, neither the lawyer nor the client may have any idea about any particular legal risk. Indeed, there may be none. Brown advocated “periodic legal check-ups” between lawyer and client in which the lawyer would regularly be brought up to date with all of the client’s affairs. Much like regular medical check-ups, no risk may be detected. The inquiries of the physician and accompanying routine blood tests may turn up no areas for concern. Or, they may identify early warning signs for which preventive measures would be warranted. The point, of course, is to have the risk identified as early as possible so that treatment can be less intrusive and less expensive.

Preventive Law thus stresses the need for early consultation between lawyer and client. But it also emphasizes the importance for the lawyer to inquire as broadly as possible about the client’s affairs. The lawyer, by reason of training and experience, can spot legal risks far ahead of when they may be perceived by the client. But to be effective in fashioning suggestions for interventions that may avert the injury, the lawyer’s knowledge about the client’s larger environments must be broad. The preventive lawyer must understand legal risks not in isolation, but as part of a broader system of connections in the client’s world.

\begin{footnotes}
\item[12] For a comprehensive comparison of traditional versus therapeutic or problem-solving courts court procedures and officers, see the chart at page 5 of \textit{Judging for the 21st Century}, supra note 1.
\item[13] See \textit{Lawyering for the Future} at 49--54.
\item[14] See \textit{Id.} at 55--78.
\item[16] Berman and Feinblatt, supra note 6, as quoted \textit{Id.}, at 79.
\item[17] \textit{Id.}, at 18
\end{footnotes}
B. Obstacles to Preventive Actions by General-Jurisdiction Judges

This traditional practice of Preventive Law is not readily available to a general-jurisdiction judge. Judges in Problem-Solving Courts have, through consent of the parties, assumed a broad vision over the problem, its resolution, and the prevention of its recurrence. But the original legal jurisdiction of these judges under state or federal constitutional authority is not in question. If we set aside Problem-Solving Courts and focus on general-jurisdiction judges, the scope of preventive practices is not so broad.

First, as suggested above, traditional general jurisdiction courts react to claims that summon their authority. That authority is based on plausible legal rights, as stated in a complaint. Until a legally cognizable claim is stated—which most often must be based on some actual or imminent injury—courts may not act. This contrasts with lawyers who, in the private confines of their law offices, may freely counsel the client. The lawyer may investigate broadly and recommend a variety of legal and nonlegal preventive measures. In so doing, the private lawyer may communicate directly with potential adversaries or their attorneys.

A judge who became involved in a matter before the proper lodging of a claim about legal rights or duties would challenge several assumptions about the rule of law. First, a foundational principle of the rule of law is the limitation on state authority in making people answer to courts. That nexus is established through the idea of due process. How can a general-jurisdiction judge become legitimately engaged at the stage of legal risk rather than legal injury? The private lawyer is not an agent of the state; the judge is clearly part of its embodiment.

Second, Preventive Law is done best through conversations that are broad as well as early. The lawyer seeks to understand the client’s affairs as fully as possible. But unfocused inquiries by a general-jurisdiction judge could further violate traditional understandings of the relationship between citizen and state. One important function of formal pleadings is to narrow legal inquiries as well as provide notice of the proceedings. Tying a judge’s authority to pleadings avoids Star Chamber-style interrogations.

Relatively, the adversarial system is still employed within general-jurisdiction courts. Unless a matter is diverted from that system, the articulation of legal issues and the application of legal rules are still premised on the arguments of opposing counsel. The inquisitorial processes of civil-law judges can create a strong rule of law. But that is simply a different judicial model from the Anglo-American heritage.

A final challenge to the rule of law stems from the premise that Preventive Law can intervene in multiple ways in a broadly envisioned system so as to disrupt pathological interactions or to enhance the connections to work better toward a client’s goals. Where public issues become involved, expansive proactive measures would not only challenge the court’s supervisory capabilities, but also raise division-of-powers issues about the relationship of the judicial branch of government to the legislative and executive branches.19

IV. HOW MAY A GENERAL-JURISDICTION JUDGE PARTICIPATE IN PREVENTIVE LAW?

The goals of Preventive Law have always been worthy. And as our society becomes more sophisticated about the complex systems in which risks are born and injuries erupt, Preventive Law is an idea whose time has come. How, therefore, may a general-jurisdiction judge participate? Convinced by the logic of prevention, how can judges act in ways that address risks before they cause injury?20

Some powers that are traditionally available to judges may be used for preventive purposes. This assumes, of course, that a case is properly before the judge. But once that happens, the judge has inherent powers that can help to uncover the precursors of additional problems. The judge can discover and act upon some sources of risk, friction, overreaching, and poor communication. The judge has powers of investigation, referral of issues for public prosecution or to Bar authorities, sanctioning attorneys, dismissal of unworthy claims, and persuasive authority in judicial-chambers settlement conferences. These powers may not work as easily or comprehensively as those available to the private lawyer counseling a client, but they nonetheless could be helpful and can be exercised well within the rule of law.

