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# Court Review

Volume 48, Issue 3

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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# Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

Volume 48, Issue 3

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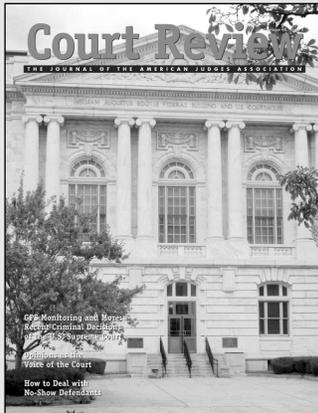
## EDITOR'S NOTE

**W**e begin the issue with Professor Chuck Weisselberg's annual review of the past year's criminal decisions of the United States Supreme Court. This is the fifth year he's provided the criminal-case summary for us, having taken on this helpful task for American judges after the death of Professor Charlie Whitebread in 2008. Professor Whitebread had provided *Court Review* readers with annual reviews of the Court's civil and criminal cases for more than 25 years. We have been thrilled with Professor Weisselberg's work: he places the new decisions in context, emphasizes what's most important for state-court judges (most of our readership), and tells us what's on tap for the coming year as well.

I'm pleased to announce that we've signed up a well-qualified author for a companion annual review of the Court's civil cases, which will lead off the next issue of *Court Review*. That article, by Professor Todd Pettys of the University of Iowa College of Law, is already posted on the AJA's website. (Go to <http://aja.ncsc.dni.us/publications/court-review.html> to access any of our articles from 1998 to the present.) We've recently started posting articles that are especially timely—like these annual reviews of the Court's civil and criminal cases—on the website as soon as they're ready. With the combination of Professors Weisselberg and Pettys, we now have two top-notch scholars doing an annual review of the cases decided by the United States Supreme Court, prepared especially for the needs of a judicial audience. If you ever have a chance to do so, please thank them: these summaries take a lot of work to prepare.

This issue contains three additional articles. The first is by Texas Chief Justice Wallace Jefferson, former California judicial administrator Bill Vickrey, and California judicial staff member Douglas Denton. They review how state-supreme-court opinions have grown longer and more complicated over the years; they also suggest ways that courts might better communicate their rulings to the public so as to enhance public perceptions that cases have been handled fairly. While their study focused on state supreme courts, many of the authors' suggestions would be applicable to any judge issuing a written opinion, and many might be worth considering as well by judges who rule orally from the bench.

The final two articles examine ways to reduce no-show rates by defendants for criminal-court hearings. Defendants who fail to appear for hearings can clog court calendars and, when warrants are issued, jails as well. In addition, of course, serving warrants to those who fail to appear takes law-enforcement resources. So finding ways to reduce the no-show rate is important to courts, to law-enforcement officials, and to the public budget. These articles present the results of two pilot projects that achieved some success in reducing no shows. In Jefferson County, Colorado, telephone calls from real people greatly reduced the no-show rate. In 14 counties in Nebraska, postcard reminders also reduced the no-show rate. Those who conducted each test project report what worked, what didn't, and what merits further consideration.—Steve Leben



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

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Photo credit: Cover photo, Mary Watkins. The photo is of the William Augustus Bootle Federal Building and United States Courthouse in Macon, Georgia, one of five locations at which the United States District Court for the Middle District of Georgia sits. The building, built in 1905, was renamed for Judge Bootle in 1998. Bootle, a 1954 appointee of President Dwight D. Eisenhower, issued several landmark civil-rights rulings during his career, including a 1961 ruling forcing the integration of the University of Georgia. Bootle retired in 1981 and died in 2005 at the age of 102.

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# President's Column

Toni M. Higginbotham

**A**s a newly elected trial judge in the state of Louisiana in 1996, one of the most important decisions I made was joining the American Judges Association, the Voice of the Judiciary®—the premier organization of judges, for judges. That marked the beginning of my commitment to becoming the best judge I could be, and to working to make our judiciary the finest in the world.

Having just celebrated Thanksgiving with my family, I feel compelled to begin my year as president of the American Judges Association by pointing out all the thank-yous I have for our organization.

My first thank-you is to the founders of the AJA and all my predecessors and fellow judges who had the vision of how valuable such an organization would be to each of us. Since 1959, AJA judges have been working to make this the important organization it is today. What makes the AJA so special is that it provides all of us the opportunity to exchange ideas with colleagues from jurisdictions in 50 states and Canada.

I am thankful to everyone for the very successful annual conference held in New Orleans in October in partnership with the Louisiana Judicial College. The theme was innovative judging, and the conference was definitely innovative. Educational offerings included a review of the recent decisions of the U.S. Supreme Court, as well as sessions on ethics in the Internet age, new approaches to procedural fairness, components of veterans treatment courts, pro se protective-order proceedings, child-custody issues, domestic violence, multijurisdictional judging, courts and media, using technology, and drugged driving. Thank you to everyone who made the conference such a success.

The Red Mass at historic St. Louis Cathedral in the French Quarter was thought-provoking for everyone, reminding us how important our work in the judiciary is to our country. The centuries-old tradition celebrating the beginning of the judicial year was attended by judges, lawyers, officials, and citizens of all faiths for the purpose of invoking God's blessing and guidance in the administration of justice.

A special thank-you goes to the host city and state judges who organized special events for our members, their families, and guests. These events were hosted by the Louisiana Supreme Court, Conference of Court of Appeal Judges, District Judges Association, City Judges Association, Judicial College, State Bar Association, and Fourth and Fifth Circuit Judges. The entertainment, food, and hospitality were fabulous.

Thanks are also in order for the American Judges Foundation and everyone who attended the fundraiser in the penthouse at the Ritz Carlton. The Stewart Juneau family graciously allowed

us to use their home. The hard work and generosity of the volunteers enable us to fund our law-school essay contest and other special projects. The American Judges Foundation is moving forward in establishing an endowment fund to support the future education of judges from North America.

The National Center for State Courts staff who support the AJA, especially Shelley Rockwell and Barry Forrest, make it possible for all of us to keep our organization running smoothly. Thank you for your dedication.

Although you can see we have much to be thankful for, to keep our organization viable, we still have work to do to make it even better. Some of our goals are:

1. Enhancing participation and services to AJA members, and maintaining and increasing our membership.
2. Developing a network with other judicial and legal institutions to create a first-class educational program.
3. Providing more electronic educational forums for AJA members and producing distance-learning sessions.
4. Partnering with other organizations to enhance collaborative opportunities.
5. Encouraging members to routinely produce white papers addressing specific issues facing judges.
6. Being the leading Voice of the Judiciary® by having greater visibility on judicial issues, having a dialogue with the media, and developing responses to attacks on judges, courts, and judicial systems.



As you can see, our work must be ongoing to maintain our mission as the Voice of the Judiciary®. On the immediate horizon are further presentations of the new AJA white paper, *Minding the Court*, by Judge Kevin Burke, Judge Steve Leben, and Pamela Casey, Ph.D.—a paper prepared with support from the State Justice Institute. We are also finalizing the domestic-violence distance-learning project that will be free to all judges on the AJA website. And the executive committee is hard at work on the 2013 midyear and fall conferences.

All judges need the American Judges Association, and the AJA needs all you judges! We all have strengths—whether it is presenting white papers, teaching, serving on the AJA Board of Governors, developing specialized training, writing for our publications, attending conferences, or simply being a dues-paying member.

Since we all have very demanding judicial jobs, the key to maintaining and improving our organization is to get some participation and work from each of our members. Is anyone willing? If so, what are you willing to do? Please be in touch.

# GPS Monitoring and More:

## Criminal Law Cases in the Supreme Court's 2011-12 Term

Charles D. Weisselberg

The United States Supreme Court's 2011-2012 Term was big. The headline on the civil side of the docket was the Affordable Care Act decision.<sup>1</sup> The blockbuster on the criminal side was *United States v. Jones*,<sup>2</sup> the Global Positioning System (GPS) monitoring case. In *Jones*, the Court showed that some old things can be new again—the justices gave us “new” ways of thinking about Fourth Amendment searches. There were other key criminal-law rulings as well, including on effective assistance and plea negotiations, confrontation, juries and criminal fines, juvenile life-without-parole sentences, and double jeopardy. And as in the previous Term, the Court issued several opinions emphasizing the deference to be afforded state courts on federal habeas corpus review. This article examines some of the most notable criminal-law-related opinions of the Supreme Court's 2011 Term, focusing on those decisions that have the greatest impact upon the states. It concludes with a brief preview of the 2012-2013 Term.

### FOURTH AMENDMENT

The criminal case of the year was *Jones*, the GPS-monitoring decision. *Jones* has broad implications for how we define a “search” within the meaning of the Fourth Amendment. The majority gave us a trespass-based alternative to the familiar “reasonable expectation of privacy” analysis, and even the concurring justices mustered five votes for a gloss on the reasonable-expectation-of-privacy test. In other Fourth Amendment rulings, the justices addressed jailhouse searches (rejecting a broad challenge to visual strip searches of detainees), passed on the Fourth Amendment aspects of the Arizona S.B. 1070 challenge, and, in two civil-rights matters, gave some guidance about warrants and exigent circumstances.

### GPS monitoring and a “new” trespass-based approach to searches and seizures

The case began when agents suspected Antoine Jones of trafficking in narcotics. Without a valid warrant,<sup>3</sup> they installed a GPS tracking device on the undercarriage of a Jeep registered to Jones's wife. Agents used the device to track the vehicle's movements over the next 28 days, obtaining over 2,000 pages of locational data, which was introduced at trial. The Court unanimously found that this violated the Fourth Amendment, and it

reversed Jones's conviction, though the justices were split on their reasoning.

The Court's opinion was delivered by Justice Scalia, joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Sotomayor. They held that the government physically occupied private property for the purpose of obtaining information, and that “such a physical intrusion would have been considered a ‘search’ within the meaning of the Fourth Amendment when it was adopted.”<sup>4</sup> Until the latter half of the twentieth century, “Fourth Amendment jurisprudence was tied to common-law trespass.”<sup>5</sup> The Court deviated from that property-based approach beginning in *Katz v. United States*,<sup>6</sup> with the development of the “reasonable expectation of privacy” analyses. Perhaps most significantly, the *Jones* majority held that the *Katz* reasonable-expectation-of-privacy test exists alongside (and does not displace) a test grounded in the law of trespass.<sup>7</sup> Thus, the Court rejected the government's claim that Jones had no interest protected by the Fourth Amendment; the United States had argued that Jones lacked a reasonable expectation of privacy in the underbody of the Jeep and in the locations of the Jeep on the public roads, which, after all, were visible to all.

Four justices (joined in part by a fifth) concurred on a very different theory. They criticized the majority's property-based approach and would have found a Fourth Amendment violation applying the “reasonable expectation of privacy” test. In his concurrence for these justices, Justice Alito criticized the majority for deciding the case based upon eighteenth-century tort law, saying that “it is almost impossible to think of late-eighteenth-century situations that are analogous to what took place in this case.”<sup>8</sup> He argued that the “reasonable expectation of privacy” analysis was meant to replace a trespass-based approach. Justice Alito wrote that the Court's approach created a number of difficulties and anomalies, including that it attached great significance to *placing* the GPS device as opposed to long-term monitoring *using* the device; it provided no protection if the device was attached prior to the car being turned over to a bailee for his use; the outcome may vary according to property laws in the states; and reliance on the law of trespass may “present particularly vexing problems in cases involving surveillance that is carried out by making electronic, as opposed to physical, contact with the item to be

### Footnotes

1. Nat'l Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (2012).
2. 132 S. Ct. 945 (2012).
3. Agents actually obtained a warrant, but it was valid for 10 days and authorized placing the device while the vehicle was in the District of Columbia. Agents installed the device on the 11th day and in Maryland.
4. *Id.* at 949.
5. *Id.*

6. 389 U.S. 347 (1967).

7. *Jones*, 132 S. Ct. at 953.

8. *Id.* at 957-58 (Alito, J., concurring). He asked, amusingly, whether it was possible to imagine a case in which a constable secreted himself in a coach and remained there for a period of time to monitor the movements of the coach's owner, saying that this “would have required either a gigantic coach, a very tiny constable, or both—not to mention a constable with incredible fortitude and patience.” *Id.* at 958 n.3.

tracked.”<sup>9</sup> However, the concurring justices also acknowledged that the *Katz* analysis was not without problems in cases like this. *Katz* depends upon the assumption that a hypothetical reasonable person has a stable set of expectations of privacy, and technological advances may lead to changes in those expectations and periods where expectations may be in flux. Also, though the use of long-term GPS monitoring in most investigations violates expectations of privacy—“society’s expectation” has been that agents and others could not “secretly monitor and catalogue every single movement of an individual’s car for a very long period”—the concurring justices declined to “identify with precision the point at which the tracking of [Jones’s] vehicle became a search, for the line was surely crossed before the 4-week mark.”<sup>10</sup> The concurring justices also refrained from deciding whether the same outcome would follow “in the context of investigations involving extraordinary offenses.”<sup>11</sup>

Justice Sotomayor provided the fifth vote to make Justice Scalia’s trespass-based approach the decision of the Court, but her concurrence revealed a willingness to reconsider basic aspects of privacy analysis as well as general support for the approach taken by Justice Alito. She concurred with Justice Alito in finding that “at the very least, ‘longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.’”<sup>12</sup> Justice Sotomayor also underscored that records of a person’s public movements provide a wealth of detail about that person’s familial, political, professional, religious, and sexual associations, which the government can store and mine years in the future. Justice Sotomayor would take these into account in determining whether there is a reasonable expectation of privacy in one’s public movements, and she would not find it dispositive that the government might obtain the fruits of GPS monitoring through lawful conventional surveillance techniques. She would be willing to reconsider the notion that an individual has no reasonable expectation of privacy in information that they voluntarily disclose to third parties.<sup>13</sup> The bottom line: there were five votes for finding a Fourth Amendment violation based upon Justice Scalia’s trespass theory and five votes for finding a violation based upon some form of reasonable-expectation-of-privacy analysis.

One other important point to note: contrary to many press

reports, *Jones* does not hold that a warrant is necessarily required for GPS monitoring. The issue in the case was whether placing and using the device constituted a search or seizure within the meaning of the Fourth Amendment. The Court did not reach the question whether the search was reasonable without a warrant, as that issue was not raised below.<sup>14</sup>

For those who study and write about the Fourth Amendment, *Jones* offered up a veritable feast.<sup>15</sup> For judges, lawyers, and officers who have to apply *Jones* in the real world, the decision raised as many questions as it answered. Some of the unresolved issues include: What acts of trespass may amount to a search? Can a property interest provide “standing” to bring a suppression motion even if the defendant does not have a reasonable expectation of privacy in the place searched or object seized?<sup>16</sup> Just what is “long-term” monitoring under the approach of the concurring justices?<sup>17</sup> What is an “extraordinary” investigation? In light of the millions of requests made to cellphone carriers for subscriber information,<sup>18</sup> what does *Jones* mean for users of mobile devices?<sup>19</sup> Does the automobile or any other exception permit the State to place a GPS device on a vehicle with probable cause but without a warrant?<sup>20</sup> Should evidence be suppressed when officers objectively relied upon pre-*Jones* precedent?<sup>21</sup> The FBI is reportedly preparing memoranda to guide agents’ use of GPS and other devices post-*Jones*.<sup>22</sup> The FBI certainly has a lot of issues to address.

### Jail searches

It was no *Jones*, but another highly anticipated Fourth Amendment case was *Florence v. Board of Chosen Freeholders of County of Burlington*,<sup>23</sup> which addressed intrusive searches of arrestees. The plaintiff in this civil-rights action was arrested on an outstanding warrant for failure to pay a fine, and he was held for six days in two different jails. He was subjected to a visual inspection of his entire body, including his genitals. The plaintiff alleged that a policy of strip searching, without reasonable

**[C]ontrary to many press reports, *Jones* does not hold that a warrant is necessarily required for GPS monitoring.**

9. *Id.* at 962.

10. *Id.* at 964.

11. *Id.*

12. *Id.* at 954, 955 (Sotomayor, J., concurring) (quoting *id.* at 964 (Alito, J., concurring)).

13. *Id.* at 955-57.

14. *Id.* at 954 (Scalia, J.).

15. See, e.g., Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 110 MICH. L. REV. (forthcoming 2012); Fabio Arcila, Jr., *GPS Tracking Out of Fourth Amendment Dead Ends: United States v. Jones and the Katz Conundrum*, 91 N.C. L. REV. (forthcoming 2012).

16. See *United States v. Luna-Santillanes*, 2012 WL 1019601 (E.D. Mich. Mar. 26, 2012); *United States v. Hanna*, 2012 WL 279435 (S.D. Fla. Jan. 30, 2012).

17. See *State v. Zahn*, 812 N.W.2d 490, 498-99 (S.D. 2012).

18. See Eric Lichtblau, *More Demands on Cell Carriers in Surveillance*,

N.Y. TIMES, July 8, 2012, available at <http://www.nytimes.com/2012/07/09/us/cell-carriers-see-uptick-in-requests-to-aid-surveillance.html?pagewanted=all> (reporting 1.3 million demands for subscriber information in 2011 alone).

19. See Catherine Crump, *Location Tracking After United States v. Jones: Continued Uncertainty Harms Americans’ Privacy*, 91 CRIM. L. RPTR. 577 (BNA July 11, 2012).

20. See *United States v. Ortiz*, 2012 WL 2951391 (E.D. Pa. July 20, 2012).

21. See *United States v. Pineda-Moreno*, 2012 WL 3156217 (9th Cir. Aug. 6, 2012).

22. See Ariane de Vogue, *Supreme Court Ruling Prompts FBI to Turn Off 3,000 Tracking Devices*, ABC NEWS, Mar. 7, 2012, available at <http://news.yahoo.com/supreme-court-ruling-prompts-fbi-turn-off-3-154046722--abc-news.html> (describing comments of FBI general counsel, Andrew Weissman).

23. 132 S. Ct. 1510 (2012).

**Justice Alito . . . noted that the case concerned arrestees who were committed to the general population of the jail and whose searches did not involve physical contact.**

suspicion, those arrested for minor offenses violates the Fourth Amendment. The Court disagreed, 5-4.

Writing for the majority, Justice Kennedy first stressed the difficulties of operating a detention center, though the Court acknowledged that people arrested for minor offenses may be among the detainees. There are perhaps two most notable aspects of the majority's opinion. First, the justices emphasized that "deference must be given to the officials in charge of the jail unless there is 'substantial

evidence' demonstrating their response to the situation is exaggerated."<sup>24</sup> Second, the Court was pointedly determined to craft a bright-line rule rather than require jail officials to decide on a detainee-by-detainee basis whether a visual strip search is permitted.<sup>25</sup> Framed this way, the majority concluded that the search procedures at the two jails "struck a reasonable balance between inmate privacy and the needs of the institutions."<sup>26</sup> Justice Alito joined the Court's opinion but concurred to emphasize the limits of the holding. He especially noted that the case concerned arrestees who were committed to the *general population* of the jail and whose searches did not involve physical contact. He pointed out that the opinion does not hold that it is always reasonable to conduct a full strip search of an arrestee whose detention has not yet been reviewed by a judicial officer and who could be held apart from the general population.<sup>27</sup>

Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, dissented. They underscored that a visual strip search is a serious invasion of privacy and that people arrested for minor offenses have been subjected to the humiliations of such a search. While also acknowledging that managing a jail is a difficult undertaking, the dissenting justices could find "no convincing reason indicating that, in the absence of reasonable suspicion, involuntary strip searches of those arrested for minor offenses are necessary . . ."<sup>28</sup> The dissenters argued that these procedures were sufficient to detect injuries, diseases, or gang tattoos, and that there were no clear examples of instances in which contraband was smuggled into the general population of the jail during intake that could not have been discovered under a reasonable-suspicion standard.<sup>29</sup>

### **Investigative detentions**

*Arizona v. United States*,<sup>30</sup> the S.B. 1070 decision, was a cross-over hit: the Court touched on the Fourth Amendment in addition to its more important holding about the federal power over immigration. A 5-3 majority of the Court<sup>31</sup> found that several parts of Arizona's controversial immigration-related law (S.B. 1070) were preempted by federal law.<sup>32</sup> But all eight participating justices agreed that Arizona might be able to implement a statute requiring officers to make a reasonable effort to determine the immigration status of any person they stop, detain, or arrest on some other legitimate basis, provided the officers have reasonable suspicion that the person is a non-citizen and is not lawfully present in the country. The justices also declined to overturn a provision that any person arrested shall have their immigration status determined prior to release.

The plaintiffs had claimed that determining immigration status may unduly prolong a detention or delay a release, which may violate the Fourth Amendment. However, the statute was yet to be construed by the state courts or applied by officers. As Justice Kennedy wrote for the Court, if the statute is construed to require officers "to conduct a status check during the course of an authorized, lawful detention or after a detainee has been released, the provision would likely survive preemption—at least absent some showing that it has other consequences that are adverse to federal law and its objectives."<sup>33</sup> Justice Alito wrote separately to emphasize that officers already had the power to inquire about immigration status of people who are lawfully detained, and this part of the statute does not expand that power. He also noted that while the statute should not lead to federal constitutional violations, "there is no denying that enforcement . . . will multiply the occasions on which sensitive Fourth Amendment issues will crop up."<sup>34</sup> He suggested some ways that Arizona might mitigate that risk.

### **Qualified immunity, warrant searches, and exigent circumstances**

Two civil-rights cases about qualified immunity gave the Court an opportunity to address aspects of warrant searches and the exigent-circumstances doctrine.

In *Messerschmidt v. Millender*,<sup>35</sup> a victim reported that her boyfriend, a reputed gang member, had attacked her and fired a sawed-off shotgun at her car. Officers prepared arrest and search warrants. The search warrants sought, broadly, all firearms (not just the sawed-off shotgun) and evidence of gang membership. Executing the warrant, officers searched the home of the sus-

24. *Id.* at 1518 (citing *Block v. Rutherford*, 468 U.S. 576, 584-85 (1984)).

25. *Id.* at 1521-22.

26. *Id.* at 1523.

27. *Id.* at 1524 (Alito, J., concurring).

28. *Id.* at 1525, 1528 (Breyer, J., dissenting).

29. *Id.* at 1526-28.

30. 132 S. Ct. 2492 (2012).

31. Justice Kagan recused herself.

32. Given the federal government's broad authority over immigration, Arizona could not criminalize a non-citizen's failure to carry an alien registration document or a non-citizen's unauthorized application for employment (or the person's actual work). Nor could

Arizona authorize officers to arrest without a warrant if there was probable cause to believe a person has committed a removable offense. *See* 132 S. Ct. at 2503, 2505, 2507.

33. *Id.* at 2509.

34. *Id.* at 2524, 2529 (Alito, J., concurring in part and dissenting in part). Justice Scalia concurred with the decision to uphold this part of the statute but saw no reason to address the Fourth Amendment issue. *See id.* at 2511, 2516 (Scalia, J., concurring in part and dissenting in part). Justice Thomas wrote separately on the preemption question. *See id.* at 2522 (Thomas, J., concurring in part and dissenting in part).

35. 132 S. Ct. 1235 (2012).

pect's foster mother, where they found a shotgun and ammunition. The plaintiffs alleged that the warrants were overbroad and not supported by probable cause. The Supreme Court ruled 6-3 that the officers were entitled to qualified immunity.

The majority opinion, authored by Chief Justice Roberts, notes that the same standard of objective reasonableness that applies in the context of a suppression motion under *United States v. Leon*<sup>36</sup> is involved in determining whether an officer should be denied qualified immunity because an affidavit is so lacking in indicia of probable cause. The threshold for meeting this standard is high. Under the circumstances of this case, an officer could conclude that there was probable cause to believe that the suspect had other weapons, and that seizing the weapons was necessary to protect the victim. Further, it would not be unreasonable for an officer to believe that evidence regarding gang membership would help in prosecuting the suspect for the attack. Without deciding whether the circumstances actually established probable cause, the Court found that the officers were entitled to qualified immunity. The majority emphasized that the officers here "sought and obtained approval of the warrant application from a superior and a deputy district attorney before submitting it to the magistrate."<sup>37</sup>

Justice Sotomayor, joined by Justice Ginsburg, dissented, arguing that there was no basis to seek evidence of gang affiliation in this non-gang-related assault or reasonable basis to search for weapons other than the gun used in the assault. They also complained that the majority erred in giving weight to the fact that the officers had sent the warrant application to superiors and obtained a judge's approval.<sup>38</sup> Justice Kagan concurred in part and dissented in part, finding a middle ground between the majority and dissenting justices. She thought that the officers were entitled to immunity with respect to the search for weapons, but not the search for evidence of gang membership.<sup>39</sup>

The other case was *Ryburn v. Huff*,<sup>40</sup> where the Court clarified principles of qualified immunity and the exigent-circumstances doctrine. Four officers were investigating an allegation that a high-school student threatened to shoot up his school. They went to his home and knocked, but no one answered. Eventually, the student's mother came out of the home with her son and stood on the front steps. The mother declined the officers' request to interview young man inside. After she was asked if there were any guns in the home, she turned around and ran into the house. The officers followed. The family sued because of the warrantless entry. The Supreme Court granted certiorari and summarily reversed the court of appeals, determining that the officers were entitled to qualified immunity.

In a per curiam opinion, the justices first noted that "[a] reasonable police officer could read" the Court's prior decisions to mean that an officer may enter a residence without a warrant "if the officer has a reasonable basis for concluding that there is an imminent threat of violence."<sup>41</sup> Taking the events together

rather than in isolation, reasonable officers could have come to the conclusion that there was an imminent threat to safety. The mother ran into the home immediately after being asked about the presence of weapons. While she was lawfully entitled to enter her home, "there are many circumstances in which lawful conduct may portend imminent violence."<sup>42</sup>

#### **FIFTH AMENDMENT— MIRANDA**

The Term gave us two *Miranda* decisions, including *Howes v. Fields*,<sup>43</sup> which addressed *Miranda* custody and inmates. *Fields* received the most attention, but *Bobby v. Dixon*,<sup>44</sup> a per curiam summary reversal, may turn out to be more significant. *Dixon* has implications for situations in which a defendant makes an anticipatory invocation, and it also is the first Supreme Court decision to construe the 2004 opinions in *Missouri v. Seibert*.<sup>45</sup>

In the first of the two cases, *Fields* was serving a sentence in a county jail. Officers wanted to question him about whether he had earlier engaged in sex with a young boy. *Fields* was escorted from his cell to a conference room in the jail, where he was questioned without *Miranda* warnings for five to seven hours. At the outset, he was told that he was free to return to his cell and later was reminded that he could leave whenever he wanted. *Fields* confessed, although he allegedly said several times that he no longer wanted to speak with the deputies. The state courts found that his confession was admissible, ruling that he was not in *Miranda* custody during the questioning. On federal habeas corpus review, the court of appeals found this conclusion contrary to clearly established federal law, the standard required to grant relief under the Anti-Terrorism and Effective Death Penalty Act (AEDPA). The court of appeals determined that *Miranda* custody exists per se when an individual is imprisoned and is questioned in private about events outside of the prison. The Supreme Court unanimously reversed.

In an opinion for the Court, Justice Thomas wrote that prior decisions did not establish such a categorical rule. Thus, the state-court decisions were not contrary to clearly established federal law. Moreover, even had the case been brought on direct appeal, and not judged under the deferential AEDPA standards, the court of appeals ruling was wrong. Custody is determined from the objective circumstances of the interrogation and from the point of view of a reasonable person, in light of all of the circumstances. Citing *Berkemer v. McCarty*,<sup>46</sup> the Court emphasized that not all restraints on the freedom of movement amount to

**The [lower court] determined that *Miranda* custody exists per se when an individual is imprisoned and is questioned in private about events outside of the prison. The Supreme Court unanimously reversed.**

36. 468 U.S. 897 (1984).

37. 132 S. Ct. at 1249.

38. *Id.* at 1252, 1256-60 (Sotomayor, J., dissenting).

39. *Id.* at 1251 (Kagan, J., concurring in part and dissenting in part).

40. 132 S. Ct. 987 (2012).

41. *Id.* at 990.

42. *Id.* at 991.

43. 132 S. Ct. 1181 (2012).

44. 132 S. Ct. 26 (2011).

45. 542 U.S. 600 (2004).

46. 468 U.S. 420 (1984).

**Dixon is a sleeper, but I think it is significant in two respects.**

*Miranda* custody. There are reasons to believe that imprisonment alone is not enough to create *Miranda* custody, including that when someone already imprisoned is questioned, the circumstances generally do not involve the shock that often accompanies an arrest. Moreover, an individual is not likely to

be lured into speaking by hoping for prompt release.<sup>47</sup>

Justice Ginsburg (joined by Justices Breyer and Sotomayor) agreed that the law was not clearly established in *Fields*' favor, and thus relief could not be granted under AEDPA. But had the case been presented on direct appeal, these three justices would have found that the questioning was custodial. They pointed to the definition of custody in *Miranda* itself and stressed that *Fields* was questioned incommunicado in a police-dominated atmosphere, in an inherently stressful way, and that his freedom of action was significantly curtailed.<sup>48</sup>

In the Term's other *Miranda* case, *Bobby v. Dixon*, Dixon and a co-defendant murdered the decedent to steal and sell his car. Dixon used the victim's documents to obtain an ID card, and he forged a signature to cash the check for the sale of the car. Officers had several distinct contacts with Dixon. First, there was a chance non-custodial encounter at a police station. A detective gave Dixon *Miranda* warnings and asked him about the victim's disappearance, but Dixon would not answer questions without his lawyer, and he left. Then, five days later, after arresting Dixon for the forgery, detectives interrogated him intermittently for several hours and intentionally did not provide *Miranda* warnings. They urged him to cut a deal before his co-defendant did. Dixon made some inculpatory admissions but claimed that the decedent gave him permission to sell the car and that he did not know where the victim was. There was a third encounter later that day, after Dixon's co-defendant led police to the victim's grave. Dixon said that he had heard police found a body, that he talked to his attorney, and that he wanted to tell what happened. Officers then read Dixon his rights, obtained an express *Miranda* waiver, and Dixon gave a detailed confession. The federal court of appeals granted habeas corpus relief, finding (among other things) that officers should not have interrogated Dixon after he had previously refused to speak with them without his lawyer present. And relying upon *Seibert*, the lower court determined that Dixon's confession was the product of a deliberate question-first, warn-later strategy. The Supreme Court granted certiorari and summarily reversed.

