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Court Review

Volume 49, Issue 3

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

Volume 49, Issue 3

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EDITOR'S NOTE

This is the second of two *Court Review* issues devoted to judicial decision making. The prior issue began with the American Judges Association's 2012 white paper on judicial decision making, which reviewed the science of decision making, some common problems that judges may have in processing information, and some suggestions about how judges might become more "mindful." The issue also contained an article considering the emotions judges deal with in doing their jobs, along with strategies judges might use to better regulate their emotions. And the issue included an article about how judges use heuristics (cognitive shortcuts or rules of thumb), often without conscious thought, and how that may led to errors.

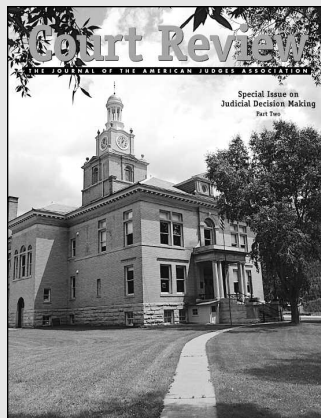
This issue begins with a question that judges face in courtrooms daily: Can we tell the difference between the truth and a lie? Richard Schauffler, Director of Research Services at the National Center for State Courts, and Minneapolis Judge Kevin Burke explore this question from the judge's perspective. They review the literature on whether we can be trained to tell who's lying (the short answer is no) and then discuss what judges might do to perform better. Schauffler and Burke conclude with three specific suggestions for judges.

Our second article looks at how judges use—and control—the testimony of expert witnesses. Professor Andrew Jurs surveyed 118 state-court judges in Iowa, Nebraska, and North Dakota. He looked at items such as whether judges asked their own questions of experts and, if so, on what topics; whether judges appointed independent experts and, if so, for what reasons; and what reasons judges might have for not appointing independent experts. We think you may find it interesting to compare your experiences in handling experts with those reflected in the survey.

Our final two articles consider problems that arise when evaluating judicial decision making. Many states have formal judicial-performance evaluation programs, and concerns have been expressed that these programs may foster racial or gender bias in their use of opinion surveys on judicial performance. In our third article, researchers Jennifer Elek and David Rottman discuss ways in which the chance for bias can be reduced when using surveys about judicial performance. Elek and Rottman discuss work that has been done to revise surveys used to evaluate Illinois judges—and the finding that the initial use of the revised surveys has shown no systematic differences based on a judge's gender.

In our final article, professors Theodore Eisenberg, Talia Fisher, and Issi Rosen-Zvi consider differences between the actual performance of judges and what the public—or the bar—may perceive. In a study of the Israeli Supreme Court, the authors found that media reports in a small number of cases tend to drive the opinions about each justice's performance, while a review of their record in all cases provides a different picture. The authors suggest that evaluations of judicial performance should cover as much of the judge's work as possible.

We hope you'll enjoy the issue. Our next issue will include our annual review of the past year's United States Supreme Court cases.—Steve Leben & Alan Tomkins



Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 158 of this issue. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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Cover photo, Mary S. Watkins (maryswatkins@mac.com). The cover photo is of the San Juan County Courthouse in Silverton, Colorado. San Juan County is the least populous county in Colorado, with only 699 residents as of the 2010 U.S. Census. Silverton is the last town standing among what were once 16 thriving mining communities. The county's website says it has the highest mean elevation of any county in the United States, at 11,240 feet; Silverton sits at 9,318 feet.

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President's Column

Toni Manning Higginbotham

LAST CALL FOR HAWAII!



Don't miss the chance to attend the American Judges Association's 2013 Annual Educational Conference on "The Big Island" of

Hawaii. We are meeting September 22-27 at the luxurious Fairmont Orchid. The cut-off date for reservations is August 30 and the AJA block is close to full so make your reservations TODAY! Every year I look forward to the AJA conference, and this year is no exception. The educational sessions promise to be of great interest to judges from all jurisdiction levels, and the conference provides the perfect opportunity to talk with judges from across the United States and Canada about the concerns and problems we all face. You may meet someone who already has dealt with a situation you currently are confronting who can provide valuable insight and ideas — and also become a friend and contact. Please take a few minutes to read the conference brochure (<http://goo.gl/SklRK>), and then register as soon as possible for this great conference.

Toni Manning Higginbotham, President

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Who Are You Going to Believe?

Richard Schauffler & Kevin S. Burke

Although most of the time people tell the truth, people do lie. On a bad day, those working in the justice system get lied to all day long. Some days the lies are harmless, even unnecessary, and they amuse and entertain. Some of the lies are a product of self-deception: “I can quit doing drugs any time I want.” Some statements are not lies but honest mistakes: “I’m sure that is the guy who robbed me.” But on other days the lies are despicable and dangerous, and they must be exposed.

The question is: Can we tell the difference between the truth and the lie? Many of us would like to believe we can rely on our professional and personal instincts to guide us, or perhaps even on some professional training we have received. Often we rely on a process we cannot precisely describe, but one in which we have confidence nonetheless. We just know. Or do we?

There have been over 300 post-conviction DNA exoneration cases in the United States. These cases are dramatic proof that the ability of judges to determine the truth remains suspect. Eighteen people had been sentenced to death before DNA proved their innocence and led to their release. The average sentence served by DNA exonerees before their release is about 13 years.¹ Exonerations have been won in 35 states and Washington, D.C. And in every case in which DNA led to exoneration, the courts were wrong in determining who was lying. The cost of that mistake could have killed someone and is a stark reminder of just how weak we are in determining who is lying.

Although it would be nice to have DNA to answer whether someone stopped at a stop sign or did a California roll through it, traffic cases will never be susceptible to DNA analysis. The admonition “you always believe the police officer” may work for a few judges or, more likely, may get a laugh among judges at a cocktail party, but the fact remains that every day courts make determinations about credibility and rarely is there serious discussion about how that happens or how to improve the odds of getting it right.

A MACHINE CAPABLE OF LIE DETECTION?

In the 1950s, one of the most popular new developments in applying science to matters of justice was the polygraph, known by many as the “lie detector.” The device was thought to determine conclusively if a person was lying by measuring several physiological indicators such as pulse, blood pressure,

galvanic skin response, and respiration. By having the subject answer baseline questions and comparing measurements on these indicators to measurements taken during responses to questions related to a crime, investigators believed they were able to accurately determine whether a person (e.g., a suspect or prospective employee) was telling the truth or not.

Television talk-show host Dick Cavett once had F. Lee Bailey on his show to demonstrate how the polygraph worked.² Bailey was a strong proponent of the polygraph. Cavett asked Bailey, “If lie detectors work, how come they’re not allowed in court cases?” Bailey responded, “They do work . . . I use them all the time.” Cavett challenged Bailey to prove it. A few weeks later, Bailey brought a state-of-the-art polygraph to the show, complete with a qualified operator of the machine. Cavett was questioned, and at the end of the questioning, the polygraph examiner scanned the results. The examiner was to his field what Henry Kissinger is to the field of foreign affairs: an expert with a very pronounced German accent. According to Cavett, the examiner began to noticeably sweat. The examiner said to Bailey, “It didn’t work.” There, on national television, the lie detector could not provide a definitive answer as to whether a person had lied.³

In *United States v. Scheffer*, the United States Supreme Court ruled that juries could be excessively swayed by the testimony of polygraph experts. The opinion states:

Unlike other expert witnesses who testify about factual matters outside the jurors’ knowledge, such as the analysis of fingerprints, ballistics, or DNA found at a crime scene, a polygraph expert can supply the jury only with another opinion, in addition to its own, about whether the witness was telling the truth. Jurisdictions, in promulgating rules of evidence, may legitimately be concerned about the risk that juries will give excessive weight to the opinions of a polygrapher, clothed as they are in scientific expertise and at times offering, as in respondent’s case, a conclusion about the ultimate issue in the trial. Such jurisdictions may legitimately determine that the aura of infallibility attending polygraph evidence can lead jurors to abandon their duty to assess credibility and guilt.⁴

In 2003, the National Academy of Sciences concluded that the evidence to support the reliability of the polygraph was “unreliable, unscientific and biased.”⁵ But despite being dis-

The authors wish to acknowledge the legal research assistance and manuscript review of Jordan Bowman, William & Mary College of Law, Class of 2014; Tove Kooda, University of St. Thomas School of Law, Class of 2005; and Annie Balghiti, University of Minnesota Law School, Class of 2013.

Footnotes

1. See <http://www.innocenceproject.org/about/Mission-Statement.php>.

2. Dick Cavett, *Liar, Liar, Pants Aflame*, NY TIMES OPINIONATOR, May 2, 2008, <http://opinionator.blogs.nytimes.com/2008/05/02/liar-liar-pants-aflame/>.

3. *Id.*

4. *United States v. Scheffer*, 523 U.S. 303, 313-314 (1998).

5. Board on Behavioral, Cognitive, and Sensory Sciences (BBCSS) and Committee on National Statistics (CNSTAT), *THE POLYGRAPH AND LIE DETECTION* 212 (2003).

credited, the polygraph remains in widespread use by law enforcement and prosecutors. Polarization of views on this issue is reflected in the fact that 31 states bar the admission of polygraph evidence per se.⁶ Eighteen states admit polygraph results at trial if the parties stipulate to its use before the administration of the test.⁷ Only New Mexico allows for the routine admission of polygraph evidence.⁸ The admissibility of polygraph results in Federal Court varies by circuit.⁹

Because just about every private company uses a computer, the mail, or a telephone system to send messages to someone in another state, the federal Employee Polygraph Protection Act of 1988 has a broad application.¹⁰ This Act prohibits nearly all use of lie detectors in connection with employment. It is illegal for all businesses covered by the Act to require or even suggest that any employee or job applicant submit to a lie-detector test. If a business dismisses, disciplines, discriminates against, or threatens to take action against any employee or job applicant who refuses to take a lie-detector test, there are sanctions and civil liability for the business.

The latest version of the lie-detector machine is the fMRI, or functional magnetic resonance imaging, developed in the 1990s. The fMRI is similar to the original polygraph machine: the telling of a lie creates a measureable physiological

response, in this case increased blood oxygenation and blood flow to the prefrontal and parietal regions of the brain. Images can be created that show this brain activity. This work was highlighted at a recent judicial seminar hosted by the Ameri-

can Association for the Advancement of Science and summarized in the National Judicial College publication *Case in Point*.¹¹ Edward Lempinen described the claims of the vendor selling this “science” at the seminar and recounted the critique of a university neuroscientist who noted among other concerns that the definition of when the brain is “activated” is arbitrary. The vendor candidly admitted that “[t]here will be mistakes. We will misclassify people.” But he went on to say that this was not a big problem, since “[t]he judicial system puts people away based on ambiguous evidence all the time.”

The next generation of lie-detector machine is being developed by Customs and Border Protection, with additional funding from the military. This machine combines a microphone to record the person’s voice, a near-infrared camera to record pupil

dilation and glance location, and a high-definition video camera to record body movements; in addition to recording responses, the kiosk also functions as the interrogator asking the questions. This machine is being field tested at the United States-Mexico border, although budget reductions have slowed

There is no particular formula for evaluating the truthfulness and accuracy of another person’s statements or testimony. You bring to this process all of your varied experiences. In life, you frequently decide the truthfulness and accuracy of statements made to you by other people. The same factors used to make those decisions, should be used when evaluating the testimony.