Acting preventively may not always feel comfortable, however, even where exercised under powers that are legitimately available to judges. In the examples below, consider whether you would feel authorized, and if so, whether you would feel at ease in taking the actions suggested.21

Example 1:22

A judge is hearing the fifth example of the same sort of tort claim; each claim was brought by unrelated plaintiffs, but each claim was brought against the same industrial defendant. In each case, the plaintiff has lost, and the judge comes to believe it is because the individual plaintiffs will not be able to muster expert witnesses of the same caliber as those testifying on behalf of the defendant. Would it be appropriate for the judge to order the appointment of an independent neutral expert?

Now suppose that the judge were to attempt to make such an appointment, but several potential experts contacted had to refuse on conflict-of-interest grounds: They had previous connections with the defendant or had been contacted about the case already by the defendant. Would it be appropriate for the judge to order an

19. But see Berman and Feinblatt, supra note 6, as quoted in Judging in a Therapeutic Key, at 82.
20. One significant step, although related only indirectly to prevention, could be to consider the courtroom demeanor eloquently described in Judging for the 21st Century, supra note 1.
22. The author is indebted to retired Federal Magistrate James F. Stiven for his most helpful consultation on all of listed examples. Several of the alternative possibilities explored in these examples were supplied and developed by Judge Stiven.
investigation of the terms and practices by which research money has been funneled by the defendant over the past three years into academic institutions whose employees are now testifying for the defendant or unable to act as a neutral expert for the court.

**Example 2:**

In a private-nuisance case, mediation has been tried and failed. The case is scheduled for trial. When the judge reads the papers and is sitting in a pretrial settlement conference, the judge gets the strong impression that this is a grudge match: that the parties are being vindictive and self-destructive; that it is not about the plaintiff needing a remedy, but instead about each party wanting to secure a pronouncement that the other person is wrong. Suppose, however, that the plaintiff’s claim has some technical legal merit. Is it appropriate for the judge in that instance to declare, off-the-record in chambers, that either the parties come to some compromise, or the judge will dismiss the complaint? Short of that, is it appropriate for the judge to schedule multiple settlement conferences? Delay the trial?

**Example 3:**

During a medical-malpractice trial, the judge comes to the suspicion that the defendant, a physician who was never called to testify, was impaired due to drug abuse. Before the trial is concluded, a settlement is reached that never called to testify, was impaired due to drug abuse. The case is scheduled for trial. When the judge reads the papers and is sitting in a pretrial settlement conference, the judge gets the strong impression that this is a grudge match: that the parties are being vindictive and self-destructive; that it is not about the plaintiff needing a remedy, but instead about each party wanting to secure a pronouncement that the other person is wrong. Suppose, however, that the plaintiff’s claim has some technical legal merit. Is it appropriate for the judge in that instance to declare, off-the-record in chambers, that either the parties come to some compromise, or the judge will dismiss the complaint? Short of that, is it appropriate for the judge to schedule multiple settlement conferences? Delay the trial?

**Example 4:**

Suppose that a plaintiff has been pursuing a civil action for sexual discrimination by her medium-sized business employer on a disparate-treatment theory. The jury awards damages to the plaintiff. In hearing the testimony, however, the judge believes that the work environment is hostile even though that theory was never pursued by the plaintiff’s attorney. Would it be appropriate for the judge, following entry of judgment for money damages in favor of the plaintiff, to further order that every employee of the defendant undergo gender-sensitivity training on the theory that the risk of future sexual discriminations should be prevented?

Most of us, judges or lawyers, will reach a point of discomfort in considering the examples. Most would see the worth of preventive action and the legitimacy of the judge’s proposed action. And yet we know that the stakes are high. The rule of law is a treasure, and judges have a vital role in its maintenance.