In a unanimous per curiam opinion, the justices found that

Dixon's refusal to speak without his lawyer present was not an invocation of the right to counsel, which would have prevented officers from initiating the subsequent interrogations. Dixon was not in custody during the initial encounter. Quoting *McNeil v. Wisconsin*,<sup>49</sup> the Court said that it has "never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation.'"<sup>50</sup> In addition, there was no two-step interrogation technique of the type condemned in *Seibert*. In *Seibert*, the defendant's first, unwarned interrogation left little unsaid, and after receiving midstream warnings the defendant merely repeated what she said before. By contrast, Dixon initially denied involvement in the murder, and his full, warned confession contradicted his unwarned earlier statements. Moreover, in *Seibert*, the justices were concerned that the midstream *Miranda* warnings were part of a single interrogation and could not have effectively apprised the suspect that she had a choice whether to speak. Given the separation of Dixon's interrogations, that was not a concern here.<sup>51</sup> The Court concluded that it was not clear that the state court erred at all, much less erred so transparently that Dixon could meet the demanding AEDPA standards.<sup>52</sup>

*Dixon* is a sleeper, but I think it is significant in two respects. First, although *Dixon* is an AEDPA case, the Court appeared comfortable in allowing officers to initiate an interrogation of a suspect who previously refused to speak without counsel after having receiving *Miranda* warnings in a non-custodial setting. While the Court in *McNeil* had indicated that invocations cannot be made anticipatorily, the holding of *McNeil* was that a request for counsel under the Sixth Amendment at an initial court appearance was not equivalent to an invocation under *Arizona v. Edwards*.<sup>53</sup> *Dixon* appears to expand *McNeil*, perhaps permitting officers to ignore an unambiguous invocation of the right to counsel for an out-of-custody suspect, even when officers actually give warnings. Second, *Dixon* is the first Supreme Court case to apply *Seibert*. While five justices in *Seibert* found that officers employing a "question-first" strategy had violated *Miranda*, and *Seibert*'s second statement was inadmissible, courts have struggled to extract a workable rule from the various opinions in *Seibert*.<sup>54</sup> The plurality opinion focused on whether midstream warnings could function effectively as *Miranda* requires, while Justice Kennedy—who provided the fifth vote in *Seibert*—advocated a "narrower test" applicable only where the two-step technique was used in a calculated way to undermine the warnings.<sup>55</sup> In *Dixon*, the Court cited both opinions, but the justices appeared to apply the plurality's test.

47. *Fields*, 132 S. Ct. at 1189-91.

48. *Id.* at 1194-95 (Ginsburg, J., concurring in part and dissenting in part).

49. 501 U.S. 171, 182 n.3 (1991).

50. *Dixon*, 132 S. Ct. at 29.

51. *See id.* at 31-32.

52. *See id.* at 27.

53. *See McNeil*, 501 U.S. at 176-82. *McNeil* sought the greater protection of *Edwards*, 451 U.S. 477 (1981), as his Sixth Amendment right had attached for a separate offense, but an *Edwards* invocation prevents officers from reinitiating an interrogation on any offense. *McNeil*, 501 U.S. at 177. The *McNeil* Court's reference to the inability to invoke *Miranda* anticipatorily came in a footnote,

where the majority disputed a claim by dissenting justices that lawyers could simply invoke the *Miranda-Edwards* right during their initial court appearances. *Id.* at 182 n.3. The *Dixon* Court also cited *Montejo v. Louisiana*, 556 U.S. 778 (2009), for the proposition that *Miranda* applies to custodial interrogations, but the Court made that point only to contrast the scope of protections under *Miranda-Edwards* and the Sixth Amendment.

54. *See* Charles D. Weisselberg, *Mourning Miranda*, 96 CAL. L. REV. 1519, 1551-52 (2008); *see also* *United States v. Capers*, 627 F3d 470, 476-77 (2d Cir. 2010); *United States v. Williams*, 435 F3d 1148, 1157-58 (9th Cir. 2006).

55. *See Seibert*, 542 U.S. at 611-12 (plurality opinion); *id.* at 618, 622 (Kennedy, J., concurring).

## SIXTH AMENDMENT

The Sixth Amendment was quite prominent this Term. In two cases, the Court found that defendants are entitled to the effective assistance of counsel in advising them whether to plead guilty or not. The justices also dealt again with forensic reports and the Confrontation Clause, addressed the application of the Double Jeopardy Clause to certain mistrials, and determined that there is a right to a jury determination of facts that determine the maximum sentence of a fine.

### *Effective assistance of counsel and pleas*

In *Missouri v. Frye*,<sup>56</sup> the first of the two cases related to assistance of counsel and pleas, Frye was charged with driving with a revoked license. He had been convicted of the same offense on three earlier occasions, so this time he was charged with a felony that carried a maximum sentence of 4 years. The prosecutor wrote Frye's lawyer and offered two possible deals: one would require Frye to plead to the felony, with a recommendation for a 3-year probationary sentence with 10 days in jail; the other was a misdemeanor with a recommended sentence of 90 days. Frye's lawyer failed to advise his client of the offers, which expired. Just before his preliminary hearing, Frye was arrested again on a new charge. Frye eventually pleaded guilty to the original charge without an agreement. The prosecutor asked for, and the court imposed, a 3-year sentence without any probation. Frye later sought post-conviction relief, arguing that he would have pleaded guilty to the misdemeanor had he known about the offer. The question before the Supreme Court was whether the failure of Frye's lawyer to communicate the offer was ineffective assistance of counsel and, if so, what the remedy might be.

In a 5-4 ruling, the Court found that counsel's performance was deficient under the first prong of *Strickland v. Washington*.<sup>57</sup> Writing for the majority, Justice Kennedy pointed out that the Sixth Amendment guarantees the right to have counsel present at all critical stages of a criminal proceeding. Although no formal court proceedings take place when a plea offer lapses or is rejected, plea bargaining is prevalent in our justice system: 97% of federal convictions and 94% of state convictions follow guilty pleas. "The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process," and these must be met to afford "the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages."<sup>58</sup> The majority refrained from defining the responsibilities of defense counsel in plea bargaining. On the facts of this case, it was clear that counsel's performance was deficient. "[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea" on favorable terms and conditions.<sup>59</sup> The majority remanded for the state courts to determine whether Frye was prejudiced by counsel's performance. While there was a reasonable probability that Frye would have accepted the offer had it

been communicated (as shown by his later plea to a felony charge), Frye must also show that the offer would have been adhered to by the prosecution and accepted by the trial court.<sup>60</sup>

Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, dissented. In their view, "[c]ounsel's mistake did not deprive Frye of any substantive or procedural right; only of the opportunity to accept a plea bargain to which he had no entitlement in the first place."<sup>61</sup> Moreover, the focus of ineffective-assistance-of-counsel cases is on the fundamental fairness of the proceeding—whether the defendant was deprived of his constitutional right to a fair trial—and Frye's conviction (which followed a guilty plea) was untainted by his lawyer's error. The dissenters also noted that lawyers have different negotiating styles, and they faulted the majority for not "confronting the serious difficulties that will be created by constitutionalization of the plea-bargaining process."<sup>62</sup>

The other plea-bargaining case of the Term, *Lafler v. Cooper*,<sup>63</sup> explored *Strickland* prejudice when a plea offer is communicated but rejected.

Cooper was charged with 4 offenses including assault with intent to murder. The prosecutor offered to dismiss 2 of the charges and recommend a sentence of 51 to 85 months if Cooper pleaded guilty to the other offenses. His lawyer, however, recommended rejecting the plea offer, advising that the prosecution could not prove intent to kill because the victim was shot below the waist. Cooper went to trial. He was convicted on all counts and received a mandatory minimum sentence of 185 to 360 months. On federal habeas corpus review, the State conceded that counsel's advice was deficient, and Cooper could meet the first prong of *Strickland*. But the State argued that because Cooper received a fair trial, he was not prejudiced. In a 5-4 decision, with the same lineup of justices as in *Frye*, the Court disagreed.

Writing again for the majority, Justice Kennedy emphasized that, under *Strickland*, a defendant must show that but for counsel's errors, "the result of the proceeding would have been different."<sup>64</sup> In this case, Cooper would be required to show that but for the deficient advice, there is a reasonable probability that he would have accepted the plea, that the prosecution would not have withdrawn it, that the court would have accepted it, "and that the conviction or sentence, or both, under the offer's terms would have been less severe than [what was] in fact . . . imposed."<sup>65</sup> As in *Frye*, the majority held that the Sixth Amendment does more than just protect the right to a fair trial. Thus, the Court rejected the State's argument that "[a] fair trial

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56. 132 S. Ct. 1399 (2012).

57. 466 U.S. 668 (1984).

58. *Frye*, 132 S. Ct. at 1407.

59. *Id.* at 1408.

60. *Id.* at 1409-11.

61. *Id.* at 1412 (Scalia, J., dissenting).

62. *Id.* at 1413.

63. 132 S. Ct. 1376 (2012).

64. *Id.* at 1384 (quoting *Strickland*, 466 at 694).

65. *Id.* at 1385.

**The Supreme Court's most important Confrontation Clause case of the last decade—*Crawford v. Washington*—is the gift that keeps on giving.**

wipes clean any deficient performance by defense counsel during plea bargaining. That position ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials.”<sup>66</sup> With respect to remedy, the majority largely left it to the trial court’s discretion but noted a number of important considerations. If the harm is receiving a greater sentence, the remedy might be to give the defendant the sentence previously offered, the sentence given after trial, or

something in-between. In other cases, particularly where the offer was to plead to less serious counts, the prosecution might be required to reoffer the plea. The correct remedy here was to order the State to reoffer the deal. That would leave Cooper the option of accepting it and would preserve the trial court’s discretion with respect to accepting it or not.

Again taking the lead for the four dissenting justices, Justice Scalia castigated the majority for “open[ing] a whole new field of constitutionalized criminal procedure: plea-bargaining law.”<sup>67</sup> He argued once more that the purpose of requiring effective assistance of counsel is to assure a fair *trial*, and that requiring the advice of competent counsel before rejecting a plea offer is “a judicially invented right to effective plea bargaining.”<sup>68</sup> Justice Alito wrote an additional dissent to address the question of remedy. He pointed out that where there is deficient legal advice about a favorable plea offer, “the only logical remedy is to give the defendant the benefit of the favorable deal. But such a remedy would cause serious injustice in many instances . . . .”<sup>69</sup>

**Confrontation and lab reports, revisited**

The Supreme Court’s most important Confrontation Clause decision of the past decade—*Crawford v. Washington*<sup>70</sup>—is the gift that keeps on giving. *Williams v. Illinois*<sup>71</sup> is the most recent (though certainly not the last) of the *Crawford* line of cases. In *Melendez-Diaz v. Massachusetts*<sup>72</sup> and *Bullcoming v. New Mexico*,<sup>73</sup> the justices held that the Confrontation Clause barred the introduction of laboratory reports written by non-testifying analysts. Depending upon one’s perspective, *Williams* may represent either an unwarranted retreat from these cases or a partial return to sanity. But the Court was badly split and, whatever one’s perspective on the outcome, *Williams* is simply a mess.

In *Williams*, a state police laboratory sent a vaginal swab containing semen to Cellmark Diagnostics Laboratories.

Cellmark produced a report with a DNA profile, which was subsequently matched to a DNA profile obtained from a sample of Williams’ blood. At trial, the State called an expert witness, Sandra Lambatos, who was a forensic specialist at the state lab. No one from Cellmark testified. While Lambatos did not quote the Cellmark report and the report was never offered into evidence, she replied “yes” to this question: “Was there a computer match generated of the male DNA profile *found in semen from the vaginal swabs* of [the victim] to a male DNA profile that had been identified?” as Williams’?<sup>74</sup> The Confrontation Clause problem was that Lambatos “did not have personal knowledge that the male DNA profile that Cellmark said was derived from the crime victim’s vaginal swab sample was in fact correctly derived from that sample. . . . Rather, she simply relied . . . upon Cellmark’s report,” and Williams had no opportunity to cross-examine its drafters.<sup>75</sup> Five justices found no violation of the Confrontation Clause. Justice Thomas provided the fifth vote and *possibly* the controlling opinion; for ease of exposition, I will address his opinion last.

In a plurality opinion by Justice Alito, four justices (all of whom had dissented in *Melendez-Diaz* and *Bullcoming*) found that Lambatos’ testimony was consistent with the established rule that an expert may provide an opinion based on facts “even if the expert lacks first-hand knowledge of those facts.”<sup>76</sup> Although Lambatos testified that Williams’ profile matched the DNA profile found in semen from the vaginal swabs of the victim, these four justices concluded that this testimony was not offered for the truth of the matter asserted; rather, it was just part of the premise of the prosecutor’s question to the expert.<sup>77</sup> These justices also found that even if the testimony had been admitted for its truth, the Cellmark report was not testimonial because it “was not prepared for the primary purpose of accusing a targeted individual.”<sup>78</sup>

Four justices dissented in an opinion written by Justice Kagan. They disputed the suggestion that “Lambatos merely ‘assumed’ that Cellmark’s DNA profile came from [the victim’s] vaginal swabs”; rather, she affirmed without qualification that the source of the profile was semen from the victim, and she “became just like the surrogate witness in *Bullcoming*.”<sup>79</sup> The dissenting justices also disagreed with the conclusion that the report was non-testimonial, noting that the analysis was conducted to identify the assailant and to serve as evidence in a criminal trial.

Justice Thomas provided the fifth vote to affirm. He sided with the dissenters in finding that the testimony was indeed offered for its truth, writing that “[t]here is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert’s opinion and disclosing

66. *Id.* at 1388.

67. *Id.* at 1391 (Scalia, J., dissenting).

68. *Id.* at 1393.

69. *Id.* at 1398 (Alito, J., dissenting).

70. 541 U.S. 36 (2004).

71. 132 S. Ct. 2221 (2012).

72. 557 U.S. 305 (2009).

73. 131 S. Ct. 2705 (2011).

74. *Williams*, 132 S. Ct. at 2236 (Alito, J.).

75. *Id.* at 2244, 2245 (Breyer, J., concurring).

76. *Id.* at 2233 (Alito, J.). Chief Justice Roberts, and Justices Kennedy and Breyer, joined the plurality opinion. Justice Breyer also wrote separately to say that he would have held the case over for further briefing and reargument on how to deal with the variety of laboratory reports written by technicians. *Id.* at 2244, 2245 (Breyer, J., concurring).

77. *Id.* at 2236 (Alito, J.).

78. *Id.* at 2243.

79. *Id.* at 2264, 2270 (Kagan, J., dissenting, joined by Justices Scalia, Ginsburg, and Sotomayor).

that statement for its truth.”<sup>80</sup> He also rejected the plurality’s “primary purpose test” for determining if a statement is testimonial.<sup>81</sup> However, in his view, the Cellmark report was “not a statement by a ‘witness’ within the meaning of the Confrontation Clause. [It] lacks the solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact.”<sup>82</sup> No other justice agreed with this formulation.<sup>83</sup>

Here is the bottom line: Five justices rejected the argument that the State may simply introduce a forensic report through the testimony of an expert by claiming that statements forming the basis of an expert’s opinion are not asserted for their truth. Five justices also rejected the argument that the Cellmark report was non-testimonial because its “primary purpose” was to identify an unknown assailant. Justice Thomas’ opinion only *arguably* provides the narrowest ground for the decision and, thus, the controlling opinion under the *Marks* rule.<sup>84</sup> Indeed, the dissenters cautioned that until a majority reverses or confines *Melendez-Diaz* and *Bullcoming*, they “would understand them as continuing to govern, in every particular, the admission of forensic evidence.”<sup>85</sup> Jeffrey Fisher, a close observer, summed up the case this way: post-*Williams*, “the Confrontation Clause continues to deem *formal* forensic reports testimonial. That means that drug, blood alcohol, fingerprint, ballistics, autopsies, and related reports that typically involve testing by one person and that are incriminating on their face will continue to be inadmissible without the testimony of their authors (or some other method of satisfying the Confrontation Clause).”<sup>86</sup> Will we see efforts to make reports less formal? Fisher thinks not, and Justice Thomas noted that the Confrontation Clause reaches “technically informal statements when used to evade the formalized process.”<sup>87</sup> As I’ve said, *Williams* is a mess. Whatever it may stand for, it certainly cannot be the last word on the application of the Confrontation Clause to forensic reports.

### **Double jeopardy and form of verdicts**

The Court’s Double Jeopardy Clause case, *Blueford v. Arkansas*,<sup>88</sup> may have significant implications for states, depending upon how state law provides for the receipt of verdicts. The defendant in *Blueford* was charged with capital murder and three lesser-included offenses. The jury reported that it had voted unanimously against guilt on both capital and first-degree murder, but was deadlocked on manslaughter and had not voted on

negligent homicide. The way in which the jury deliberated was in accordance with Arkansas law and the trial court’s instructions, which required the jury to deliberate first on the most serious offense and only consider a lesser-included charge if all twelve jurors first agreed to acquit on the more serious offense. When the jury reported that it remained deadlocked, the court declared a mistrial. When the State sought to retry Blueford on all charges, he argued that double jeopardy prevented his retrial for capital and first-degree murder. In a 6-3 decision, the Supreme Court rejected Blueford’s claim.

The opinion of the Court was delivered by Chief Justice Roberts. The majority held that there was no double jeopardy bar to retrial because the jury had not finished its deliberations. While the jury had voted on the two most serious charges, no verdict was actually rendered or received. The jury was free to reconsider what could have been a tentative or early vote on the two most serious charges, and no final decision was reached. Moreover, though the foreperson reported that the jury had voted unanimously against guilt on the two most serious charges, the Court said that it had “never required a trial court, before declaring a mistrial because of a hung jury, to consider any particular means of breaking the impasse—let alone to consider giving the jury new options for a verdict.”<sup>89</sup>

Justice Sotomayor dissented, joined by Justices Ginsburg and Kagan. They argued that while different jurisdictions may have different procedures with respect to announcing verdicts and entering judgments, the diversity of procedures has no constitutional significance. Under Arkansas law, the jury must acquit the defendant of the greater offense before deliberating on the lesser-included offense. The forewoman’s “colloquy with the judge [left] no doubt that the jury understood the instructions . . . .”<sup>90</sup> “There is no reason to believe that the jury’s vote was anything other than a verdict in substance. . . . And when that decision was announced in open court, it became entitled

**Williams is a mess. Whatever it may stand for, it certainly cannot be the last word on the application of the Confrontation Clause to forensic reports.**

80. *Id.* at 2255, 2257 (Thomas, J., concurring).

81. *Id.* at 2261-62.

82. *Id.* at 2260. Further, while the report was produced “at the request of law enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogation.” *Id.*

83. The dissent was particularly harsh. *See id.* at 2276 (Kagan, J., dissenting) (“Justice Thomas’s approach, if accepted, would turn the Confrontation Clause into a constitutional geegaw—nice for show, but of little value.”).

84. *Marks v. United States*, 430 U.S. 188, 193 (1977). But since Justice Thomas explicitly rejected the majority’s reasoning, and no other member of the Court agreed with Justice Thomas, it is difficult to conclude that there is a “lowest common denominator” or “narrowest ground” that represents the Court’s holding. *See King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc) (“*Marks* is workable . . . only when one opinion is a logical subset of other,

broader opinions. In essence, the narrowest opinion must represent a common denominator of the Court’s reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment.”); *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) (quoting *King*); *see also Nichols v. United States*, 511 U.S. 738, 745 (1994) (discussing *Marks*).

85. *Williams*, 132 S. Ct. at 2277 (Kagan, J., dissenting).

86. Jeffrey Fisher, *The Holdings and Implications of Williams v. Illinois*, available at <http://www.scotusblog.com/?p=147095>. Fisher argued *Crawford*, *Melendez-Diaz*, and *Bullcoming*.

87. *Williams*, 132 S. Ct. at 2260 n.5 (Thomas, J., dissenting) (citation omitted).

88. 132 S. Ct. 2044 (2012).

89. *Id.* at 2052.

90. *Id.* at 2053, 2054 (Sotomayor, J., dissenting).

**For our purposes, what is most important is the Court's discussion of the goals of the *Apprendi* line of cases and the practical implications.**

to full double jeopardy protection.”<sup>91</sup> The dissenters would also “hold that the Double Jeopardy Clause requires a trial judge, in an acquittal-first jurisdiction, to honor a defendant’s request for a partial verdict before declaring a mistrial on the ground of jury deadlock.”<sup>92</sup>

***Apprendi* and fine-only cases**

In a line of cases beginning with *Apprendi v. New Jersey*,<sup>93</sup> the Court held that the Sixth

Amendment guarantees the right to a jury determination of any fact (other than the fact of a prior conviction) that increases a defendant’s maximum potential sentence of imprisonment. In *Southern Union Co. v. United States*,<sup>94</sup> the Court ruled 6-3 that this principle also applies to sentences of criminal fines.

The defendant company was charged with violating federal environmental statutes by illegally storing liquid mercury. The statute provided for a fine of up to \$50,000 for each day of the violation. The indictment and the jury verdict form both stated a range of dates, and the jury was not asked to specify the duration of the violation. At sentencing, the judge concluded that the jury had found a violation over the entire time period, and set the maximum potential fine at \$38.1 million. This was error, said the Supreme Court.

The majority and dissenting opinions both contain lengthy dissertations on the historical role of the jury, particularly in prosecutions involving fines. For our purposes, what is most important is the Court’s discussion of the goals of the *Apprendi* line of cases and the practical implications. The majority opinion, authored by Justice Sotomayor, states that *Apprendi*’s core concern is to preserve the jury’s role in determining facts that warrant punishment. The jury is a “bulwark between the State and the accused at the trial for an alleged offense,”<sup>95</sup> and there is no principled basis to distinguish a sentence of a fine from a sentence of imprisonment. “Where a fine is so insubstantial that the underlying offense is considered ‘petty,’ the Sixth Amendment right of jury trial is not triggered and no *Apprendi* issue arises.”<sup>96</sup> Dissenting, Justice Breyer, joined by Justices Kennedy and Alito, argued that the outcome should have been controlled by *Oregon v. Ice*,<sup>97</sup> where the Court found that sentencing judges could find facts that allow sentences to run consecutively as opposed to concurrently. The dissenters also contended that extending *Apprendi*’s holding to fines would straightjacket legislatures. Some “may choose to return to highly discretionary sentencing, with its related risks of nonuniformity.”<sup>98</sup>

While several parts of the decision may be worth studying, there are two points to emphasize: first, there is no wiggle room based upon the size of the potential fine. If the offense is non-petty, and the defendant has the right to a jury trial, the rule applies. Second, the rule applies to facts that determine the maximum fine, even if the maximum fine is not imposed. In this case, the maximum fine was \$38.1 million, but the amount imposed was \$6 million.

**EIGHTH AMENDMENT**

The juvenile life-without-parole (LWOP) case, *Miller v. Alabama*,<sup>99</sup> was a quite significant Eighth Amendment ruling. In a 5-4 decision, the Supreme Court held that the Eighth Amendment “forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.”<sup>100</sup> One petitioner, Jackson, was 14 when he helped rob a video store, where a co-defendant killed the clerk. The second petitioner, Miller, was also 14 when he and a co-defendant were charged with murder during the course of arson. Both were tried as adults and, upon conviction, both received a mandatory LWOP sentence.

Writing for the majority, Justice Kagan drew on two strands of Eighth Amendment jurisprudence. First, decisions such as *Graham v. Florida*<sup>101</sup> address mismatches between the culpability of the class of offenders and the severity of the penalty. Thus, *Graham* prohibits an LWOP sentence for a juvenile who has committed a non-homicide offense. But *Graham* also likens LWOP for juveniles to the death penalty itself, implicating a second line of precedents, which require sentencing authorities to consider the individual characteristics of the defendant and the details of the crime before imposing a death sentence. As in prior cases, the Court noted that “the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.”<sup>102</sup> Here the mandatory sentencing schemes prevented “assessing whether the law’s harshest term of imprisonment proportionately punishes a juvenile offender.”<sup>103</sup> Moreover, relying again upon *Graham* and precedents requiring individualized sentencing in capital cases, a mandatory LWOP sentence for juveniles impermissibly precludes consideration of the defendant’s chronological age and its associated features—including immaturity and failure to appreciate risks—as well as family circumstances, the facts of the case, and the possibility of rehabilitation. The majority swept aside the State’s arguments, finding (among other things) that although it is possible for juveniles to receive mandatory LWOP sentences in 29 U.S. jurisdictions, the variance in the statutory schemes does not show that the penalty has been fully and deliberately endorsed by these legislatures. Further, the discretion in some statutes dealing with transfer from juvenile to adult systems does not

91. *Id.* at 2056.

92. *Id.* at 2058.

93. 530 U.S. 466 (2000).

94. 132 S. Ct. 2344 (2012).

95. *Id.* at 2351 (quoting *Oregon v. Ice*, 555 U.S. 160, 168 (2009)).

96. *Id.*

97. 555 U.S. 160 (2009).

98. *Southern Union Co.*, 132 S. Ct. at 2357, 2371 (Breyer, J., dissenting).

99. 132 S. Ct. 2455 (2012).

100. *Id.* at 2469.

101. 130 S. Ct. 2011 (2010).

102. *Miller*, 132 S. Ct. at 2465 (citing *Graham* and *Roper v. Simmons*, 543 U.S. 551 (2005)).

103. *Id.* at 2466.

make up for the lack of discretion in the mandatory LWOP schemes.<sup>104</sup>

Chief Justice Roberts penned the primary dissent. Joined by Justices Scalia, Thomas, and Alito, he pointed to the nearly 2,500 inmates serving LWOP sentences for crimes committed as juveniles, and argued that it is therefore not “unusual” for a murderer to receive an LWOP sentence. He noted that in determining whether a punishment is cruel and unusual, the Court generally begins with “objective indicia of society’s standards, as expressed in legislative enactments and state practice.”<sup>105</sup> Given the number of states that require and frequently impose mandatory LWOP sentences upon juveniles, “there is no objective basis” for finding a “consensus against” the practice.<sup>106</sup> Nor is the majority’s decision supported by the prior holdings in *Roper* and *Graham*, which were expressly limited to death penalty and non-homicide prosecutions.<sup>107</sup> Justice Thomas, joined by Justice Scalia, contended neither strand of Eighth Amendment jurisprudence relied upon by the majority is consistent with the original understanding of the Cruel and Unusual Clause. He also argued that in *Harmelin v. Michigan*, the Court previously “declined to extend its individualized-sentencing rule beyond the death penalty context.”<sup>108</sup> Justice Alito, joined by Justice Scalia, first questioned the concept of “evolving standards of decency,”<sup>109</sup> and noted that “today’s decision shows . . . that our Eighth Amendment cases are no longer tied to any objective indicia of society’s standards.”<sup>110</sup>

#### FOURTEENTH AMENDMENT—DUE PROCESS

Two significant Due Process Clause cases were decided this past Term. In one, the Court addressed the prosecution’s duty to disclose notes that could have been used to impeach a key witness. In the other, the justices turned aside a challenge to the reliability of an eyewitness identification.

##### Brady obligations

This may be an unfair observation, but it almost seems like whenever there is a Supreme Court ruling about a prosecutor’s noncompliance with *Brady v. Maryland*,<sup>111</sup> the Orleans Parish district attorney’s office has offered up the vehicle.<sup>112</sup> In *Smith v. Cain*,<sup>113</sup> the most recent of these cases, the Court ruled 8-1 that the failure to comply with *Brady* required Smith’s conviction to be vacated.

Smith was convicted of murder based upon the testimony of a single witness, Boatner. In court, Boatner identified Smith as the first of three gunmen to enter the home where five people were killed. He said that he had been face-to-face with Smith at

the beginning of the robbery-homicides. However, according to the notes of the lead investigator, on the night of the murders, Boatner could not describe the perpetrators other than that they were black men. Five days later, Boatner also said he could not identify anyone because he could not see their faces and he would not know them if he saw them. The prosecution did not disclose these notes to the defense.

In his opinion for the Court, Chief Justice Roberts wrote that Boatner’s statements were both exculpatory and material. There was no inculpatory physical evidence. Boatner’s trial testimony was the only evidence linking Smith to the crime, and the undisclosed statements directly contradicted that testimony. While the State has offered “a reason that the jury *could* have disbelieved Boatner’s undisclosed statements,” it “gives us no confidence that it *would* have done so.”<sup>114</sup> The undisclosed statements thus sufficed to undermine confidence in the conviction, and the Louisiana courts’ denial of post-conviction relief was reversed. Justice Thomas, the lone dissenter, contended that Smith had not established a reasonable probability that the jury would have afforded the undisclosed statements sufficient weight to alter its verdict. He argued that the majority failed to consider the record as a whole and that the Court improperly shifted the burden of proof to the State.<sup>115</sup>

##### Reliability of eyewitness identifications

In *Perry v. New Hampshire*,<sup>116</sup> a closely watched case, the Court turned aside a Due Process Clause challenge to the admissibility of an eyewitness identification. A witness called police to report a person breaking into cars in a parking lot early one morning. Officers stopped the defendant, Perry, at the scene. When they went to the witness to ask for a description, she pointed to her window and said the person she saw breaking into the car was standing in the parking lot, right next to a police officer. Perry challenged the identification on due-process grounds, arguing that it was equivalent to a one-person showup that all but guaranteed he would be identified as the offender. He lost the motion and was convicted of theft. The New Hampshire Supreme Court rejected his argument, and the U.S. Supreme Court affirmed, 8-1.