New York State Criminal Jury Instructions 2d, Sample Preliminary Jury Instructions, at 22, available at http://www.nycourts.gov/judges/cji/5-SampleCharges/CJ12d.Preliminary_Instructions.pdf

6. See *Van Meter v. State*, 743 P.2d 385, 387-88 (Alaska Ct. App. 1987); *People v. Anderson*, 637 P.2d 354, 355, 358 (Colo. 1981); *State v. Porter*, 698 A.2d 739, 758-59 (Conn. 1997); *State v. Antone*, 615 P.2d 101, 109 (Haw. 1980); *People v. Gard*, 632 N.E.2d 1026, 1032 (Ill. 1994); *Morton v. Commonwealth*, 817 S.W.2d 218, 222 (Ky. 1991); *Evans v. DeRidder Municipal Fire*, 815 So. 2d 61, 67 (La. 2002); *Commonwealth v. Mendes*, 547 N.E.2d 35 (Mass. 1989); *State v. Hawkins*, 604 A.2d 489, 492 (Md. 1992); *State v. Harnish*, 560 A.2d 5, 8 (Me. 1989); *People v. Lagrou*, No. 207,166, 1999 WL 33434265, at *2 (Mich. Ct. App. Oct. 22, 1999); *Ledin v. State*, No. C7-97-876, 1997 WL 757156, at *1 (Minn. Ct. App. Dec. 9, 1997); *Carr v. State*, 655 So. 2d 824, 836 (Miss. 1995); *State v. Burch*, 939 S.W.2d 525, 528 (Mo. Ct. App. 1997); *State v. Staat*, 811 P.2d 1261, 1261 (Mont. 1991); *State v. Allen*, 560 N.W.2d 829, 842 (Neb. 1997); *State v. Ober*, 493 A.2d 493, 493 (N.H. 1985); *People v. Leone*, 255 N.E.2d 696, 700 (N.Y. 1969); *State v. Grier*, 300 S.E.2d 351, 360-61 (N.C. 1983); *Fulton v. State*, 541 P.2d 871, 872 (Okla. Crim. App. 1975); *State v. Lyon*, 744 P.2d 231, 231-33 (Or. 1987); *Commonwealth v. Brockington*, 455 A.2d 627, 629 (Pa. 1983); *State v. Werner*, 851 A.2d 1093, 1104 (R.I. 2004); *State v. Wright*, 471 S.E.2d 700, 701-02 (S.C. 1996); *State v. Muetze*, 368 N.W.2d 575, 588 (S.D. 1985); *State v. Campbell*, 904 S.W.2d 608, 614-15 (Tenn. Crim. App. 1995); *Castillo v. State*, 739 S.W.2d 280, 293 (Tex. Crim. App. 1987); *State v. Hamlin*, 499 A.2d 45, 53-54 (Vt. 1985); *Taylor v.*

Commonwealth, 348 S.E.2d 36, 36-38 (Va. Ct. App. 1986); *State v. Frazier*, 252 S.E.2d 39, 49 (W. Va. 1979); *State v. Dean*, 307 N.W.2d 628, 653 (Wis. 1981).

7. See Cal. Evid. Code §351.1(a) (West, Westlaw through ch. 11 of 2012 Reg. Sess. and all propositions on the 6/5/2012 ballot); *Ex parte Clements*, 447 So.2d 695, 697-98 (Ala. 1984); *State v. Marquez*, 558 P.2d 692, 696 (Ariz. 1976); *Wingfield v. State*, 796 S.W.2d 574, 576 (Ark. 1990); *Melvin v. State*, 606 A.2d 69, 71 (Del. 1992); *Codie v. State*, 313 So. 2d 754, 756 (Fla. 1975); *Forehand v. State*, 477 S.E.2d 560, 562 (Ga. 1996); *State v. Fain*, 774 P.2d 252, 256 (Idaho 1989); *Sanchez v. State*, 675 N.E.2d 306, 308 (Ind. 1996); *State v. Losee*, 354 N.W.2d 239, 242 (Iowa 1984); *State v. Wakefield*, 977 P.2d 941, 954 (Kan. 1999); *State v. Baskerville*, 374 A.2d 441, 442 (N.J. 1977); *Kazalyn v. State*, 825 P.2d 578, 582 (Nev. 1992); *Bismark v. Berger*, 465 N.W.2d 480, 481 (N.D. Ct. App. 1991); *State v. Brand*, No. C-990548, 2000 WL 299497, at *1 (Ohio Ct. App. 2000); *State v. Crosby*, 927 P.2d 638, 642 (Utah 1996); *State v. Gregory*, 910 P.2d 505, 508 (Wash. 1996); *Schmunk v. State*, 714 P.2d 724, 731 (Wyo. 1986).

8. *State v. Sanders*, 117 N.M. 452, 459, 872 P.2d 870 (1994).

9. See 140 A.L.R. Fed. 525 (originally published in 1997).

10. Employee Polygraph Protection Act of 1988, 29 U.S.C. § 2001.

11. Edward W. Lempinen, *Exploring the Impact of Neuroscience on Justice*, CASE IN POINT, Spring 2008, at 22-23, available at http://www.judges.org/pdf/caseinpoint_spring08.pdf.

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its deployment.¹² In an attempt to recognize and overcome the fact that, once again, the machine is simply registering physiological responses that are supposed to prove lying, the inventors have received funding to study how people might defeat the ability of the machine to read them.

In the 1700s, a German doctor believed that the shape and contours of the human skull could predict a person's character and therefore criminality. For many years, some believed this new "science" of phrenology would revolutionize criminal law, but today the idea is totally discredited. Similarly, the best scientific evidence today is clear: the polygraph should be tossed to the junkyard of pseudoscience like phrenology. No one can predict whether some new machine may be invented. But today all of the machines are based on a faulty premise that, in each and every case, telling a lie will provoke a physiological response in all people. That link is simply not true. Some people can lie without any physiological response; indeed Soviet spies were trained to lie without any physiological response, and it worked. The problem is not the polygraph machine or the fMRI or the interrogator kiosk, it is the premise upon which they are based. While it is understandable that judges and others want some forensic machine to help, there is simply no machine that can determine if a witness is lying, or conversely, if a person is telling the truth. All these technologies generate unacceptably high rates of false positives—that is, results that suggest truthful people are lying when they are not.

CAN BEHAVIORAL SCIENCE TEACH JUDGES TO DETECT LIES?

The drive to develop a science of lie detection extends to the social sciences as well. The earliest versions of the behavioral-science approach argued that certain eye behaviors, such as gaze aversion and shifting eyes left or right, could successfully determine deception. A review of evaluations of this claim found that "[23] out of 24 peer-reviewed studies published in scientific journals reporting experiments on eye behavior as an indicator of lying have rejected this hypothesis. No scientific evidence exists to suggest that eye behavior or gaze aversion can gauge truthfulness reliably."¹³ And yet there remain the popular myths that timing and duration of speech are off when someone is lying. Some claim people touch their nose more when lying and a great deal less when telling the truth. Others claim a liar breathes faster, displaying short breaths followed by one deep breath. And there is the popular myth that the mouth may appear dry (causing much throat clearing). The problem with these myths is they just are not true. So placing

a water pitcher in front of a witness and waiting for signs of dry mouth will not advance the quest to find the truth. But it is a nice thing to do for the witness.

A more recent version of the behavioral-science approach is based on the recognition of microexpressions—brief involuntary facial expressions generated by emotions. This training is packaged and sold online as "products" with names like "Micro Expression Training Tool" and "Subtle Expression Training Tool," with the tag line "Accept No Substitutes."¹⁴ One website boasts that their "deception expert . . . teaches scientifically proven methods of lie detecting These 'state of the art' methods are what federal agents, law enforcement and other professionals are taught when they seek the highest accuracy rates."¹⁵

Although not a single study supports the idea that those taking "training" to detect behavioral cues said to accompany a lie are better at determining whether a person is lying, courses continue to be taught to law enforcement, prosecutors, and judges, enticing them to "[s]ee why Government agencies, Fortune 500 companies, educational and medical professionals are using Dr. Ekman's training to enhance their ability to better 'read' people and detect truth and lies."¹⁶ Here, the claim to scientific truth is enhanced by the claim that not only is this training "scientifically proven and field tested," it is "now the basis of a new television show on FOX/SKY tv—Lie to Me—to which Dr. Paul Ekman is the Scientific Consultant."¹⁷

The same psychologists who publish academic papers in professional journals admitting that "[i]n every study reported, people have not been very accurate in judging when someone is lying"¹⁸ and "[i]t is unlikely that judging deception from demeanor will ever be sufficiently accurate to be admissible in the courtroom"¹⁹ also serve as faculty to state and local judges for the courses designed to convince them of the opposite—namely, that they can be taught to accurately detect lies.²⁰ There is nothing wrong with exploring what we know and don't know about something as central to justice as the ability to determine what is a lie, but the danger such courses potentially create is that they convince the students they have achieved expertise. This "expert effect" results in its opposite: "you become less, not more, effective than the average person, likely because of overconfidence or overblown belief in yourself."²¹

[T]here is simply no machine that can determine if a witness is lying, or conversely, if a person is telling the truth.

12. Adam Higginbotham, *Deception Is Futile When Big Brother's Lie Detector Turns Its Eyes on You*, WIREd, Jan. 17, 2013, <http://www.wired.com/threatlevel/2013/01/ff-lie-detector/>.

13. David Matsumoto et al., *Evaluating Truthfulness and Detecting Deception*, LAW ENFORCEMENT BULL., June 2011, available at http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/june_2011/school_violence (citing C.F. Bond et al., *Lie Detection Across Cultures*, 14 JOURNAL OF NONVERBAL BEHAVIOR 189-204 (1990)).

14. Dr. Paul Ekman, <http://www.ekmaninternational.com/paul-ekman-international-plc-home/training-courses/online-training.aspx>.

15. See <http://www.deceptionmanagement.com/>.

16. Ekman, *supra* note 14.

17. *Id.*

18. Paul Ekman & Maureen O'Sullivan, *Who Can Catch a Liar?*, 96 AM. PSYCHOLOGIST 913 (1991).

19. Paul Ekman, Maureen O'Sullivan & Mark G. Frank, *A Few Can Catch a Liar*, 10 PSYCHOL. SCI. 265 (1999).

20. *Id.* at 264 (reporting that a group of 84 federal judges took part in one such course).

21. Sue Russell, *Can We Detect When Someone's Lying?*, SALON, Sept. 16, 2012, www.salon.com/2012/09/16/can_we_detect_when_someones_lying.

A judge who believes he or she is a lie-detection expert is making decisions based on false criteria

Studies have shown those who have taken such courses are more likely to believe they know when someone is lying than others and to cease to adhere to the duty to examine all the evidence at hand. A judge who believes he or she is a lie-detection expert is making decisions based on false criteria invisible to other actors. Such a judge does not make explicit that he or she has made a ruling based on

interpreting the sideward glance or posture of a defendant in response to a question. Too often the jargon of a written order is “based on the demeanor of the witness.” By relying on this “training” the judge succumbs to the danger foreseen by the Supreme Court in *United States v. Scheffer*, namely abandoning the duty to evaluate all the facts, testimony, and evidence before him or her. Armed with this training, judges, like law enforcement, can succumb to confirmation bias, in which they see and hear what they want to hear based on the rules of behavior defined in the training while ignoring facts and behaviors that exist outside of that framework.

LESSONS LEARNED FROM FALSE CONFESSIONS

Perhaps no lie seems as counterintuitive as the false confession. In about 25% of DNA-exoneration cases, innocent defendants made incriminating statements, made complete confessions, or even pled guilty. If you can't rely on a confession being the truth, what can you believe? Most confessions are genuine, and people plead guilty because they are guilty. But these cases show that confessions can occasionally be a lie.

How is it that someone confesses to something he or she did not do? A study by Saul Kassin and Jennifer Perillo of John Jay College of Criminal Justice tested how bluffing affects “confessions” gained from innocent parties.²² The subjects of the study were instructed to complete a task on a computer and then were falsely accused of crashing the computer or collaborating with a colleague to improve their performance. Bluff evidence, false evidence, and unreliable witnesses were used to test their effect. In the first test, 60% of the subjects “confessed” to pressing a computer key they had been instructed to avoid when, in fact, they had not. Research has identified two sets of risk factors for false confessions: (1) dispositional vulnerabilities inherent in the suspect, such as youth, intellectual impairments, mental illness, and personality traits that foster compliance and suggestibility; and (2) situational pressures inherent in the conditions of custody and interrogation, such as excessive time, the presentation of false incriminating evi-

dence, and the use of minimization themes that imply leniency.