Every society must construct some device for simultaneously advancing two vital social functions: facilitating human interaction, and protecting people from one another. Both functions are required for social existence. Historically, however, the two functions have been seen as conflicting: the more dense the human interaction, the greater the threat to self-protection. This may be conceived as the fundamental social dilemma. Our society has chosen to balance or manage these two functions through the rule of law: people are empowered to interact freely without constraints of caste or inherited role. But they are strongly protected in those interactions by being equipped with individual rights, which can be vindicated through carefully constructed and constrained legal rules and judicial determinations.

If we broaden the contexts by which the legal system evaluates human problems and accord greater discretion in general-jurisdiction judges to frame, investigate, and remedy problems, will the protective function of law be compromised? Or the human-interaction function? Or both?

But could such a broadening of our understanding of the general judicial role actually strengthen both functions, as arguably ADR and Problem-Solving Courts have done? It seems a possibility. Preventive Law imagines that human relationships inside as well as outside of the official legal system can, as they deepen or intensify, augment human protection. As Preventive Law presents itself to the judiciary alongside Problem Solving, these questions are worthy, even if as yet unanswerable.

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Court Review, the quarterly journal of the American Judges Association, 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 psychological or other social-science research) that can be used by judges in their work.

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Only the Really Hard Part of eCourt Is Really Worth Doing

Michael H. Marcus

Some 20 years ago, I released a defendant facing a minor charge pending his trial, who promptly beat up proprietors in a new attempted robbery. I had no access to information about the defendant’s criminal history. Even today, my mistakes that are based on inadequate information can allow tremendous harm to victims, communities, families, and children. I profoundly hope that I’m sending the right people to prison, to probation under proper conditions, and to the right providers.

It is, of course, terrible when someone we release promptly causes great harm. It is understandable that observers blame the judge for that harm (even if the judge had no lawful choice). But our decisions often play out badly over a much longer period of time. Others may participate along the path to the harm and spare us at least visible fault, but we still desperately hope that we improve the outcome: a criminal pretrial, sentence, or probation decision that best protects the community from future criminal conduct; a family custody; dependency; or delinquency decision that leads to the most successful childhood, adulthood, and subsequent parenting; a civil commitment decision that leads to the highest level of functioning for an impaired citizen; a disposition that helps any victims best emerge from their victimization and serves the legitimate purposes of “just deserts.”

Technology can bring great convenience to courts: eFiling; electronic access to content; efficient case and exhibit management; useful access to voluminous social files; and even improved participation via web forms for self-represented litigants. Yet there are many aspects of courts that threaten success for even this use of technology: diversity of case and user types, proprietary barriers to interactivity of components, security issues, and the gap between what vendors and court users know about each other. What vendors and courts know about each other can determine whether their agreements nourish productive collaboration or fuel the blame game when things go wrong.

But serving efficiency and user satisfaction is not a high enough demand of technology. We must insist that technology also help us improve the safety of dispute resolution, to reduce the criminal behavior of those we sentence, to improve the well-being of communities and the lives of children and families we touch, and to achieve the best outcomes for impaired citizens we encounter. Outside the rare wealthy states, funding for court technology competes with such important purposes as public safety, education, child welfare, mental health, and medical care. In short: the convenience of improved dispute resolution doesn’t take the battle for dollars very far. To warrant funding, court technology must improve our ability to impact the lives and communities we touch.

This dialog has continued over decades in Oregon’s judicial branch. On the eve of a budgetary downturn in early 2008 that might have cost us “Oregon eCourt” funding, some of us argued that our business case to the legislature ought to be this vision of eCourt:

Oregon eCourt will give courts and judges the tools they need to provide just, prompt, and safe resolution of civil disputes; to improve public safety and the quality of life in our communities; and to improve the lives of children and families in crisis.

The word “improve” was seen by some as improvident. But our Chief Justice Paul De Muniz courageously carried precisely this torch to the legislature:

Insufficient access to relevant information explains bad release decisions, sentences, child placements, and even mental health placements that can lead to horrible crimes and other life-changing disasters to victims, children, families, and communities. Improving access to information and tools to reduce these tragedies has been a critical piece of the justification for our eCourt funding. Our Chief Justice, our Legislative Fiscal Office oversight participants, and our quality-assurance vendor all confirm that this vision is critical to the value of eCourt that bundled within “just deserts.” In rare cases, public values require doing something that compromises the pursuit of public safety. Widely held social values demand substantial punishment not necessary to prevent future crime, for example, in some non-cidivist DUI vehicular homicides, “opportunistic” intrafamilial child-sex-abuse cases, and shaken-baby deaths. In most cases, best efforts at crime reduction also satisfy the legitimate functions of “just deserts.” See generally, e.g., Responding to the Model Penal Code Sentencing Revisions: Tips for Early Adopters and Power Users, 17 S Cal. Interdiscipl. L J 68 (2007) (includes A Harm-Reduction Sentencing Code); see also http://www.smartsentencing.info/ArticlesonSSP.htm.