**In *Perry v. New Hampshire*, . . . the Court turned aside a Due Process Clause challenge to the admissibility of an eyewitness identification.**

104. *Id.* at 2470-75. Justice Breyer concurred to emphasize that if the State seeks a sentence of life without the possibility of parole for petitioner Jackson, there would have to be a determination that he killed or intended to kill the robbery victim. *Id.* at 2475, 2477 (Breyer, J., concurring).

105. *Id.* at 2477, 2477-78 (Roberts, C.J., dissenting) (quoting *Graham*, and citing *Kennedy v. Louisiana*, 554 U.S. 407, 422 (2008) and *Roper*).

106. *Id.* at 2478.

107. *Id.* at 2480-82.

108. *Id.* at 2482, 2485 (Thomas, J., dissenting) (citing *Harmelin*, 501 U.S. 957 (2003)).

109. “Is it true that our society is inexorably evolving in the direction of greater and greater decency? Who says so, and how did this particular philosophy of history find its way into our fundamental law?” *Id.* at 2487 (Alito, J., dissenting).

110. *Id.* at 2490.

111. 373 U.S. 83 (1963).

112. *See, e.g., Connick v. Thompson*, 131 S. Ct. 1350 (2011); *Kyles v. Whitley*, 514 U.S. 419 (1995).

113. 132 S. Ct. 627 (2012).

114. *Id.* at 630.

115. *See id.* at 631, 635-40.

116. 132 S. Ct. 716 (2012).

**Perry could not prevail because the police engaged in no improper conduct; the officers did not arrange the suggestive circumstances surrounding the witness's identification of Perry.**

The opinion for the Court was authored by Justice Ginsburg. She first emphasized that the Constitution protects against a conviction based on unreliable evidence primarily by affording sufficient safeguards for the adversary system to function: defendants have counsel, confrontation, cross-examination, compulsory process, and other rights. The leading eyewitness identification decisions, *Neil v. Biggers*<sup>117</sup> and *Manson v. Brathwaite*,<sup>118</sup> make clear that “due process concerns arise only when law enforcement officers use an identification procedure

that is both suggestive and unnecessary” and suppression of the resulting identification depends upon “whether improper police conduct created a ‘substantial likelihood of misidentification.’”<sup>119</sup> But there is an important limitation. “The due process check for reliability . . . comes into play only after the defendant establishes improper police conduct.”<sup>120</sup> Perry could not prevail because the police engaged in no improper conduct; the officers did not arrange the suggestive circumstances surrounding the witness's identification of Perry. The justices rejected Perry's argument for a broader application of the Due Process Clause, saying that “[a] primary aim of excluding identification evidence. . . is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place.”<sup>121</sup> The Court also turned aside the argument that eyewitness identifications are a uniquely unreliable form of evidence in large part because “the jury, not the judge, traditionally determines the reliability of evidence.”<sup>122</sup>

Justice Sotomayor was the lone dissenter. She argued that the Court's cases establish the clear rule that admitting “out-of-court eyewitness identifications derived from impermissibly suggestive circumstances that pose a very substantial likelihood of misidentification violates due process.”<sup>123</sup> Nor is there any distinction between intentional and unintentional suggestion. Justice Sotomayor took issue with a number of other aspects of the majority opinion, including the Court's emphasis on a deterrence rationale for exclusion. Citing empirical evidence regarding the unreliability of eyewitness identification, she argued that the majority adopted “an artificially narrow conception of the dangers of suggestive identifications at a time when our concerns should have deepened.”<sup>124</sup>

117. 409 U.S. 188 (1972).

118. 432 U.S. 98 (1977).

119. *Perry*, 132 S. Ct. at 724 (citing *Biggers* and *Brathwaite*).

120. *Id.* at 726.

121. *Id.* at 726.

122. *Id.* at 728. Justice Thomas concurred, arguing that the Court's eyewitness-identification cases rely upon substantive due process and are thus wrongly decided. *Id.* at 730 (Thomas, J., concurring).

123. *Id.* at 730, 731 (Sotomayor, J., dissenting).

## FIRST AMENDMENT

The Court issued two notable First Amendment cases this Term.

In *United States v. Alvarez*,<sup>125</sup> a much-anticipated decision, the Court struck down the Stolen Valor Act. The Act prohibits false representations of the receipt of military decorations, and the penalties are enhanced if the representations concern the Medal of Honor. Alvarez, a local official, lied at a public meeting about receiving the Medal of Honor. Six justices agreed that the Act violates the First Amendment, but split on the reasons.

A plurality held that content-based restrictions on speech are permitted only when confined to certain traditional categories, such as obscenity, defamation, and speech presenting some imminent and grave threat. Writing for four justices, Justice Kennedy rejected the government's claim that false statements have no value and hence are unprotected. They distinguished statutes criminalizing acts such as perjury and false statements to government officials; these provisions are narrower and do not establish a general rule that false statements are unprotected. Finally, even though the government asserted that the Act protects compelling interests, “[t]he First Amendment requires that the Government's chosen restriction on the speech at issue be ‘actually necessary’ to achieve its interest,”<sup>126</sup> which was not shown here. Justices Breyer and Kagan concurred in the outcome, but on a different theory. Even when one reads the statute narrowly as criminalizing “only false factual statements made with knowledge of their falsity and with the intent that they be taken as true,” the statute lacks “any . . . limiting features” such as context or proof of injury.<sup>127</sup> As drafted, it “works disproportionate constitutional harm.”<sup>128</sup> Justice Alito, joined by Justices Scalia and Thomas, dissented. In their view, the statute “reaches only knowingly false statements about hard facts directly within a speaker's personal knowledge. These lies have no value . . . and proscribing them does not chill any valuable speech.”<sup>129</sup> The dissenters argued that “there are more than 100 federal criminal statutes that punish false statements made in connection with areas of federal agency concern,”<sup>130</sup> and the Act, like those, does not infringe the First Amendment.

*Reichle v. Howards*<sup>131</sup> was a civil-rights action brought by a plaintiff who was arrested by Secret Service agents after meeting Vice President Cheney at a public event. The plaintiff, Howards, told the Vice President that his policies in Iraq were “disgusting,” and Howards touched the Vice President's shoulder. Agent Reichle stopped Howards, who denied touching the Vice President, and was arrested. The agent had probable cause to arrest Howards for making a false statement to a federal official, but Howards alleged that the arrest was in retaliation for criticizing the Vice President, in violation of the First

124. *Id.* at 739.

125. 132 S. Ct. 2537 (2012).

126. *Id.* at 2549 (quoting *Brown v. Entertainment Merchants Assn.*, 131 S. Ct. 2729, 2738 (2011)).

127. *Id.* at 2551, 2552-53, 2555 (Breyer, J., concurring).

128. *Id.* at 2556.

129. *Id.* at 2556, 2556-57 (Alito, J., dissenting).

130. *Id.* at 2562.

131. 132 S. Ct. 2088 (2012).

Amendment. The case raised two questions: whether a plaintiff may raise a First Amendment retaliatory arrest claim despite the presence of probable cause to arrest, and whether the agent was entitled to qualified immunity. The Court did not reach the first question; it determined that the agent was entitled to qualified immunity.

Justice Thomas wrote for the Court. The qualified-immunity question turned on the impact of *Hartman v. Moore*,<sup>132</sup> which held that a plaintiff cannot claim retaliatory prosecution in violation of the First Amendment if probable cause supported the charges. Reichle was entitled to qualified immunity because *Hartman*'s impact on the precedent governing retaliatory arrests was not clear, and a reasonable official "could have interpreted *Hartman*'s rationale to apply to retaliatory arrests."<sup>133</sup> Justices Ginsburg and Breyer concurred in the judgment. Secret Service agents must make swift decisions about the safety of public officials, and they may take into account words spoken to or near the person whose safety is their charge.<sup>134</sup>

### FEDERAL HABEAS CORPUS

In last year's summary of Supreme Court decisions, I wrote that the 2010-11 Term gave us several landmark habeas corpus rulings, including *Harrington v. Richter*<sup>135</sup> and *Cullen v. Pinholster*.<sup>136</sup> This Term may be remembered as much for its pattern of summary reversals in habeas cases as for any of the individual rulings. In no fewer than six cases, the justices granted certiorari and summarily reversed decisions of courts of appeals that had granted federal habeas corpus relief to state inmates.<sup>137</sup>

The summary reversals came throughout the year. Setting the tone, the very first opinion of the Term was *Cavazos v. Smith*,<sup>138</sup> where the majority held that the court of appeals had erred in finding that the state court had unreasonably applied the "sufficiency of the evidence" standard of *Jackson v. Virginia*.<sup>139</sup> In *Smith*, six justices emphasized the deference due to state courts under AEDPA as well as the deference afforded to jury verdicts under *Jackson*.<sup>140</sup> The dissenters argued that certiorari should have been denied and that the Court was merely engaging in error correction.<sup>141</sup>

After leading off with *Smith*, summary reversals followed in *Bobby v. Dixon* (the *Miranda* case), *Hardy v. Cross* (under AEDPA, the state court did not unreasonably apply Confrontation Clause precedents),<sup>142</sup> *Wetzel v. Lambert* (habeas

relief should not be granted "unless each ground supporting the state court decision is examined and found to be unreasonable under AEDPA"),<sup>143</sup> *Coleman v. Johnson* (the state court denied a *Jackson v. Virginia* claim "and that determination in turn is entitled to considerable deference under AEDPA"),<sup>144</sup> and *Parker v. Matthews* (the court of appeals decision "is a textbook example of what [AEDPA] proscribes: 'using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts'").<sup>145</sup>

In *Greene v. Fisher*,<sup>146</sup> an unusual case (heck, this one was actually argued), a unanimous Court sent another message about the limits of federal habeas corpus review under AEDPA. The main Supreme Court precedent case on which *Greene* relied was issued after his state post-conviction petition was decided but before it was made final. The Court ruled that AEDPA requires federal courts to measure state-court decisions against the Supreme Court's precedents at the time the state courts render their decisions.

Four cases about procedural default are also important to note, including what may turn out to be the most significant individual habeas decision of the Term, *Martinez v. Ryan*.<sup>147</sup> The question in *Martinez* was whether an inmate can raise ineffective assistance of counsel for the first time in federal court when the claim was not properly presented in state court due to counsel's errors. The case came from Arizona, and state law does not permit ineffective assistance of counsel to be raised on direct appeal; rather, the claim can only be brought in a state post-conviction petition. *Martinez*'s lawyer, however, failed to do so. The court of appeals had ruled that under *Coleman v. Thompson*,<sup>148</sup> an attorney's errors in a post-conviction proceeding cannot amount to cause to excuse a procedural default. The Supreme Court disagreed, by a vote of 7-2.

With Justice Kennedy writing for the Court, the majority modified what many had taken as a blanket rule in *Coleman*.

**The Court ruled that AEDPA requires federal courts to measure state-court decisions against the Supreme Court's precedents at the time the state courts render their decisions.**

132. 547 U.S. 250 (2006).

133. *Reichle*, 132 S. Ct. at 2095. Justice Kagan did not participate in the case.

134. *Id.* at 2097 (Ginsburg, J., concurring).

135. 131 S. Ct. 770 (2011).

136. 131 S. Ct. 1388 (2011).

137. For a discussion of the pattern of summary reversals, see Jonathan M. Kirshbaum, *Accelerating Pace of Supreme Court's Summary Reversals of Habeas Relief Suggests Impatience with Circuit Courts' Failure to Defer to State Tribunals*, 81 U.S.L.W. 67 (July 27, 2012).

138. 132 S. Ct. 2 (2011) (per curiam).

139. 443 U.S. 307 (1979).

140. *Smith*, 132 S. Ct. at 6.

141. *Id.* at 8, 9 (Ginsburg, J., dissenting, joined by Justices Breyer and

Sotomayor).

142. 132 S. Ct. 490 (2011) (per curiam).

143. 132 S. Ct. 1195, 1199 (2012) (per curiam). Justices Breyer, Ginsburg, and Kagan dissented, arguing that the court of appeals did not overlook aspects of the decision by the Pennsylvania Supreme Court, and that the Court should not have reviewed the court of appeals fact-specific holding. *Id.* at 1199, 1199-1201 (Breyer, J., dissenting).

144. 132 S. Ct. 2060, 2065 (2012) (per curiam).

145. 132 S. Ct. 2148, 2149 (2012) (quoting *Renico v. Lett*, 130 S. Ct. 1855, 1866 (2010)).

146. 132 S. Ct. 38 (2011).

147. 132 S. Ct. 1309 (2012).

148. 501 U.S. 722 (1991).

**When a State requires an ineffective assistance of counsel claim to be raised in a collateral state proceeding, two circumstances can provide cause to excuse a default of that claim.**

The *Martinez* Court “qualifie[d] *Coleman* by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial.”<sup>149</sup> In *Coleman*, the alleged failure of counsel was on appeal from an initial-review collateral proceeding, and the claims had been addressed by the state habeas trial court. By contrast, “[w]here, as here, the initial-review collateral proceeding is the first designated proceeding

for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner’s direct appeal as to the ineffective-assistance claim.”<sup>150</sup> When a State requires an ineffective-assistance-of-counsel claim to be raised in a collateral state proceeding, two circumstances can provide cause to excuse a default of that claim. One is if the state courts did not appoint counsel in the initial-review collateral proceeding for the claim of ineffective assistance of counsel. The second is where appointed counsel in the initial-review collateral proceedings is in turn ineffective under *Strickland v. Washington*.<sup>151</sup> Justice Scalia, joined by Justice Thomas, dissented. They denounced the majority’s claim “that today’s holding is no more than a ‘limited qualification’ to *Coleman*,” calling it instead “a repudiation of the longstanding principle governing procedural default, which *Coleman* and other cases consistently applied.”<sup>152</sup>

*Maples v. Thomas*,<sup>153</sup> another procedural-default case with the same lineup of justices, is interesting though somewhat fact specific. Maples, an inmate on death row in Alabama, missed the deadline to file an appeal from the denial of his state post-conviction petition. He had been represented in his post-conviction petition by two associates at a New York law firm, who left the firm while the case was pending. When the trial-level court denied relief, the notice of the court’s order (which had been mailed to the associates) was returned unopened. After missing the deadline to appeal and losing in several efforts to bring a late appeal, Maples filed a federal habeas corpus petition. It was dismissed due to the procedural default. The Supreme Court reversed. In an opinion by Justice Ginsburg, the Court noted the general rule that when a post-conviction attor-

ney misses a filing deadline, the petitioner is bound by the error and cannot rely upon it for cause to excuse a procedural default. But Maples’ lawyers left him without notice. “Having severed the principal-agent relationship, an attorney no longer acts, or fails to act, as the client’s representative.”<sup>154</sup> Justices Scalia and Thomas dissented, disagreeing with the majority’s conclusion that Maples was essentially unrepresented at the critical time. They added that “if the interest of fairness justifies our excusing Maples’ procedural default here, it does so whenever a defendant’s procedural default is caused by his attorney. That is simply not the law—and cannot be, if the states are to have an orderly system of criminal litigation conducted by counsel.”<sup>155</sup>

The last two procedural-default cases are worth a brief mention. In *Wood v. Milyard*,<sup>156</sup> the justices held that courts of appeals, like the district courts, have the authority but not the obligation to raise a forfeited timeliness defense on their own initiative. However, a court of appeals abuses its discretion by dismissing a habeas petition as untimely where that ground has been intentionally waived by the State. Finally, in *Gonzalez v. Thaler*,<sup>157</sup> the Court addressed an issue about the specificity of certificates of appealability but, more importantly for our purposes, clarified an aspect of AEDPA’s one-year statute of limitations. Under AEDPA, the limitations period runs from the latest to occur among four dates set out by statute.<sup>158</sup> One of those is the date on which the state court judgment became final by the conclusion of direct review or the expiration of time for seeking review. The justices held that “with respect to a state prisoner who does not seek review in a State’s highest court, the judgment becomes ‘final’ under [AEDPA] when the time for seeking such review expires.”<sup>159</sup>

## ODDS AND ENDS

A few other decisions are important to note.

### *The interrelationship of federal and state sentences*

*Setser v. United States*<sup>160</sup> holds that a federal district court may order a federal sentence to run consecutively to a state sentence that has not yet been imposed. Setser pleaded guilty to a federal drug offense. He also had pending state probation-violation and drug charges. At sentencing, the federal judge ordered Setser’s federal sentence to run *consecutively* to any state sentence for the probation violation but *concurrently* with any sentence imposed on the new drug charge. The state court subsequently sentenced him to 5 years for probation violation and 10 years on the new drug charge, to be served *concurrently*.<sup>161</sup> The majority read the applicable federal statute, 18 U.S.C. §

149. *Martinez*, 132 S. Ct. at 1315.

150. *Id.* at 1317.

151. *Id.* at 1318 (citing *Strickland*, 466 U.S. 668).

152. 132 S. Ct. at 1321, 1324 (Scalia, J., dissenting).

153. 132 S. Ct. 912 (2012).

154. *Id.* at 922-23 (citation omitted).

155. *Id.* at 929, 934 (Scalia, J., dissenting).

156. 132 S. Ct. 1826 (2012). Justices Thomas and Scalia would have decided the case on different grounds. See *id.* at 1835 (Thomas, J., concurring in the judgment).

157. 132 S. Ct. 641 (2012).

158. See 28 U.S.C. § 2244(d)(1).

159. *Id.* at 656. Justice Scalia dissented from the holding about certificates of appealability and would have reversed for lack of jurisdiction. See *id.* at 656 (Scalia, J., dissenting).

160. *Setser*, 132 S. Ct. 1463 (2012).

161. Under state law, this meant that the state sentences were to run concurrently with each other *and* with the federal sentence. See Brief for Petitioner, *Setser v. United States* (No. 10-7387), at 7.

3584(a), as affording discretion to federal judges to specify whether a federal sentence is concurrent or consecutive to a yet-to-be-imposed state term, even though such discretion is not explicit in the statute. The Court turned aside an argument that this made Setser's sentence unreasonable in light of the state court's later decision to run the sentences concurrently.<sup>162</sup> Justice Breyer, joined by Justices Kennedy and Ginsburg, dissented. They read § 3584 as providing authority to specify consecutive or concurrent sentences only when a federal judge is the second sentencer. Justice Breyer (one of the original members of the U.S. Sentencing Commission) wrote that that interpretation was most consistent with the purposes of the 1984 Sentencing Reform Act, which favors concurrent sentences when the separate convictions are based upon the same relevant conduct, and this determination would ordinarily best be made by the second sentencing court.<sup>163</sup>

### Grand jury witness immunity

In *Rehberg v. Paulk*,<sup>164</sup> a unanimous Court held that a grand jury witness is entitled to the same absolute immunity from federal civil rights liability as a witness who testifies at trial. The witness, Paulk, was an investigator for the local district attorney. He testified several times before a county grand jury, which returned several indictments against Rehberg. Rehberg brought an action under 42 U.S.C. § 1983, alleging that Paulk conspired to present and did present false testimony. In finding that Paulk was entitled to absolute immunity, the Court noted that just as with trial witnesses, "a witness' fear of retaliatory litigation may deprive the tribunal of critical evidence. And in neither context is the deterrent of potential civil liability needed" to prevent perjury.<sup>165</sup>

### A LOOK AHEAD

As this article goes to press (prior to the Court's September and October conferences), it is still too early to handicap the upcoming Term. But a few interesting cases are already in the hopper. The justices are slated to determine whether *Padilla v. Kentucky*<sup>166</sup>—the landmark ruling on advice of the immigration consequences of a plea—applies to convictions that became final before its announcement.<sup>167</sup> The Court will also decide whether federal habeas corpus proceedings may be stayed for capital defendants who are mentally incompetent.<sup>168</sup>

Fourth Amendment cases are perhaps attracting the greatest

amount of early interest. *Bailey v. United States*<sup>169</sup> asks if officers can detain a person while executing a search warrant when the person already left the immediate vicinity before the warrant is executed. Then there is the doggie duo. The issue in *Florida v. Harris*<sup>170</sup> is whether an alert by a narcotics-detection dog provides probable cause to search a vehicle. *Florida v. Jardines*<sup>171</sup> asks if a drug dog's sniff at the front door of a home amounts to a search within the meaning of the Fourth Amendment. You may or may not agree with his legal analysis, but it is hard to beat the prose of *Time* columnist Joel Stein, who opined about *Jardines*: "The outcome depends on whether the court sees a dog as a gadget like a thermal imager or as a human who can invade your privacy by smelling private smells. My take is, if you think dog sniffing isn't an invasion of privacy, then you don't have a crotch."<sup>172</sup>

### CONCLUSION

The past Term was big. The Court gave us thrills,<sup>173</sup> chills,<sup>174</sup> and spills,<sup>175</sup> with transformative decisions about searches, effective assistance of counsel, jury trials, and juvenile life sentences. Can the next Term top it? We'll see.



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162. *Id.* at 1469-70, 1472.

163. *Id.* at 1474, 1476-79 (Breyer, J., dissenting).

164. 132 S. Ct. 1497 (2012).

165. *Id.* at 1505.

166. 130 S. Ct. 1473 (2010).

167. *Chaidez v. United States*, No. 11-820.

168. *Ryan v. Gonzales*, No. 10-930, and *Tibbals v. Carter*, No. 11-218.

169. No. 11-770.

170. No. 11-817.

171. No. 11-564.

172. Joel Stein, *My Day in Court. Who Do You Call When You Need to Interpret the Constitution? Me*, *TIME*, Feb. 27, 2012.

173. Well, some were thrilled. See *Thrilled and Relieved, Sick Patients Cheer Court Ruling*, available at <http://vitals.msnbc.msn.com/>

[\\_news/2012/06/28/12363291-thrilled-and-relieved-sick-patients-cheer-court-ruling?lite](http://_news/2012/06/28/12363291-thrilled-and-relieved-sick-patients-cheer-court-ruling?lite).

174. "Permitting the government to decree this speech to be a criminal offense . . . would endorse governmental authority to compile a list of subjects about which false statements are punishable. . . . The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit . . ." *Alvarez*, 132 S. Ct. at 2547-48.

175. Somebody at the Court spilled the beans, or so it was reported. See Charles Lane, *Slimy Leaks About John Roberts at Supreme Court*, available at [http://www.washingtonpost.com/blogs/post-partisan/post/slimy-leaks-about-john-roberts-at-supreme-court/2012/07/03/gJQAPq9mKW\\_blog.html](http://www.washingtonpost.com/blogs/post-partisan/post/slimy-leaks-about-john-roberts-at-supreme-court/2012/07/03/gJQAPq9mKW_blog.html).

# Opinions as the Voice of the Court:

## How State Supreme Courts Can Communicate Effectively and Promote Procedural Fairness

William C. Vickrey, Douglas G. Denton & Wallace B. Jefferson

The 50 state supreme courts issue more than 5,000 published opinions each year. These opinions are vital to protect the liberties guaranteed by the constitution and laws of the state, impartially uphold and interpret the law, and provide open, just, and timely resolution of all matters. The opinion of the high court is its voice—the means to convey and explain to both legal and general audiences that the court listened, resolved a legal dispute, impartially applied the law, and reached a fair and reasoned judgment. As the highest level of state judiciaries, supreme courts also strive to provide open access to opinions and proceedings.

The challenge for the nation's judges and justices, public information officers, and members of the bar and media is to make sure that the public understands what is expressed in a supreme court opinion, which is written in the language of the law that speaks to the legal profession and academia. In a splintered media landscape with increased means of communication, partners in various media, traditional or new, must engage if they are to inform. Increasingly, many issues before state supreme courts are of high importance to the public, an environment which requires courts to be transparent, accountable, and accessible. There are means of communication that supreme courts can employ to convey to participants and external audiences that the procedures used to decide and render an opinion are fair and foster respect for the law.

This article discusses the nature of and trends in the formation of state supreme court opinions and the methods by which opinions are communicated to the press, the public, members of the bar, and online communities. It considers current practice in light of a field in social psychology called procedural fairness, a helpful and practical theory that explains what makes it likely that people are satisfied with and comply with decisions by authorities, such as judges. The article goes on to highlight current state court trends, including the use of plain language and summarization, the use of websites for improved communication and dissemination of opinions, and the increase in

educational opportunities for appellate bench officers to make opinions clearer and more effective. Historical analysis and a state by state comparison demonstrate changes to opinion length over time, and the article discusses the ramifications that court opinion complexity may have on public and media understanding. A case study on same-sex marriage cases in California, along with findings from a national survey, show that the nation's highest courts use diverse strategies to more effectively communicate opinions and encourage public understanding. Ultimately, opinions serve as the court's voice because rulings communicate not only to lawyers but also to the public and media and explain how courts resolve disputes and determine constitutional rights.

The concepts behind procedural fairness have developed from research showing that the manner in which disputes are handled by the courts has an important influence on peoples' evaluations of their experiences in the court system.<sup>1</sup> Procedural fairness refers to court users' perceptions regarding the fairness and transparency of the processes by which their disputes are considered and resolved, as distinguished from the outcome of a case.<sup>2</sup> For any court to achieve procedural fairness, individual court players must demonstrate through their actions that the court has listened to all parties and reached a fair conclusion.

The California judiciary has placed an emphasis on implementing procedural fairness in all aspects of its work. In 2005, the Judicial Council of California commissioned a landmark public trust and confidence assessment, *Trust and Confidence in the California Courts*, which identified procedural fairness—court users having a sense that decisions have been reached through processes that are fair—as by far the strongest predictor of whether members of the public approve of or have confidence in California's courts.<sup>3</sup> In 2007, in response to these findings and those in a follow-up study involving in-depth focus groups and interviews with court users, administrators, bench officers, and attorneys,<sup>4</sup> Chief Justice Ronald M. George launched a

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### Footnotes

1. E. ALLAN LIND & TOM TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCHOL. 117 (2000).
2. Douglas Denton, *Procedural Fairness in the California Courts*, 44 CT. REV. 44 (2007).
3. DAVID B. ROTTMAN, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS (Judicial Council of California 2005), available at [http://www.courts.ca.gov/documents/4\\_37pubtrust1.pdf](http://www.courts.ca.gov/documents/4_37pubtrust1.pdf).
4. PUBLIC AGENDA & DOBLE RESEARCH ASSOCIATES, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: PUBLIC COURT USERS AND JUDICIAL BRANCH MEMBERS TALK ABOUT THE CALIFORNIA COURTS (Judicial Council of California 2006), available at [http://www.courts.ca.gov/documents/4\\_37pubtrust1.pdf](http://www.courts.ca.gov/documents/4_37pubtrust1.pdf).

statewide initiative on procedural fairness, the first of its kind in the nation. It is aimed at ensuring fair process, equitable treatment of all court users, and higher public trust and confidence in California's courts. Procedural fairness is most significantly influenced by four key elements interconnected in the work of the courts: respect, voice, neutrality, and trust. People are more likely to accept and respond more positively to court decisions when the importance of facts is emphasized and the reasons for a decision have been clearly explained. Procedural fairness is also significantly affected by the quality of treatment that court users receive during every interaction with the court. This article urges the adoption of procedural fairness as a guide to enhancing the value of opinions as the voice of the courts.

Supreme and appellate courts face unique challenges regarding achievement of procedural fairness because much of the work of high courts is complex and not in public view. The procedures involved (filing of notices of appeal, writs, briefs, and responses) are often governed by complex rules and proceedings that do not lend themselves to easy explanation. Even oral argument, the most public manifestation of a supreme court's procedures, is not generally understood or covered in the press. By contrast, proceedings in the trial courts often lend themselves to "police-blotter-style" reporting, encompassing simpler explanations of who, what, where, when, or why. Reports from proceedings typically depict two clear sides, issues and distinctions, and a narrative. This is especially true in high-profile cases that draw public interest and are covered intensively, even though these trials are not good representations of how the public actually experiences the courts. Sensational (and national) coverage of murder trials like the O.J. Simpson and Casey Anthony cases often ends up leaving a lasting impression on the public and may create a perception for many observers that the American justice system is unfair or does not work. Because the work of supreme courts is more complicated and attenuated, there is a higher dependence on an effective media to translate the meaning and importance of high court rulings to the public in ways that promote the goals of procedural fairness.

This article is organized into five sections that discuss the workings of state supreme courts and effective communication through the lens of procedural fairness.

## **I. HISTORY AND TRENDS REGARDING SUPREME COURT OPINION DELIVERY AND LENGTH**

The method of disseminating opinions has changed dramatically in the over 230 years that our state supreme court systems have been in existence.<sup>5</sup> The increasing length and complexity of state supreme court opinions can present challenges for court audiences that must be able to access, understand, and accept court opinions. This section will discuss the transition from an

oral to a written system of law, historical trends regarding the length of opinions, and the ramifications that longer and more complex opinions may have for the supreme courts.