Studies by Dr. Robert Horselenberg of Maastricht University have similar results to the Kassin and Perillo research. Dr. Horselenberg and his fellow researchers told 83 people that they were taking part in a taste test for a supermarket chain. The top taster would win a prize such as an iPad or a set of DVDs. The volunteers were asked to try ten cans of fizzy drink and guess which was which. The labels were obscured by socks pulled up to the rim of each can, so to cheat a volunteer had only to lower the sock. The test was filmed by a hidden camera, which caught ten participants who actually did cheat. Bafflingly, though, another eight falsely confessed when accused by the experimenter.²³

In *Colorado v. Connelly*, Justice Brennan's dissent detailed the powerful impact a confession has on the outcome of a case. Justice Brennan wrote:

Our distrust for reliance on confessions is due, in part, to their decisive impact upon the adversarial process. Triers of fact accord confessions such heavy weight in their determinations that “the introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained.” No other class of evidence is so profoundly prejudicial. “Thus the decision to confess before trial amounts in effect to a waiver of the right to require the state to meet its heavy burden of proof.”²⁴

False confessions demonstrate the limitations on our ability to determine what is a lie even where it is so obvious that the “lie” is against one's self-interest. There are reforms that have or can significantly reduce the likelihood that the “confession” is in fact a lie. Some states in recent years have tried, either through legislation or court decisions, to ensure the confession is not a lie.²⁵ Videotaping confessions and changing interrogation methods are the most common reforms and have the potential to aid in differentiating lies from the truth. University of Virginia law professor Brandon Garrett, author of the 2011 book *Convicting the Innocent*, reviewed 250 cases of people who were exonerated by DNA evidence. Garrett found that suspects confessed in detail to crimes they didn't commit in 40 of those cases. None of the interrogations in those cases was recorded in its entirety. As Garrett noted, when the entire interrogation is recorded, discovering whether interrogators have provided suspects with key details of the crime is a lot easier.²⁶

LESSONS LEARNED FROM EYEWITNESS IDENTIFICATION

Eyewitness identification that is inaccurate is most likely not a lie but the product of self-deception or just an honest mistake. This is what we know about the phenomenon of eye-

22. Jennifer T. Perillo & Saul M. Kassin, *Inside Interrogation: The Lie, the Bluff, and False Confessions*, 35 LAW & HUM. BEHAV. 327-337 (2011).

23. Saskia van Bergen et al., *Memory Distrust and Acceptance of Misinformation*, 24 APPLIED COGNITIVE PSYCHOL. 885-896 (2010).

24. *Colorado v. Connelly*, 479 U.S. 157, 182 (1986) (quoting E. CLEARY, MCCORMICK ON EVIDENCE 316 (2d ed. 1972)).

25. See, e.g., *Stephan v. State*, 711 P.2d 1156 (Alaska 1985); *State v.*

Scales, 518 N.W.2d 587 (Minn. 1994). In 2003, Illinois became the first state to require by law that all police interrogations of suspects in homicide cases must be recorded. *Recording Police Interrogations: Bill Would Expand Beyond Homicide Cases*, 101 ILL. B.J. 69 (2013).

26. BRANDON GARRETT, *CONVICING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2012).

witness identification: mistakes can happen. As with false confessions, we know that reforms in police procedures can reduce the possibility of a mistake. We know at a minimum that jury instructions regarding eyewitness testimony can be improved.

Law enforcement, lawyers, judges, and psychologists have worked together to make eyewitness testimony more reliable and accurate. Although the United States Supreme Court declined to order new procedures in *Perry v. New Hampshire*,²⁷ and held that the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances, New Jersey and Oregon have introduced significant reforms on their own.²⁸ In the words of the New Jersey Supreme Court, there is a “troubling lack of reliability in eyewitness identifications.”²⁹ Could the same be said of some of our judgments regarding when a defendant or a witness is lying? And if that is so, should courts at a minimum rethink what jury instructions should say? Telling people to use the same factors you use in life sounds pretty simple; it is just that many of the factors we use are wrong—or at least challengeable.

WHAT WE CAN LEARN FROM MINDFULNESS

There is a compelling body of social and cognitive research on how people make decisions and how the brain processes information. The caveat here is that there is still much that scientists do not know, but what is known and widely accepted may improve a judge’s ability to figure out whom to believe.

Anchoring is the well-documented phenomenon that describes the process through which an individual’s estimates or comparison judgments are influenced by an initial value; information provided early in a process shapes subsequent judgments.³⁰ This can occur with judges just like anyone else. The problem if a judge anchors on a fact, or even worse, an irrelevant fact, is that anchoring can blind the judge to other evidence or an alternative view of what happened. Judgment about lying can be premature and then distorted by confirmation bias where the decision maker overly focuses on facts supporting the premature decision and ignores facts that are inconsistent with that view. One study found that criminal-law judges exposed to a high anchor responded to incriminating evidence faster than exculpatory evidence (measured by response latencies on a timed categorization test), suggesting that the anchor primed the judges to look for anchor-consistent information. The same was not true for exculpatory information. The researchers found this consistent with prior

research indicating that negative information tends to be more salient for individuals in general, and they hypothesized that judges focus on the incriminating information because they are charged with determining whether the defendant is guilty beyond a reasonable doubt.³¹ In addition, the criminal-law judges were more certain about their decisions than those who were not experts in criminal law, suggesting that “experts may mistakenly see themselves as less susceptible to biasing influences on their sentencing decisions.”³²

It is plausible that the expertise criminal-law judges had was a product of egocentricity—overconfidence in one’s abilities. Egocentricity may be the single most important lesson from mindfulness research. Simply put, overconfidence in one’s ability may be counterproductive to good decision making. While the culture of judicial decision making is weighted toward rarely expressing self-doubt, good judicial decision making—in this case, trying to determine the truth—needs to be heavily weighted toward acknowledging that this is a difficult task.

Implicit biases can also affect one’s judgment. Implicit biases are based on attitudes or stereotypes that operate below the radar.³³ As a result, individuals are not aware that implicit biases may be affecting their behaviors and decisions. Indeed, research shows that even individuals who consciously strive to be fair and objective can nonetheless be influenced by implicit biases.³⁴ The good news is that the researchers found that “when judges are aware of a need to monitor their own responses for the influence of implicit racial biases, and are motivated to suppress that bias, they appear able to do so.”³⁵

WHAT IS A JUDGE TO DO?

Forensic science has produced valuable new advances that have contributed to making the system of justice better. Those advances, however, also have revealed that sometimes faulty forensic-science analyses may have contributed to egregious errors. There are expensive polygraph machines and lie-detector apps for an iPhone—even iBodyLanguage. These apps are cheap and entertaining. However, there is no machine that can accurately detect if the defendant is telling the truth when he or she either confesses to a horrific crime or claims to have stopped at a stop sign. But the quest for the truth cannot be

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overconfidence
in one’s ability
may be
counterproductive
to good decision
making.**

27. *Perry v. New Hampshire*, 132 S. Ct. 716 (2012).

28. *State v. Lawson*, 291 P.3d 673 (Or. 2012); *State v. Henderson*, 27 A.3d 872, 877 (N.J. 2011).

29. *Henderson*, 27 A.3d at 877.

30. Pamela Casey, Kevin S. Burke & Steve Leben, *Minding the Court: Enhancing the Decision-Making Process*, 49 CT. REV. 76, 81-82 (2013).

31. Birte Englich, Thomas Mussweiler & Fritz Strack, *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts’ Judicial Decision Making*, 32 PERSONALITY & SOC. PSYCHOL.

BULL. 188 (2006)

32. *Id.* at 194.

33. See the resources provided by Harvard’s Project Implicit at <https://implicit.harvard.edu/implicit>.

34. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV., 21 (2007).

35. Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1221 (2009).

deterred by a lack of a machine (or an app for your iPhone).

The notion that whether a person is lying or telling the truth can be detected by a trained expert remains a popular one, but it is simply not supported by behavioral science. That science teaches us that behaviors claimed to prove lying are often merely expressions of stress or anxiety. An honest person, asked a question in a stressful setting, may fidget, avoid eye contact, cross his or her arms, or contradict himself or herself, none of which constitute definitive proof of lying. Conversely, a variety of instances have been documented in which spies trained themselves to provide false statements during a polygraph, and as a result they “beat” the machine and the lie is seen as truth. Habitual liars may register no behaviors that suggest deception, since dishonesty is a way of life for them.

Talking about lying might be nothing but fodder for interesting conversation were it not for the profound consequences of getting this wrong. As clarified in Daniel Kahneman’s award-winning book *Thinking, Fast and Slow*, focus requires energy to sustain slower, deliberative, and rational decision making.³⁶ Judges cannot simply throw up their hands and say, “determining who is lying cannot be done.” But they can—indeed must—improve the process of making the decision about what is a lie.

Three things can make a judge a better judicial lie detector.

1. Judges should acknowledge that the human mind can play tricks on them in determining who is lying. Egocentrism may be a term of art in psychology that is more easily understood in the context of courts as “black robe disease.” If a judge assumes that he or she has unique powers to determine who is telling the truth either because of “training” or some inherited talent, there is an increased likelihood of making a mistake.
2. Judges need to use their brains in following the testimony and evaluating inconsistencies, rather than relying on visual cues, to try to figure out what is “more probably true than not true” at trial. Even in this endeavor, though, judicial humility is really what is called for. Everyone who tells a story several times may have some inconsistencies in the retelling of the story, and yet these are not lies. Rather than jumping on one inconsistency in a witness’s testimony, judges should think. In the final analysis, that inconsistency may prove so compelling that a judge should simply not believe the testimony. But, just as juries are instructed to do, judges need to do their best to keep an open mind until they’ve heard—and carefully considered—everything before them. Judges need to ask: Am I anchoring? Did I make a premature judgment and ignore conflicting evi-

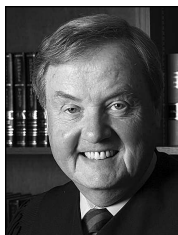
dence? Was my decision the product of confirmation bias? Is there a chance my decision about who to believe is a product of implicit bias?

3. In the final analysis, the burden of proof may well be the most important safeguard for judges. The standard in criminal cases is a high one (“beyond a reasonable doubt”), but the standard in civil cases (“more likely”) is no less compelling in its demand. While many cases are clear cut, there are many others where the facts are often murky.³⁷ As trite as it may seem, relying on the burden of proof is the most overarching and important step toward improving the ability to recognize or admit you cannot detect a lie. And that is the honest truth.



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36. DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).

37. For a judge’s perspective on this issue, see Steve Leben, *Thoughts*

on Some Potential Appellate and Trial Court Applications of Therapeutic Jurisprudence, 24 SEATTLE U. L. REV. 467, 470 (2000).



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Utilization of Rules 614 and 706 in Fact-Finding: A Recent Study of Midwest Judges

Andrew W. Jurs

Judges who are deciding contested issues in their courtrooms have an immense toolbox of potential methods at their disposal. Many of these are commonplace methods, used on a day-to-day basis for common issues in litigation. Pre-trial conferences come to mind as an example in this regard. But for those issues involving complex science, a judge has choices to make on how to perform his or her important gatekeeping role, and those gatekeeping tools may be more rarely used.

In 1993, the United States Supreme Court chose to review admissibility of scientific evidence in the landmark case of *Daubert v. Merrell Dow Pharmaceuticals*.¹ In that case, the court declared that district court judges must act as a gatekeeper for admissibility of scientific evidence, to determine the relevance and reliability of expert evidence before its admission. Further caselaw affirmed and expanded the original *Daubert* holding, ensuring trial judges had maximum flexibility to perform the gatekeeping function.²

So what tools do judges actually use to perform their gatekeeping role, and how often do they do so? During those years when the Court was scrutinizing scientific evidence in *Daubert* and other related decisions, several studies examined the issue of gatekeeping methodology in both state and federal courts. These studies relied on surveys performed before the end of the *Daubert* trilogy, at a time when many states had either recently shifted their standard to *Daubert* or had yet to do so. Considering the age of the studies, updated analysis seems timely.

In a recent survey, I asked state-court judges about their use of what I will call “advanced fact-finding techniques.” By this term, I am referring to those techniques that are often used for gatekeeping purposes with complex evidence. Specifically, I wanted to look at the methods contained within the Rules of Evidence—questions from the bench and independent experts—which had been endorsed by Justice Breyer for gatekeeping complex expert evidence.³ Considering this high-level endorsement of these methods, I reasoned that judges might be more likely to use them now that *Daubert* has taken hold. By surveying judges, I hoped to explain what is actually going on in courtrooms today.

I intended the survey to answer the following questions:

- Are judges using these techniques?
- If so, how often?
- What specifically are the judges using the techniques to do? and
- Why are some methods unlikely to be used?

In collecting answers to these questions, the survey could inform judges whether their use of techniques is typical by explaining what other judges do in their courtrooms and why. The results would also be helpful in debating the efficacy of the current methodologies in the Rules of Evidence and could raise a policy question of whether modifications are in order. Finally, the survey touches on how the gatekeeping role—as envisioned by the *Daubert* trilogy—may be changing judicial practice.

This article will discuss these issues in detail by examining the prior research in the area, explaining the survey design, and finishing with the survey results and a discussion of their implications. By asking judges about the methods they use in their courtrooms, this survey can explore the methodologies of judging, advanced fact-finding techniques and their use, and whether the methodologies endorsed by the Supreme Court match courtroom reality today.