Footnotes
2. My position is not that “just deserts” is an invalid function of punishment but that we tragically allow mainstream sentencing to use that mere label to avoid accomplishing anything other than a sentence within legal limits, ignoring even the legitimate purposes of “just deserts.” Responsible sentencing is rare (outside good treatment and juvenile courts). Sentencing should be required to employ advocacy, information, and tools to seek public safety and public values, which include the pro-social functions legitimately

The author thanks Oregon Circuit Judge Maureen McKnight, and his daughter, California attorney Andréa Marcus, for their valuable input on this article.

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we have promised to our state in return for financial support. It has helped sustain funding through the worse economic times that have followed 2008.

What follows is what we’ve learned so far about pursuing the eCourt performance that matters most—to us and to those we serve.

EVEN THE REST IS HARD ENOUGH

It’s probably a good idea to share some of the problems of the easier parts. Vendors and administrators see justice as an assembly line designed and managed as an electronic means for managing workflow. Even the judges who often get called first into any design meetings are those who also tend to see cases as part of a fast-flowing set of disputes whose successful handling is demonstrated by speed; they share with administrators the view that what matters is that cases be concluded quickly. They are all most likely to accept the vendor’s presentation of how interfaces work best and how to process cases as if on an assembly line with efficiency, meaning speed, as the primary goal. This approach tends to accept the vendor’s view of what the screen should look like, based on the efficiency mission.

What is being overlooked is that the highest calling of the judicial process is not speed. The lengthy hearings and trials, particularly but not exclusively jury trials, are not part of “workflow;” though they may be supported by workflows. Real hearings have components totally absent from an assembly line: ceremony, respect, decision, debate, research, deliberation, and the various sources of legitimacy for the ultimate decision.

It is, therefore, critical that judges who commonly do extended hearings and trials participate in early design discussions. Ideally, this includes some judges who have some experience with web design and application customization. Many have experience with proprietary legal research and web applications. Judges must have a meaningful role in design and setting “requirements” so that costly amendments to agreements are not necessary to make an application work well in extended hearings.

An example: The first version we saw for “electronic” court was for eviction matters. The interface would have a judge select the case to work on by selecting a day of the docket (in a fast-track court, the day the judge is using the tool for all cases), then selecting the case, the beginning and ending dates that would contain documents of interest to the judge, and then receive a document on which the judge would fill in some form. The judge would then produce a judgment or an order in the case. The judge may be interrupted by a “time out” box, in which case the judge would have to log in again and again navigate to the same position. Without going into all the details, suffice it to say that it took much work and money to allow a judge to select a case and gain access to all of its documents by case number, handle exhibits, write notes and opinions, and not have to worry about timing out and having to renavigate through an interface designed for an assembly line while trying to perform the legal analysis and participate in the human interaction that produce the most important part of the administration of justice in terms of dispute resolution.

It is a challenge to ensure that court technology is making technology convenient for judicial users beyond the “workflow” to support major hearings without distracting judges from the important human interactions. But the challenge is far greater and more important: technology must be used to its full potential to improve our impact on our communities. What follows is what we’ve learned so far about pursuing the eCourt performance that matters most—to us and to those we serve.

SILOS, OCM, PMBOK®

Silos

We all tend to restrict our focus to core functions, now commonly addressed as “silos,”* separated from others’ pursuits in their silos within the courthouse. Achieving the highest purposes of eCourt technology requires transcending such limited objectives as these:

Judges: close cases efficiently, reach a reasonable and lawful result, attribute outcomes to whatever agency is involved—collections, corrections, probation, judgment-enforcement processes, child and family services. Avoid embarrassment, criticism, and reversal on appeal.

Administrators: keep the calendar running smoothly, limit wasted time, avoid set-overs, keep users happy, and reduce the number cases unnecessarily returning for further attention. Avoid embarrassment and criticism.

Staff: calendar matters for the docket accurately; get the files (electronic or paper) where they need to be when they are needed; afford access to files; get new orders and materials into files and make them accessible to those who rely on them for the next step; be sure that sealed materials are not wrongly revealed; avoid criticism.