### **THE TRANSITION FROM AN ORAL TO A WRITTEN SYSTEM OF LAW**

In its beginnings, the American legal system was characterized by oral advocacy and oral opinions. In early state supreme courts, oral argument between parties and before the court lasting several days was not uncommon, and judgments were rendered orally.<sup>6</sup> "Much of the litigation [during California's early statehood] addressed the legal concerns of the people who flocked to the state during the Gold Rush. Many of their cases involved titles to property, mining, and agricultural issues, and rights to water and minerals on public lands. Often those decisions were not published. In the early years of statehood, the number of [written] opinions issued by the court filled less than one slim volume of the Official Reports annually."<sup>7</sup> With the growth of cities and the long distances traveled by parties and attorneys, oral advocacy was replaced by written advocacy and written opinions of the court.<sup>8</sup>

In March 1879, California voters adopted major changes to the state constitution and the state's judicial system, including a requirement that all opinions be in writing. "In the determination of causes, all decisions of the Court in bank or in departments shall be given in writing, and the grounds of the decision shall be stated."<sup>9</sup> The amendment was a response to public allegations of corruption, and the requirement to put opinions in writing was a way to ensure accountability by the courts and at the same time also give supreme court justices longer terms. As the American legal system moved away from oral advocacy to a writing-centered system of law, state supreme courts also moved away from oral decision making (i.e., judges or justices of the supreme court providing spoken explanations of rulings). The American legal system is now a system in which parties must petition the court in writing, submit written legal briefs, and request brief time for oral argument before a written opinion is issued.

### **SUPREME COURT OPINIONS ARE GETTING LONGER AND MORE COMPLEX**

To compare trends regarding opinion length, the California

**Supreme and appellate courts face unique challenges regarding achievement of procedural fairness because much of the work of high courts is complex and not in public view.**

5. After the adoption of the Massachusetts Constitution in 1780, the Superior Court of Judicature (established in 1692) was changed to the Supreme Judicial Court. The court operates under the oldest, still functioning written constitution in the world.

6. Gerald Lebovits, Alifya V. Curtin & Lisa Solomon, *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237 (2008).

7. THE SUPREME COURT OF CALIFORNIA: CONTAINING THE INTERNAL OPERATING PRACTICES AND PROCEDURES OF THE CALIFORNIA SUPREME

COURT (2007 ed.).

8. Lebovits, et al., *supra* note 6.

9. Cal. Const. 1879, art. VI, § 2. The Texas Rules of Appellate procedure currently states that "The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal." Tex. R. App. P. 47.

**Different theories have been attributed to the increased length of opinions . . . .**

Administrative Office of the Courts Judicial Administration Library has completed a word count analysis of opinions for 16 of the country's court systems (California, Florida, Georgia, Illinois, Indiana, Massachusetts, Michigan, New

Hampshire, New Jersey, New York, Ohio, Pennsylvania, Texas, Utah, Vermont, and Virginia) from 1930–1932 and 2008–2010 and averaged the word counts across case types (see attached summary chart). For 2008–2010, California has by far the longest opinions, averaging 11,820 words over three years. Using an average of 250 words per page, this translates to 47 pages for the average California opinion.<sup>10</sup> Excluding California, the average for the 15 states during the same period was 3,934 words, or roughly 15.75 pages. For 1930–1932, word counts show that the average length of a California opinion was approximately 1,969 words (roughly 8 pages), while the average for the 15 other states during the same period was 2,187 words (about 8.75 pages). So while most states show a 180% increase in opinion length over the past 80 years, the length of California opinions has increased almost 600%.<sup>11</sup>

Different theories have been attributed to the increased length of opinions, including expanded use of law clerks by individual justices and the advent of word processing; the arcane nature of legal writing including the use of lengthier string citations and footnotes; the necessity of longer writing for audiences that include parties, attorneys, academics, and lower or higher courts; and substantive concurrences and dissents that may build out an already long majority opinion. A separate California study from 1994 helps shed light on why the length of California opinions has so dramatically increased. By measuring the number of headnotes in an opinion, this study found that an average opinion of the court during the six-year period of 1987–1993 analyzed twice as many legal issues as did an average opinion during the previous 16-year period, 1970–1986.<sup>12</sup> Correspondingly, during three periods studied, the average number of pages published in each California opinion increased, from 1970–1976 (13.9 pages per case), to 1977–1986 (16.6 pages per case), to 1987–1993 (30.2 pages per case).<sup>13</sup>

**RAMIFICATIONS OF OPINION LENGTH AND COMPLEXITY**

An opinion's scope and length is often determined by the nature and complexity of the case, but the overall trend toward longer opinions may impede audience understanding, comprehension, and compliance. Litigants, especially losing litigants, care less about the length of opinions and more about clarity and the scope or soundness of the reasoning.<sup>14</sup> Parties to disputes want to be assured that the courts considered the issues, engaged in a reasoned and fair analysis, and provided clear direction. New York's former Chief Judge Judith Kaye has noted that opinion readers expect a certain level of scholarliness, but as the length of writings grows, the number of people who actually read them dwindles.<sup>15</sup>

Longer and more complex opinions mean that fewer people are able to understand judgments of the court—or the role of the court—without some form of assistance. In theory, more concise explanations would help the public and the media better understand and access opinions. If opinions are too specialized or unnecessarily complex, courts may be in danger of losing their public voice. As will be discussed below, this has significant consequences for members of the media, who must be able to clearly communicate the substance of opinions, and for members of the public (including lawyers) who must understand rulings. If opinions are too brief, however, they may be too conclusory and not demonstrate that all parties have been listened to. Civil and criminal opinions often must contain a range of legal points in order to adequately address every issue on appeal.

This article does not mean to suggest that opinions of the nation's state supreme courts should always be short or simple or follow one standardized format. However, given that we know that high court opinions are complex for lay audiences and are getting longer, we speak directly to how the preparation and dissemination of high court opinions (including use of tools like plain language, summarization, and effective communication via the web) may help courts to ensure that each individual opinion—the voice of the court—successfully communicates and demonstrates that the court has listened to parties, fulfilled its unique and important role as an arbiter of justice, and reached a fair outcome.

10. Word count: based on an average of 25 lines per page in Courier New 12 pt., approximately 250 words per page.

11. See the attached summary chart, *infra*. Information regarding the numbers of opinions issued by the various state supreme courts is included in the appendices of findings from a national survey conducted by the Conference of Chief Justices, the Administrative Office of the Courts of California, and the National Center for State Courts.

12. William C. Vickrey, *Opinion Filings and Appellate Court Productivity*, 78 JUDICATURE 47 (1994).

13. The 1994 California study found that the court's capital opinion case load (the percentage of all opinions that were capital cases) increased almost eight times from 1970 to 1993 (Vickrey, *supra*). Capital cases generally, and capital affirmances in particular, consume a far greater amount of the court's time and typically require

the court to analyze and resolve numerous complex and fact-specific issues. The attached chart shows that for the period 2008–2010, the average word count for a California death penalty appeal opinion was 24,937 words, or approximately 99.75 pages (excluding death penalty appeals, the average California opinion was 7,332 words, or approximately 29 pages). An area for further research may be to identify the impact that death penalty cases may be having on the growth and complexity of state Supreme Court opinions, along with overall national trends regarding rates of opinion concurrences and dissents.

14. Steve Leben, *Thoughts on Some Potential Appellate and Trial Court Applications of Therapeutic Jurisprudence*, 24 SEATTLE U. L. REV. 467 (2000).

15. Judith S. Kaye, *Judges as Wordsmiths*, 69 N.Y.ST.B.J. 10, 11 (Nov. 1997).

**AVERAGE LENGTH OF 16 STATE SUPREME COURT OPINIONS, 2008-2010**

STATE	OPINION LENGTH 2010	OPINION LENGTH 2009	OPINION LENGTH 2008	POPULATION 2010	NUMBER OF JUDGES OR JUSTICES ON	CONSTITUTIONAL REQUIREMENTS REGARDING
California	11,221 words	11,537 words	1,945 words	37,253,956	7	Cal. Const. art. VI, §§ 11a, 14 Cal. Pen. Code § 1239
Florida	5,101	7,250	7,057	18,801,310	7	Fla. Const. art. V, § 3
Georgia	2,091	2,095	1,922	9,687,653	7	Ga. Const. art. VI, § 6, Para. II
Illinois	6,401	7,108	6,674	12,830,632	7	Ill. Const. art. VI, § 4
Indiana	3,407	3,823	3,754	6,483,802	5	Ind. Const. art. VII, § 4
Massachusetts	3,507	3,756	3,593	6,547,629	7	Mass. Const art. CI, § 3
Michigan	5,985	8,455	7,375	9,883,640	7	Mich. Const art. VI, § 4, 6
New Jersey	5,490	6,864	6,363	8,791,894	7	N.J. Const. art. 6, § 2
New Hampshire	3,385	2,788	3,123	1,316,470	5	N.H. Sup. Ct. Rule 7
New York	2,474	2,592	2,402	19,378,102	7	N.Y. Const art. VI, § 7
Ohio	3,472	3,450	3,770	11,536,504	7	Ohio Const art. IV, § 4.02
Pennsylvania	3,821	4,413	3,671	12,702,379	7	Pa. Courts (42 Pa.C.S. §§ 721-726)
Texas	1,104	3,699	3,689	25,145,561	9	Tex. Const. art. V, § 3,5 Tex. R. App. P Rule 47
Utah	6,168	4,804	4,388	2,763,885	5	Utah Const. art. VIII, § 3
Vermont	3,356	3,468	3,447	625,741	5	Vt. Const. § 30
Virginia	2,720	2,880	2,831	8,001,024	7	Va. Const art. VI, § 1

**AVERAGE LENGTH OF 16 STATE SUPREME COURT OPINIONS, 1930-1932**

STATE	OPINION LENGTH 1932	OPINION LENGTH 1931	OPINION LENGTH 1930	POPULATION 1930	NUMBER OF JUDGES OR JUSTICES ON BENCH (1930 SUPREME COURT)
California	1,973 words	1,989 words	1,945 words	5,677,251	7
Florida	2,212	2,310	1,872	1,468,211	6
Georgia	2,571	2,294	2,703	2,908,506	6
Illinois	2,240	2,265	2,194	7,630,654	7
Indiana	1,751	1,573	2,428	3,238,503	5
Massachusetts	1,822	2,372	1,976	4,249,614	7
Michigan	1,588	1,437	1,563	4,842,325	8
New Jersey	1,552	1,475	1,778	4,041,334	9
New Hampshire	1,760	2,134	1,817	465,293	5
New York	1,941	2,270	1,728	12,588,066	7
Ohio	1,609	1,756	1,947	6,646,697	7
Pennsylvania	2,218	1,692	1,660	9,631,350	7
Texas	2,488	2,244	2,463	5,824,715	3
Utah	3,700	4,345	3,979	507,847	5
Vermont	1,525	1,481	1,896	359,611	5
Virginia	2,651	3,121	3,811	2,421,851	8

**NUMBER AND AVERAGE LENGTH OF CALIFORNIA DEATH PENALTY APPEALS, 2008-2010**

	OPINION LENGTH 2010 (JAN-JUNE)	OPINION LENGTH 2009	OPINION LENGTH 2008
DEATH PENALTY APPEAL	26,672 words	23,027 words	25,112 words
ORDINARY APPEAL	11,221 words	11,537 words	12,702 words

**Opinions must reassure the public that the court has deliberated carefully and acted as a neutral body.**

## **II. CHALLENGES FOR THE MEDIA AND PUBLIC**

Opinions convey dense information, usually in narrative form: an introduction that states what is being appealed, a statement or “story” of the case, discussion of the issues (with corresponding legal analysis), and an explanation of the outcome. Despite an often traditional structure, opinions must make sense to a general readership in order to make a

judgment understandable. Opinions usually speak at a high level to a sophisticated audience (e.g., attorneys or judges) and convey reasoning through legal analysis and argument and references to legal briefs, constitutional or statutory provisions, and case law. Often an opinion will discuss other opinions that in turn may each have multiple concurrences or dissents. In combination with the length and the voices of more than one author, relating even the basic components can make the content of opinions difficult for a lay audience to digest and understand.

### **WRITTEN OPINIONS ARE THE COURT’S MOST IMPORTANT CONTACT WITH THE PUBLIC**

Supreme court opinions deal with some of the most important and difficult issues of the day, provide guidance to the lower courts, and may ultimately contain outcomes that affect the lives of every state resident. Members of the public may not understand the third branch, or every intricacy of a legal opinion, but they do have overall confidence in the courts.<sup>16</sup> The survey in California found that the public believes that in order to do their job well, courts must protect the constitutional rights of everyone. Opinions provide a window to and explanation of the work of the court for the public:

Although a judge’s role in the courtroom is a critical judicial function, only those in the courtroom witness the judge’s conduct, and most of them are concerned with their case alone. Judicial writing expands the public’s contact with the judge. Writing reflects thinking, proves ability, binds litigants, covers those similarly situated, and might determine the result of an appeal. Judges hope that what they write will enhance confidence in the judiciary and bring justice to the litigants.<sup>17</sup>

This observation about judicial writing particularly holds true, if not more so, for appellate-level justices, especially because at the supreme and appellate courts, as opposed to trial courts, not many witness all the workings of the court. When an opinion is released, only a few people may have observed all of the case proceedings leading up to the decision.

### **OPINIONS MUST CLEARLY EXPLAIN JUDGMENTS AND SPEAK TO VARIED AUDIENCES**

In written or summarized form, supreme court opinions explain judgments for the parties. The challenge is often that the judgment and the basis to support it must be communicated

in one document to diverse audiences: the parties, lower courts, stakeholders, public, and media. The format of judgments varies from court to court, but ideally, opinions guide readers through the legal system, demonstrate to stakeholders that the court has listened and that a proper resolution has been reached, eliminate any appearance of judicial arbitrariness, and legitimize any judicial departure from established law. Clear communication of these concepts is crucial in order to demonstrate fairness, ensure public and media understanding of the role of the court, and encourage acceptance of high court judgments. Effective communication starts with a well-reasoned and well-written opinion, but is still dependent on a media that understands the basis of rulings to provide the public with essential information and enhance trust and confidence.

Supreme court opinions are disseminated to wide audiences: parties and attorneys to the case; government officials who may have to follow or implement rulings; lower courts; courts in other states or jurisdictions; lawyers and court practitioners who will review and cite opinions in research; legal journalists, commentators, scholars, and critics; and the public and citizens at large. But to achieve basic elements of procedural fairness, audiences of opinions need to know that the court understood the context of the controversy, listened carefully and respected both sides, and reached a principled judgment based on the law. They also need to know that the court’s role is limited and differs from that of other branches. “Because the judicial opinion is the essential document of the third branch of government, the judge should explain his action in terms that enable the reader to understand precisely what he has done and why he has done it.”<sup>18</sup>

### **OPINIONS MUST CLEARLY COMMUNICATE ROLE OF THE COURT**

Because they are the voice of the court, opinions play a critical role in protecting and promoting fair and impartial courts. Without a full understanding of opinions, misinterpretation of judgments by audiences can lead to public perceptions that the court is insensitive, wrong, or not a legitimate authority. Opinions must reassure the public that the court has deliberated carefully and acted as a neutral body. Therefore, opinions must not only convey the substance of judgments but also demonstrate that the court has fulfilled its constitutional role: listened to parties, evenly and fairly interpreted the law, resolved disputes, and upheld and protected public rights under the laws and constitution of the state.

### **JUSTICES ARE NOT AVAILABLE TO EXPLAIN RULINGS OR DISCUSS CASES**

The current policy of high courts is that the opinion speaks for itself. This policy removes the possibility of a spoken explanation for the public by the person who authored the opinion. A key ingredient of procedural fairness is clear explanations from judges to help litigants and interested parties understand the basis of rulings. Because current practices and the nature, complexity, and length of high court opinions no longer allow

16. Rottman, *supra* note 3.

17. Lebovits et al., *supra* note 6.

18. Irving R. Kaufman, *Helping the Public Understand and Accept Judicial Decisions*, 63 A.B.A.J. 1567 (1977).

justices to deliver them from the bench, how high court opinions are written and communicated affects the understanding of rulings, the overall acceptance of decisions, and perceptions regarding whether the court is transparent and fair. Justices are further constricted by judicial canons that prevent them from discussing cases before an opinion is issued.<sup>19</sup> Although judges often use the bench to explain court procedures and the basis for rulings when they are able, without the ability to provide clarifying spoken explanations to all audiences regarding published opinions, courts must use other communication methods to provide further insight into opinions and promote procedural fairness.

### **MEDIA DEMANDS MUST BE BALANCED WITH ACCURACY**

Supreme court opinions deal with some of the most important and difficult issues of the day on potentially controversial topics that range from the definition of marriage, to limits on free speech or individual rights, to the limits of government's ability to tax and spend, and they deliver outcomes that may ultimately affect the lives of every state resident. Because the general news media are principal agents for informing the public about the courts and opinions, they are vital partners in the provision of accurate and helpful information. Legal publications are vital resources that speak to the profession and can serve as partner resources to general news operations that may not have reporters with legal knowledge or experience. Media demands for access to court proceedings and opinions, however, must be balanced with efforts that encourage accuracy in reporting. This is particularly true for cases of high public interest or controversy. Few reporters are trained in the law, and consequently there is a risk that they will misunderstand difficult decisions they are called on to report and interpret, particularly if the opinions are permeated by legal jargon.<sup>20</sup> If high courts are to be able to play their proper role in government—i.e., serve as part of the impartial and independent branch of government that interprets the law and resolves disputes—it is imperative that they assist media with access to opinions, information, and tools that encourage accurate coverage of opinions. Understanding court procedure may facilitate better reporting on the courts and dissemination of opinions.

### **JUDICIAL PERFORMANCE AND ACCOUNTABILITY**

The length and format of opinions are often also driven by

external and environmental factors that may not be easily understood by the public. Supreme courts in the United States are of different sizes and compositions and operate under different jurisdictions.<sup>21</sup> The opinions of supreme courts and individual justices may be evaluated by the press, the local bar, the legislature, or other government entities on the basis of their reasoning, or the frequency with which they are issued in any given year (i.e., opinions may lead to evaluations of judicial performance

based on numbers of opinions or frequency of issue, and opinion length or understanding may not be a prescribed consideration or factor). Unpublished opinions—where the case law or ruling is considered routine because the matter is one that has been previously determined by the court—also provide potential confusion for the public and stakeholders regarding transparency and accountability.<sup>22</sup> Although remedies exist for a party to request publication of an unpublished opinion, the practice of issuing unpublished opinions may create a tension between efficiency for the courts and public perceptions regarding fairness and transparency (i.e., some parties may believe that their matter has been handled differently by the court if the opinion indicates that it is “not to be published”). However, if the substance or nature of a court ruling is complex because of the language, format, or explanation provided, it behooves courts to take proper steps to ensure that every opinion is generally understood by the public, whether or not the outcome has enormous social impact. Most individuals—whether they are litigants or medical patients—are more comfortable accepting outcomes when adequate explanations are provided, in both routine and complex matters.

### **III. SOLUTIONS TO CHALLENGES**

The needs of the public, the media, and the legal community must be met and balanced by the high court when issuing opinions. The written opinion carries great weight, especially when viewed as the singular source of the court's views. Limitations

**Few reporters are trained in the law, and consequently there is a risk that they will misunderstand difficult decisions . . . , particularly if the opinions are permeated by legal jargon.**

19. See, for example, California Code of Judicial Ethics, Judicial Canon 3B(9) [“A judge shall not make any public comment about a pending or impending proceeding in any court, and shall not make any nonpublic comment that might substantially interfere with a fair trial or hearing.”]

20. Kaufman, *Helping the Public Understand and Accept Judicial Decisions*, *supra* note 18.

21. See the attached summary chart. For example, the Supreme Court of Texas is the court of last resort for noncriminal matters, including juvenile delinquency, which the law considers to be a civil matter and not criminal, in the state of Texas. A different court, the Texas Court of Criminal Appeals, is the court of last resort for criminal matters. In California, the Supreme Court of California decides every death penalty appeal in a written opinion. See Cal.

Pen. Code, § 1239; Cal. Const., art. VI, § 11(a), § 14. A petition for a writ of habeas corpus in a California death penalty case may be decided without an opinion by a brief order stating simply that the petition is denied, but opinions in death penalty appeal cases must communicate substantial fact- and legal-intensive arguments and describe issues that are complex, numerous, and often repetitious.

22. California Court of Appeal unpublished opinions are posted on the California courts website for 60 days solely as public information about actions taken by the Court of Appeal. California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published.

**If tools are provided to make even lengthy opinions more understandable (e.g., summaries or press releases), media reporters can be more accurate . . .**

also exist on the court's ability to expand or explain these views in a fast-paced media landscape where the public experiences many demands for their attention. However, courts can use a number of low-cost and high-impact procedures to help their partners in the media and legal communities by facilitating the communication of decisions and the analyses of the issues involved. These procedures, techniques, and strategies are described below.

#### **USE OF PLAIN LANGUAGE SUMMARIES AND ROAD MAPS IN AN OPINION**

Guidelines that are applicable to plain-language jury instructions have relevance to the communication of opinions. Traditionally, using "plain language" in court communications means to be clear, be brief, remember who your audience is (lay people, with varying degrees of education and language skills), address the audience directly, and order your points in a logical sequence. For plain-language summaries and introductions, even for lengthy and complex opinions, courts should rely on facts and concrete examples, rather than legal jargon, so that all audiences understand the court's reasoning in the opinion that follows. Testing the understanding of plain-language summaries with different audiences is an easy and low-cost way to ensure that the court is achieving this goal. Introductions to opinions can be written after the court's reasoning has been reached to describe the story of the case and to relay any high-level implications for public policy and case law. More extensive use of road maps in opinions, which includes the use of a clear introduction accompanied with explanatory headnotes for ease of reference, accomplishes one of the major goals that this article discusses: ways to prepare and structure opinions to make them more accessible and available. Spoken broadcasts from the chief justice, whether in video or podcast form, can also provide a voice for the court and provide the public and media with a clear explanation of the role of the court, including neutral explanations regarding rulings. If tools are provided to make even lengthy opinions more understandable (e.g., summaries or press releases), media reporters can be more accurate and the public will be better informed.

#### **JUDICIAL EDUCATION**

The survey findings below show that most states provide some form of judicial education for appellate justices, including opinion writing. A handful of states send their justices to forums attended by justices from other states and federal appellate judges. An example of this is the state provision of funds for individual justices to attend the Opperman Institute of Judicial Administration at the New York University School of Law.

Opinion writing has been a regular feature of judicial education for justices in California. The California Administrative Office of the Courts Education Division/Center for Judicial Education and Research (CJER) includes courses at its

statewide educational conference—the Appellate Justices Institute—designed to explore different approaches, practices, and styles. However, because of the unprecedented budget crisis, alternatives to the live statewide delivery of education are also being implemented. In late 2009, the CJER Governing Committee approved a new model of developing judicial education. Under this approach, justices and appellate judicial attorneys oversee curriculum and course development. Alternative delivery of education has also been implemented with the involvement of stakeholders and branch leaders. For example, a webinar on appellate writing is planned for 2012. In 2011, California had 112 supreme court and court of appeal justices serving more than 37 million people living in a geographic region over 3.79 million square miles, geographically the fourth largest state in the country. The strategic use of online resources, such as webinars or videoconferences, will reduce travel and hotel costs associated with traditional face-to-face education.

Judicial education on opinion writing does not lend itself to a one-size-fits-all model, and judicial educators need to be cognizant of different learning styles. Some forums should be confidential to facilitate frank and candid exchanges of ideas, but individual court leadership has a responsibility to understand and balance the learning objectives underlying education on opinion writing in order to determine when education is most needed, whether a justice is new or experienced, and how to provide access effectively.

#### **IMPROVING COMMUNICATION AND COLLABORATION WITH MEDIA AND THE BENCH**

Effective collaboration between the bench and bar is crucial to both public and judicial branch stakeholder understanding. Many newspaper reporters who were trained as lawyers have left or retired from newspaper jobs, which, if not replaced by often more expensive, law-trained reporters, creates a challenge for media to inform the public so that the average citizen can follow what the court is doing and why. Engaging and encouraging the sophistication and cooperation of each state's bar associations makes a difference; the more creative and engaged that lawyers are with the media, the more they will be able to identify, explain, and raise key issues for reporters. Bar associations and law schools have a responsibility to educate the public. This includes engagement with leaders from diverse communities to ensure that the substance of opinions is properly disseminated to audiences that may need to access information in different languages. California, in addition to large ethnic populations of African Americans, Latinos, and Chinese Americans, has a substantial number of Filipinos, Vietnamese, Korean Americans, and other constituents who may speak English as their second language.

#### **USING THE WEB AND SOCIAL MEDIA TO PROVIDE NOTICE AND ENHANCE ACCESS, PARTICIPATION, AND UNDERSTANDING**

Procedural fairness first and foremost concerns individual litigants who appear before a court. The appearance of fairness to the individual litigants, parties, and attorneys involved in a case contributes to a sense of fairness, and this perception carries from those in the courtroom to the public. We know from

the trust and confidence studies conducted in California that procedural fairness is of core concern to the public and is by far the leading determinant of overall trust and confidence in the courts.<sup>23</sup> We also know that Californians rated their courts the lowest on the “participation” (“listen carefully”) element of procedural fairness.<sup>24</sup> Web and social media are now the key modern tools to enable and encourage the broadest possible audience to participate regarding appellate opinions, to access, understand, and comment. One of the central tenets of the “Web 2.0” world is that presenters of information have to go to where people are already online, to Facebook, Twitter, and other social media, and courts cannot rely on people or constituents to voluntarily visit a court website. The web enables courts to do more to get plain-language summaries out into the world, and ideally to promote wider understanding and foster public perception that the court has acted fairly to all parties, listened, applied the law, and been accountable.

As will be discussed below in survey findings and in the opinion study on the same-sex marriage cases in California, advance notice for media, along with modern tools like Twitter and increased use of press releases and plain-language summaries, encourages wider dissemination of information and public understanding. These tools help the media do their job and allow the public to see and participate in the court process. The ability to hear all voices is the reason that our society trusts courts and court officials to settle disputes ranging from a neighbor’s fence encroachment to a minor traffic ticket to a presidential election, or even the deprivation of liberty or life.<sup>25</sup> The web and social media are necessary tools for state supreme courts to demonstrate that the court is a legitimate authority that has listened and has acted in the best interest of all parties.

#### **IMPROVING LAW-RELATED EDUCATION AND OUTREACH**

For years, courts have bemoaned the lack of public understanding of the justice system.<sup>26</sup> Many courts state a commitment to law-related education and outreach, but not all courts broadcast oral arguments on television (furthering the concept that “justice must be seen to be done”) and not all courts venture into their communities and conduct oral arguments at different locations accessible to the public, such as state capitols, colleges, or schools.

The California Supreme Court takes cases out of its traditional venues and chooses to move some arguments into non-traditional locations in the state. The state’s six court of appeal districts also engage in this form of community outreach and public education. This model has made a huge difference to the children, youth, education staff, and community members who view oral argument and to participating appellate lawyers and

23. Rottman, *supra* note 3.

24. *Id.* See also Nathalie Des Rosiers, *From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts*, Spring 2000 COURT REVIEW 54 (2000); Amy D. Ronner, *Therapeutic Jurisprudence on Appeal*, Spring 2000 54 COURT REVIEW (2000) (“The court must make the parties know that they have a voice, one that is not being silenced.”).

25. See Garrett M. Graff, *Courts are Conversations: An Argument for*

academics from different law schools, who are becoming effective commentators on cases. Like other states, California also uses a teacher training program that brings high school teachers together to learn from one another in order to more effectively teach about civics and the rule of law. To date, through the 2010–2011 school year, the California On My Honor: Civics Institute for Teachers program has engaged 270 primary and secondary education (K–12)

teacher participants in 27 superior court jurisdictions, who in turn have reached an estimated 50,450 students with court-centered civics curricula developed at the institutes.

**[M]ore courts are using simpler opinion formats, plain-language summaries, or case syllabi to help people access and understand opinions.**

#### **IV. NATIONAL SURVEY FINDINGS**

Through a national survey conducted by the Conference of Chief Justices, National Center for State Courts, and the Administrative Office of the Courts in California, information has been collected from state courts regarding the methods by which state supreme courts communicate to the press, public, and online communities. Forty-two states responded and indicated that courts use a variety of means to disseminate opinions and related case information for public and media to enhance access and understanding and to engage audiences and communities. In high-profile cases, the California Supreme Court occasionally issues news releases on behalf of the court to assist in public understanding of complex legal issues, such as the court’s rulings on same-sex marriage, discussed more fully below. The Supreme Court of Texas webcasts all arguments, posts all briefs, and provides summaries of oral arguments alongside the video webcast. This section highlights survey findings regarding effective communication practices currently used by various state supreme courts.

#### **USE OF PLAIN LANGUAGE AND SUMMARY**

To address concerns regarding opinion length, complexity, and difficulty in understanding, more courts are using simpler opinion formats, plain-language summaries, or case syllabi to help people access and understand opinions. While 29 out of 42 states responded that there is no prescribed format for opinions and a number of states indicated that it is up to an individual justice to decide how his or her opinion will be written, most states responded that opinions tend to follow similar formats. As a matter of practice, opinions have a defined and

*Increased Engagement by Court Leaders*, Harvard Executive Session for State Court Leaders in the 21st Century (2012), available at [www.ncsc.org/hes](http://www.ncsc.org/hes).

26. The 2005 Trust and Confidence study found that self-rated familiarity with the California courts is low for the public, unchanged since 1992. However, knowledge of the courts increases with exposure to court information in newspapers, the web, televised trials, and, most importantly, the court itself. Rottman, *supra* note 3.

**A number of public information officers or partnering organizations (e.g., law schools) provide a plain-language summary on the web in addition to the full opinion . . . .**

repeated structure, such as introduction, statement of jurisdiction and ruling, statement of facts, analysis, conclusion, and any instructions to a lower court. Several courts indicated that an explanatory introduction summarizes and states the court's ruling. For example: "Every opinion starts with a brief introductory paragraph which indicates whether the Court is affirming or denying the judgment of the lower court" [Rhode Island], or "[o]pinions often include a

brief, plain-language summary of the holding near the beginning" [Florida].