RESEARCH ON JUDICIAL METHODOLOGIES SINCE DAUBERT

In the 1990s debate over “junk science” and judicial management of complex evidence, scant attention had been paid to the methodologies of judicial gatekeeping. The *Daubert* trilogy clearly established the substantive burden to admit evidence in federal court, rejecting the *Frye* general-acceptance test for the twin inquiries of relevance and reliability from the Federal Rules of Evidence.⁴ But the court generally had little to say on the management of complex science in the courtroom.

In the *Joiner* decision, Justice Breyer did offer some thoughts on managing gatekeeping. In his concurrence, Breyer suggested four different methods for judges to use in the gatekeeping of expert evidence. Two methods were from the Rules of Civil Procedure—pretrial conferences and special masters—

This article is an abridged and revised version of a report of the author’s study originally published as *Questions from the Bench and Independent Experts: A Study of the Practices of State Court Judges*, 74 U. PITT. L. REV. 47 (2012).

Footnotes

1. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

2. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142-43 (1997) (finding abuse of discretion as the correct standard for appellate review of trial-court gatekeeping). See also *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) (expanding gatekeeping review to technical experts in addition to traditional scientific fields).
3. *Joiner*, 522 U.S. 136, 147 (1997) (Breyer, J., concurring).
4. FED. R. EVID. 702. See *supra* text accompanying notes 2 & 3.

while the other two were from the Rules of Evidence—questions from the bench and independent experts.⁵ With barely more than a paragraph to explain how he proposed judges perform the gatekeeping task demanded of them, Breyer and the Court left it largely to the judges to figure out effective methods of evaluating expert evidence.

Around the same time as *Joiner*, several research groups inquired into the methodology of judicial decision making. In 1998, Carol Krafska and her research team surveyed federal judges to measure methods used in the courtroom.⁶ Judges were asked about their use of a wide variety of techniques, including independent judicial research, special masters, questions from the bench, pretrial conferences, and independent experts. When the survey results were published in 2002, the researchers had found which techniques were common, which were uncommon, and which remained unused.

Krafska found that federal judges were very likely to question experts from the bench, with 93.6% having used the technique and only 6.4% stating they did not use that method at all.⁷ Compare that result to the use of independent experts and one can see a stark contrast. A large majority of federal judges—74%—said they would never consider appointing an independent expert, with a majority of the remaining 26% believing it was appropriate only in cases with complex testimony.⁸ With their study, Krafska and her colleagues recorded the use patterns of the federal judiciary right at the time of the *Daubert* trilogy.

State-court judges would also be surveyed, by Shirley Dobbin and her colleagues in 1999.⁹ In many ways, the state-court judges had similar responses to the federal judges. For example, a large majority of judges had questioned an expert from the bench, with only 18% stating they would not use this method.¹⁰ In contrast, state judges appeared more likely than their federal counterparts to use independent experts, with just 57% stating they would never use the method and 31% saying they would.¹¹ Of note to this study, the research did not divide the state judges into groups based on their state admissibility standard.

The combined effect of Krafska's and Dobbin's work was to establish the methodologies of judicial gatekeeping during the *Daubert* trilogy. Each study asked judges about the use of specific methods in their courtroom, showing that the likelihood of the use of different techniques moving forward varied significantly.

You might be thinking, "So with these prior studies, why is it necessary to survey judges again?" Several reasons necessitated an updated survey of methodologies of judicial gatekeeping.

First, the surveys for Krafska's and Dobbin's work date to 1998 and 1999. Of course, these were essential in learning what methods judges used around the time of *Joiner*. With over a dozen years having passed since, though, the situation has changed. At the time of many these surveys, the *Daubert* trilogy was not yet completed, as *Kumho Tire v. Carmichael* would be decided in March 1999.¹² Since the *Kumho* decision expanded the gatekeeping role to nonscientific technical expertise, judges might have had to rethink which techniques they were likely to use after that decision.

Second, at least for many state-court judges, the critical decision on the substantive standard for judicial gatekeeping was not *Daubert* but instead occurred afterward when their state supreme courts addressed the state standard for admission of expert evidence. In the years after *Daubert*, many states followed the Supreme Court to a Rule 702 standard.¹³ Other states, faced with the same choice, did not.¹⁴ Since the issue was changing rapidly in the 1990s, both on the state and federal level, the judicial responses from that era may have measured use of a system that has since changed, or may have asked judges about gatekeeping methods prior to *Daubert* taking hold in judges' states. Over a decade later, the scientific-admissibility standard in most states has remained stable for many years, engendering a stasis lacking in those earlier years.¹⁵

Third, recent research suggests judges might be having difficulty with some of the gatekeeping required under *Daubert* and similar state rules.¹⁶ If so, establishing the methods that

5. FED. R. CIV. P. 16 (pretrial conferences); FED. R. CIV. P. 53 (special masters); FED. R. EVID. 614; FED. R. EVID. 706.
6. Carol Krafska et al., *Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials*, 8 PSYCHOL. PUB. POL'Y & L. 309 (2002)
7. *Id.* at 326.
8. *Id.*
9. Shirley A. Dobbin et al., *Federal and State Trial Judges on the Prof-fer and Presentation of Expert Evidence*, 28 JUST. SYS. J. 1 (2007).
10. *Id.* at 10.
11. *Id.*
12. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).
13. For a list of states that have adopted a *Daubert*-type analysis, see Alice B. Lustre, *Post-Daubert Standards for Admissibility of Scientific and Other Expert Evidence in State Courts*, 90 A.L.R. 5th 453 (2001). See also DAVID H. KAYE, DAVID E. BERNSTEIN & JENNIFER L. MNOOKIN, *THE NEW WIGMORE: A TREATISE ON EVIDENCE - EXPERT EVIDENCE* §6.4.2.a n.16 (2d ed. 2010).
14. For a list of remaining *Frye* states, see KAYE ET AL., *supra* note 13, at §6.4.2.a n.17; Lustre, *supra* note 13, at 453. These states include: California (*People v. Leahy*, 882 P.2d 321 (Cal. 1994)),

Florida (*Flanagan v. State*, 625 So.2d 827 (Fla. 1993)), Illinois (*People v. Basler*, 740 N.E.2d 1 (Ill. 2000)), New York (*People v. Wesley*, 633 N.E.2d 451 (N.Y. 1994)), and Pennsylvania (*Grady v. Frito-Lay*, 839 A.2d 1038 (Pa. 2003)).
15. Of course, there are some exceptions in which a state changed its scientific-admissibility standard more recently. See Brian Pollock & Tore Mowatt-Larssen, *Arizona's Adoption of Federal Rule of Evidence 702: Life Under the New, Old, Daubert Standard*, 48 ARIZONA ATTORNEY 42 (2012) (Arizona adopts a *Daubert*-like approach in 2012); *Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391 (Mich. 2004) (Michigan adopts a *Daubert*-like approach in 2004); *Mississippi Transportation Commission v. McLemore*, 863 So.2d 31 (Miss. 2003) (Mississippi adopts a *Daubert*-like approach in 2005); *Schafersman v. Agland Coop*, 631 N.W.2d 862 (Neb. 2001) (Nebraska adopts *Daubert*-like approach in 2001).
16. Valerie P. Hans, *Judges, Juries, and Scientific Evidence*, 16 J.L. & POL'Y 19, 19-20 (2007); see, e.g., Sophia I. Gatowski et al., *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World*, 25 LAW & HUM. BEHAV. 433, 442 (2001) (judges split on whether they believe they have the necessary background to handle scientific evidence in their courtroom).

are currently being used is critical to understanding if policy changes are in order.

Finally, an updated study can measure two things not previously analyzed in detail. Dobbin's survey of state-court judges explained their use of techniques in detail, but the survey did not examine whether judges' use of methods changed based on their "home" scientific-admissibility standard.¹⁷ Second, neither Krafska nor Dobbin asked judges to explain why one technique—the use of independent experts—was so unlikely to be used. In one survey, sent before *Daubert*, researchers Joe Cecil and Thomas Willging had asked that question and found that reluctance to appoint experts was based on the rarity of cases necessitating an independent expert.¹⁸ Both this finding and the issue of scientific-admissibility standards could be examined in an updated survey.

STUDY DESIGN

To learn about judicial use of advanced fact-finding methodologies, I needed both a sample of judges and a survey questionnaire.

I began by selecting judges for the survey. To start, I chose states that would be in a similar geographic area: the Midwestern U.S. I did this to remove, as much as possible, the potential of cultural or regional differences affecting the results. Each selected state also needed to have identical or nearly identical rules for judicial questioning under Rule 614 and independent experts under Rule 706.

Next, I needed to select states that had variation in their admissibility standard for expert evidence. This led me to choose North Dakota, a state that had a *Frye* admissibility standard, and Nebraska, which follows *Daubert*.¹⁹ I also decided to add Iowa as a third survey state, since it has a more state-specific standard in use.²⁰ Each state met the requirement of having nearly identical Rules of Evidence 614 and 706.

Even in those selected states, I also limited the participants to those judges who serve on the highest level of trial courts in their state. The selection of these judges ensures not only that the judge is using the standard state Rules of Evidence but also that the judge may encounter civil cases of significant complexity, which may require the use of advanced fact-finding methods.

With these parameters, I created a database of eligible trial-court judges from North Dakota, Nebraska, and Iowa. Each judge in the database received a letter asking him or her to participate in the survey, a written survey of ten questions, and a return envelope. I followed the initial letter with a second reminder letter several months later.

In the survey, each judge was asked about three different

methods: judicial questioning of a fact witness using Rule 614, judicial questioning of an expert witness under Rule 614, and judicial appointment of an independent expert under Rule 706. For each method, I asked if the judge had used the method, and if so, how many times. If a judge had used the method, I asked him or her to explain why, inquiring whether it was for one or more than one point, and whether it was to explain something contained in previous testimony or not contained within previous testimony. Then, for all judges, I asked whether they believed the use of the method would be appropriate for either one or more than one point, and whether the use would be appropriate either to explain something contained in previous testimony or not contained within previous testimony. After three questions about each of the three methods, I finished with a final question asking judges to choose among explanations for why judges are reluctant to appoint independent experts. Judges could pick more than one answer, or, if they did not find an explanation they wished to choose, could also select an open-ended "other" category and then write a response.²¹

I sent the survey to the 209 judges who qualified for participation, and I received responses from a total of 118 judges, for a response rate of 56%.²²

RESULTS OF THE SURVEY

Having received a terrific response to the survey, my next step was to analyze the responses of the judges, both collectively and also when grouped into different categories. The groups included: state of origin, years of experience, gender, and location of assignment (urban or rural). The categorical analysis was intended to see if different groups of judges used the advanced fact-finding methods differently.

RESPONSES OF ALL JUDGES

The first response data I reviewed regarded the general trends in the use of advanced fact-finding techniques among all judges. As one might expect, the use of the techniques declined from the questioning of a fact witness, which was quite common and frequently used, to the appointment of independent experts, which was rarely used by most judges.

Rule 614 had been used by 84% of the judges to question a fact witness, while a majority of 58% had used it to question an expert. Not only did many judges use Rule 614 to question a fact witness, but 45% of the judges had done so more than 20 times. While a majority of judges had used Rule 614 to question an expert, a much smaller number—12%—had done so over 20 times. So even among the responses solely on the ques-

17. I am aware of only one prior study that did address this issue, finding that the admissibility standard of the home state had no effect on judicial attitudes about decision making. Gatowski et al., *supra* note 16, at 443. For the results of this survey in this area, see *infra* text accompanying note 28.

18. See Joe S. Cecil & Thomas E. Willging, *Accepting Daubert's Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity*, 43 EMORY L.J. 995, 1015-19 (1994). For the results of this survey in this area, see *infra* Figure 6 and accompanying text.

19. *Schafersman*, 631 N.W.2d at 876 (Nebraska); *City of Fargo v.*

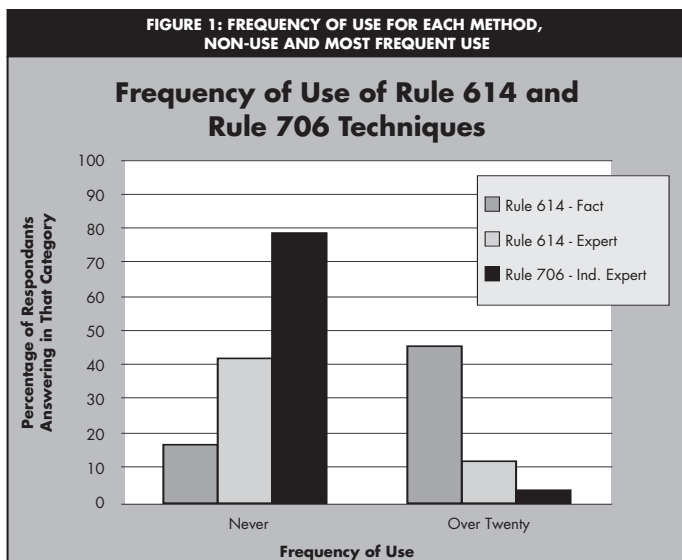
McLaughlin, 512 N.W. 2d 700, 704 (N.D. 1994).