Technology workers: Support the technological infrastructure that increasingly supports functions that the rest of us rely so heavily upon but usually notice only when something goes wrong: filing, scheduling, communication, case management, transcript and exhibit access, video and teleconference sessions, collections and accounting, administrative and judicial conferencing, and security from unauthorized modification or access to non-public material. Supporting this growing set of functions is the easiest source of pride in serving courts with technology—and in avoiding criticism.

Law clerks: Get the right memo to the judge to get the decision made well, quickly and without ultimate embarrassment. Avoid criticism.

Facilities staff: Protect the safety of the process, the comfort of the participants, and whatever calming dignity the facilities and their maintenance can bring to difficult occasions. Avoid criticism.

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4. The “silo effect” phrase currently popular in business and technology communities describes a dysfunctional isolation of perceptions and skill sets within separate departments in an organization.
Jury trials, though imperfect, provide the purest form of government of, by, and for the people . . . .

**OCM**

The “organizational change management” (OCM) part of any technology court project must be much more than just getting the courts to accommodate technology’s needs. OCM must also get the bulk of all of our colleagues—all of our judicial, administrative, support, and technical colleagues—to expect to use technology to improve the lives we should be improving. We need to revisit basics to achieve such an ambitious result. Though partner perspectives (lawyers, providers, vendors, agencies) vary and are important, I will focus on our colleagues within the judicial branch of government.

The judicial system is worthy of job satisfaction in spite of the imperfections that are inherent in any human institution. There is ample consensus that what we do, with and without juries, provides tremendously valuable services when they are needed: unbiased delivery of justice, the rule of law, and dispute resolution. Jury trials, though imperfect, provide the purest form of government of, by, and for the people: jurors are selected for absence of bias, decide cases based on what comes to them in court and on the record, cannot be lobbied, do not run for the office of juror, cannot accept campaign contributions, and are interested only in achieving a just and lawful result.

This is the foundation of job satisfaction that must fuel our pursuit of the valuable purposes of the eCourt vision—to improve the lives and communities we touch.

**PMBOK®**

PMBOK® is an internationally respected set of concepts employed by our Legislative Fiscal Office (LFO) to maximize our chances of succeeding in building a court technology upgrade. Due to local and national examples of how easily eCourt projects stumble, LFO required us to produce the documents designed to maximize the likelihood of our success. However critical this effort is, we can’t expect that making documents say the right things will ensure that we will accomplish the right things. But LFO firmly agrees that we must “make sure that ‘Oregon eCourt will give courts and judges the tools they need to provide just, prompt, and safe resolution of civil disputes; to improve public safety and the quality of life in our communities; and to improve lives of children and families in crisis.’”

One of the important PMBOK® tools is a “risk matrix” that monitors risks to the overall program as well as to its components, which include enterprise content management (ECM), Web Portal, Intranet, Servers, Integration, case management, eFiling, and OCM. The risk presented by “‘silo’ hurdles is perfectly illustrated by this scenario:

We identified a risk titled “vision dissipation” and assigned it to OCM. The fate of the “vision dissipation” risk itself soon appeared to doom pursuit of the vision. The risk was treated as if it belonged only to OCM; it effectively disappeared from risk matrices assigned to projects because it was relegated solely to the “program” and not to its projects. The risk was assessed as too low to appear on any risk matrices presented to governance committees. The eCourt vision reached some text in most of the many documents created to comply with PMBOK® but had no apparent connection to the rest of the project each document described. Even OCM documentation suggested that merely stating the vision was all that was required. Every document could comfortably be read as seeking only efficiency, convenience, and user satisfaction. All implications were that the hardest part—improving our impact on public safety, community well-being, and rational allocation of correctional and social resources driven by our dispositions—was not the responsibility of court technology. Of course, the vision can only be achieved if each component of eCourt embraces and pursues the vision; it simply cannot be achieved on a “program level” unless the components are engaged and integrated in its pursuit.

What paperwork must do at the very least is this: (1) Demonstrate with reasonable prominence how the document and its subject relates to pursuit of our vision; (2) Never be easily readable as deeming our program sufficient if it merely serves efficiency of court operations and user convenience.

We know that OCM is not just about getting the courts to accept and accommodate the needs of new court technology; we know that integration is not just about getting the many components of court technology to play well with each other. All of this is hard, but the hardest part of all is the most valuable—transcending silos and achieving cultural changes necessary to get us all to embrace and use court technology to improve our impact on the lives and communities we touch as well as the efficiency of our processes and the convenience of our constituents.