A number of public information officers or partnering organizations (e.g., law schools) provide a plain-language summary on the web in addition to the full opinion (see, for example, Georgia, Kentucky, Massachusetts [for particularly difficult opinions], Missouri, Rhode Island, and South Carolina). A number of states responded that opinions are written in plain language for wide audiences ("With the exception of occasional jargon, the intent of opinion writing is for lay and legal reader alike" [Texas]). In addition, several states indicated that they issue and post summaries of cases on the web prior to oral argument.

The California Commission for Impartial Courts was a blue ribbon group charged with studying and providing recommendations to the Judicial Council on ways to strengthen the court system, increase public trust and confidence in the judiciary, and ensure judicial impartiality and accountability for the benefit of all Californians. It found that "many judicial opinions are not written in a manner that is easily digestible by nonattorneys. Introductory remarks or paragraphs could summarize a case and the court's decision in a way that can enhance media accuracy."<sup>27</sup> Greater use of plain-language summarization and more accessible formats will help all audiences understand opinions and have greater access to them.

## JUDICIAL EDUCATION

The California Commission for Impartial Courts also recommended that "[education] should be developed for judges and justices on how to present clearly the meaning or substance of court decisions in a way that can be easily understood by litigants, their attorneys, and the public."<sup>28</sup> Because opinions are the voice of the court, education for judges and justices regarding the effective communication of opinions will help promote a broader and clearer understanding of the role of the court.

A majority of state supreme courts reported that new judges and justices receive education on opinion writing (i.e., appellate justices receive some form of education in-state or attend

out-of-state programs). For example, several courts identified in-house training or courses offered by their state judicial colleges (California, Connecticut, Florida, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Nebraska, Tennessee, and Wisconsin). Six states responded that new justices attend the New Appellate Judges Seminar of the Dwight D. Opperman Institute of Judicial Administration at the New York University School of Law, which includes courses on appellate opinion writing. Five states mentioned attending courses or partnerships with the National Judicial College in Reno. The most commonly cited trainer was Bryan Garner of LawProse.org.

## IMPROVING COMMUNICATION AND COLLABORATION WITH MEDIA

Coalitions and efforts aimed at improving working relationships and communication among judges, attorneys, and the press are being promoted by courts to assist stakeholders keenly interested in the accurate dissemination of opinions. States are focusing on strategies to work closely with bench, bar, and media representatives to increase legal understanding. Courts must recognize the business needs of media and other stakeholders who are impacted by opinions. For example, reporters operate under the demands of deadlines and news cycles, and other branches of government often must understand and implement changes in statute and rules according to what is stated in high court opinions.

Most states (35) indicated that they have a designated public information officer (PIO) or communications counsel. The PIO may answer procedural questions about the court or opinions but does not comment on the substance of rulings. As noted above, many courts stated that a policy of the court is that "the opinion speaks for itself." Justices do not give interviews regarding specific opinions, and judicial canons in a number of states prevent justices from specifically commenting on proceedings or opinions. However, 28 states indicated that justices are available to speak with media representatives and may comment on opinions in a general way to help describe the work of the court. Twenty-two states indicated that they distribute opinions directly to media representatives or to subscribers who have signed up to be notified immediately when an opinion has been released.

Providing advance notice regarding opinions to the media is less common, but some states provide advance notice to interested audiences via the web or an e-mail notification that an opinion will be released, for example, advising on a Friday that a specific case opinion will be released on the following Monday. Press releases are rare but do accompany high-profile or complicated cases and may include plain-language summaries. Seventeen states indicated that they have a bench-bar committee to discuss media access and appropriate interaction with the media, and 21 states stated that they offer or participate in programs to educate the media about the judicial branch (for example, "law schools" for the media) and vice versa. These kinds of partnerships, including engagement with media

27. JUDICIAL COUNCIL OF CALIFORNIA, COMMISSION FOR IMPARTIAL COURTS: FINAL REPORT, RECOMMENDATIONS FOR SAFEGUARDING JUDICIAL

QUALITY, IMPARTIALITY, AND ACCOUNTABILITY IN CALIFORNIA 64 (2009). 28. *Id.*

representatives to develop press release protocols, may help to facilitate understanding and recognition of the constraints under which reporters or stakeholders operate (for example, meeting print deadlines or understanding rulings that impact statewide policy).

### **USING THE WEB TO ENHANCE ACCESS, PARTICIPATION, AND UNDERSTANDING**

States are focusing on using the web to address procedural fairness concerns regarding opinions in a variety of ways. For example, some use a standardized process for publishing court opinions where opinions are simultaneously released to the parties and the public via the web or schedule a time of the week when opinions are posted and released. Opinions are most commonly posted as PDF files.<sup>29</sup> Courts are enhancing search mechanisms, and 34 states indicated that opinions are searchable on their court web page.

State courts are also using the web to highlight cases of interest and related case documents, and some states, such as Texas and Florida, broadcast all oral arguments live on the web or public television. Courts use the web to provide more intuitive navigation to reach and educate specific court audiences—for example, web pages directed to attorneys, educators, and members of the public. Social media is also emerging as a tool to alert audiences regarding opinions or activities of the court. Fifteen states currently use or are considering RSS feeds to communicate court news, including opinions; eight states use Twitter; and two states use Facebook or YouTube.

### **IMPROVING LAW-RELATED EDUCATION AND OUTREACH**

Courts also use various methods to improve law-related education and outreach to the public. Although these efforts do not exclusively focus on opinions, they do relate to perceptions of procedural fairness because they teach about the courts, enhance understanding regarding the role of the court, and engage communities on a local level. Thirty-nine states offer some form of public education programs, such as educational web content or direct outreach to students by local judges and attorneys visiting classrooms. Thirty-three states routinely conduct oral argument in high schools or venues other than court buildings.

In 2010, the Supreme Court of California hosted its annual special off-site educational session to improve public understanding of the courts and to provide local students with a rare view of how the appellate courts work. An expanded background summary of the case is prepared, which contains a plain-language description of the case and issues to be decided. Hundreds of students from all nine counties in the Fifth

Appellate District headquartered in Fresno, California, were able to see the Supreme Court argue cases of statewide importance. The session was broadcast live by Valley Public Television and the California Channel, a statewide cable network with 5.6 million viewers. Additional educational materials for the special session were placed on the public television station's special website in order to reach interested audiences and provide resources in multiple forums. All appellate courts in California conduct oral argument outreach in their communities and involve local judges, teachers, students, media, and lawyers.

Several states responded that they are focusing on law-related education efforts, including professional development programs that are offered to teachers with an emphasis on civics related to the judicial branch. In these programs, teacher and student participants interact with judges and attorneys and increase their knowledge about the role and operations of the courts, specifically in Arkansas, California, Colorado, Florida, Kansas, Massachusetts, Michigan, North Dakota, Pennsylvania, Rhode Island, South Carolina, Tennessee, West Virginia, and Wisconsin.

### **V. OPINION STUDY REGARDING THE SAME-SEX MARRIAGE CASES IN CALIFORNIA**

This section will use a case study to illustrate the California Supreme Court's communications strategy with regard to a particularly high-profile issue. Despite a number of legal actions that involved challenges to the executive, legislative, and public's power to determine policy, one result of that strategy was that the media was well informed and public confusion was minimized.

#### **DECIDING WHO HAS THE RIGHT TO MARRY**

Over the past two decades, whether same-sex couples have the right to marry has been an evolving state issue determined by public vote, state legislatures, and the courts. The history of the same-sex marriage cases in California, where a high court was asked to decide who is allowed to marry in the midst of a highly charged emotional and political environment, provides a case study regarding the role of the courts and the evolution of the law, the balancing of public and media demands for access, and efforts by the court to provide respectful and clear communication.<sup>30</sup> In 2000, California voters approved an ini-

**States are focusing on using the web to address procedural fairness concerns regarding opinions in a variety of ways.**

29. PDFs are a common format but are uniquely unfriendly to the web, since the files are difficult for search engines to locate and for others to link to. California is beginning to look at posting more material on the California courts website as plain text in order to enhance access and readability.

30. In 2004, Mayor Gavin Newsom gained national attention when he directed the San Francisco city-county clerk to issue marriage licenses to same-sex couples, in violation of the current state law.

Subsequently, a combination of individual court cases (in the California superior court, Court of Appeal, and Supreme Court) and a statewide ballot initiative (Proposition 8) have decided the rights of gays and lesbians to marry. Extensive public and media awareness in these matters has helped to explain and demonstrate how a supreme court settles important questions of law and significantly impacted development of national policy regarding same-sex marriage.

**By paying critical attention to key elements of procedural fairness . . . , justices and court staff can alleviate public confusion or dissatisfaction with the courts through the clear communication of court opinions.**

tiative statute, the Defense of Marriage Act (Proposition 22), which recognized marriage only between a man and a woman. On May 15, 2008, California's highest court voted 4-3 to overturn the statutory ban on the grounds that it was unconstitutional (*In re Marriage Cases*, S147999). After the court's ruling and before the passage of Proposition 8 (a constitutional amendment passed by voters in November 2008 that added language to the constitution to only recognize marriage between a man and a woman), California followed Massachusetts to become the second state in the nation to

allow same-sex marriage.<sup>31</sup> The court not only legalized same-sex marriage but also extended to sexual orientation the same broad protections against bias previously saved for race, gender, and religion.

#### **HIGH PUBLIC INTEREST AND ACCOMMODATING PUBLIC AND MEDIA DEMANDS**

To accommodate high public interest in the California Supreme Court proceedings—media requests were received from all over the world and numerous parties and advocacy groups filed extensive legal briefs—the California Supreme Court took the following steps:

The court dedicated a “high-profile case” web page to provide online access to case documents and to increase public access to court information. The web page provided online access to all briefs filed in the marriage cases and ultimately archived all related case information (for example, case calendars, documents, and history; links for the public to watch hearing broadcasts; press releases; and information about the Supreme Court of California). A media advisory was also released to the press and public to alert them regarding the web page and its contents.

The court notified the public and media one month in advance (on February 6, 2008) that the California Supreme Court would hear oral arguments in the marriage cases on March 4, 2008. The advisory provided the history of the cases and their consolidation and also explained in plain language that “in these cases, the challengers contend that the current

California marriage statutes are unconstitutional in limiting marriage to opposite-sex couples and denying same-sex couples access to the designation of marriage.” It also included California Supreme Court procedure and timelines for a decision: “Under the applicable court rules, the Supreme Court generally issues a decision, through a written opinion, within 90 days of oral argument.”

To increase public access to the court session, the California Supreme Court designated a public affairs cable network to provide a live TV broadcast of the oral argument session (a public and media advisory provided a link to find cable companies that carried the network). Oral arguments were also broadcast live for interested audiences in an overflow viewing auditorium within the California Supreme Court building and on a large television screen for crowds gathered in the square outside San Francisco City Hall.

When the California Supreme Court's 121-page opinion was released on May 15, 2008, the court provided notice of a specific time of day in the morning when the opinion would be issued, and at that specific time simultaneously issued hard copies and posted the opinion on a public website. At the same time, the court issued a 7-page news release that summarized previous court action and the instant case history, the majority opinion, and the concurring and dissenting opinions. This news release had been developed in consultation with supreme court attorneys and communications staff to ensure that the content was accurate and appropriately stated the issues and holdings. The news summary also provided a web link to access the full opinion as a PDF file.

#### **CONCLUSION**

By paying critical attention to the key elements of procedural fairness (voice, neutrality, respect, and trust), justices and court staff can alleviate public confusion or dissatisfaction with the courts through the clear communication of court opinions. By focusing on how opinions are delivered and ensuring that the public understands the substance of rulings and that all voices have been heard, the legitimacy of the courts is reinforced.

Application of this policy will have positive implications regarding support for supreme courts by other branches of government and by the public at large, audiences that are impacted both by opinions that address narrowly focused, particular issues of law and by wide-ranging opinions that affect social policy statewide. Because the policy of a high court is often that “the opinion speaks for itself,” and justices are prevented from discussing specific rulings, courts are helping audiences with tools to better understand sometimes complex and lengthy rulings. As information moves faster and faster through social

31. On May 26, 2009, the California Supreme Court voted 6-1 to uphold Proposition 8 but also ruled that those same-sex couples who married between June and November 2008 might remain married. In August 2010, in a separate federal challenge, U.S. District Chief Judge Vaughn R. Walker overturned Proposition 8 but also stayed his ruling pending appeal. The U.S. Court of Appeals for the Ninth Circuit indefinitely extended the District Court's stay, stopping any new same-sex marriages in the state of California. The federal Court of Appeals heard oral argument in

December 2010, and on February 7, 2012, in a 2–1 decision, affirmed Judge Walker's decision declaring the Proposition 8 ban on same-sex marriage to be unconstitutional. *Perry v. Brown*, Nos. 10-16696, 11-16577 (9th Cir. opinion filed Feb 7, 2012). The court of appeal decision continued the stay on Judge Walker's ruling pending further appeal. The marriages of more than 18,000 same-sex couples that took place between the time of the *In re Marriages* opinion and before Proposition 8 was passed remain valid.

media and instantaneous notification, audiences expect more clarity and helpfulness when they are directed to review and digest a particular outcome.

Audiences today for state supreme court opinions represent a diverse body—members of the public, government stakeholders, media and lawyers, and interested parties from all around the world—that needs to understand the work of the courts. Opinions must reassure the public that the court has deliberated carefully and acted as a neutral body. Plain-language summarization, transparency, instant notification and access via the web, as well as improved collaboration with media and education partners, are all helping to make high court opinions less difficult to comprehend and the workings of the court more accessible and understandable to wider audiences.



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# Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Pilot Project and Resulting Court Date Notification Program

Timothy R. Schnacke, Michael R. Jones & Dorian M. Wilderman

It is likely during our first jobs in the justice system when we realize the adjective “important” is a somewhat relative term as it relates to the issues that we face. Far from what we learned in college or law school—and further still from the topics typically reported in the media—often the most important issues we face will be found in the most common of cases. There is a saying in city government that the public’s idea of how well you are doing your job is only as good as how well you administer the water bills. That is because every household gets one, and, for many citizens, it represents the only contact that they may ever have with their local government. The same is true in criminal justice. Most people will never face a felony trial, but a relatively large number of them will be summonsed into court on lesser charges such as misdemeanor and traffic offenses. For any particular defendant, a court appearance required by summons may be his or her singular personal experience with the justice system; how we guide that defendant through the system is perhaps one of the most important issues we may ever face and says a lot about how we administer justice. Doing this well promotes judicial-branch legitimacy by increasing the defendant’s overall sense of procedural fairness, lessens system costs associated with any particular case, and avoids the compounding array of negative consequences associated with a single yet preventable incident such as the defendant’s failure to appear for court.

In 2004, one of the most important issues facing Jefferson County, Colorado, criminal justice leaders was the rising numbers of these failures to appear (FTAs). That year, consultants working on behalf of the National Institute of Corrections’s Jails Division completed a local system assessment showing that 33% of the county jail’s inmates were compliance violators (*i.e.*, failure to comply with court orders by failing to appear, pay, or perform some task), up from only 8% in 1995.<sup>1</sup> Subsequent jail-population analyses found that three-fourths

of these compliance violators had been booked on failure-to-appear warrants for misdemeanor, traffic, or municipal offenses, and in 90% of the studied cases these FTA warrants were issued to defendants missing the very first court event in their case. In 2004, the jail was rapidly nearing its operational capacity, and county leaders felt compelled to address the increasing demand for jail beds. As a matter of jail-population management alone, a facility with roughly 25% of its inmates incarcerated for failing to appear for mostly lower-level offenses did not seem like the best use of the limited jail resources. Moreover, because these leaders also felt the FTA issue to be largely avoidable, an overall sense of procedural fairness to at least avoid worst-case-scenarios—such as someone’s grandmother being jailed for failing to appear in a dog-at-large case—was foremost in their minds.

Criminal justice systems expend substantial resources to deal with FTAs and FTA warrants. In Jefferson County, researchers found that there were roughly 600 traffic and misdemeanor FTA warrants issued in a single month in 2004.<sup>2</sup> Further study of those warrants revealed that after one year, 25% had been cleared by defendants coming in on their own, 50% had been cleared by police arresting the defendant, and 22% of the warrants remained outstanding—all outcomes that trigger significant financial and social costs. Indeed, from the time a particular defendant fails to appear for court, the burden from that FTA begins to drain public resources at multiple points in the system. Any people associated with the case during the life of an FTA warrant, including judges, clerks, law-enforcement officers, attorneys, and jail staff, find that their workloads increase significantly because of that warrant. Moreover, the tangible and intangible costs of FTAs extend to victims, witnesses, and even to the defendants themselves. Finally, and perhaps most importantly, FTAs undermine the integrity of the justice system, as each FTA tends to erode the

## Footnotes

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1. The National Institute of Corrections provides free technical assistance to state and local correctional agencies. For more information, go to <http://nicic.gov/TA>.

2. These data were collected in August of 2005 by examining half of the court files of all defendants who were issued FTA warrants during June of 2004. The overall number of misdemeanor and traffic FTA warrants for that month (590) is somewhat higher than the number of warrants issued in July of 2005 (524). The June 2004 data were examined to collect arrest and walk-in rates after one year, and the number was rounded to 600 for ease of computation.

respect that an independent judiciary deserves.

With these data in hand, Jefferson County leaders, through the county's criminal justice coordinating committee (CJCC),<sup>3</sup> initiated a multifaceted approach to increase court appearance rates<sup>4</sup> and to lessen the impact of FTAs and FTA warrants on the jail. In this article, we describe the results of a randomized experiment designed to study the effectiveness of one part of that approach—telephone reminder and notification calls to defendants. The “FTA Pilot Project,” as it was called, was borne mostly of logic and knowledge of doctor-office practice, but it was patterned after successful programs found in King County, Washington, and the Seattle Municipal Courts. It ultimately spawned a fully funded program, the “Court Date Notification Program” nested within the Jefferson County Sheriff's Office. The program has served as the model for numerous similar efforts across Colorado as well as several in other states. In addition to describing the details of the experimental pilot project, we will also discuss the ongoing strategy and results of the Court Date Notification Program and offer several observations concerning the implications of these findings and results for policy making.

### WHY WAS THE STUDY DONE?

Across America, police issue citations in a staggering number of cases. In Jefferson County, a county with roughly 14 law-enforcement agencies feeding into its court system, the local Sheriff's Office Patrol Division alone wrote 15,693 traffic tickets in 2009.<sup>5</sup> As an issue connected to the topic of pretrial release or detention, the practice of issuing a citation in lieu of making an arrest is one of delegated release authority, and it is generally favored by national pretrial standards that recommend release prior to trial under the least restrictive conditions.<sup>6</sup> Nevertheless, there are pros and cons to citation release. As noted in one report, while cost savings are greatest

when field citations are used, “[c]itation release . . . has been criticized for resulting in unacceptably high rates of failure to appear (FTA) and a consequent loss of justice system credibility in the eyes of defendants and the general public.”<sup>7</sup>

The reason people fail to show up for court on relatively minor offenses is the subject of debate. Some argue that the typically long period of time between the citation and the court date naturally leads to FTAs due to the relative instability of many defendants. Others argue that defendants are largely unaware that failing to show up for court can lead to an arrest warrant for seemingly minor violations of the law. Some say defendants fail to appear for court on purpose. Others say they just forget. The Jefferson County Criminal Justice Planning Unit (CJP), staff to the Jefferson County CJCC, interviewed numerous defendants jailed for failing to appear for court and found that their reasons for not appearing varied widely and included each of the hypothesized reasons listed above.

A better understanding of why defendants fail to appear for court might help formulate a testable hypothesis based on some established theory of crime or delinquency, such as “rational-choice theory,” its offspring “routine-activities theory,” or theories explaining a defendant's sense of anonymity, such as those proposed by noted psychologist Philip Zimbardo in the 1960s.<sup>8</sup> However, the Jefferson County CJCC had little time for that type of research. Like many entities struggling to find answers to pressing problems, the CJCC was addressing the somewhat urgent issues of unsustainable jail-population growth, increas-

**FTAs undermine the integrity of the justice system [and tend] to erode the respect that an independent judiciary deserves.**

3. See ROBERT CUSHMAN, GUIDELINES FOR DEVELOPING A CRIMINAL JUSTICE COORDINATING COMMITTEE, U.S. Dept of Justice, Nat'l Inst. of Corr., NIC Accession No. 017232 (Jan. 2002), available at <http://static.nicic.gov/Library/017232.pdf>.

4. The current trend in the field of pretrial justice is to use the phrase “court-appearance rates,” which focuses on the positive and typically larger number of defendants who actually appear for court, rather than the phrase “failure-to-appear-rates,” which focuses on the negative and less-frequent cases. The two phrases represent different ways of describing the same phenomenon: a jurisdiction with a 97% court appearance rate has a 3% failure-to-appear rate.

5. See Linda Detroy Alexander, *Backing Law with a Lecture*, GOLDEN TR., Dec. 2, 2010, at 4, available from the Jefferson County Criminal Justice Planning Unit.

6. See AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE PRETRIAL RELEASE (3rd ed., 2007), Std. 10-1.3, at 41 (“The principle of release under least restrictive conditions favors use of citations by police or summons by judicial officers in lieu of arrest at stages prior to the first judicial appearance in cases involving minor offenses.”), available at [http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_pretrialrelease\\_toc.html](http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_toc.html). The term “minor offenses” is used rather than “misdemeanors” because the latter term is often defined differently among jurisdictions across the United States.

Generally, according to the commentary to Standard 10-1.3, “‘minor offenses’ are the equivalent of lower-level misdemeanors. However, when the alleged offense involves danger or weapons—as, for example, is often the case in domestic violence misdemeanors—the Standard allows jurisdictions to determine that the offense is not ‘minor,’ regardless of its statutory designation.” *Id.*

7. BARRY MAHONEY, BRUCE D. BEAUDIN, JOHN A. CARVER III, DANIEL B. RYAN, AND RICHARD B. HOFFMAN, PRETRIAL SERVICES PROGRAMS: RESPONSIBILITIES AND POTENTIAL, Nat'l Inst. of Justice (2001), at 62 (further citation omitted), available at <http://www.ncjrs.gov/pdffiles1/nij/181939.pdf>.

8. In hindsight, Zimbardo's early theories may be the best to describe the Jefferson County experience. In the 1960s, Zimbardo wrote how a sense of anonymity versus a sense of community can cause social deviance. See *Anonymity of Place Stimulates Destructive Vandalism*, available at [http://www.lucifereffect.com/about\\_content\\_anon.htm](http://www.lucifereffect.com/about_content_anon.htm). During Jefferson County's discussions over court-date-reminder call script language, county leaders considered the relative worth of messages focusing on letting defendants know that: (1) they were not anonymous; (2) they were part of a social community; (3) the court system recognized their individuality and humanity; and (4) the court also knew how to reach them if they failed to appear.

**The script was framed in terms of defendant choice[, and a] strong sanctions message for “choosing” not to show up for court was included intentionally . . . .**

ing case filings, high FTA rates, and an unacceptable number of people jailed pursuant to FTA warrants. Accordingly, the Committee was content with knowing that simple logic, coupled with the experience of at least one other jurisdiction (King County, Washington, known for its advancement of innovative criminal justice practices) provided a basis for testing the hypothesis that court-date-reminder calls would improve court-appear-

ance rates in summonsed cases. This approach also appeared to follow the writings of at least some experts in the field of pre-trial justice, who had documented the complicated nature of FTAs and focused on practical system solutions involving pre-FTA court-date reminders and swift action on warrants.<sup>9</sup>

#### **WHY DID WE USE A LIVE CALLER?**

Jurisdictions seeking to increase their court-appearance rates through reminder calls inevitably face the question of whether to use live versus automated callers. When the Jefferson County FTA Pilot Project was undertaken, there was very little written on the efficacy of either approach. Through telephone conversations, King County, Washington, officials reported to CJP staff an overall decrease in failure-to-appear rates of approximately 60% using live reminder calls for misdemeanor defendants. At the time, those officials advised against using an automated system and stressed the need for the caller to have multiple databases to find defendants' contact information, as well as extensive knowledge of the criminal justice system to answer defendants' questions.

Through those same conversations, Jefferson County became aware of one other unpublished Washington study reporting FTA-rate decreases of approximately 38% using automated calls. Since then, Multnomah County, Oregon, began its own study of an automated Court Appearance Notification System (CANS) in 2006. In the final report to that study, Multnomah County reported an overall decrease in FTAs of 37% using an automated calling system on the targeted population.<sup>10</sup>

In Jefferson County, the live-caller option was ultimately chosen for primarily practical purposes: At a meeting in March 2005, the head of the Probation Department announced that

he had money in his budget to hire a person part-time for three months to call defendants. Given the lack of hard data for either option as well as the perceived complexity over the logistics of setting up an automated system, there was no real debate over this opportunity, and, accordingly, the Pilot Project proceeded with a live caller.

#### **WHAT DID THE RESEARCHERS DO?**

##### **The FTA Pilot Project**

The Subcommittee assembled a small Implementation Team, made up of a County Court Judge, the Court Clerk, the hired caller, and CJP Staff to work out the logistics of the live-caller study. The Team believed that it was important for the caller to see the actual court files when calling, but those files were not allowed out of the courthouse. Accordingly, the court made space for the caller in a vacant room on the floor where most of those files were kept. Due to time constraints, the caller was given access to only a telephone book to aid in searching for defendants' phone numbers. The effectiveness of the Pilot Project was thus somewhat at the mercy of police officers legibly writing down phone numbers on their citations. Typically, tickets having no numbers, or with illegible numbers, meant that no telephone call could be made.

The court provided the caller with a desk, a computer with a spreadsheet for data collection, and a telephone. Throughout the study, CJP Staff would also work in the room entering control-group information into the spreadsheet.

The Implementation Team created a script in English and Spanish to be used as a primary tool for conveying information to the defendant when he or she was reached directly, and to be read verbatim when leaving a message on voicemail. The script was framed in terms of defendant choice, reflecting the experience of one Team member from the field of psychology. A strong sanctions message for “choosing” not to show up for court was included intentionally, although that language has been softened since. The fact that such a script was created quickly (and the fact that it was apparently successful) should not diminish the crucial role of script content. As seen with recent important studies by the Nebraska Public Policy Center, variations in content can affect overall appearance rates.<sup>11</sup> Pilot Project logistics also required the Team to develop a fairly detailed procedure for gathering files, separating cases, making calls, inputting data, and monitoring outcomes.

For 10 weeks, the caller collected data on approximately 30 variables on a total of 2,100 randomly selected defendants summonsed to appear on misdemeanor and traffic offenses in the Duty Division of the Jefferson County Court.<sup>12</sup> Although

9. MAHONEY et al., *supra* note 7, at 39, 62.

10. See MATT NICE, COURT APPEARANCE NOTIFICATION SYSTEM: PROCESS AND OUTCOME EVALUATION, A REPORT FOR THE LOCAL PUBLIC SAFETY COORDINATING COUNCIL AND THE CANS OVERSIGHT COMMITTEE (Mar. 2006).

11. See Mitchel N. Herian and Brian H. Bornstein, *Reducing Failure to Appear in Nebraska: A Field Study*, THE NEB. LAWYER, Vol. 13, No. 8, at 11 (Sept. 2010); Brian H. Bornstein, Alan J. Tomkins, Elizabeth M. Neeley, Mitchel N. Herian, and Joseph A. Hamm, *Reducing Courts' Failure-to-Appear Rate by Written Reminders*, 18

PSYCHOL. PUB. POL'Y & L. (in press), available at doi: 10.1037/a0026293.

12. In Colorado's First Judicial District (made up of Jefferson and Gilpin counties), the county-court judges take turns staffing a “Duty Division,” which handles, among other things, defendants on felony, misdemeanor, and more serious traffic citations and summonses. Less serious traffic and misdemeanor cases are handled in “Division T” by a magistrate. The Pilot Project focused solely on cases heard in the Duty Division.

the Duty Division handles felony matters, those cases, along with cases in which defendants had legal representation, were excluded. The Pilot Project proceeded in two phases. In the first phase, defendants were called one week ahead of their court dates to remind them to appear. In the second phase, defendants who had failed to appear were called the next day to notify them of their FTA warrants.

### Call-Ahead Phase

On average, there were 70 unrepresented misdemeanor and traffic cases per day in the Duty Division. Each day during the Pilot Project, the caller would take a random sample of all cases with arraignments scheduled exactly one week in the future to use for data input. All of the data, such as the case number, defendant demographics, offense information, statutory penalties, etc., were gathered from the court file and recorded on a spreadsheet.

The parameters for calling defendants were strict. The caller was given only three opportunities to telephone defendants—exactly seven days prior to the initial court date—to remind them of the upcoming Duty Division proceeding. If the caller “successfully contacted” a defendant, the caller read a script (in either English or Spanish) reminding the defendant of the court date, giving directions to the court, and warning the defendant of the consequences of failing to appear. The script was carefully worded with guidance from the judges assigned to Duty Division and included a list of anticipated defendant questions with appropriate answers to those questions. A “successful contact” was defined as any call in which the script was read to either: (a) the defendant; (b) the defendant’s voicemail; or (c) an apparently responsible adult living with the defendant. Because the caller had three opportunities to reach the defendant, that caller had some discretion in how to use those opportunities. To collect the maximum amount of data, however, the caller’s protocol was to read the script on voicemail anytime the caller reached a recording that was clearly the defendant’s. “Successful” and “unsuccessful” (wrong number, no number on ticket, disconnected number, etc.) contacts were documented in fields for each of the three allowable attempts. A “comments” section on the spreadsheet allowed the caller to clarify miscellaneous data issues and to qualitatively document defendant and other household member reaction. All of the telephone calls were made between 8:00 a.m. and 7:00 p.m., Monday through Friday. Throughout the project, an individual from the CJP Unit collected and separately inputted data for the control group, which consisted of randomly selected defendants from the court’s files. The outcome measured was whether or not the defendants failed to appear on their scheduled dates.