20. *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 532 (Iowa 1999) (state committed to "liberal" standard for admissibility). A third state standard would allow me to better understand any differences that arose between the survey groups.

21. A copy of the survey is attached as Appendix A to the complete study. Andrew W. Jurs, *Questions from the Bench and Independent Experts: A Study of the Practices of State Court Judges*, 74 U. PITT. L. REV. 47, 81 (2012).

22. Thank you to all judges who participated.

tioning of witnesses, differences can be seen among use patterns depending on the witness. Those numbers sharply contrast to the appointment of independent experts under Rule 706. Of all of the judges, only 22% had ever appointed an independent expert. Of the 26 judges in the response group who had done so, only 4 had done so frequently—a rate of 3.4%. These differences can be seen in Figure 1.

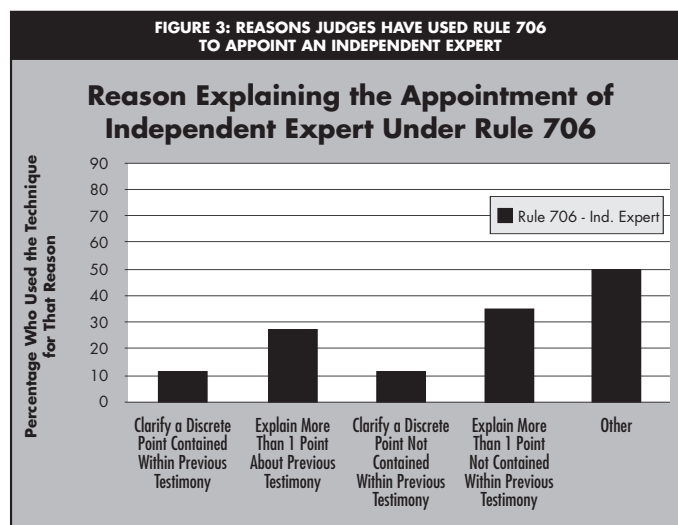


The use patterns between Rule 614 and Rule 706 contrast not only on the frequency of use but also on the appropriate reasons for—and personal reasons for—the use of these methods. When asked for the reasons they had personally used Rule 614 to question a witness, judges could respond that their use of the method was for either one or more than one point, and that the use was to clarify either something contained within previous testimony or not contained in previous testimony. With these options, the use pattern was nearly identical for questioning a fact witness and for questioning an expert.

Judges felt most comfortable with asking questions of a witness when the questioning was to clarify a discrete point contained within previous testimony. Substantial majorities of judges who used this technique did so for this reason, with 86% of judges doing so for fact witnesses and 87% doing so for expert witnesses. On the other hand, judges were much less comfortable with asking witnesses questions to clarify more than one point about something not contained within previous testimony. Only 40% of judges using this technique for fact witnesses did so for this reason, while only 33% did so with experts. The other two options were in-between—more than one point contained within previous testimony (62% fact, 70% expert) and one point not contained within previous testimony (44% fact, 38% expert). But in large part, the response patterns here were similar, as seen in Figure 2, and show a general downward trend as the intrusiveness of the questioning increased.

These responses on the questioning of a witness under Rule 614 contrast with the judicial use of independent experts, where use of the expert seems to increase along with the intrusiveness. With the use of Rule 706, a much smaller percentage of judges appointed an independent expert for the least intrusive reason—12%—as did so for the most intrusive reason—35%. In fact, the two responses with the largest affirmative

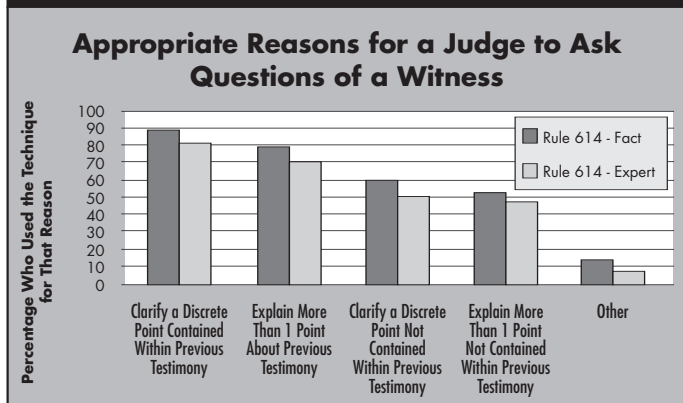
answers are the answers about issues unrelated to previous testimony (27% and 35%), and judges seem less comfortable with using this technique to clarify testimony previously given (12% and 12%). A visual representation of the response, as seen in Figure 3, highlights the difference in reasons for judicial use of Rule 706, when compared to Rule 614 and Figure 2.



When the survey asked judges about the appropriate reasons for any judge to use the techniques, instead of about their personal use of the techniques, similar patterns emerged. For Rule 614, large majorities agreed with using the technique for the least intrusive reason—to clarify one point about previous testimony (88% fact, 81% expert)—while the number declined substantially when the intrusiveness increased—to clarify more than one point not contained within previous testimony (53% fact, 46% expert). But in general, the responses here, as shown in Figure 4, show general similarities between judicial use of Rule 614 for fact witnesses and expert witnesses, along with a general downward trend as intrusiveness increases.

The judicial responses on appropriate reasons for any judge to use Rule 706 to appoint an independent expert contrast sharply with the Rule 614 responses, as they do with the responses to questions about a judge's personal reasons for using the techniques. Judges were again most likely, at 40%, to agree that it is appropriate to use an independent expert for the most intrusive reason—to explain more than one point about previous testimony. The percentage who thought it was appro-

FIGURE 4: REASONS JUDGES BELIEVE IT IS APPROPRIATE TO QUESTION A WITNESS USING RULE 614



appropriate did not change a lot from that intrusive reason to the least intrusive reason—to explain one point about previous testimony—which 37% agreed was appropriate. Again, a visual representation of the data, contained in Figure 5, highlights the difference in responses between judges on their responses on Rule 706, as compared to Rule 614 and Figure 4.

FIGURE 5: REASONS JUDGES BELIEVE IT IS APPROPRIATE TO APPOINT AN INDEPENDENT EXPERT USING RULE 706



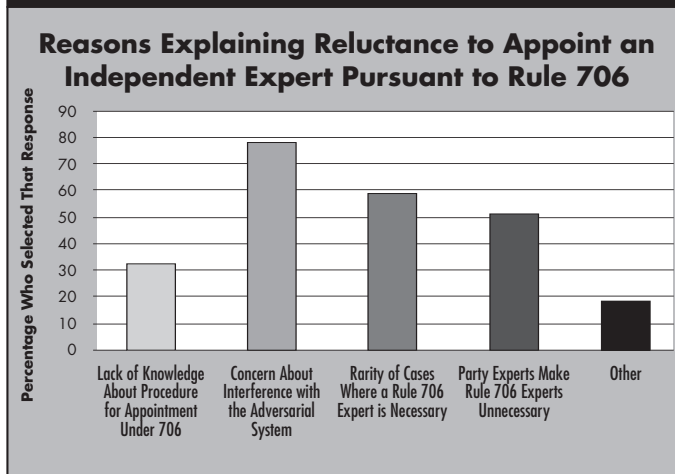
After asking about Rule 614 and Rule 706, and the frequency and reasons for the use of those techniques, the survey finished with a question asking the judges why, in general, judges are reluctant to appoint independent experts. Both Krafska's and Dobbin's work demonstrated that a significant majority of judges would never consider appointing an independent expert,²³ and I wanted to figure out why that was the case.²⁴ The question gave judges four options to explain their reluctance, and judges could also select "other" and then write a response.²⁵ The response data for the question are contained below, in Figure 6.

23. See text accompanying notes 9 & 12.

24. The age of the prior study in this area, done by Cecil and Willging, suggested an updated analysis of the issue would be helpful. Cecil & Willging, *supra* note 18, at 1004 (surveys given to judges in 1988).

25. Each of the four options is derived from the prior study in the area. Cecil & Willging, *supra* note 18, at 1015-19. Judges were also instructed that they could choose more than one option, if

FIGURE 6: EXPLANATIONS FOR JUDICIAL RELUCTANCE TO APPOINT AN INDEPENDENT EXPERT PURSUANT TO RULE 706



Most judges—77%—believed that “concern about interference with the adversarial system” explained the judicial reluctance to appoint a Rule 706 expert. Similarly, most judges—69%—disagreed with “lack of knowledge about the procedure” as an explanation for the lack of 706 appointments. Finally, slim majorities agreed with “rarity of cases” and “party experts” as the reasons, at 58% and 52.5%, respectively. And since so many judges selected the “other” category, it bears mentioning that many of those judges mentioned cost or payment of expert expenses as a concern.²⁶

ANALYSIS OF RESPONSES BY CATEGORY

Having reviewed the response data of all judges, I also wanted to analyze the judicial responses by category to see if different categories of judges used these techniques differently. First and foremost, I was curious to see if the use patterns of these fact-finding techniques varied based on the judge's home-state scientific-admissibility standard. After all, these are *Daubert* gatekeeping methods endorsed by Justice Breyer in *Joiner*. But it could also be helpful to see if judges used the techniques differently in any other category as well.

To these ends, I split the judges into four categories based on: state/scientific-admissibility standard, years of experience, gender, and location of appointment (urban or rural). I divided the years-of-experience category into two groups of judges, one group with ten years or less on the bench and one group with over ten years. For location of appointment, I split judges into rural and urban groups. Urban judges served at a location that was the central county of a metropolitan statistical area with a population over 200,000, based on the 2010 U.S. Census Data.²⁷ Each categorical subset contained at least 16 judges.

Analysis of the responses demonstrated few differences

they wished to do so.

26. Presumably this is because expert-witness fees under Rule 706 are often only taxable as expenses at the end of the litigation, while expert-witness fees are usually due upon receipt. See, e.g., FED. R. EVID. 706(c)(2).

27. For this database, the urban locations include: Cedar Rapids, IA; Davenport, IA; Des Moines, IA; Fargo, ND; Lincoln, NE; and Omaha-Council Bluffs, NE-IA.

between responses in most categories. While I was curious to see if the state admissibility standard affected the use of these techniques, I could find almost no statistically significant differences between the judges.²⁸ As a result, I can only conclude that the judge's state admissibility standard has little effect on the use of these fact-finding techniques, whether or not they were approved for *Daubert* gatekeeping.

The years-of-experience and gender categories also lacked many differences in use patterns. For gender, I could find no statistically significant difference between men and women for use, frequency of use, or reasons for use of the advanced fact-finding techniques. For years of experience, most categories of analysis also yielded no differences. The sole statistically significant difference I could find between the more- and less-experienced judges was on whether they had ever appointed an independent expert. In the more-experienced group, 29% of judges had appointed a Rule 706 expert, while only 12.5% of the less-experienced judges had done so. Considering that a majority of judges believe independent-expert cases are rare,²⁹ if that is true we would expect to see judges with fewer years on the bench have fewer opportunities to appoint a 706 expert. The data do support that result.

Even if the state admissibility standard, the gender, or the years of experience showed few differences, I could find several statistically significant differences between urban and rural judges. As compared to their urban colleagues, rural judges gave different responses on the reasons for their own personal use of—and for the appropriate reasons for any judge's use of—Rule 614 to question a fact witness. Rural judges were more likely to have used Rule 614 to question a fact witness to “explain more than one point about previous testimony,” with 69% of judges having done so compared to 45% among their urban counterparts. When asked about reasons any judge might ask questions of a fact witness, 94% of rural judges thought it was appropriate to “clarify a discrete point contained within previous testimony,” while only 76% of urban judges agreed. Both of these differences are statistically significant. Finally, on the use of Rule 706, there was also a difference that merits mention. When asked for the reason they had personally used a Rule 706 expert, 42% of rural judges said they had done so to “explain more than one point about previous testimony.” In contrast, there were no urban judges who had done so for this reason.³⁰

When I analyzed the response data, I found that—for the most part—judicial use of advanced fact-finding methods does not vary based on the judges' characteristics. For gender, years of experience, and state admissibility standard, this is true with minor exceptions. The other category—urban and rural

judges—showed variation on several points, with statistically significant differences between the response groups.