5. Project Management Book of Knowledge (PMBOK®) is a proprietary standard for successful management of a wide range of projects, certainly including technology projects.
6. We’ve expended considerable resources to drafting and vetting over 84 significant documents to meet LFO’s requests. This work has necessarily competed with energy otherwise devoted to building eCourt.
7. The matrix describes the risk as “Losing sight of connection to eCourt’s vision to give courts and judges the tools they need to provide just, prompt, and safe resolution of civil disputes; to improve public safety and the quality of life in our communities; and to improve lives of children and families in crisis.” If we don’t avoid the risk, “eCourt does not deliver just, prompt, and safe dispute resolution, improved public safety, or improved quality of life in communities or for children or families in crisis,” and we risk “[l]oss of legislative support and continued funding based on the vision’s promise.” The matrix then outlines how we should manage the risk: “Ensure vision is clearly stated in all presentations and foundational documents for the Oregon eCourt Program; Ensure that the vision drives tactics, strategy, and implementation in all phases of eCourt upon which fulfillment of the vision depends.”
8. Oregon’s eCourt’s governance committees have adopted these requirements as an eCourt document protocol.
Collaboration

We cannot achieve the vision without transcending silos because none of us has all the skills, information, or perceptions we need. Judges are generally not aware of the rapid expansion of technology tools, applications, and benefits, so we are hardly in the position to identify what “requirements” would best meet our needs. Technological workers are generally not focused on what judges actually do or how our decisions impact people, lives, and communities, so they are hardly in a position to identify what “requirements” would best meet our needs to improve that impact. We need to collaborate, and we surely can benefit from outside help.9

We all mean well. Here is what judges bring to our ongoing collaboration:

We increasingly depend upon court technology when doing our jobs: handling papers, filings, scheduling, official records, exhibits, jury assignments, enforcement of orders, communicating with counsel, agency partners in criminal cases, family and juvenile matters, and such routine business partners as title companies, collections enterprises, and even vital statistics agencies. We tend to notice our many technology colleagues only when something goes wrong, and only until it is fixed so we can take them for granted again. Glitches can delay trials, lose critical witnesses, inconvenience jurors, inefficiently allocate court resources, frustrate users, and tarnish users’ sense of justice by the burden of its processes.

Judges should not gather information not offered by litigants during the decisional parts of trials and hearings. Navigating between decisional and dispositional functions in all sorts of civil, probate, criminal, juvenile, and family cases is not always easy, but there is no doubt: (1) judges often cannot do the best we should in dispositional phases by relying solely on information provided by advocates; and (2) even when judges should see only information provided by litigants, others often should see much more, such as those whose role is to advocate for an outcome or to provide safety in and out of court.

Judges often know what is at stake in the decisions we make. Even judicial colleagues who most fiercely resist judicial performance measures, or complain of lack of resources or wisdom brought by others to the tasks between our decision and the next disaster, hope to produce the best impact they can on those whose lives we touch. What we really want is lurking beyond such realities as these:

Judges who preside in treatment courts across the country are profoundly transformed by the experience;

Family and juvenile judges vigorously strive so as to serve children and families in partnership with agencies;

Judges commonly personally volunteer to assist agencies devoted to the welfare of children, families, and the impaired;

Judges have expressed hunger for the type of information that can help us do a better job to serve public safety.10

Collaboration—the pieces of the eCourt vision

We need to start with “person-linked data.” Vendors now commonly claim this capability, but we need to ensure that their algorithms are up to the challenge of intentional falsification by offenders and to the reality of vast unintentional errors reflecting cultural, mechanical, and communication limits. Biometric links such as fingerprinting, DNA, and pupil scans may be our best confirmation, but all need a mechanism for feedback certification loops.11

“Just, prompt, and safe resolution of civil disputes” begins with case management via infrastructure, communication, calendaring, electronic content management, and legal research. But that safe part is more challenging for technology. Staff who schedule cases are responsible for security, and they need useful access to person-linked data when data (ours and from our partners) that would reveal when a party or a witness has involvement in another proceeding, such as a protective order, a previous dispute between parties, criminal history, or a pending charge, that would suggest a risk of violence to or from parties or witnesses or enforcers of judgments in any litigation across all case types. Even when judges should be oblivious to issues irrelevant to the merits being litigated, people responsible for “safe resolution of civil disputes” must be alerted to such

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9. Many resources are available, such as the many local correctional agencies committed to evidence-based practices; the criminal justice commissions of such states as Illinois, Virginia, Missouri, and Oregon; The Justice Management Institute; A Framework for Evidence-Based Decision Making in Local Criminal Justice Systems (I’ve been on the National Advisory Committee related to this project); the Crime and Justice Institute’s EBP (Evidence Based Practices) Box Set Papers; The Center for Effective Public Policy; The Pretrial Justice Institute (among other wonderful innovations is using pretrial release processing to assess risk and need in a way to pass up the chain in the event of conviction, sentencing, and supervision in custody or on supervision instead of or after incarceration).