### Call-After Phase

The day after the Duty Division arraignments, the caller col-

13. In the call-ahead phase, the caller attempted to contact 1,176 defendants and “successfully contacted” 695, for a successful-contact rate of approximately 60%. By contrast, only 44% of the defendants in the call-after phase were successfully contacted.

14. The decrease in the FTA rate for leaving a message with either

lected all of the files for those defendants who had failed to appear—on average, 15 per day. The caller randomly selected half of the files and collected the same demographic and case-specific data as described in the call-ahead phase. The caller also filled out an “outcome sheet,” which included the defendants’ names and case numbers, as well as check boxes designed to help the court clerks document the

outcome measures for this phase. Given the same strict calling parameters, the caller telephoned defendants to advise them of their failure to appear for court and to explain the consequences of the arrest warrant. Again, a carefully worded script (in English and Spanish) was created to convey that message. Each of the judges assigned to the Duty Division agreed, in advance, to stay these warrants for five business days after the FTA; accordingly, the caller also advised the defendant that if he or she came into court within five business days, the warrant would not be issued. As in the call-ahead phase, the caller documented the results of successful and unsuccessful contacts across the three allowable calling attempts. And again, a second individual collected complete control data for later comparison. Files (along with the outcome sheet) were returned that day to the court clerks with instructions to hold them for five business days. The outcomes that were measured were whether defendants came to court within five business days, and what the defendants did when they appeared for court (e.g., pleaded guilty, rescheduled, etc.).

### WHAT DID THE RESEARCHERS FIND?

#### The Call-Ahead Phase

Normally, the court-appearance rate in the Jefferson County, Colorado, Duty Division for the types of cases studied was 79%. When defendants were successfully contacted<sup>13</sup> and reminded of their court dates one week in advance of their arraignments, however, the court-appearance rate was increased to 88% (a 43% reduction in the FTA rate). This overall increase in the appearance rate can be further broken down by how the successful contact was made. If a message was left with either voicemail or a responsible adult, the appearance rate was increased to 87%.<sup>14</sup> If the message was delivered to the actual defendant, however, the court appearance rate rose to approximately 92%.

#### The Call-After Phase

Normally, 10% of people who fail to appear for court do return to court on their own initiative within five business

voicemail or with a responsible adult (38%) was approximately the same as the automated-reminder-call decreases reported verbally by King County, Washington, officials and reported in Multnomah County Oregon. See NICE, *supra* note 10.

**When defendants were . . . reminded of their court dates . . . , the court-appearance rate was increased to 88% (a 43% reduction in the FTA rate). . . .**

**[T]he pre-calls primarily focused on customer service, a priority of the Jefferson County Board of County Commissioners . . . .**

days. When defendants were notified of their warrant after they failed to appear, however, 50% returned to court within five business days.

**THE JEFFERSON COUNTY COURT DATE NOTIFICATION PROGRAM**

Based on the success of the Pilot Project, the Jefferson County CJCC cre-

ated a Task Force to make recommendations for creating a permanent call-reminder program designed to increase court-appearance rates. Those recommendations, along with a detailed cost/benefit analysis of FTA reduction,<sup>15</sup> were subsequently presented to the CJCC, which unanimously supported the concept of developing a program using a live caller to telephone defendants to remind them in advance of their upcoming court dates.

Because pre-FTA call reminders and post-FTA call notifications were ultimately shown to be equally effective during the pilot project, the Task Force and the Committee discussed the advantages of starting with one component over the other. While there was some consensus that the ideal program would likely consist of both pre- and post-FTA calls, the Task Force and Committee ultimately recommended that the caller begin by making reminder calls to defendants one week in advance of their arraignments.

This recommendation was made for several reasons. First, the Committee and Task Force recognized that substantial effort goes into preparing for the first court appearance. Decreasing failures to appear altogether, rather than simply using the warrant as an incentive to get defendants back into court, would maximize the initial work of court staff and would reduce the amount of redundant efforts expended when a defendant arrives sometime after the planned appearance date. Second, the Committee and Task Force believed that calling defendants in advance of their court dates would provide opportunities to tell those defendants important information about their particular case that would reduce the chances of a continuance. For example, the court experienced many unnecessary continuances in car-insurance and license cases when defendants arrived without proof of insurance or proof of license reinstatement. A pre-call script, it was believed, could be drafted to tell these defendants what they needed to bring with them so that their case could be resolved. Third, the Committee was already working on other projects designed to reduce FTA bookings after the warrant

was issued, and the Committee and Task Force believed that pre-calls would provide balance to these other post-FTA initiatives. Finally, and perhaps most importantly, the pre-calls primarily focused on customer service, a priority of the Jefferson County Board of County Commissioners at the time. In addition to reminding defendants about their court dates, the Committee and Task Force believed that pre-calls would provide a human voice to guide defendants through a daunting criminal justice system and would ultimately reduce the number of frantic, last-minute phone calls placed by defendants to court clerks.

The Program, named the Jefferson County, Colorado, Court Date Notification Program, is funded and staffed by the Sheriff's Office and is located inside the Jefferson County Combined Court. The staff person who served as the caller during the Pilot Project was hired full-time as a civilian Program Specialist to implement the Program. As originally planned, this Program Specialist was hired to spend roughly equal amounts of time on Program implementation and expansion, with 50% of her time spent actually calling defendants and 50% spent evaluating the effectiveness of those calls and on investigating and addressing the FTA issue associated with other courtrooms and court events. The Program Specialist (hereinafter the caller) began making calls for the Program during the last week of March 2006.

**Program Process**

Like the FTA Pilot Project, the Court Date Notification Program began by focusing on the court-appearance rate for the Duty Division of the Jefferson County Court, which was staffed on a rotating basis by seven county-court judges in Jefferson County. At Program inception, the Duty Division heard an average of 77 unrepresented traffic and misdemeanor cases summonsed daily into court by municipal, county, and state ticketing agencies. Because the initial intent of the Program was for the caller to spend only half of her time making calls, an implementation group consisting of a county-court judge, the Court Clerk, and others decided to initially limit those calls to defendants who had no proof of insurance (NPOI) as one of their charges. This emphasis on NPOI cases was made for several reasons. First, files containing this charge accounted for over half of the cases seen in Duty Division each day. Second, defendants facing an NPOI charge often had other charges associated with the same traffic stop. Third, fines for these charges were typically high, so increasing court-appearance rates for these cases might ultimately lead to significant increased revenue to the State. Fourth, as noted previously, defendants facing NPOI charges frequently asked for continuances to bring in the required documentation, causing addi-

15. There appear to be relatively few cost/benefit analyses on this issue. The Jefferson County analysis concluded that by using the FTA Pilot Project's result of a reduction in misdemeanor and traffic warrants of 43% in Duty Division, an FTA-reduction program aimed at all misdemeanor and traffic offenses in the County would: (1) reduce the overall number of FTA warrants issued for those cases from 7,200 to 4,100 per year; (2) reduce the overall time spent by court clerks processing the warrants from 3,800 to

2,200 hours per year; (3) reduce law-enforcement-officer hours spent serving the warrants from 5,400 to 3,100 hours per year; (4) reduce the hours spent by jail booking staff to process the arrestee from 7,200 to 4,104 hours per year; and (5) assuming an arrest rate at 50% and a two-day length of stay for persons with FTA warrants (both estimates documented), save approximately \$200,000 per year in jail-bed costs.

tional strain on the court's workload. After the implementation group made this decision, it created a customized script specifically for NPOI cases.<sup>16</sup>

File security issues and the need to create non-obtrusive working relationships with court-division clerks led to a logistical decision to locate the Program in the court building on the same floor as the county-court judges and clerks. Because the Program's caller would be working primarily from documents in the official court file, this location allowed the caller and the clerks to share files with little disruption to their normal work flow. The caller worked Monday through Friday during business hours. Her office was private, with a computer with access to multiple databases for data collection and defendant tracking, and a telephone with call-back capability.<sup>17</sup> The primary spreadsheet for data collection had twenty fields, which included defendant contact information, call outcomes, and court-appearance outcomes. To adequately measure the court-appearance outcomes of the Program, the caller created (with input from the judges and Court Clerk) a colored sheet of paper that she filled out and placed in each file targeted for calling. The paper had three possible outcomes for the case that the court clerks were to check and that were ultimately measured in the data set: (1) FTA; (2) Disposition (pled, settled, or dismissed); and (3) Pretrial Conference, which is also used to indicate a continuance for any reason. This colored outcome check sheet was an additional duty given to court clerks, but it provided (and continues to provide) crucial data needed for the ongoing evaluation of the Program.

Due to the rotation in Duty Division, the caller had to adapt her own procedures to accommodate differing policies and practices among the judges. Nevertheless, her daily routine (as observed by CJP Staff) was fairly consistent between divisions. Each day, the caller would ask Duty Division clerks about the FTAs from the day before.<sup>18</sup> She then collected the colored outcome check sheets, and typed the outcomes into the spreadsheet.<sup>19</sup> The caller next retrieved the files for all misdemeanor and traffic cases that were set to be heard in Duty Division in seven days. The caller then read through the files, looking for her target group of NPOI defendants. The information found in those files, primarily from the summonses themselves, was then transferred onto a printed docket sheet and into the Program's spreadsheet. If there was no contact information for a particular defendant, the caller used one of two online directories to try to locate a useable phone number.<sup>20</sup> Once she input the required data into the spreadsheet, the caller was prepared to telephone the defendants. In the initial stages of the

Program, the caller became accustomed to alternately entering a page or two of data and then making her initial calls.

In the Pilot Project, the caller was limited to only three attempts at calling any particular defendant. The resulting Program was designed with no such restrictions; however, on her own, the caller apparently placed the same limits on her calls to keep from clogging her workflow. Calls were documented using the following codes: (1) talked to defendant personally; (2) left message on defendant's home/personal voicemail; (3) talked with relative/roommate of defendant and left message; (4) wrong number; (5) phone disconnected; (6) no answer, no device on phone for messages, busy signal, "subscriber not available" message on cell phones; and (7) no phone number listed on summons or found with online directory. The caller also used a variety of sub-codes to record other information she deemed to be relevant. Successful contacts were those in the first three categories. If the caller successfully contacted a defendant, she read a script (in either English or Spanish) reminding the defendant of the court date, giving directions to the court, and warning the defendant of the consequences of failing to appear for court. The caller had (and still has) considerable discretion as to whether she would leave a message or call back later. In many cases, the caller simply left a generic message for the defendant to return her call, and she then fielded return calls from the defendants throughout the day.

**[T]he normal court-appearance rate for [this category of] defendants was 77%.**

### Six-Month Outcomes

During the first six months of the Court Date Notification Program, the total number of docketed cases with unrepresented defendants facing traffic or misdemeanor charges in County Court Duty Division reached approximately 10,000, for an average of 385 per week. Of those 10,000 cases, approximately 5,600 were targeted for telephone calls. Of those targeted, approximately 3,500 defendants were "successfully contacted" (defined as either talking to the defendant in person, or by leaving a message on the defendant's voicemail or with a third party) and 2,100 were unsuccessful, for a successful-contact rate of 63%. As documented in the FTA Pilot Project, the normal court-appearance rate for NPOI defendants was 77%. When these defendants were successfully contacted and reminded of their court dates one week in advance of their

16. For example, because defendants with NPOI charges typically face steep fines, the script made a specific reference to "payment options," which was designed to allay defendants' fears concerning any inability to pay.

17. Giving defendants the ability to telephone the caller back is an important improvement over the Pilot Project, which had no call-back capability.

18. The caller compared the clerk's verbal report of FTAs to the outcome sheets as an error check.

19. While the Program was not designed to track and contact defendants after they failed to appear, the caller nonetheless informally

kept track of FTAs for defendants with whom she had directly spoken. After six months, the caller reported that a follow-up call appeared to cause more defendants to come back to court at a higher rate than those who were not called; however, more formalized study is required to make any definitive conclusions on the effectiveness of this practice.

20. In the Pilot Project, the percentage of tickets that had no defendant phone numbers or were unreadable was approximately 10%. In 2011, the percentage of tickets that had no phone numbers and for which the phone numbers were not found in either of the two online directories was 4.4%.

**[D]irect contact with a defendant led to the highest appearance rate—as high as 93% . . . .**

arraignments, however, the appearance rate increased to 89%. This result represented a 52% decrease in the FTA rate for the targeted population. In more concrete terms, it meant that 425 FTA warrants were

avoided during the first six months of the Program.

Additional analyses of data from June and September 2006 again showed that the overall court-appearance rate varied based on how the successful contact was made. As in the Pilot Project, direct contact with a defendant led to the highest appearance rate—as high as 93% in the September data set. Contact by leaving a message was second best (86% in June, 90% in September), and contact by leaving a message with a third party was the least effective method. These analyses also suggested a need to convince law enforcement to collect verifiable defendant contact information at the scene, and to perhaps revise program elements (e.g., adding additional databases for finding defendants with bad contact information; calling defendants at night or on weekends) to better locate the defendants themselves to further increase the overall court-appearance rate.

Finally, the six-month data showed that of those defendants successfully contacted, most (approximately 54%) came to court and reached a disposition on their case on the day the case was set for arraignment, but approximately 35% of the defendants had their cases continued. This latter percentage suggested the need to inquire into the reasons for these continuances and to assess whether they were unnecessary or otherwise burdensome to the criminal justice system.

**Program Expansion**

During 2006, the Program's caller was able to increase the number of cases called by using volunteers (when available) obtained through the Sheriff's Office volunteer pool. On certain days, this meant providing full-time coverage, which allowed the caller to target 100% of the traffic-and-misdemeanor docket in the Duty Division. Nevertheless, that docket represented only a portion of the overall number of cases having FTA issues in the Combined Court. In response to queries by the Sheriff and Chief Judge of the District, CJP Staff analyzed the extent of the FTA issue in all courts of the District and made a number of recommendations, including: (1) expanding the procedure to the remaining cases in Duty Division (primarily felony summonses) while using techniques to improve the "successful-contact rate"; (2) based on the analyses in the report, working with the judges to identify and target other court events (such as "pro se sentencing hear-

ings," etc.) requiring telephone reminder or notification calls; (3) beginning to make calls for cases in Division T, the division devoted to less-serious misdemeanor and traffic matters; (4) allowing Program staff time to conduct continuing research into best practices; and (5) implementing a "court-closure-notification system" to cover emergency court closures due to weather, etc.

Based in part on those recommendations, the Sheriff's Office hired a second full-time Program Specialist, who now assists with the daily calls. With her addition, the program has significantly expanded to include calls to 100% of unrepresented traffic and misdemeanor cases in Duty Division and 100% of the unrepresented misdemeanor and non-infraction<sup>21</sup> traffic cases in Division T. At the time this article was drafted, the Program had also expanded to begin calling pro se defendants with felony summonses in one division of the district court,<sup>22</sup> with plans to expand to three other district court divisions in the near future.

**Court-Appearance Benefits**

Overall, the results of the Program to date are exceptional. The successful-contact rate has risen from an initial rate of 60% in the Pilot Project to 74% in 2010 for the Duty Division, and from 78% in 2009 to 80% in 2010 for Division T. In 2007, the court-appearance rate for defendants who were successfully contacted was 91%, compared to an appearance rate of 71% for those who were not. In 2010, combining all statistics from both Duty Division and Division T, the court-appearance rate for defendants who were successfully contacted was 92%, compared to an appearance rate of 73% for those who were not. These increases have significantly reduced the costs of FTAs, including the somewhat intangible costs to victims and society in general. Moreover, although not empirically tested, these numbers indicate that the use of a live caller appears to have permitted experimentation and "tweaking" of the process, which has, in turn, fostered steady improvement.

**Other Benefits**

In addition to increasing court-appearance rates, Jefferson County has experienced both a number of intended and unintended benefits from the Court Date Notification Program. Perhaps most important is enhanced customer service provided to defendants through personal reminder calls. While their primary responsibility is to convey the information from the script, the Sheriff's Office's civilian callers also field defendant questions that would normally be directed to court clerks,<sup>23</sup> give driving and busing directions and instruction, look up other court information, forward calls to appropriate agencies, and generally allay the fears of defendants who may be intimidated by the criminal justice system. Several of the court's divi-

21. When a defendant fails to appear for court in low-level traffic infractions in Colorado, it results in a civil judgment rather than an arrest warrant.  
22. In Colorado, district courts generally handle more serious criminal and civil cases, as well as probate, domestic relations, and juvenile cases. While most defendants appearing on the district court's criminal docket have representation, FTAs still occur.

23. Anecdotally, court clerks have told the authors that prior to the Court Date Notification Program many defendants would call the day before their court date with numerous questions about their cases. The Program has, to some extent, removed that burden from the clerks. Not surprisingly, by proactively calling defendants the callers have also learned that many defendants have forgotten about their court dates, do not have directions, have lost

sion clerks have heard from numerous defendants who have praised these mostly immeasurable aspects of the Program. In comments compiled throughout 2007 and 2008, defendants themselves routinely articulated their appreciation for the reminders. The callers have been named by some in the county as the “goodwill ambassadors” of the Sheriff’s Office, offering a helpful and friendly component to the case that many people do not normally perceive from their experiences with law enforcement. Although customer service was one of four key values articulated by the Jefferson County Board of county Commissioners at the time of Program creation, opportunities for providing quality customer service in the criminal justice system can seem elusive. Nevertheless, the Jefferson County Court Date Notification Program has shown that local leaders can provide quality and sometimes unexpected customer service in a delicate government function that is too often seen as cold and unfriendly to its participants.

Answering questions, though, represents only one aspect of the Program’s ability to enhance customer service. Additionally, the callers have provided significant benefits as quality control agents for “internal” customers. In particular, the callers have caught and corrected many advisement, ticket, and ticket-agency-record errors, have helped clerks to combine cases, and have even uncovered instances of identity theft.<sup>24</sup> When the callers learn that a defendant is already incarcerated, they are able to advise the court so that an FTA warrant will not be issued. With access to the Sheriff’s Office’s records-management system, the callers are also able to gather additional contact information that is unavailable through traditional online directories and to update the court files accordingly.

Quality control is also reflected in at least two more global endeavors. First, primarily due to the callers’ frustration with the existing half-page Colorado Uniform Summons and Complaint (the ticket issued for most traffic and misdemeanor offenses), Jefferson County created a “Ticket Task Force,” made up of municipal, county, and state agencies, to create a model full-page summons for use across Colorado.<sup>25</sup> Since then, members of that Task Force have independently worked

their tickets, or have questions about the consequences of certain actions, such as failing to appear. In a limited number of cases, the callers have helped defendants reschedule cases, helped family members who have incarcerated or deceased defendants, and helped defendants with multiple cases navigate the system.

24. This has occurred when the callers have contacted a defendant, only to learn that a third party had used the defendant’s identification during a traffic stop.

25. In the full-page ticket, the Task Force made room for two separate phone numbers to enhance the callers’ ability to successfully contact defendants.

26. See WENDY F. WHITE, COURT HEARING CALL NOTIFICATION PROJECT (May 17, 2006), available at <http://www.coconino.az.gov/cjcc.aspx?id=4692>. Like the Jefferson County Pilot Project, the rates varied based on how contact was made—the highest court-appearance rate was for defendants who were personally contacted (94.1%), followed by the rate for defendants for whom a message was left with another person (85%) and for whom the message was left on an answering machine (79%).

27. The ongoing list of those interested in the Program includes visi-

to begin developing electronic citations using the data fields from the full-page ticket. Second, recognizing that having officers collect good defendant contact information is foundational to the calling program, the callers have kept detailed records of both agencies and individual officers who are

deficient in doing so. The callers have contacted officers to discuss the need for legible phone numbers on the tickets, and the callers continue to discuss the efficacy of alternative methods, such as emails or text messaging, for contacting defendants.

Finally, the Court Date Notification Program has benefited numerous other jurisdictions as the live callers of the Program continue to educate—free of charge—others seeking to implement the same or similar programs. For example, after visiting with Jefferson County staff members, Coconino County, Arizona, essentially replicated the Jefferson County FTA Pilot Project in 2006, independently finding that calling defendants prior to their court appearance resulted in a court-appearance rate of 87.1%, compared to 74.6% for the control group.<sup>26</sup> Other jurisdictions, too, have visited the Program, and many of those jurisdictions have since begun similar projects.<sup>27</sup> As one notable example, Douglas County, Colorado, recently implemented a “Court Call Ahead Program” that is similar to the Court Date Notification Program, and that county has reported an increase in its court-appearance rate to slightly above 98% for the targeted population.<sup>28</sup>

## IMPLICATIONS FOR COURT POLICY AND PRACTICES

What causes defendants to fail to appear for court? Is it the length of time between the citations or summonses and the court dates? Is it their fear of the system? Is it their sense of anonymity? Do they do it on purpose, or do they just forget? Until we know the answers to these questions, we can nonethe-

tors from three Colorado municipalities, three other Colorado counties, and jurisdictions in seven other states. Many of those jurisdictions have adapted a version of the Jefferson County script.

28. Douglas County, Colorado, performed its own pilot project from April to September of 2009, using a live caller to remind defendants of their upcoming court dates, and has since funded its own “Call Ahead Program,” which calls defendants in advance but also includes an “FTA-recovery” component that involves calling defendants again if they fail to appear. In a short description of the pilot and resulting program, one county official stated as follows: “The general consensus is that the public appreciates the courtesy call and the opportunity to ask questions as to what they can expect when they report to the Justice Center. With specific instructions as to where to appear along with defined expectations regarding resolving court matters the docket management experienced a noticeable improvement in efficiency and a decrease in FTA warrants.” For more information on that particular program, contact Scott Mattson at [SMatson@douglas.co.us](mailto:SMatson@douglas.co.us).

**[C]allers have caught and corrected many . . . errors . . . and have even uncovered instances of identity theft.**

**[T]elephone reminders using live callers work. They increase court-appearance rates, . . . reducing the significant costs associated with FTAs . . . .**

less recognize that, for whatever reason, telephone reminders using live callers work. They increase court-appearance rates, dramatically reducing the significant costs associated with FTAs and FTA warrants. These costs include fiscal impacts, such as money to process, serve, and house defendants on FTA warrants, but they also include the varied social costs triggered by needlessly arresting and incarcerating individuals for a behavior that might be prevented by a simple phone call. In Jefferson County, the benefits of reducing FTAs clearly outweigh any costs associated with the Notification Program borne by the Sheriff's Office,<sup>29</sup> and other agencies (*i.e.*, municipal police agencies, prosecutors, court clerks, and judges) have realized the benefits of a decreased workload at virtually no cost to them.

FTAs also tend to adversely affect defendants and the larger society long after the initial case is resolved, and reminder calls can help minimize those effects. For example, a person's bail is frequently determined largely on the number of FTAs on his or her criminal record, and removing false or unfair indicators of FTAs from defendants' records has become an important but complex issue for discussion among those who rely upon criminal histories to guide them in the bail-setting process. To the extent that the justice system can prevent the FTA altogether, no indication of any failure can exist on the criminal history, and the issue of a needless FTA affecting a later case is avoided.

Court-date-reminder programs can also be important additions to any pretrial-justice initiative that seeks to increase the use of citations and summonses, as is recommended by national standards on pretrial release.<sup>30</sup> Because the criminal justice system is often reluctant to purposefully increase the use of citations and summonses, implementation of a workable notification system may mitigate system fears and thus reduce system resistance to pretrial justice reform in this area.

A significant (albeit empirically unmeasured) benefit to using live reminder calls appears to be in the area of customer service, an area often overlooked in the criminal justice system. The Jefferson County Court Date Notification Program strives to make most people's first—and often only—trip to the courthouse something other than an entirely negative experience.

Finally, as demonstrated by the FTA Pilot Project, calling people *after* they fail to appear for court can be equally effective at increasing court-appearance rates, and although such

calls lack the full customer-service benefits of reminder calls, they can be done for significantly less money. The future of the Jefferson County Court Date Notification Program, and perhaps the model program for the future, includes strategic use of a combination of court-date reminders along with a call-after notification component for all court events, based on empirical data indicating the need for intervention. The hope is that this strategic planning, coupled with ongoing research and practice to increase the number of successful contacts (especially contacts with defendants themselves) might lead to court appearance rates of 95% and higher. Additional research needed to move toward this goal should focus on script content, message timing (*e.g.*, one week versus three days prior to the court date), message delivery (*e.g.*, using a male versus a female voice, and the nuances between leaving a message with a human being versus a machine), program placement and operation (*e.g.*, operated by the law enforcement versus operated by the courts), and new ways of communicating with defendants, such as via email or text message.

## CONCLUSION

For many jurisdictions, the singular response to defendants failing to appear for court is to issue warrants, typically with high monetary bonds attached, and then to wait for law enforcement to serve those warrants through arrests.<sup>31</sup> Unfortunately, this way of doing business is costly, and it has resulted in some jurisdictions having court-appearance rates as low as 70%. Innovative ways of dealing with the issue of court-appearance rates should be of primary concern to all people in the criminal justice system, including judges. The Jefferson County FTA Pilot Project demonstrated that live telephone callers either reminding defendants to come to court or notifying them of their impending warrant status after they fail to appear for court can have a dramatic effect on appearance rates. The resulting Court Date Notification Program has shown that these results can be improved and that customer service is significantly enhanced through the use of a live caller intervening in advance of the court event.

The administration of justice does not normally play out in the types of cases that dominate newspaper headlines or law-school and criminal-justice-program curricula. More often, justice is done in the routine, if not mundane cases at the lower end of the system, such as misdemeanor and traffic cases—the figurative water bills of the criminal justice system. The aggregate commonality of these cases should not erode our sense of urgency in dealing with them fairly; instead, we should see them as opportunities to demonstrate a glimpse of justice on a grand scale. Doing so, quite simply, is good public policy.

29. CJP Staff has estimated that in 2006 alone, the Sheriff's Office spent roughly \$900,000 processing and housing persons arrested on FTA warrants. CJP staff further estimated that if the program became fully implemented throughout the First Judicial District and reached its full potential of reducing FTA warrants by 52% (its six-month benchmark), the Sheriff's Office could realize a net savings of approximately \$400,000 per year.

30. See, *e.g.*, AMERICAN BAR ASSOCIATION STANDARDS, *supra* note 6, at 41, 63-70.

31. As reported by The Denver Post, the spokesperson for the Jefferson County Sheriff's Office stated that its deputies' "most common arrest is for those who don't appear in court, a needless use of time." *Phone Roundup Helping Courts Stay Filled*, THE DENVER POST (Nov. 23, 2007), at [http://www.denverpost.com/ci\\_7536476?source=bb](http://www.denverpost.com/ci_7536476?source=bb).



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# An Experiment in the Law: Studying a Technique to Reduce Failure to Appear in Court

Alan J. Tomkins, Brian Bornstein, Mitchel N. Herian, David I. Rosenbaum & Elizabeth M. Neeley

It would be ideal if we knew the best ways to structure the judicial system, the best processes to use to ensure fairness for litigants, and the best incentives to ensure compliance with the law. Unfortunately, as all of us who work in or with the system and those of us who study such issues well know, we do not. So what should we do?

As social scientists trained to examine the judiciary and judicial processes from the perspectives of economics, law, political science, psychology, and sociology, we suggest that *systematic experimentation should be used* whenever feasible and warranted to study the operations of the courts for purposes of improving the courts' functioning. As has been learned in the case of medical procedures and treatments, systematic, experimental, or quasi-experimental study helps to determine what works, what does not, and why. Decades ago, in the face of charges that experimentation in the law would undermine due

process and equal treatment, the Federal Judicial Center rebutted these concerns, arguing that rather than thwarting justice, experimentation in the law promotes justice, ensuring an evidentiary basis for court reforms and administrative decision making.<sup>1</sup> Our work operates under this approach to examining potential judicial reforms. In this article, we discuss our use of the methods of science<sup>2</sup> to examine systematically whether there might be a technique that would, without costs that exceeded their benefits, reduce misdemeanants' failure to appear in court.<sup>3</sup>

It is not *overly* hyperbolic to assert that failure to appear (FTA) at a scheduled court appearance<sup>4</sup> is an epidemic problem afflicting defendants who do not have attorneys: Some estimates of misdemeanants who do not appear for their court hearing are as high as one in three, depending on the jurisdiction and offense type.<sup>5</sup> FTAs increase resources that need to be expended

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## Footnotes

1. FEDERAL JUDICIAL CENTER, EXPERIMENTATION IN THE LAW: REPORT OF THE FEDERAL JUDICIAL CENTER ADVISORY COMMITTEE ON EXPERIMENTATION IN THE LAW (1981). See also Jerry Goldman, *Experimenting with Justice: The Federal Judicial Center Report*, 8 L. & SOC. INQUIRY 733 (1983).
2. See, e.g., David Goodstein, *How Science Works*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 37 (3d ed., 2011).
3. The research summarized here is based on a project funded by the National Institute of Justice (Award # 2008-IJ-CX-0022) and is adapted from three peer-reviewed publications: The project's final report submitted to NIJ, BRIAN H. BORNSTEIN, ALAN J. TOMKINS, & ELIZABETH M. NEELEY, REDUCING COURTS' FAILURE TO APPEAR RATE: A PROCEDURAL JUSTICE APPROACH (2010), available at [http://www.michigan.gov/documents/corrections/Reducing\\_Courts\\_Failure\\_to\\_Appear\\_Rate\\_376119\\_7.pdf](http://www.michigan.gov/documents/corrections/Reducing_Courts_Failure_to_Appear_Rate_376119_7.pdf) (NIJ does not endorse project final reports, but they do subject them to internal and peer review before the final report is accepted and made available through the Inter-University Consortium for Political and Social Research [ICPSR] data and document repository, hosted by the University of Michigan); and two journal articles, Brian H. Bornstein et al., *Reducing Courts' Failure-to-Appear Rate by Written Reminders*, 18 PSYCHOL. PUB. POL'Y & L. (in press) (PDF version available online, doi: 10.1037/a0026293; page numbers herein refer to the PDF version because the pagination for the journal article are not presently available); and David I. Rosenbaum et al.,

*Using Court Date Reminder Postcards to Reduce Courts' Failure to Appear Rates: A Benefit-Cost Analysis*, 95 JUDICATURE 177 (2012). The primary data themselves also are available through ICPSR, at <http://dx.doi.org/10.3886/ICPSR28861.v1>. See also Joseph A. Hamm et al., *Exploring Separable Components of Institutional Confidence*, 29 BEHAV. SCI. & L. 95 (2011) (psychometric development of trust and confidence measures); Joseph A. Hamm et al., *Deconstructing Public Confidence in State Courts* (unpublished manuscript, available upon request, currently under review for publication, 2012) (further psychometric refinement of trust/confidence measures). We also published preliminary insights in our state's bar magazine, Mitchel N. Herian & Brian H. Bornstein, *Reducing Failure to Appear in Nebraska: A Field Study*, NEB. LAWYER, Sept. 2010, at 11.