DISCUSSION AND CONCLUSIONS

The Midwest judicial survey provides insight into judicial use of advanced fact-finding techniques in the modern era, updating and expanding upon previous studies in the area.

First, the study updates the prior surveys in the area, which had relied on judicial responses collected no later than 1999. Krafska's study of federal judges in the 1990s provided insight into the case-management practices of federal judges, while Dobbin's study did the same with state-court judges. Yet each relied on surveys administered during the *Daubert* trilogy, before the transition of many states to a *Daubert* gatekeeping standard, and before the application of *Daubert* to nonscientific expertise testimony after *Kumho*. This survey therefore provides a much-needed update to the prior work, measuring the case-management practices of state-court judges now that *Daubert* gatekeeping is more firmly established.³¹

In providing that update, the results obtained are quite similar to the prior studies. In Krafska, 74% of federal judges would not appoint a Rule 706 expert, and in Dobbin, 57% of judges would not do so. In this survey 78% of judges had never appointed an independent expert. The results are also similar on the issue of witness questioning.³² With this survey, we can see the current patterns for the use of advanced fact-finding techniques and can observe that they have not changed drastically since the 1990s.

Second, the survey provides the only data since *Daubert* on why judges are reluctant to appoint independent experts. In a 1988 survey, Cecil and Willging asked judges why they were reluctant to appoint Rule 706 experts.³³ In their work, a majority of judges (62%) responded that the rarity of appropriate cases explained that reluctance, while less than half (48%) agreed it was the adversarial system.³⁴ The response data from this survey contrast with these prior results. A large majority of judges in this survey (77%) felt it was adversarial norms that explained reluctance to appoint, while a much smaller majority (58%) selected rarity of cases. These results show a clear difference in responses to explain judicial reluctance to appoint Rule 706 experts, suggesting further study is warranted to further understand the issue. In addition, if judges believe—as this survey suggests—that adversarial norms explain reluctance of judges to use Rule 706, it suggests the rule will remain largely unused. Policymakers might wish to decide if having a “moot” rule is appropriate, or if changes should be made to reinvigorate or otherwise modify the rule.

Next, in analyzing the data, we can learn several lessons

28. The sole exception was a minor difference in responses between Iowa (state-specific standard) and Nebraska (*Daubert*) on whether judges had ever used independent experts. Jurs, *supra* note 21, at 67 n. 66.

29. See *supra* Figure 6.

30. There is an issue here, though, of the variability of the numbers due to low sample size. As a result, the difference here—42%—does not quite meet the threshold for statistical significance. See Jurs, *supra* note 21, at 75 n. 76. Clearly, a larger sample size would

clarify if this result is statistically significant or a result of sampling only.

31. Dobbin specifically mentioned the need for further evaluation of the management practices of state-court judges, now that *Daubert* has become so prevalent. Dobbin, *supra* note 9, at 14.

32. See *supra* Figure 1 and accompanying text.

33. Cecil & Willging, *supra* note 18, at 1015-18.

34. *Id.*

about judicial management of complex evidence using these techniques. The survey responses demonstrate an inverse relationship between likelihood of the use of Rule 614 and the intrusiveness of the reasons for use, so that as the questions become more intrusive, judges are less likely to personally use the rule and are less likely to believe it is appropriate for other judges to do so. Yet for Rule 706, the pattern is different. Judges are more likely to have personally used an independent expert for the most intrusive inquiries, namely, those about more than one point not contained within previous testimony. The same is true for judges' opinions about appropriate reason for other judges to appoint a 706 expert. These responses demonstrate different use patterns for the two different techniques measured.

Another interesting result from analyzing the data is the relationship between a state's expert-admissibility standard and a judge's use of these techniques. These techniques, after all, were specifically endorsed for *Daubert* gatekeeping by Justice Breyer in *Joiner*. Yet when we examine judicial use of these *Daubert* techniques, we see that the use of the methodologies is basically the same between judges with a home-state standard of *Daubert* and those with other standards.³⁵ The data therefore affirm a finding from earlier studies: that the power of *Daubert* was not in the way specific issues are handled, but rather in the system-wide increase in scrutiny of scientific or other expert evidence.³⁶

Finally, when the responses were broken into different categories, the responses of urban and rural judges demonstrated the most differences. I am not aware of any similar findings in other studies, and I see this as a new finding warranting further research. The question of the nature of judging in urban and rural areas, and the differences between those areas, is one that would be quite interesting and could have significant policy implications as well.

By measuring the actual practices of state-court judges, this study provides insight into what is actually occurring in the courtroom today, how judges perform their assigned duties, and whether those methods are as useful as the Supreme Court had suggested.



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35. *Supra* text accompanying note 28.

36. See, e.g., Krafka, *supra* note 6, at 322; Gatowski, *supra* note 16, at 443.

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Improving Judicial-Performance Evaluation: Countering Bias and Exploring New Methods

Jennifer K. Elek & David B. Rottman

Official judicial-performance evaluation (JPE) programs in the United States emerged to achieve important judicial-branch objectives. JPE programs respond to the need for courts to demonstrate accountability, provide information for voters in low-information judicial-retention elections, improve the quality of the bench by providing feedback for individual judges to use for self-evaluation purposes, and assist judicial administrators in making decisions on retention and assignments in some states with appointed judiciaries. A number of professional organizations, such as the American Bar Association, American Judicature Society, and the Institute for the Advancement of the American Legal System, are strong advocates for the value of JPE programs.¹

Eighteen states and the District of Columbia currently operate official JPE programs, mostly conducted by the judicial branch itself, but some conducted by executive-branch agencies in a few states.² Whether official or unofficial, nearly all JPE programs rely upon surveys distributed to attorneys and court staff—and in some instances to jurors, litigants, and others—as the exclusive or a primary method for measuring judicial performance.³ Most state JPE programs are based on the American Bar Association's Black Letter Guidelines for the Evaluation of Judicial Performance,⁴ and several states use some variation of the model surveys put forth by the ABA Lawyers' Conference.⁵

The great potential of JPE programs to improve the qual-

ity of justice is not being realized due to fundamental problems in the evaluation methodologies they use. Some of these problems result from deficiencies in basic survey design or in the manner in which the surveys are distributed, issues we have previously addressed.⁶ Other problems result from the failure to incorporate efforts to minimize the potential for systematic biases against women and minority judges in JPE survey ratings.

The good news is that if states adopt best practices in survey design generally and work-performance surveys in particular, it is possible to improve the validity of JPE surveys and minimize the presence of bias in evaluation ratings. This article briefly explains the potential for bias in JPE surveys and then describes one effort to design a new JPE survey that achieves the above goals.

CONCERNS OF BIAS IN SURVEY-BASED JUDICIAL-PERFORMANCE EVALUATION

Anecdotally, concerns about the problem of gender and racial bias in results of state JPE surveys have been voiced for decades.⁷ Unfortunately, very little research has been conducted on the efficacy of state JPE survey instruments.⁸ It was not until 2011, when researchers at the University of Nevada published evidence of systematic gender and racial biases in the JPE ratings data from one state,⁹ that this issue gained momentum. Other research confirms that in JPE surveys based

Footnotes

1. See, e.g., AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE (1985); AMERICAN BAR ASSOCIATION, BLACK LETTER GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE (2005), available at http://www.americanbar.org/content/dam/aba/migrated/jd/lawyersconf/pdf/jpec_final.authcheckdam.pdf [hereinafter ABA, BLACK LETTER]; Seth S. Andersen, *Judicial Retention Evaluation Programs*, 34 LOY. L.A. L. REV. 1375 (2001); Institute for the Advancement of the American Legal System, *Judicial Performance Evaluation in the States*, http://iaals.du.edu/initiatives/qualityjudges_initiative/implementation/judicial-performance-evaluation (last visited Apr. 12, 2012).
2. See Institute for the Advancement of the American Legal System, *supra* note 1.
3. The first JPE program was started in Chicago in 1873, conducted by the Bar Association: "As the bar began to organize in order to combat the dominant role of partisan politics, surveys of lawyers were instituted to maximize the influence of the legal community on judicial selection." JAMES H. GUTERMAN AND ERROL E. MEIDINGER, IN THE OPINION OF THE BAR: A NATIONAL SURVEY OF BAR POLLING PRACTICES: A RESEARCH PROJECT OF THE AMERICAN JUDICATURE SOCIETY (1977).

4. ABA, BLACK LETTER, *supra* note 1.
5. See David C. Brody, *ABA Lawyers' Conference Model Survey Instruments*, available at http://www.americanbar.org/groups/judicial/conferences/lawyers_conference/resources/judicial_performance_resources.html [hereinafter Brody, *Model Survey Instruments*].
6. See Jennifer K. Elek, David B. Rottman & Brian L. Cutler, *Judicial Performance Evaluation Steps to Improve Survey Process and Measurement*, 96 JUDICATURE 65 (2012).
7. See Christine Durham, *Gender and Professional Identity: Unexplored Issues in Judicial Performance Evaluation* JUDGES' J., Spring 2000, at 11 (2000); JUSTICE D.K. MALCOLM, REPORT OF CHIEF JUSTICE'S TASKFORCE ON GENDER BIAS (1994); Joyce S. Sterling, *The Impact of Gender Bias on Judging: Survey of Attitudes Toward Women Judges*, 22 COLO. LAW REV. 257 (1993).
8. See David C. Brody, *The Use of Judicial Performance Evaluation to Enhance Judicial Accountability, Judicial Independence, and Public Trust*, 86 DENV. U. L. REV. 115 (2008).
9. Rebecca D. Gill, Sylvia R. Lazos & Mallory M. Waters, *Are Judicial Performance Evaluations Fair to Women and Minorities? A Cautionary Tale from Clark County, Nevada*, 45 LAW & SOC'Y REV.731 (2011) [hereinafter Gill et al., *Women and Minorities*].

on the ABA model,¹⁰ women and minority judges receive systematically poorer ratings on average relative to their male and majority group peers.¹¹

Although critics have recently targeted the ABA model as a biased approach to performance evaluation,¹² stereotypic bias is likely present in the rating results of JPE surveys developed independently from this model. Gender and racial biases have been observed in both informal performance appraisal and formal work-performance evaluations across a number of job types and fields. When rating others' work performance, evaluators often draw on assumptions about race, ethnicity, gender, and other social or cultural stereotypes to construct their judgments. An evaluator may or may not be consciously aware of doing this. This cognitive phenomenon, known to some in the court community as *implicit bias*, has been found to produce systematically different judgments about candidates with identical qualifications or about employees with comparable performance to the systematic disadvantage of women and racial minorities subjected to evaluation.

Stereotypic bias is also likely to be present in the ratings from all JPE surveys because of how these surveys are developed. Many modern approaches to survey design improve the overall quality of survey data in part by reducing the likelihood or the impact of an array of undesirable response biases, including, in some cases, stereotypic gender and racial biases.¹³ Most state JPE surveys do not reflect scientific advances in the understanding of quality survey design.¹⁴ This is perhaps to be expected because most were designed a decade or more ago, generally by groups of legal practitioners with limited guidance, if any, from researchers with professional expertise in survey design.¹⁵

Efforts to incorporate modern techniques in survey design can help to minimize the impact of stereotypic biases on data and, more generally, can improve the overall quality of data collected by JPE surveys.¹⁶ In this article, we draw on the experience of the first state to redesign its JPE surveys following the new research findings about systematic bias in JPE results.

IMPROVING SURVEY-BASED JUDICIAL-PERFORMANCE EVALUATION: A CASE EXAMPLE

In 2010, a Supreme Court of Illinois sought assistance from the National Center for State Courts (NCSC) in developing and implementing a new survey for use in their mandatory statewide JPE program. In this program, all judges are required to undergo evaluation for the purpose of judicial education

and self-improvement. When selected, judges are asked to nominate attorneys and court personnel to complete their evaluations. They also meet with a facilitator or mentor judge at the end of the process to discuss individual results and to help create an action plan for professional development. Given the structure and goals of this program, the overseeing state Supreme Court committee prioritized the confidentiality of performance-evaluation results to encourage an open, honest atmosphere for feedback. They stressed the importance of confidentiality both for respondents providing feedback and for judges in terms of their individual results. Individual JPE results are not retained on file for any administrative purpose, nor are they shared with anyone but the judge and his or her facilitator.