10. For example, a 2008 poll by the Oregon Criminal Justice Commission found that 89.3% of responding Oregon judges agreed that an upcoming risk assessment tool will be useful for all sentencing. Missouri, Virginia, Oregon, and other states are rapidly improving risk assessment tools available to sentencers and advocates. Critics serve a useful purpose in improving the accuracy and identifying the limitations of such risk and need instruments, but they abandon rationality when they insist on ignoring all but “gold standard” evidence in sentencing as they essentially return to faith-based sentencing under the opaque version of the “just desert” umbrella. Abandoning children to faith healing with deadly outcomes can lead to criminal convictions in Oregon, and I suspect that most seeking to combat life-threatening disease would prefer that their doctors do their best to extrapolate from the best evidence available even if it doesn’t rise to “gold standard” evidence.

11. A respected local attorney (a Muslim) was wrongly accused of complicity in international terrorism due to a fingerprint error.
Finally, best chances for success require meaningful performance measures.

The typical perception of researchers and statisticians is a good example of the need to transcend silos. Most researchers and statisticians believe their function is to determine what is happening and to display it in graphs and charts. Collaboration would insist that we also extract data that shows how well we are producing the promised improvements in safety, communities, and the lives of children and families, and how to improve our impact in these areas. Moreover, displays of data should be intelligible to judges to help them improve that impact. The point is not to displace judicial clinical judgment and to have computers craft dispositions. Researchers have repeatedly shown (largely to each other) that clinical judgment based on evidence is substantially more successful than clinical judgment alone—in many fields.

Moreover, displays of data should be intelligible to judges part of doing what is most likely to evidence is substantially more successful than clinical judgment alone. We need access to such applications as child risk and need assessment tools and sentencing-support tools of future harm to the community, eCourt should provide many types of information to achieve the optimum disposition. We need ready access to legal principles that guide available choices: to waiting lists, locations, and eligibility for providers within or outside jail and prison; to monitoring and treating and correctional agencies; to information about an offender's past behaviors, successes, failures, and risk and needs assessments; to other existing sentences, holds, protective orders (for and against the offender); to automatic notification of police contacts, no-shows at providers, and so on for those still under our supervision. The harder part of doing what is most likely to reduce future crime and harm requires resources our colleagues are increasingly able to provide via technology: domestic-violence-lethality assessment tools and sentencing-support tools give us our best picture of what works best or not on which offenders under which circumstances. This requires tapping the highest values of data warehouses and data-crunching applications—not just to give us a good view of what's happening but to equip and encourage us to exploit data to improve what we are doing through our part of the process.12

"Improve the lives of children and families in crisis" also starts with the easier of the hard parts of technology. At least in the context of family and juvenile courts, these goals are more commonly in mind. We need access to such applications as child support calculators. But when we craft dispositions, we also need person-linked data to see opportunities, conflicting orders, challenges, and risks to avoid mistakes in prehearing or post-hearing placements, to make evidence-based choices concerning treatments, institutionalizations, or mere conditions, and to maintain useful and current communication with agency partners whose work also heavily contributes to the lives of children and families we touch. And as they become developed, we need access to the best risk and need instruments to improve our chances of success. This also all applies to the adults and children who need protective mechanisms due to developmental disabilities.

Collaboration—what a useful web portal looks like

Most court technology will be delivered by a web portal interface, but we haven't even started what needs to be done if it comes to this. Users: “How can I get content on the web that will make it easier to do what I've always been expected to do?”

The web portal can illustrate what silo-transparent collaboration should produce in an optimal court technology. Of course, we may want to provide users with the ability to customize what the web looks like to them. But by default, what is delivered by web tools should automatically be tailored to the user and the user's task—to "push" that which is most likely to produce the best efforts when and where it is needed. A collections clerk should certainly see all sources of court-related debt to any criminal or civil debtor facing collections. Clerks and security personnel might need information about conflicts among trial participants a judge shouldn't get during a decisional phase. During dispositional phases, a well-delivered and well-tailored web portal presents to judges precisely those tools, applications, training materials, references, and resources that are most likely to support best efforts in a manner most likely to encourage judges to use them appropriately. The same information should also be freely available to advocates to be most useful in their roles. This runs the whole range from, for example, sentencing law that limits discretion, relevant offender histories, pending matters and holds, risk and need assessment, and sentencing decision support applications, to data about what programs are and are not successful with offenders like those before the court, whether in or out of custody.