4. Over the past 40 years, the issue of failure to appear in court has primarily been studied in the context of whether to liberalize pre-trial release for defendants who are charged with minor offenses to reduce unnecessary detention of defendants who do not appear to be risks for non-appearance. E.g., STEVENS H. CLARKE, JEAN L. FREEMAN, & GARY G. KOCH, THE EFFECTIVENESS OF BAIL SYSTEMS: AN ANALYSIS OF FAILURE TO APPEAR IN COURT AND REARREST WHILE ON BAIL (1976); CHRIS W. ESKRIDGE, AN EMPIRICAL STUDY OF FAILURE TO APPEAR RATES AMONG ACCUSED OFFENDERS: CONSTRUCTION AND VALIDATION OF A PREDICTION SCALE (1978); RICHARD R. PETERSON, PRETRIAL FAILURE TO APPEAR AND PRETRIAL RE-ARREST AMONG DOMESTIC VIOLENCE DEFENDANTS IN NEW YORK CITY (2006); QUDSIA SIDDIQI, ASSESSING RISK OF PRETRIAL FAILURE TO APPEAR IN NEW YORK CITY: A RESEARCH SUMMARY AND IMPLICATIONS FOR DEVELOPING RELEASE-RECOMMENDATION SCHEMES (1999). In this study, however, we look at failure to appear for the initial hearing. This has become a topic of interest because of the high failure-to-appear rates seen for misdemeanor offenses across the nation. See *infra* notes 5-7.
5. See, e.g., Warren Davis, *Should Georgia Change Its Misdemeanor Arrest Laws to Authorize Issuing More Field Citations? Can an Alternative Arrest Process Help Alleviate Georgia's Jail Overcrowding and Reduce the Time Arresting Officers Spend Processing Nontraffic*

for courts and law-enforcement agencies and can increase penalties for defendants, including pretrial incarceration and greater fines for what sometimes begin as minor offenses. FTAs thus are costly to both court systems and defendants.<sup>6</sup>

Why would a defendant not appear in court? Why would a person risk a greater penalty when charged with a relatively minor offense? Why not simply show up and accept whatever is going to happen given that the consequences tend to be relatively minor for misdemeanors? Some commentators note that some defendants willfully fail to appear, but they also find, unsurprisingly, that many defendants fail to appear not only because they fear the consequences of the legal proceedings but also because they are unable to arrange for transportation to court, they have other, competing responsibilities (e.g., work, care for child or other person), or they are disorganized, forgetting the appointment or losing critical information (e.g., citation, contact, or location).<sup>7</sup>

We wondered whether there might be a discernible pattern of defendants' psychosocial characteristics that influence their failure to appear in court. Tom Tyler and others have found

that positive compliance with the law is increased when people feel like they have been subjected to fair procedures and have high levels of trust and confidence in the legal system.<sup>8</sup> Inspired by judicial reminder programs that have conceptualized non-appearance in court as a client-management challenge similar to appearing for one's health-care appointment, we wondered whether the apparent success of such programs might be explained by defendants' perceptions of procedural justice combined with their trust and confidence in courts. If so, it could provide an empirical roadmap for courts to use to increase compliance with the law.

We also saw this as an opportunity to study systematically what effect implementing a reminder program has on defendant-appearance rates. Court reminder programs have been implemented somewhat haphazardly across the country, primarily using telephone reminders.<sup>9</sup> A call-reminder system, however—either automated or using employees to make the calls—can be expensive.<sup>10</sup> Might it be as effective to use reminder *postcards* as it is to use the telephone? Postcards are relatively cheap to process and mail, and studies in other con-

Misdemeanor Offenders? 22 GA. ST. U. L. REV. 313 (2005); Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J. L. & ECON. 93 (2004); Timothy J. McGinty, "Straight Release": Justice Delayed, Justice Denied, 48 CLEV. ST. L. REV. 235 (2000); Christopher Murray, Nayak Polissar, & Merlyn Bell, *The Misdemeanor Study: Misdemeanors and Misdemeanor Defendants in King County, Washington* (1998), available at <http://your.kingcounty.gov/exec/news/1999/030499fos.rtf>; MATT NICE, COURT APPEARANCE NOTIFICATION SYSTEM: PROCESS AND OUTCOME EVALUATION, A Report for the Local Public Safety Coordinating Council and the CANS Oversight Committee (Mar. 2006), available at [http://www.thecourtbrothers.com/fta\\_repo/cans\\_eval\\_00206\\_final.pdf](http://www.thecourtbrothers.com/fta_repo/cans_eval_00206_final.pdf); Matt O'Keefe, Court Appearance Notification System: 2007 Analysis Highlights, available at [http://www2.co.multnomah.or.us/County\\_Management/Budget/Budget%20Office%20Evaluation/Reports/Public%20Safety%20Research/CANS%20Highlights.pdf](http://www2.co.multnomah.or.us/County_Management/Budget/Budget%20Office%20Evaluation/Reports/Public%20Safety%20Research/CANS%20Highlights.pdf); Timothy R. Schnacke, Michael R. Jones, & Dorian M. Wilderman, *Increasing Court Appearance and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Pilot Project and Resulting Court Date Notification Program*, 48 CT. REV. 86 (2012) (this issue); WENDY F. WHITE, COURT HEARING CALL NOTIFICATION PROJECT (May 17, 2006), available at [http://www.thecourtbrothers.com/fta\\_repo/Coconino\\_County\\_court\\_hearing\\_notification\\_project.pdf](http://www.thecourtbrothers.com/fta_repo/Coconino_County_court_hearing_notification_project.pdf).

6. *Id.*

7. BARRY MAHONEY ET AL., PRETRIAL SERVICE PROGRAMS: RESPONSIBILITIES AND POTENTIAL 39-40 (Off. Just. Programs, Nat'l Inst. Just.) (March 2001), available at <http://www.ncjrs.gov/pdffiles1/nij/181939.pdf>. See also references in note 5, *supra*. See generally Court Brothers, FTA Repository (2012), available at [http://www.thecourtbrothers.com/web\\_court/fta\\_fta\\_repository.pl](http://www.thecourtbrothers.com/web_court/fta_fta_repository.pl); Marie VanNostrand, Kenneth J. Rose, & Kimberly Weibrecht, STATE OF THE SCIENCE OF PRETRIAL RELEASE RECOMMENDATIONS AND SUPERVISION 15-20 (June 2011), available at [http://pretrial.org/Featured%20Resources%20Documents/PJI%20State%20of%20the%20Science%20Pretrial%20Recommendations%20and%20Supervision%20\(2011\).pdf](http://pretrial.org/Featured%20Resources%20Documents/PJI%20State%20of%20the%20Science%20Pretrial%20Recommendations%20and%20Supervision%20(2011).pdf).

It is likely some undocumented defendants fear being deported, and this is a reason for non-appearance. However, there is no evidence that this reason constitutes a large proportion of failures to appear.

8. E.g., TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006). See especially Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*. 44 CT. REV. 4 (2007-2008) (AJA White Paper on Procedural Fairness). See generally *Procedural Justice*, 44 CT. REV. 1 (2007-08) (special issue devoted to procedural justice with numerous citations to key empirical evidence regarding procedural justice as well as public trust and confidence), available at <http://aja.ncsc.dni.us/courtrv/cr44-1/CR44-1-2.pdf>. Public trust and confidence in the courts is closely related to procedural justice. In fact, Tyler and others treat trust and confidence as a component of procedural justice. See, e.g., TYLER, *supra* note 8. See also *Public Trust and Confidence in the Courts*, CT. REV., Fall 1999, at 1, available at <http://aja.ncsc.dni.us/courtrv/cr36-3/CR%2036-3.pdf>, and *Public Trust and Confidence in the Courts*, 19 BEHAV. SCI. & L. 197 (2001) (both special issues devoted to public trust and confidence in the courts and include empirical evidence and legal commentary related to the nationwide survey of trust and confidence in the courts conducted by the National Center for State Courts; see NAT'L CTR. ST. CTS., HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY [1999]).

9. There even is a company that offers calling services, nationwide. The Court Brothers, Reminder Call Service, available from [http://www.thecourtbrothers.com/web\\_court](http://www.thecourtbrothers.com/web_court). The Court Brothers calling service costs range from \$0.75 to \$3.00 per defendant per appearance, depending on the services desired. Email from Chad Columbus, The Court Brothers, to Alan J. Tomkins, Director, University of Nebraska Public Policy Center (Oct. 19, 2012) (on file with author). See also notes 5 & 7, *supra*.

10. Cost estimates for Multnomah County, OR, were \$40,000 in FY 2006 and \$56,000 in FY 2007. O'Keefe, *supra* note 5. Also, as noted previously, *id.*, the Court Brothers calling service can cost as high as \$2.00 per defendant. [http://www.thecourtbrothers.com/web\\_court/pf\\_features.pl](http://www.thecourtbrothers.com/web_court/pf_features.pl) (features). In contrast, another company, Tavoca, offers cheaper calling services for physician-appointment reminders. Tavoca, available at [http://www.tavoca.com/ac\\_calculatecosts.asp](http://www.tavoca.com/ac_calculatecosts.asp) (depending on numbers of calls, call costs are in the 10 to 20 cents per call range).

texts suggest they are effective.<sup>11</sup>

Although others have examined reminder programs, there are limitations in how informative these inquiries have been for determining impacts. Because there have been no comparison groups, the extent of increases in appearance rates due to the interventions were not clear, and although there have been estimates of benefits,<sup>12</sup> these estimates tend to be general rather than passing muster of what would be expected of a high-quality, benefit-cost analysis conducted by an economist.<sup>13</sup>

In our study, we used experimental methods, guided by theory<sup>14</sup> (specifically, procedural justice and trust/confidence) to guide our assessment of the use of postcards to reduce failure to appear in a cost-effective manner *compared* to no postcards. We also conjectured there would be a race-of-defendant effect, with our hypothesis being the greatest impact would accrue to minority defendants. Thus, while we understood that a one-jurisdiction inquiry is at best simply suggestive but is not definitive, we thought we could advance the field with our systematic research effort.

## THE STUDY AND ITS RESULTS

### A. METHODS

With the partnership of the Nebraska Administrative Office of the Courts and funding from the U.S. National Institute of Justice, we implemented a postcard-reminder study in 14 counties across Nebraska between March 2009 and May 2010.<sup>15</sup> We hypothesized misdemeanants' likelihood of failing to appear would be reduced if defendants were sent a postcard reminder of the hearing date. For all misdemeanants who met certain criteria in these 14 counties during the study,<sup>16</sup> we randomly assigned them to receive one of three different postcard reminders or a control condition of no reminder. One postcard was intended to reflect elements of procedural justice, specifically addressing *voice* concerns, letting the defendant know a *fair* and *neutral* fact-finder (*i.e.*, judge) was interested in *hearing* the defendant's side of the story. Moreover, the judge would treat the defendant with *respect* and would take the defendant's *concerns seriously*. This postcard also informed defendants of the punishments that were possible if they failed to appear.

The other two postcards were a) simple reminders, and b) reminders coupled with a caution that harsher punishments were possible for those who failed to appear (but without the procedural-justice information). Different postcard versions were used to determine whether the postcard's content or message would make a difference in appearance rates, that is, whether effects could be obtained simply by notification (Reminder-Only Condition), whether the threat of sanctions by itself would increase compliance (Reminder-Sanctions), or whether a postcard that included both the sanctions information and the elements of procedural justice (Reminder-Combined) were key.<sup>17</sup>

We encountered a practical problem that conflicted with our scientific desire to keep the postcard conditions as different from one another as possible. Specifically, we would have preferred that the postcard that included the procedural-justice elements not also include a statement about sanctions. However, the real-world intruded, and the courts' personnel we worked with asked us not to send out a postcard that excluded the potential for greater sanctions if the defendant failed to appear in court. The concern was that it might be misleading, and unfair, not to mention the potential of harsher penalties. Consequently, the Reminder-Combined postcard also included the same language about sanctions as the Reminder-Sanctions postcard.<sup>18</sup>

Because of a substantial proportion of Spanish-speaking residents in Nebraska, the postcard content was provided in both Spanish and English in all conditions.<sup>19</sup> Thus, there was a no-reminder (*control*) condition or one of three different postcards. The postcard versions are presented in Figure 1.

The participants in our study were 7,865 defendants (19 and older)<sup>20</sup> issued a non-traffic ticket by law-enforcement officials instructing them to appear in court for an initial hearing on their non-waiverable, misdemeanor offense. The race/ethnic distribution was 69.8% White, 10.7% Hispanic; 10.1% Black, 6.6% Unknown; 1.6% Native American; 1% Asian American; and .2% Other.<sup>21</sup>

On a daily basis during the workweek, researchers reviewed the database of cases uploaded by the 14 trial courts to the

11. Cf. Eric B. Larson et al., *Do Postcard Reminders Improve Influenza Vaccination Compliance?: A Prospective Trial of Different Postcard Cues*, 20 MEDICAL CARE 639 (1982).

12. E.g., O'Keefe, *supra* note 5.

13. For an example of a more systematic benefit-cost study, see the Jefferson, CO, FTA study conducted by Schnacke, Jones, and Wilderman, *supra* note 5, at n.15.

14. This approach, using experimental methods guided by theory, is the *sine qua non* of science. See e.g., Goodstein, *supra* note 2.

15. The complete NIJ report of the project is available online. BORNSTEIN, TOMKINS, & NEELEY, *supra* note 3. See also *supra* note 3 for the other peer-reviewed publications stemming from this project.

We benefited tremendously from the efforts of court administrators and clerks in the 14 counties where we collected data, as well as from the support of the Nebraska Minority Justice Committee. We thank the Clerk Magistrates from each of the 14 counties for allowing us to test this program in their counties, and we also are grateful to the Committee for its support and assistance in developing and implementing this study. We would also

like to thank staff at the Nebraska Administrative Office of the Courts, particularly Sherri Dennis and Ross Johnson, for their help in collecting data and for their insights.

16. See *infra* notes 22-23 and accompanying text.

17. Our design was thus akin to a clinical trial in a medical study, with each postcard a level of intervention (*i.e.*, reminder), and the no-reminder condition serving as the comparison group.

18. We pretested the *order* in which we would present the information, and these results guided our decision to place the sanctions information first, followed by the procedural-justice information. BORNSTEIN, TOMKINS, & NEELEY, *supra* note 3, at 19-20.

19. We used the practice of two different translators, with a translation from the English version to Spanish first, and then an independent translation of the Spanish version back into English. The process revealed an acceptable Spanish version of the postcard.

20. Because the age of majority in Nebraska is 19, we excluded any offender younger than 19.

21. The officer issuing the citation generally made the race/ethnicity classification. Our data were extracted from the citation or other information obtained from the case file.

**FIGURE 1  
POSTCARD REMINDER CONDITIONS**

**REMINDER-ONLY**

Dear XXXX XXXX:

This notice is to remind you that you have a hearing scheduled at the XXXX County Courthouse at 1:30 PM on 12/11/2009.

Estimado(a) XXXX XXXX:

Este aviso es para recordarle que tiene una audiencia programada en la Corte del Condado de XXXX a las 1:30 PM en el día 12/11/2009.

Case ID: C X CR X XXXX

If you have questions about this postcard, please call: (XXX) XXX-XXXX

**REMINDER-SANCTIONS**

Dear XXXX XXXX:

This notice is to remind you that you have a hearing scheduled at the XXXX County Courthouse at 1:30 PM on 5/1/2009.

Failure to appear for this hearing may result in a number of negative consequences, including:

- You may be charged with the additional crime of failure to appear, which is a Class II misdemeanor.
- You may receive up to six months in jail and/or a \$1,000 fine for this additional charge.
- A warrant may be issued for your arrest.
- It may be harder to get bail in the future.
- Even if you are not formally charged with a failure to appear, failing to appear may be considered by the judge in determining your sentence on the original misdemeanor charge.

We strongly encourage you to not miss your hearing on the date and time listed above!

If you have questions about this postcard, please call: (XXX) XXX-XXXX  
Case ID: C X CR X XXXX

Estimado(a) XXXX XXXX:

Este aviso es para recordarle que tiene una audiencia programada en la Corte del Condado de XXXX a las 1:30 PM en el día 5/1/2009.

El no presentarse para esta audiencia puede traer como resultado un número de consecuencias negativas, que incluyen:

- Ud. puede ser acusado de un delito adicional por faltar a comparecer, que es un delito menor, Clase II.
- Ud. puede recibir hasta seis meses en la cárcel y/o una multa de \$1,000 por este cargo adicional.
- Una orden judicial puede ser expedida para su arresto.
- Puede ser más difícil calificar para una fianza en el futuro.
- Aunque no sea acusado formalmente por faltar a comparecer, el faltar a comparecer puede ser considerado por el juez en la determinación de su pena por el delito menor original.

¡Le advertimos enérgicamente que no falte a comparecer en la fecha y el tiempo descrito arriba y que no deje de presentarse!

**REMINDER-COMBINED**

Dear XXXX XXXX:

This notice is to remind you that you have a hearing scheduled at the XXXX County Courthouse at 1:30 PM on 5/1/2009.

Failure to appear for this hearing may result in a number of negative consequences, including:

- You may be charged with the additional crime of failure to appear, which is a Class II misdemeanor.
- You may receive up to six months in jail and/or a \$1,000 fine for this additional charge.
- A warrant may be issued for your arrest.
- It may be harder to get bail in the future.
- Even if you are not formally charged with a failure to appear, failing to appear may be considered by the judge in determining your sentence on the original misdemeanor charge.

This Court aims to serve the best interests of both you and the public by:

- Providing neutral and consistent judgments to all defendants. The judge who presides over your hearing will be fair and open-minded.
- Treating all defendants charged with the same kind of offense in the same way.
- Treating all defendants politely, with courtesy, dignity and respect.
- Taking defendants' concerns seriously. We understand that you might be worried about the hearing and its consequences, and we are prepared to listen to your concerns and offer explanations as best we can.
- Allowing defendants to explain the situation from their perspective.

We strongly encourage you to not miss your hearing on the date and time listed above, and to be sure to appear for it!

If you have questions about this postcard, please call: (XXX) XXX-XXXX  
Case ID: C X CR X XXXX

Estimado(a) XXXX XXXX:

Este aviso es para recordarle que tiene una audiencia programada en la Corte del Condado de XXXX a las 1:30 PM en el día 5/1/2009.

El no presentarse para esta audiencia puede traer como resultado un número de consecuencias negativas, que incluyen:

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- Ud. puede recibir hasta seis meses en la cárcel y/o una multa de \$1,000 por este cargo adicional.
- Una orden judicial puede ser expedida para su arresto.
- Puede ser más difícil calificar para una fianza en el futuro.
- Aunque no sea acusado formalmente por faltar a comparecer, el faltar a comparecer puede ser considerado por el juez en la determinación de su pena por el delito menor original.

Esta Corte tiene la meta de servir mejor a los intereses de Usted y del público al:

- Emitir fallos neutrales y contundentes para todos los acusados. El juez que preside sobre su audiencia será justo y de actitud abierta.
- Tratar a todos los acusados con igual justicia.
- Tratar a todos los acusados con buenos modales, con cortesía, dignidad, y respeto.
- Tomar seriamente en cuenta las preocupaciones de los acusados. Entendemos que Ud. pueda estar preocupado sobre la audiencia y sus consecuencias, y estamos preparados para escuchar sus preocupaciones y para ofrecerle la mejor explicación que podamos.
- Permitir a los acusados explicar la situación desde su perspectiva o punto de vista.

¡Le advertimos enérgicamente que no falte a comparecer en la fecha y el tiempo descrito arriba y que no deje de presentarse!

Nebraska Administrative Office of the Courts. As we explained in one of our earlier articles:

All of the misdemeanor categories provided for by state statute were represented in the sample, with most coming from the relatively severe categories. For example, 30.5% of defendants were charged with an alcohol-related misdemeanor (e.g., first offense driving-under-the-influence charge) and an additional 31.0% were charged with violations of city ordinances (e.g., injuring or destroying property). Roughly one-sixth (17.6%) were charged with a Class 1 misdemeanor (e.g., carrying a concealed weapon, first offense; failing to stop and render aid), with the remainder charged with a Class 2 (9.3%; e.g., shoplifting \$0-\$200) or Class 3 misdemeanor (11.2%; e.g., minor in possession of alcohol). Four individuals were charged with a Class 3A misdemeanor (0.1%; e.g., possession of marijuana, third offense); 21 were charged with a Class 4 misdemeanor (0.3%; e.g., possession of marijuana, second offense); and five were charged with a Class 5 misdemeanor (0.1%; e.g., unlawful entry of state park without a park permit).<sup>22</sup>

Once we determined the offense was non-waiverable, and there was sufficient time to send out a postcard at least five days before the scheduled court date, the defendant was included in the study. We then randomly assigned defendants to one of the four experimental conditions: the control condition or one of the three postcard conditions.

## B. RESULTS

### 1. Failure-to-Appear Rates: Impact of Reminder Conditions

As shown in Table 1,<sup>23</sup> the baseline (control) FTA rate in our sample was 12.6%.<sup>24</sup> The data revealed *postcard reminders significantly reduced FTA rates*.<sup>25</sup> The specific amounts of reduction varied, dropping to about 11% FTA rate for the Reminder-Only postcards, about 10% for Reminder-Combined postcards, and about 8% for the Reminder-Sanctions postcards. The two reminders that included substantive information (sanctions or sanctions plus procedural justice) resulted in greater, statistically significant reductions than the simple reminder postcard.<sup>26</sup> There was no statistical difference between the two substantive postcards.<sup>27</sup> Thus, the critical

finding from our extensive study is that while a postcard reminder has an effect overall, there likely is an even greater impact if the postcard contains substantive language beyond the reminder of the court date.

Reminder Postcard Treatment	Appeared For Court		Total
	No	Yes	
Control	12.6%	87.4%	2,095
Reminder-Only	10.9%	89.1%	1,889
Reminder-Sanctions	8.3%	91.7%	1,901
Reminder-Combined	9.8%	90.2%	1,980
<b>Total</b>	<b>10.4%</b>	<b>89.6%</b>	<b>7,865</b>

### 2. Other Factors that Predict FTA: Race/Ethnicity, Sex, Rural vs. Urban Jurisdiction, and Nature/Number of Offense(s)

In light of previous work that indicated a relationship between trust/confidence and compliance with the law,<sup>28</sup> we hypothesized there would be a race/ethnicity impact, specifically, that Non-Whites would have higher baseline FTA rates than Whites. We did not anticipate there would be a sex difference. We wondered whether there would be a difference for rural versus urban defendants, hypothesizing that there would be a greater FTA rate for urban defendants. Finally, we examined whether FTA rates differed significantly depending on the severity of offense and/or on the number of offenses charged (one versus two or more). We were not aware of literature that would lead us to make a prediction one way or the other regarding offenses, but our belief was that offense would be an important factor to measure.

The *overall* FTA rate (all conditions combined) varied as a function of the defendant's race/ethnicity, with greater FTA rates for Black defendants (16.4%) than Whites (9.5%) or Hispanics (9.4%). The control condition (no postcard) revealed the *baseline* FTA rates likely started differently: Nearly 19% for Blacks versus approximately 12% for Whites and 10.5% for Hispanics (Table 2). Although it may appear as if there is a substantial race/ethnicity effect, our statistical analy-

22. Bornstein et al., *supra* note 3, at 5.

23. These and the other data tables and figures are taken or adapted from the three, primary publications from the project. For example, Table 1 is taken from BORNSTEIN, TOMKINS, & NEELEY, *supra* note 3, at 14, Table 1; Table 2 is taken from Bornstein et al. *supra* note 3, at 9, Table 2. See also Rosenbaum et al., *supra* note 3, at 180, Table 1 (same data but presents the information for each of the postcard combinations, not limited to experimental conditions as we have presented in the table here). Similarly, the statistical tests we report beginning with note 24 *infra* are also taken from these other publications, but are not hereinafter cross-referenced.

24. This is a comparatively lower rate than reported in other jurisdictions.

25. The omnibus test showed the four conditions were different from one another.  $X^2(3) = 20.90, p < .001, \phi = .05$ . Additional (*i.e.*, post hoc) analyses pinpointed the differences were between the reminders (taken together) versus no reminder (control condition).  $X^2(1) = 14.29, p = .001, \phi = .04$ . For background information on the use of statistics, intended for legal audiences, see ROBERT M. LAWLESS, JENNIFER K. ROBBENOLT, & THOMAS S. ULEN, *EMPIRICAL METHODS IN LAW* (2009).

26.  $X^2(1) = 4.63, p = .031, \phi = .03$ .

27.  $X^2(1) = 2.60, p = .11, \phi = .03$ .

28. *E.g.*, TYLER, *supra* note 8.

sis indicated there was not, when we used a statistical test controlling for other factors,<sup>29</sup> such as offense type and number of offenses.<sup>30</sup> Sex also did not reveal a statistically significant difference, although the FTA rate for male defendants was slightly greater than for female defendants (10.8% vs. 9.4%).<sup>31</sup> As expected, the FTA rate was greater in urban jurisdictions than in rural counties (12.4% vs. 6.8%) (Table 3).<sup>32</sup> We found a strong effect for the offense variables: Offense type significantly influenced FTA rates (Table 4),<sup>33</sup> as did the number of offenses charged (Table 5).<sup>34</sup> Thus, offenses in general, and specifically the number of offenses, are the strongest predictors of FTA we found in our study.

**TABLE 2  
FAILURE-TO-APPEAR RATE BY RACE/ETHNICITY**

Reminder Postcard Treatment	FTA Rates			Total
	Whites	Blacks	Hispanics	
Control	11.7%	18.7%	10.5%	12.6%
Simple-Reminder	9.6%	18.8%	11.8%	11.0%
Reminder-Sanctions	8.0%	13.5%	4.7%	8.1%
Reminder-Combined	8.8%	13.6%	10.1%	9.5%
<b>Total</b>	<b>9.5%</b>	<b>16.4%</b>	<b>9.4%</b>	<b>10.3%</b>

**TABLE 3  
FAILURE-TO-APPEAR RATE BY COUNTY AND URBAN/RURAL AREAS**

County	Baseline Appearance Rate			Overall Appearance Rate		
	Appeared for Court		n	Appeared for Court		n
	No	Yes		No	Yes	
Adams	33.3%	66.7%	3	33.3%	66.7%	6
Buffalo	3.4%	96.6%	59	1.8%	98.2%	225
Colfax	50.0%	50.0%	4	19%	81.0%	21
Dakota	8.8%	91.2%	57	10.0%	90.0%	211
Dawson	9.5%	90.5%	84	6.1%	93.9%	314
Dodge	2.7%	97.3%	37	5.4%	94.6%	149
Douglas	10.6%	89.4%	264	8.2%	91.8%	1,027
Hall	10.8%	89.2%	222	7.8%	92.2%	781
Lancaster	17.8%	82.2%	828	14.8%	85.2%	3,185
Madison	6.8%	93.2%	73	4.8%	95.2%	289
Platte	8.3%	91.7%	157	7.1%	92.9%	506
Saline	9.3%	90.7%	43	12.3%	87.7%	154
Sarpy	10.2%	89.8%	236	8.6%	91.4%	864
Scotts Bluff	0.0%	100%	28	2.3%	97.7%	133
<b>Urban (Douglas, Lancaster, Sarpy)</b>	<b>15.0%</b>	<b>85.0%</b>	<b>1,328</b>	<b>12.4%</b>	<b>87.6%</b>	<b>5,076</b>
<b>Rural</b>	<b>8.5%</b>	<b>91.5%</b>	<b>767</b>	<b>6.8%</b>	<b>93.2%</b>	<b>2,789</b>
<b>Total</b>		<b>87.4%</b>	<b>2,095</b>		<b>89.6%</b>	<b>7,865</b>

**TABLE 4  
FAILURE-TO-APPEAR RATE BY OFFENSE TYPE**

Offense Type	All Conditions		Control		Reminder-Only		Reminder-Sanctions		Reminder-Combined	
	FTA Rate	n	FTA Rate	n	FTA Rate	n	FTA Rate	n	FTA Rate	n
Class 1	7.6%	1,377	7.3%	358	8.2%	365	7.0%	330	8.0%	324
Class W (alcohol)	9.4%	2,389	9.7%	628	11.1%	96	7.2%	567	9.4%	598
Class 2	13.8%	732	18.9%	212	11.7%	145	10.5%	191	13.0%	184
Class 3/3A/4/5	8.4%	908	10.2%	254	8.5%	213	6.8%	220	7.7%	2,212
City Ordinance	12.9%	2,424	17.5%	636	13.2%	560	10.1%	587	10.6%	641

**TABLE 5  
FAILURE-TO-APPEAR RATE BY NUMBER OF OFFENSES**

Offense Type	Baseline Appearance Rate			Overall Appearance Rate		
	Appeared for Court		n	Appeared for Court		n
	No	Yes		No	Yes	
1 Offense	6.7%	93.3%	1,012	5.4%	94.6%	3,868
2 or More Offenses	18.2%	81.8%	1,067	15.4%	84.6%	3,962
<b>Total</b>	<b>12.6%</b>	<b>87.4%</b>	<b>2,088</b>	<b>10.4%</b>	<b>89.6%</b>	<b>7,830</b>

29. The statistical analysis appropriate for this determination is a regression analysis.  $B = -.09$ ,  $S.E. = .09$ ,  $p = .32$ ,  $\text{Exp}(b) = .91$ ,  $\text{Exp}(b)$  CI (.77-1.09). We did find that the Reminder-Sanctions postcard had the greatest absolute impact upon reducing FTA rates for Hispanic defendants, as the FTA rate was reduced to 4.7% from 10.5% in the control condition,  $X^2(1) = 4.94$ ,  $p < .026$ ,  $\phi = .11$ . For Black defendants, the decrease from 18.7% to 13.5% was not statistically significant, though it would have been significant had there been a larger number of Black defendants in the sample. For more detailed information and additional race-related analyses, see BORNSTEIN, TOMKINS, & NEELEY, *supra* note 3, at 16-18, 21-23; Bornstein et al., *supra* note 3, at 9-14.