Within this framework, NCSC attempted to develop a new survey for this state JPE program that improved upon contemporary JPE survey practices. NCSC sought to do so, in particular, in ways designed to minimize the likelihood that the tool would produce systematically biased results as observed in other state JPE programs. In particular, we describe efforts undertaken to develop a new JPE survey instrument for use with attorney respondents. The new JPE survey instrument for statewide use emerged from the following multi-step process.

Critical review. NCSC staff conducted a review of 22 JPE surveys of attorneys to identify key judicial-performance criteria. This sample included four model surveys put forth by various organizations and a number of surveys recently or currently used by state JPE programs.¹⁷ Informed by this review of existing survey instruments, NCSC staff then assembled a preliminary list of modified survey items that represented the criteria identified by the Illinois legal community as critical to judicial performance. Survey-design considerations at this stage emphasized basic item and response-scale clarity and correspondence, which many contemporary JPE surveys lacked. To reduce biased responding, NCSC focused particularly on developing items that described more concretely the kinds of judicial behaviors that an attorney or court staff would actually have the opportunity to directly observe. Similarly, questions that asked respondents to make generalized attribu-

Efforts to incorporate modern techniques in survey design can [minimize bias and] improve the overall quality of data

10. See ABA, BLACK LETTER, *supra* note 1; see also Brody, *Model Survey Instruments*, *supra* note 5.

11. See, e.g., Gary K. Burger, *Attorney's Ratings of Judges: 1998-2006*, MOUND CITY, MO: REPORT TO THE MOUND CITY BAR (2007); Rebecca Gill, *Judicial Performance Evaluations as Biased and Invalid Measures: Why the ABA Guidelines Are Not Good Enough* (2012), available at <http://ssrn.com/abstract=2031800> [hereinafter Gill, *Biased and Invalid Measures*]; and NATALIE KNOWLTON & MALLA REDDICK, *LEVELING THE PLAYING FIELD: GENDER, ETHNICITY, AND JUDICIAL PERFORMANCE EVALUATION* (2012).

12. See Gill et al., *Women and Minorities*, *supra* note 9; Gill, *Biased and Invalid Measures*, *supra* note 11.

13. See, e.g., Boris B. Baltes, C.B. Bauer & Peter Frensch, *Does a Struc-*

tured Free Recall Intervention Reduce the Effect of Stereotypes on Performance Ratings and by What Cognitive Mechanism? 92 J. OF APPLIED PSYCHOL. 151 (2007); Cara C. Bauer & Boris B. Baltes, *Reducing the Effects of Gender Stereotypes on Performance Evaluations*, 47 SEX ROLES 465 (2002); E. Lee Bernick & David J. Pratto, *A Behavior-Based Evaluation Instrument for Judges*, 18 JUST. SYS. J. 173 (1995).

14. See Elek et al., *supra* note 6.

15. See, e.g., Steven Flanders, *Evaluating the Judges: How Should the Bar Do It?* 61 JUDICATURE 304 (1978); Gill et al., *supra* note 9; and GUTERMAN & MEIDINGER, *supra* note 3.

16. See Elek et al., *supra* note 6.

17. See Elek et al., *supra* note 6.

External testing is a critical step prior to full-scale implementation

• • • •

Performance Evaluation committee consisting of judges and attorney members reviewed preliminary drafts of the survey instrument and provided recommendations for revision of content. These reviews helped to ensure that survey items captured the key elements of judicial performance as defined in Illinois. Committee feedback included comments on the evaluation criteria represented in the survey items and the language or legal terminology used. This committee also reviewed and commented on several subsequent drafts of the instrument as it was refined in the following steps.

We wish to note here that other states seeking to develop a new JPE program may also benefit from conducting separate focus groups of judges and of each potential respondent group (e.g., attorneys, court personnel). Focus groups, when conducted by independent research groups using trained, professional facilitators, can yield rich information and honest, constructive input about the types of information judges are most interested in learning and that they would find most helpful, and about the types of observations that respondents feel they ought to be able to communicate in a constructive evaluation of judicial performance. Through this approach, stakeholder concerns may be addressed at an early stage of program development. These outreach efforts may also help to promote the upcoming program and generate support. By engaging stakeholders in the development process, judges, attorneys, and others involved can develop a sense of ownership over the program, leading to greater satisfaction with the final product. This may be important for some types of JPE programs more than others (e.g., for those designed for the purpose of professional development or voter education).

Consultation with survey design and work-performance evaluation experts. NCSC staff also consulted with academic experts on performance evaluation and survey design to further improve evaluation accuracy and minimize the opportunity for systematic biases based on gender, race, or ethnicity to influence evaluation responses. The draft survey was refined based on feedback from this panel of experts to include more concrete language in the description of survey items. A *structured free-recall task*, in which survey respondents are prompted to recall specific instances of the judge's actual courtroom behavior

tions about the judge's performance or conjecture about the judge's personality were recast into more concrete, behavioral terms or eliminated from consideration.

Supreme Court committee oversight. The state Judicial Per-

formance Evaluation committee consisting of judges and attorney members reviewed preliminary drafts of the survey instrument and provided recommendations for revision of content. These reviews helped to ensure that survey items captured the key elements of judicial performance as defined in Illinois. Committee feedback included comments on the evaluation criteria represented in the survey items and the language or legal terminology used. This committee also reviewed and commented on several subsequent drafts of the instrument as it was refined in the following steps.

Testing. Following these steps and in preparation for full-scale launch of the JPE survey, NCSC staff created the survey in a web-based environment using the Conconfirm software platform with methodology that comported with Dillman's scientific tailored design method for internet surveys.¹⁹ This approach includes a research-informed procedure for scheduling and issuing tailored notifications according to the respondent's status (i.e., if the survey is complete, incomplete, or not yet started). Notifications designed for the Illinois JPE survey include a prenotice in which the respondent is notified of his or her selection for participation before the evaluation period, an invitation at the beginning of the evaluation period, and up to three tailored reminder notices, which may be issued to the respondent until he or she participates in the evaluation or until the evaluation period concludes.²⁰

After the JPE survey tool was developed in the web-based environment, NCSC staff conducted a careful internal test to ensure that the mechanics of the internet survey and corresponding distribution processes operated as intended. After passing this internal test of general functionality, the survey was subjected to external testing with samples of eligible respondents. External testing is a critical step before full-scale implementation that can help establish instrument validity and determine whether efforts to minimize or eliminate systematic biases in results were successful. In Illinois, two external tests were conducted.

First, NCSC staff contracted with a local research agency to evaluate the JPE survey by conducting *cognitive interviews* with three licensed Illinois attorneys. In this cognitive-interview approach, attorneys completed the online evaluation form in the presence of interviewers who were trained to assess problems with survey items, instructions, and functionality in this context based on Tourangeau's cognitive-interviewing model.²¹ Interviewers asked attorneys probing questions about their thought processes and reactions as they completed the survey to determine which components, if any, presented barriers to participation. This included probes to identify components that lacked clarity, did not use appropriate legal terminology, were unnecessarily long or tedious, or posed other challenges to respondents. These trained interviewers identified user concerns regarding the clarity of some instructions (e.g., the explanation of the con-

18. See e.g., Bauer & Baltes, *supra* note 3, and Baltes et al., *supra* note 3.

19. See DON A. DILLMAN, JOLENE D. SMYTH & LEAH MELANI CHRISTIAN, *INTERNET, MAIL, AND MIXED-MODE SURVEYS: THE TAILORED DESIGN METHOD* (3d ed. 2008).

20. The Illinois surveys routinely achieve response rates in the range of 55-70%, with approximately 55-60% of attorneys and approximately 60-70% of court personnel completing the JPE surveys in full. The use of reminder notifications was associated with an increase in response rates of 25 percentage points. Note also that

respondents who preferred to complete a hard copy of the survey were provided with this alternative to participate.

21. Roger Tourangeau, *Cognitive Science and Survey Methods: A Cognitive Perspective*, in *COGNITIVE ASPECTS OF SURVEY METHODOLOGY: BUILDING A BRIDGE BETWEEN DISCIPLINES* (Thomas B. Jabine, Miron L. Straf, Judith M. Tanur & Roger Tourangeau eds., 1984); and Gordon B. Willis, *Cognitive Interviewing: A "How To" Guide* (1999), available at <http://appliedresearch.cancer.gov/areas/cognitive/interview.pdf>.

fidentiality policy), the user-friendliness of some components of survey navigation, and the clarity of some survey items.

In addition to cognitive-interview testing, NCSC staff conducted a pilot study of the JPE survey to vet the JPE survey instrument and procedure. A small sample of judges volunteered to participate in this pilot study, which produced complete survey data from a sample of approximately 100 eligible attorney respondents. These pilot study respondents were also asked to complete an optional follow-up questionnaire designed to elicit feedback about respondent perceptions of and experience with the online JPE survey tool. Based on statistical analysis of this JPE survey pilot data, user feedback from the follow-up questionnaire, and results from the cognitive interviews, instructions were refined and streamlined, and problematic items were revised or removed to improve overall clarity, user-friendliness, reliability, and validity of the JPE survey.

The new evaluation instrument that emerged from this multi-step development process contained 59 rating questions and five optional narrative comment fields across the following five areas of judicial performance: legal and reasoning ability, impartiality, professionalism, communication skills, and management skills.²² The instrument met psychometric standards and adhered to best practices in survey design and performance evaluation, with a particular focus on minimizing the potential for an array of respondent biases (including stereotypic biases). NCSC staff also adopted procedures to enhance data quality control within the framework of the existing state JPE program. First, respondents were assigned individual logins to access the JPE survey; respondents could therefore complete an evaluation of a single judge only once within a single evaluation period. Respondents were also prompted to base their evaluations on their own recent, direct experience working with the judge in a workplace environment, and not on the judge's reputation or on personal or social contact with the judge. By incorporating the structured free-recall task discussed above²³ into the web-based JPE survey, respondents were explicitly prompted to recall their direct experiences working with the judge before completing the judge's evaluation. With these efforts, authors hoped to facilitate respondent use of more reliable sources of information about each judge's performance in the evaluation process.

The present study illustrates one potential approach to the development of a fairer JPE survey tool. An analysis of the first full year of data produced by the Illinois survey revealed that JPE results did not systematically differ by the judge's gender.²⁴ This demonstrates that a JPE survey can be developed that both comports with the conceptual underpinnings of the influential ABA model and produces results without marked gender disparities, as has been found in the results of JPE surveys done elsewhere.²⁵

While we recommend a rigorous development process like

22. The Illinois survey has not been published in final form, but a draft version was included as an appendix to Knowlton & Reddick, *supra* note 11.

23. Bauer & Baltes, *supra* note 3; and Baltes et al., *supra* note 3.

24. The Administrative Office of the Illinois Courts does not track gender or racial demographic information for judges statewide. Researchers could determine gender based on the name of the evaluated judge, but racial background could not be readily iden-

the one used in Illinois, the survey that emerged from that development process should not be unquestioningly adopted by other states. Several important features of the state context for JPE should be carefully considered when approaching survey redesign or the development of a new tool, including the expressed purpose of the JPE program (e.g., to inform the individual judge's professional development, to inform the assignment and/or retention decisions of the judiciary, to inform the public) and the state's distinctive legal and judicial culture. A need may arise to develop separate JPE surveys to evaluate judges presiding over different case types or dockets. For example, a few states have already developed separate survey-evaluation processes for use with judges presiding in high-volume and low-volume courts. The real challenge for the future, however, is to develop multi-method JPE programs that call upon a diverse set of data-collection strategies to maximize evaluation accuracy and utility.

BEYOND SURVEY-BASED MEASURES

Taken together, recent empirical findings support a policy recommendation that calls for the validation and likely revision of survey instruments employed by JPE programs, and for additional guidance on multi-method approaches to the measurement of judicial performance. To date, the over-reliance on surveys has been a significant problem because the weaknesses of surveys are not compensated for by the strengths of alternative measurement methodologies. A future program of research should explore how other methodologies may help to enhance the quality of JPE programs and improve the ability to achieve expressed JPE goals.

The quest for a better, multi-method program of JPE is a complicated one. Commonly recognized objective measures of judicial performance tend to emphasize productivity over quality. More subjective forms of evaluation like survey ratings, narrative feedback, and courtroom observation tend to be relied upon to capture performance quality. It should be recognized that all subjective forms of evaluation are capable of producing biased results if they are not designed well, as has been observed with survey-based measures. Greater structure is likely needed to establish a sound process for evaluators. These forms of JPE should also be subjected to scientific scrutiny before they are adopted to ensure that they produce fair, high-quality evaluation data.