Collaboration—that performance measurement piece

Finally, best chances for success require meaningful performance measures. Yes, prosecutors (who control an enormous proportion of initial sentencing through plea negotiation) and judges (who ultimately impose sentences by bargain or otherwise) naturally tend to want to avoid responsibility for an offender's subsequent crimes. Some are outraged that any blame for a crime can be located anywhere but with the offender. They should understand that blame, like love, is not diminished by its sharing. Prosecutors surely don't hesitate to blame the judge whose defendant commits a new crime right after a release the prosecutor resisted.

But we must accept this challenge; we must find ways to show which decisions work best for which offenders, children, families, and communities. As long as the performance measurement display does not blame the user but invites its exploration, it can and should motivate our best efforts to contribute to the best outcomes and show the path to the pride we should have in our public service.

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CONCLUSION

The easier part of court technology is hard enough but cannot legitimately compete with social expenditures unless we also embrace the hardest part: exploiting technology to provide just, prompt, and safe resolution of civil disputes; to improve public safety and the quality of life in our communities; and to improve the lives of children and families in crisis. Success at this level requires the enthusiastic embrace of the vision and collaboration among all of our colleagues and our partners. Its pursuit is as fruitful a source of pride in public service as available to anyone on our planet.

Michael H. Marcus has been an Oregon trial court judge since 1990. He has served on technology committees and sought to bring technology to the service of improved impact on communities affected by the judicial system throughout his career. See http://www.smartsentencing.info/Resume1010.pdf.
### American Judges Association Future Conferences

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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.

You will continue to receive *Court Review* in the mail.

If you haven’t provided your email address to the AJA, please send it to us at aja@ncsc.dni.us. We will use it only for authorized correspondence from the AJA.
MHS Full Page Ad
The two biggest factors in improving happiness are control and social connections. According to Levit and Linder, “In fact, according to one happiness expert, about 70 percent of our controllable happiness stems from relationships. We could debate whether control or connections is the most important determinant of happiness levels, but there is little disagreement that they are the two biggies.”

Given the importance of these elements, judges have some advantages. One thing that increases a sense of control is the belief that your contribution matters. Judges have great opportunities to do things that really do matter. In addition, Levit and Linder report that “[h]appiness correlates with being good at what you do and having the feeling of control that comes with professional competence.”

So judges can improve happiness by improving professional competence in ways that make a difference. Work being done in the area of procedural fairness quickly comes to mind. Several studies show that when trial judges act on the bench in ways that enhance participants’ feelings that they have been fairly treated, participants have a better view of the court system and, significantly, compliance with court orders increases. Judges may be able to improve happiness, then, by improving professional competence in areas like this.

Judges also have an advantage on the relationship, social-connection front. As leaders in our workplaces, we can help to foster good relationships between judges and support staff, as well as between those who work in the courthouse and those who drop in for other reasons. Levit and Linder emphasize the importance of fostering trust within the workplace. For fostering trust of judges by staff, they provide a helpful discussion of training that one large law firm gave its partners when the firm’s associates began leaving in high numbers (p. 195). Judges could probably benefit from similar training—on things like expressing appreciation to and praising performance of staff members, increasing interactions between judges and staff members, and the like.

One of the best chapters in the book is called the “Happiness Toolbox.” The chapter goes into detail on steps that may help anyone to improve job satisfaction and overall happiness. One example is admittedly simple but effective. Make a list of what gives you pleasure. Make sure to identify even small things that give you pleasure during the day; the authors note examples of having a moment of rest by a sunny window in late afternoon or a cup of good coffee. Then do more of these things when you can. As Levit and Linder note, “When people appreciate the daily ‘micro-moments’ of happiness, those ‘positive emotions blossom’—and help people develop resilience against adverse events.”

Not all of us have the same happiness starting point. The authors report that genetics accounts for about 50 percent of our happiness, and circumstances out of our control account for another 10 percent. But there really is quite a bit we can do with the remaining 40 percent to become happier people. It’s worth thinking about. And the book is well written and fun to read.