30. See *infra* notes 33-34 and accompanying text.  
 31.  $B = -.10$ ,  $S.E. = .09$ ,  $p = .29$ ,  $\text{Exp}(b) = .91$ ,  $\text{Exp}(b)$  CI (.76-1.09).  
 32.  $B = .40$ ,  $S.E. = .11$ ,  $p < .001$ ,  $\text{Exp}(b) = 1.50$ ,  $\text{Exp}(b)$  CI (1.21-1.86).  
 33.  $B = -.18$ ,  $S.E. = .03$ ,  $p < .001$ ,  $\text{Exp}(b) = .83$ ,  $\text{Exp}(b)$  CI (.79-.88).  
 34. Only 5.4% of defendants with one offense failed to appear, whereas 15.4% of individuals with two or more offenses failed to appear.  $B = -1.28$ ,  $S.E. = .10$ ,  $p < .001$ ,  $\text{Exp}(b) = .28$ ,  $\text{Exp}(b)$  CI (.23-.34).

### 3. Procedural-Justice and Trust/Confidence Perceptions

To reiterate, in the main part of our FTA study, we did not find that a postcard containing procedural-justice language (that also included an admonition about potential sanctions, as discussed previously) had the anticipated, beneficial impact, over and above merely mentioning sanctions. It might be the case, however, that because we were not able to single out procedural-justice elements in the postcard communication, we missed its potential added value. Or it might be that we did not adequately communicate critical procedural-justice elements in a meaningful way to defendants. Although we are unable to determine such limitations of this study, we were able to conduct a follow-up inquiry that allowed us to inquire further into the potential impact of perceptions of procedural justice, as well as trust and confidence perceptions.

In our follow-up inquiry, we sent a survey that included questions about procedural-justice and trust/confidence perceptions to all 819 of the misdemeanants who did not appear for their hearing and to 20% (1,538 randomly selected) of those who appeared.<sup>35</sup> For the survey part of the study, 77.6% of the survey respondents were White, 7.8% Black, and 5.7% Hispanic.

The 19.2% (452) overall response rate was 21.6% (335) for participants who appeared in court and 14.5% (117) for those who failed to appear.<sup>36</sup> The survey items for defendants who did not appear included questions about fairness, bias, and respect generally related to the judicial system. We also asked the defendants who appeared for their hearing additional questions about the procedural-justice subconstructs of fairness, voice, dignity, and respect.<sup>37</sup>

We had hypothesized that those defendants who appeared for their hearing would have greater levels of perceived procedural justice and be more likely to indicate higher levels of trust and confidence in the courts. The data confirmed our procedural-justice hypotheses, such that defendants who appeared for their hearing rated levels of procedural justice in their overall experience with the criminal justice system (General Procedural Justice scale) higher than those who did not appear.<sup>38</sup>

35. We sent the defendants a pre-notification that we would be sending them a survey one week after the hearing date. Two weeks later, the defendants were sent a survey accompanied by a \$2 bill as a token of appreciation. Replacement surveys were mailed two weeks later. Each of these steps are in accordance with suggested best practices to increase responsiveness to survey requests. DON A. DILLMAN, JOLENE D. SMYTH, & LEAH MELANI CHRISTIAN, *INTERNET, MAIL AND MIXED-MODE SURVEYS: THE TAILORED DESIGN METHOD* (3d ed. 2008).

36. For more details about the sample, including differences in responses rates across race/ethnicity (proportionally more Whites responded), offense types (defendants with certain misdemeanors were more likely to respond), and age (older defendants more likely to respond), as well as lack of sample differences (residing in urban versus rural county, number of offenses, reminder condition), see BORNSTEIN, TOMKINS, & NEELEY, *supra* note 3, at 10-11.

37. For complete details regarding the items we used and scales we created, see BORNSTEIN, TOMKINS, & NEELEY, *supra* note 3, at 19-23; Bornstein et al., *supra* note 3, at 11-12.

Our findings also provided quite a bit of support for the hypothesized impact of trust and confidence. Those defendants who appeared in court had significantly greater *confidence* scores (Total Institutional Confidence scale)<sup>39</sup> and *trust* scores (Trust in the Courts scale)<sup>40</sup> than those who did not. We also found that defendants who did not appear were more *cynical* than those who appeared.<sup>41</sup> Of further interest is the fact that we found high correlations between our measures of procedural justice and trust/confidence.<sup>42</sup>

Based on an extensive literature indicating that Blacks, in particular, have less trust and confidence in the courts than other groups in the U.S., especially Whites,<sup>43</sup> we had hypothesized that there would be significant race/ethnicity differences. As shown in Table 6, our results revealed significant differences for dispositional trust<sup>44</sup> and on the two trust scales, Total

**TABLE 6**  
**TRUST/CONFIDENCE AND PROCEDURAL-JUSTICE**  
**SCALE MEANS BY RACE/ETHNICITY**

Scale	Whites		Blacks		Hispanic		F	Sig.
	Mean	SD	Mean	SD	Mean	SD		
Trust in the Courts	3.26 <sup>a</sup>	0.84	2.79 <sup>b</sup>	0.91	3.24 <sup>a,b</sup>	0.87	4.34	.014
Total Institutional Confidence	3.20 <sup>a</sup>	0.70	2.84 <sup>b</sup>	0.81	3.15 <sup>a,b</sup>	0.66	3.71	.025
Dispositional Trust	2.90 <sup>a</sup>	0.80	2.34 <sup>b</sup>	1.02	2.44 <sup>b</sup>	0.89	9.20	.000
General Procedural Justice	3.35	1.04	3.13	1.31	2.99	0.98	0.23	.795
Specific Procedural Justice	3.47	1.04	3.38	1.13	3.35	1.03	1.34	.264

Note. Within a row, means with different superscripts are significantly different,  $p < .05$ .

38.  $M = 3.53$  versus  $3.23$ ,  $F(1,438) = 6.61$ ,  $p = .01$ ,  $\eta_p^2 = .02$ .

39.  $M = 3.24$  versus  $3.02$ ,  $F(1,445) = 7.82$ ,  $p = .005$ ,  $\eta_p^2 = .02$ .

40.  $M = 3.30$  versus  $3.04$ ,  $F(1,441) = 7.78$ ,  $p = .006$ ,  $\eta_p^2 = .02$ .

41.  $M = 3.48$  versus  $3.20$ ,  $F(1,444) = 5.984$ ,  $p = .015$ ,  $\eta_p^2 = .01$ .

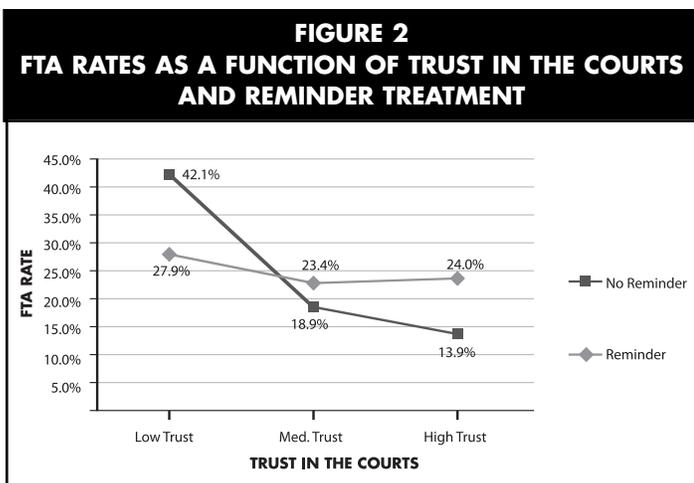
42. See BORNSTEIN, TOMKINS, & NEELEY, *supra* note 3, at 19-21.

43. E.g., Richard R. W. Brooks & Haekyung Jeon-Slaughter, *Race, Income and Perceptions of the U.S. Court System*, 19 BEHAV. SCI. & L. 249 (2001); David B. Rottman & Alan J. Tomkins, *Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges*, CT. REV., Fall 1999, at 24; Tom R. Tyler, *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want From the Law and Legal Institutions?*, 19 BEHAV. SCI. & L. 213 (2001). See generally NAT'L CTR. ST. CTS., *supra* note 8 (nationwide survey of public trust and confidence in the courts, sufficiently large to allow breakdown of the data by race/ethnicity).

44.  $F(2,401) = 9.20$ ,  $p < .001$ ,  $\eta_p^2 = .04$ , Whites greater than both Blacks and Hispanics.

Institutional Confidence<sup>45</sup> and Trust in the Courts.<sup>46</sup> We tested for, but did not find, a race effect for procedural justice.

We also tested for a more complicated relationship between those *lower* in trust and the impact of a postcard reminder.<sup>47</sup> It was the case that higher levels of trust in the courts were associated with a greater probability of appearing.<sup>48</sup> Yet the reminder made a difference, significantly reducing the FTA rate for those in our sample with the lowest trust (but not for the medium- or high-trust categories—see Figure 2). Put another way, the reminder eliminated differences in FTA rates as a function of degree of trust in the courts.



Finally, we asked the defendants for the reasons they did or did not appear. The primary reasons for appearing were to avoid additional sanctions (an FTA offense, additional penalties) or because of a feeling that the law should be obeyed. For those defendants who did not appear, scheduling issues and work conflicts were rated as the primary reasons for non-appearance, followed by transportation issues. Overall, however, those defendants who did not appear indicated they were influenced less by the reasons they gave for not appearing than those who appeared.

#### 4. Benefit-Cost Analysis<sup>49</sup>

We conducted an analysis of the benefits associated with the postcard reminders, compared to the costs, at the county level.<sup>50</sup> Benefits were estimated by determining the labor cost

45.  $F(2,402) = 3.71, p = .025, \eta_p^2 = .02$ . Additional statistical analyses showed the significant difference was driven by the gap between Whites and Blacks rather than differences between Whites and Hispanics or between Blacks and Hispanics.

46.  $F(2,398) = 4.34, p = .014, \eta_p^2 = .02$ . Additional statistical analyses showed the significant difference was driven by the gap between Whites and Blacks rather than differences between Whites and Hispanics or between Blacks and Hispanics.

47. We used a binary logistic regression. As explained in greater detail elsewhere, we dichotomized the reminder variable (*i.e.*, any reminder vs. none), turned trust in the courts into a categorical variable (*i.e.*, low, medium, or high), and controlled for race. BORNSTEIN, TOMKINS, & NEELEY, *supra* note 3, at 21-24; Bornstein

**TABLE 7**  
**REASONS FOR APPEARANCE/NON-APPEARANCE**

REASON FOR APPEARANCE	MEAN	STD. DEV.
I wanted to avoid an additional offense (for failure to appear) on my record.	4.60	1.02
I wanted to avoid additional penalties.	4.59	.98
I felt I should obey the law.	4.38	1.05
The system depends on compliance from people like me.	3.73	1.37
I wanted to tell my side of the story.	3.16	1.62
REASON FOR NON-APPEARANCE	MEAN	STD. DEV.
I had scheduling conflicts.	2.77	1.81
I had work conflicts.	2.39	1.66
I had transportation difficulty.	2.07	1.59
I forgot about the hearing date.	1.89	1.50
I had family conflicts (e.g., childcare conflicts).	1.84	1.44
I was afraid of what the outcome would be if I went to court.	1.72	1.20

*Note.* The scale ranged from 1 (affected not at all) to 5 (affected very much). Ns ranged from 317-325 for appearers, and from 109-113 for non-appearers.

avoided by not having to detain, at a subsequent date, those defendants who had failed to appear. County-specific FTA-cost estimates were developed for the largest urban counties since they have the most misdemeanor, non-traffic offenses each year and are the three most-populous counties in Nebraska. In County A, law enforcement estimated that approximately 70% of FTA bench warrants were resolved through arrest. In County B, a judge and a law-enforcement official independently estimated the percentage of FTA bench warrants resulted in arrest at 30% and 50%, respectively. An average of these two estimates, 40%, was used in County B's per-unit arraignment, FTA-cost estimate. County C law enforcement estimated that at least 50% of FTA bench warrants resulted in arrests.

Table 8 indicates the annual and hourly salary costs of labor in Nebraska as derived from the U.S. Bureau of Labor Statistics.<sup>51</sup> Table 9 presents the range of costs associated with

et al., *supra* note 3, at 12-13.

48.  $B = 0.79, p = .008, \text{Exp}(b) = 2.21, \text{Exp}(b) \text{ CI } (1.23-3.94)$ .

49. See Rosenbaum et al., *supra* note 3, for the complete benefit-cost analysis, including more detailed explanations of the assumptions and methodologies employed.

50. Although it is the case that benefits and costs accrue to both the county and the state, using the county as the level of analysis was deemed most appropriate given that the county is the unit of government where the costs and benefits primarily and directly accrue.

51. U.S. Dep't Labor, Bureau of Labor Statistics, *Occupational Employment Statistics*, available at <http://www.bls.gov/oes/2008/may/chartbook.htm#organization>.

<b>TABLE 8 ANNUAL AND HOURLY SALARY COSTS 2008</b>		
<b>POSITION</b>	<b>NEBRASKA MEAN ANNUAL SALARY</b>	<b>NEBRASKA MEAN HOURLY COST</b>
Judge	\$125,349	\$60.26
Law Clerk	\$32,630	\$15.69
Court Clerk	\$32,140	\$15.45
Patrol Officer	\$44,020	\$21.16

<b>TABLE 9 SUMMARY OF POTENTIAL LABOR-COST SAVINGS FROM ONE FTA REDUCTION ACROSS THREE COUNTIES</b>		
<b>EVENT</b>	<b>MINIMUM</b>	<b>MAXIMUM</b>
Type of Warrant Issued:	–	–
Bench Warrant	\$15.49	\$15.49
Arrest Warrant	\$14.78	\$14.78
FTA Charge Added	\$1.05	\$3.20
Clearing Warrant from System	\$4.70	\$4.70
Arrest for Outstanding Warrant and Booking Processing	\$18.51	\$32.40
Bond Processing	\$2.50	\$2.86
Jail (Cost/Inmate for 24 hrs)	\$60.00	\$85.00
<b>Total Cost</b>	<b>\$49.41</b>	<b>\$80.10</b>

an FTA. Although there are variations in costs across counties, the procedures used in the wake of a defendant's failure to appear are similar across counties.<sup>52</sup> Likewise, although there are some labor cost differences across counties, we used constant labor-cost estimates for all the counties in the study. There were differences across counties in the likelihood of an FTA incident; thus, we adjusted the expected benefit of one FTA reduction for each county for the benefit-cost analysis. As we described elsewhere:

As a proxy for jail utilization in all three counties, each arrested defendant who does not post bond spends an estimated .75 jail days waiting for arraignment. The figure for the value of estimated jail utilization for each arraignment FTA is thus the county FTA arrest percentage multiplied by the percentage that do not post bond multiplied by 0.75. The three largest counties are similar in that bench warrants are issued when defendants fail to appear for arraignment. In the cost estimates of all three counties, the estimated rate of unresolved warrants used is five percent. These figures are conservative estimates based on interviews with county officials.<sup>53</sup>

52. Rosenbaum et al., *supra* note 3, at 180-182 and summarized at 181, Fig. 2.

53. *Id.* at 183.

54. The Reminder-Only postcard cost \$0.27 in postage, whereas the

<b>TABLE 10 AVERAGE COST PER POSTCARD</b>			
	<b>TYPE OF POSTCARD</b>		
	<b>REMINDER-ONLY</b>	<b>REMINDER-SANCTION &amp; REMINDER-COMBINED</b>	<b>WEIGHTED AVERAGE</b>
Labor	\$1.15	\$1.15	\$1.15
Materials	\$0.04	\$0.04	\$0.04
Postage	\$0.27	\$0.49	\$0.42
<b>Total</b>	<b>\$1.46</b>	<b>\$1.68</b>	<b>\$1.61</b>

As Table 9 shows, the savings from each reduction in a failure to appear ranges between \$49.91 and \$80.10 across the three counties.

We also determined cost estimates for the entire reminder-postcard process. Using an estimate of 335 labor hours for the reminder-postcard process (including identifying cases, addressing the postcards, and then printing and mailing them), we came up with a labor cost of \$1.15 per postcard. Costs for each of the postcards, however, were estimated independently because they had differential impacts on FTA-reduction rates, and because there were different postage costs associated with mailing the two postcards with substantive content.<sup>54</sup> A cost estimate of \$1.46 was determined for the Reminder-Only postcard and \$1.68 for the Reminder-Sanctions and Reminder-Combined postcards, with a weighted-average cost per postcard of \$1.61 (Table 10). We also estimated that if the identification of cases was automated rather than manualized as in our project, the costs would decrease to \$.69 for the Reminder-Only postcard and \$.91 for the other two postcards, with a weighted-average cost of \$.84 per postcard.<sup>55</sup>

Given that not all postcards were deliverable and that there was not a one-to-one correspondence between postcards mailed and reductions in failures to appear, the cost of each failure to appear in terms of postcards mailed was determined. These costs were \$55.81 for the combined Reminder-Sanctions and Reminder-Combined postcards and \$97.99 for Reminder-Only postcards. The difference was driven by 1) the different effectiveness of each treatment in reducing FTA rates, and 2) the different costs in mailing the varying types of postcards. The next step in the benefit-cost assessment was to assess the benefit of an FTA reduction relative to its cost, which effectively determines the net benefit of postcard reminders; that is, the benefit of a one-unit reduction in FTA minus the cost of a one-unit reduction under the different postcard options, calculated on a per-unit and aggregate basis. Table 11 shows that the net benefit of an FTA reduction for three of the counties<sup>56</sup> differs as a function of which postcard is used. It also changes depending on whether automation can be used. Thus, if automation were used, the net benefit from using the Reminder-Sanctions and Reminder-Combined postcards is \$50

postage cost for the other two was \$0.49 each.

55. Rosenbaum et al., *supra* note 3, at 184-186.

56. To preserve the confidentiality of the jurisdictions involved, we have not specifically identified the three counties.

**TABLE 11  
NET BENEFIT OF A 1-UNIT FTA REDUCTION**

COUNTY	Benefit from Preventing One FTA	COSTS TO PREVENT ONE FTA WITHOUT AUTOMATION			COSTS TO PREVENT ONE FTA WITH AUTOMATION		
		Reminder Only	Reminder Sanctions & Reminder Combined	All 3 Weighted	Reminder Only	Reminder Sanctions & Reminder Combined	All 3 Postcards Weighted
		\$97.99	\$55.81	\$64.08	\$46.39	\$30.28	\$33.49
<b>A</b>	\$80.10	(\$17.89)	\$24.29	\$16.02	\$33.71	\$49.82	\$46.61
<b>B</b>	\$49.91	(\$48.08)	(\$5.90)	(\$14.17)	\$3.51	\$19.63	\$16.42
<b>C</b>	\$58.72	(\$39.27)	\$2.91	(\$5.36)	\$12.33	\$28.44	\$25.23

**TABLE 12  
AGGREGATE IMPACT OF POSTCARD-REMINDER SYSTEM**

COUNTY	2009 Misdemeanor Non-Traffic Offenses*	Estimated Non-Waiverable Offenses (33%)	Estimated FTA Reduction with Rem. Sanctions & Rem. Combined (3.5%)	Aggregate Net Benefit Without Automation	Aggregate Net Benefit With Automation
<b>C</b>	33,884	11,182	336	\$977	\$9,556
<b>A</b>	22,991	7,587	228	\$5,537	\$11,358
<b>B</b>	8,810	2,907	87	(\$516)	\$1,715
<b>3 County Total</b>	65,685	21,676	651	\$5,999	\$22,628

\* Nebraska Judicial Branch, 2009 Annual Caseload Report, available at <http://www.supremecourt.ne.gov/sites/supremecourt.ne.gov/files/reports/courts/cc-caseload-09.pdf>.

per FTA reduction in County A, almost \$30 in County C, and nearly \$20 in County B.

The aggregate benefit, of course, varies as a function of case numbers and case types. In Table 12, using numbers of misdemeanor offenses in 2009 for each of the focus counties, we estimate the number of citations eligible to receive postcard reminders,<sup>57</sup> and the benefits that would be accrued from the positive impacts of the Reminder-Sanctions and Reminder-Combined postcards. Without automation, the benefits range from 228 fewer FTAs at an aggregate net benefit of \$5,537 in County A to 87 fewer FTAs at a net cost of \$516 in County C. With automation, the benefits from reductions in FTAs increase to over \$11,000 in County A and generate a positive, net benefit of \$1,715 in County B.

### III. CONCLUSIONS

In this experimental study, we asked whether postcard reminders would decrease failure-to-appear rates for misdemeanants in Nebraska, and if so, what would be their cost-effectiveness. We found that postcard reminders did, indeed, reduce failure-to-appear rates. Based on procedural-justice and trust/confidence theories, we predicted that failure-to-appear rates would decrease for all defendants if they were reminded of the court-hearing date and time using language that included components of procedural justice. Although postcard reminders did decrease FTA significantly, the postcard with the procedural-justice information did not differentially decrease FTA rates compared to the postcard with only sanctions infor-

mation. The two substantive reminder postcards, however, were generally superior to the simple reminder postcard. FTA rates also varied as a function of geography (urban versus rural) and the nature and number of the offenses.

We also had predicted, consistent with theories of the impacts of procedural justice and trust and confidence, that procedural-justice and trust/confidence perceptions would be related to failure to appear. Our data revealed some support for procedural justice and even greater support for trust and confidence, in that defendants scoring higher on these constructs were more likely to appear. We also found effects for race/ethnicity related to trust/confidence perceptions.

Our more elaborate benefit-cost analysis allowed us to learn that while postcards were cost-effective overall, they were not so in all cases. Moreover, projections indicated that more benefits would accrue if the reminder process could be automated.

Thus, our experimental approach to examining a court reform allowed us to obtain specific insights into what worked, what the circumstances were for what worked versus what did not, and why things worked. Moreover, by conducting an actual benefit-cost analysis, we were able to show more precisely what costs versus benefits were associated with the reforms. This approach to assessing potential administrative changes to court procedures provides insights that allow for more strategic decision making than simply implementing a reform and/or globally projecting cost-savings.<sup>58</sup> In fiscally challenging times, it is worthwhile to know whether incurring the costs for more expensive interventions such as phone calls

57. There were 18,581 offenses, of which 6,149 were non-waiverable.  
58. Our approach was similar to the approach taken in Jefferson County, where different variations were assessed, systematically

and using random assignment to conditions. Schnacke, Jones, & Wilderman, *supra* note 5.

makes sense when automated postcards might bring more bang for the buck.<sup>59</sup>

There might be a range of solutions that could be used to increase court appearances for misdemeanants.<sup>60</sup> In the end, research in general, and experimentation in particular, along with systematic evaluation, should guide court reforms and help identify justice policies and practices that protect public safety without incurring unnecessary costs.<sup>61</sup>



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59. Other options exist besides calling defendants or mailing them postcard reminders. For example, Nebraska's 11th judicial district, in collaboration with the National Center for State Courts, is currently piloting whether text-message reminders for probation/restitution payments will increase compliance with court-ordered payments. This same free text-messaging technology, which uses the Administrative Office's database, could be used to implement court reminders.

60. It certainly makes sense to avoid unnecessary incarcerations, so the practice of citing defendants for misdemeanors and expecting them to appear is good policy. See, e.g., <http://www.pretrial.org/> (arguing for pretrial practices that assure safety without compris-

ing defendants' liberty interests).

61. We realize we are preaching to the choir: Members of the American Judges Association have long used experimental techniques to assess court reforms. See, e.g., Deborah A. Eckberg & Marcy R. Podkopacz, *Family Court Fairness Study* (Fourth Jud. District Res. Division, Hennepin Co., MN) (2004), available at [http://www.mncourts.gov/Documents/4/Public/Research/Family\\_Court\\_Fairness\\_Report\\_Final\\_\(2004\).pdf](http://www.mncourts.gov/Documents/4/Public/Research/Family_Court_Fairness_Report_Final_(2004).pdf) (past-AJA President Kevin Burke's court's experimental study of the use of messaging decisions to defendants, based on procedural-justice principles, as part of domestic-violence case).

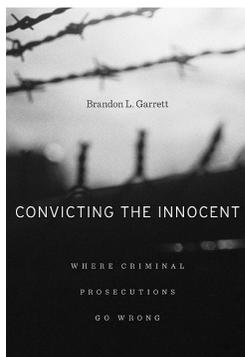


# The Resource Page



## NEW BOOKS

BRANDON L. GARRETT, *CONVICING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG*. Harvard University Press, 2011. (\$18.95 paperback; \$39.95 hardcover).



Surely no judge wants to have an innocent person convicted of a crime he or she didn't commit. Yet with so many criminal cases being tried, any judge who thinks about it knows there must be some errors along the way. After all, no human process has a 0% error rate. The fact that there must be some errors can become just an understood background concept for an experienced judge.

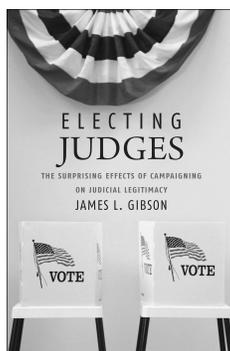
But the advent of DNA exonerations has turned this abstract understanding into a concrete fact. And University of Virginia law professor Brandon Garrett has carefully studied the first 250 DNA-exoneration cases to see what went wrong. Every judge who handles criminal cases or cares about our justice system should read the book. (And, yes, we do hope that this description covers all judges.)

In three-fourths of the cases, there was at least one eyewitness who testified and at least some forensic evidence. In one-fifth there was an informant and in 16% a confession. Yet all of these are proven exoneration cases. Garrett reviews ways in which eyewitness testimony was flawed, how false confessions were obtained, and why much of the forensic testimony was problematic. He also shows how little help was available in these cases from judicial review: in 10% of the cases, appellate

courts labeled the evidence of guilt "overwhelming," and many times—so far as one could tell from the record—the review was at best cursory.

Garrett concludes with suggested reforms; many of them have been suggested before, like recording police interrogations, better lineup procedures, better supervision of crime labs, and greater scrutiny of jailhouse informants. But the value of Garrett's book lies not in the list of proposed remedies but in its full review of 250 known exoneration cases. The flaws Garrett details from these cases led to decades in prison for innocent defendants. It's worth spending some time considering those details.

JAMES L. GIBSON, *ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY*. The University of Chicago Press, 2012. 226 pp. (\$27.50 paperback; \$85.00 cloth).



Professor James L. Gibson, a political scientist at Washington University in St. Louis, is one of the leading scholars on judicial politics. This book provides the details for a presentation Professor Gibson made at the American Judges Association's 2012 midyear meeting, which focused on judicial elections.

The book is based on opinion surveys Gibson conducted of a randomly selected group of Kentucky residents before, during, and after the 2006 election, at which four state supreme court justices were elected in contested, nonpartisan races. In one race, the final margin was 52% to 48%; in the others, the losing candidate won from 36% to 40% of the vote. Television advertising was frequent, and Gibson tracked whether each ad was primarily an

attack ad on the opponent, an ad contrasting the two candidates, or an ad promoting one candidate.

What Gibson found was that diffuse, institutional support for the Kentucky Supreme Court was higher after the election than before it. While negative ads had negative effects on support for the judiciary, that negative effect was less than the overall positive impact of the election process. Gibson discusses these and other conclusions in detail.

There are lots of potential caveats to this study—it's just one election, results under Kentucky's election system (non-partisan races by district) may not apply to other types of elections, and other selection systems might produce even better results or have advantages other than increased public support for a state's highest court. But the study presents data suggesting that judicial elections—despite attack ads and negative campaigning—can be a net contributor to greater public support for the courts. In a field with limited data, Professor Gibson's study is worth a look.



## ARTICLES OF NOTE

**Special Issue: Lawyers, Judges, and Money: Evolving Legal Issues Surrounding Spending on Judicial Elections**  
60 *Drake Law Review* No. 3 (Spring 2012 issue)  
<http://students.law.drake.edu/lawReview/?pageID=lrCurrentPrintIssue>

The *Drake Law Review*, in conjunction with the American Judicature Society, has released an issue devoted to the impact of money on judicial elections. The issue reflects a symposium held in February 2012; it contains seven separate pieces and a foreword by former U.S. Supreme Court Justice Sandra Day O'Connor. The issue includes a discussion of the impact of *Citizens United* on judicial elections, review of spending in retention elections in Illinois and Iowa in 2010, and other issues related to judicial elections.