Efforts to revitalize and improve JPE programs are already

tified. Thus researchers could not evaluate Year 1 results from the new JPE survey to determine whether systematic racial bias was present. However, authors expect results from an analysis for racial bias to be similar to the results of the gender analysis because of the similar psychological mechanisms underlying biased responding.

25. *Cf.*, Burger, *supra* note 11; Gill, *supra* note 11; Gill et al., *supra* note 9.

[R]ecent empirical findings support a policy recommendation that calls for the validation and likely revision of [JPE] survey instruments . . .

underway. Several other states have followed Illinois's lead and are overhauling JPE programs that have been in place for 10 years or more. The international scene also holds potential as we look for other approaches to evaluating judges. Most Western European countries have JPE programs in place, some with decades of experience.²⁶ To promote an international dialogue on JPE, the National Center for State Courts and the Academy of the Social Sciences in Australia co-organized a Workshop on Evaluating Judicial Performance, bringing together an international group of 22 judges, law professors, and social scientists. The workshop, held May 9-10, 2013, at the International Institute for the Sociology of Law in Oñati, Spain, identified issues that can be regarded as generic to the task of evaluating judges, along with the key differences associated with distinctive court structures, legal systems, and, most importantly, recruitment to the bench.²⁷

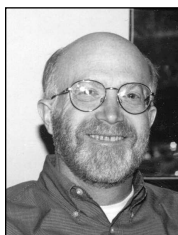
CONCLUSION

Judicial-performance evaluation programs can be of great benefit to the state courts. They can help to address core concerns, such as the need to be accountable in ways consistent with judicial independence and to allow judges the opportunity to hone their skills on the bench. The potential contributions of JPE programs remain, but considerable work is needed to bring JPE surveys up to the standard of best practices and to balance the results of those surveys against other well-developed approaches to performance evaluation. Although some states already have programs that are multi-method (augmenting surveys with interviews, case-processing data, and other

measures), the problem of bias will need to be tackled. With states working to improve their JPE programs and international attention growing in this area, it is likely that JPE programs of the future will look very different than they do today.



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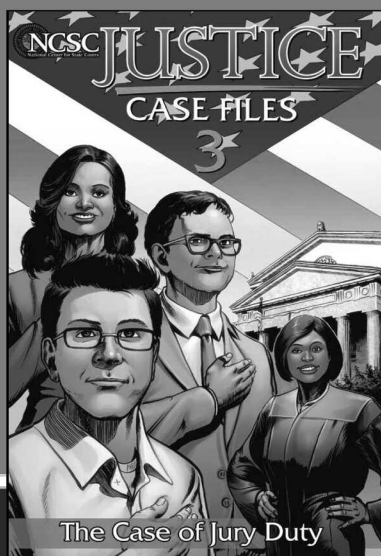


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26. RECRUITMENT, PROFESSIONAL EVALUATION AND CAREER OF JUDGES AND PROSECUTORS IN EUROPE: AUSTRIA, FRANCE, GERMANY, ITALY, THE

NETHERLANDS AND SPAIN (Giuseppe Di Federico ed., 2005).
27. For information about the workshop, visit <http://goo.gl/tmlaT>.

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Actual Versus Perceived Performance of Judges

Theodore Eisenberg, Talia Fisher & Issi Rosen-Zvi

Perceptions of judges ought to be based on their performance. Yet, few studies of the relation between perceived and actual judicial performance exist. Those claiming judicial bias should be especially sensitive to the relation between perception and performance. Judges perceived by the public or by the legal community as disfavoring a group may be regarded as biased, but that perception is unfair if the judges' votes in cases do not disfavor the group. For example, it may be unfair to accuse an appellate judge of pro-state bias in criminal cases if the judge votes for defendants at a higher rate than several other judges on the same court. This article addresses whether perception matches reality. Several studies have examined perceptions of judges and courts by surveying the public about its confidence in a particular court.¹ Our study differs because it compares perceptions of individual justices with their actual voting patterns.

Incomplete samples are one source of distorted claims about judicial behavior. Excluding a particular group of outcomes,

such as unanimous decisions, can lead to questionable results.² Studies regularly report that a judge's political affiliation, race, or sex is associated with case outcomes—results that sometimes raise inferences of bias.³ At the trial-court level, most studies are limited to available opinions, a known source of possible distortion.⁴ These studies also tend to exclude cases that end via settlement, which is the modal outcome in civil litigation.⁵ Several trial-court-level studies that use complete case samples and find no political or other effects suggest the importance of complete case samples.⁶

At the appellate level, samples may exclude screening decisions by courts with discretionary jurisdiction. Judges' screening decisions in discretionary cases—the decisions whether to grant full review of cases—often are not publicly available.⁷ Yet these screening decisions can comprise the bulk of a judge's work.⁸ Also, studies may not account for the nonrandom aspects of assignment, with variation in outcome demonstrated when analysts consider the effects of nonrandom

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Footnotes

1. E.g., Charles M. Cameron & Jee-Kwang Park, *How Will They Vote? Predicting the Future Behavior of Supreme Court Nominees, 1937-2006*, 6 J. EMPIRICAL LEGAL STUD. 485 (2009) (using preconfirmation information to assess justices' political ideology and predict their future behavior on the U.S. Supreme Court); James L. Gibson, *The Legitimacy of the U.S. Supreme Court in a Polarized Polity*, 4 J. EMPIRICAL LEGAL STUD. 507 (2007) (assessing perceptions of the U.S. Supreme Court).
2. Kevin R. Tully & E. Phelps Gay, *Louisiana Supreme Court Defended: A Rebuttal of the Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 69 LA. L. REV. 281, 289 (2009) (criticizing study of individual justices for excluding all unanimous cases from the data).

3. See generally JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002); CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (2006).
4. Denise M. Keele et al., *An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions*, 6 J. EMPIRICAL LEGAL STUD. 213, 234-36 (2009).
5. See generally Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111 (2009).
6. See, e.g., Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257 (1995); Brian T. Fitzpatrick, *Judicial Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811 (2010); Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 188 (2010) (political party of the presiding judge is not associated with outcomes of employment discrimination litigation); Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1337 (1998).
7. Significant differences exist in judges' screening behavior. Theodore Eisenberg, Talia Fisher & Issi Rosen-Zvi, *Case Selection and Dissent in Courts of Last Resort: An Empirical Study of the Israel Supreme Court*, in EMPIRICAL STUDIES OF JUDICIAL SYSTEMS (Yun-chien Chang ed. forthcoming 2013).
8. See Eisenberg, Fisher & Rosen-Zvi, *supra* note 7, at tbl.1-2 (showing less than 15% of discretionary civil or criminal appeals are granted review by the Israel Supreme Court); *The Statistics*, 125 HARV. L. REV. 362, 369 (2011) (showing 1.1% of petitions to U.S. Supreme Court are granted review).

assignment.⁹ Some studies of judiciaries, run at the behest of special-interest groups, seem to have little interest in presenting a balanced picture of judicial behavior.¹⁰

Are perceptions of judicial performance accurate if the sample used to assess judges' behavior is complete, no screening of cases is present, random assignment is used or nonrandom assignment features are accounted for, and an interest group is not trying to shape perceptions? This article uses such a sample to compare actual judicial performance with perceptions of judicial behavior, as reflected in 2,106 responses to a survey of 166 actors in the Israeli legal community. To gauge actual judicial performance, we use two full years (2006 and 2007) of criminal cases decided by the Israeli Supreme Court (ISC). The sample consists of 1,410 mandatory-jurisdiction criminal cases and 48 discretionary-jurisdiction criminal cases. We compare justices' actual behavior in criminal cases to survey respondents' rankings of those justices. The results suggest little association between the reality of judicial performance in the mass of cases and perceptions of that performance by the legal community. Because actual performance in the mass of criminal cases is not associated with perceived performance, we explore alternative sources of perceptions: media reports, votes in discretionary-jurisdiction cases, and differences among surveyed respondent groups.

Although our study is limited to one country, the results suggest caution in concluding that judges favor one group or the other—one possible definition of bias. The limited association between perception and reality suggests that claims of bias should be based on careful analysis of judges' actual behavior, rather than on either casual observation or only a few cases.

This article first provides background information about the Israeli judiciary. It then presents survey results regarding the Israeli legal community's perceptions of 16 ISC justices' tendencies in criminal cases. The survey asked respondents the degree to which they believe individual justices are favorable to the state or to defendants. We then compare the survey results with justices' actual voting patterns in criminal cases. The article explores the differences between perceptions and reality.

THE ISRAELI JUDICIARY¹¹

Israel is a unitary state with a single system of traditional courts of general jurisdiction, as well as other tribunals or authorities with judicial power that have jurisdiction limited by subject matter or persons covered. Within the traditional

courts, the judiciary law establishes three levels of courts: the ISC, district courts, and magistrate courts.¹² District courts and magistrate courts are trial courts; the ISC functions as both an appellate court and as the High Court of Justice (HCJ). In its HCJ capacity, the ISC operates as a court of first and last instance, primarily in areas relating to government behavior. Because the ISC's HCJ function is not as an appellate court, this study excludes those cases. The study does consider HCJ information relating to workload (in contrast to HCJ outcomes) because the HCJ workload can affect justices' assignments to appellate cases.

The basic trial courts are the 29 magistrate courts. Magistrate courts serve the locality and district in which they sit, and they generally have criminal jurisdiction over offenses with a potential punishment of up to seven years of imprisonment. They have civil jurisdiction in matters involving up to a specified monetary amount—currently 2.5 million shekels (approximately U.S. \$690,000)—as well as over the use, possession, and division of real property. Magistrate courts also serve as traffic courts, municipal courts, family courts, and small-claims courts. A single judge usually presides in each case unless the president of the magistrate court directs a panel of three judges to hear the case.¹³

Six local district courts have residual jurisdiction in any matter that is not within the sole jurisdiction of another court.¹⁴ As courts of first instance, district courts exercise jurisdiction over criminal cases punishable by more than seven years' imprisonment. District courts' civil jurisdiction extends to matters in which more than 2.5 million shekels are in dispute. District courts also serve as administrative courts and hear cases that deal with, inter alia, companies and partnerships, arbitrations, prisoners' petitions, and appeals on tax matters. These courts have appellate jurisdiction over magistrate court judgments.¹⁵

The ISC has jurisdiction to hear criminal and civil appeals from judgments of the district courts. Cases that begin in a district court are appealable, as of right, to the ISC. Other matters, particularly the mass of cases that begin in the magistrate courts, may be appealed only with the Court's permission. The ISC's decisions are binding on lower courts, and Israel adheres to the principle of *stare decisis*.¹⁶ The ISC generally sits in panels comprising three justices. The president or the deputy president of the Court may expand the size of the panel to any uneven number of justices, but that happened so rarely during

9. Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 394 (2010); Matthew Hall, *Randomness Reconsidered: Modeling Random Judicial Assignment in the U.S. Courts of Appeals*, 7 J. EMPIRICAL LEGAL STUD. 574 (2010).

10. Theodore Eisenberg, *U.S. Chamber of Commerce Liability Survey: Inaccurate, Unfair, and Bad for Business*, 6 J. EMPIRICAL LEGAL STUD. 969, 970 (2009).

11. The description of the Israeli judiciary is based on the description in Theodore Eisenberg, Talia Fisher & Issi Rosen-Zvi, *Does the Judge Matter? Exploiting Random Assignment on a Court of Last Resort to Assess Judge and Case Selection Effects*, 9 J. EMPIRICAL LEGAL STUD. 246 (2012).

12. See generally Courts Law (Consolidated Version), 5744-1984, 38

LSI 271 (1983-1984) (Isr.).

13. *Id.* ch. 2, art. 3.

14. Ordinances of Courts (Establishment of The Central District Court), 2007, KT 6585, 824 (Isr.).

15. Generally, a panel is composed of a single district-court judge, though a panel of three judges hears appeals of magistrate court judgments and cases of first instance when the offense is punishable by ten or more years of imprisonment. A three-judge panel also sits when the president or deputy president of the district court so directs. Courts Law (Consolidated Version) ch. 2, art. 2.

16. Basic Law: The Judiciary, 5744-1984, SH No. 1110 p. 78, § 20 (Isr.).

the two years examined in this study that it did not require further consideration.¹⁷

Courts sitting on appeal, whether district courts or the ISC, are formally authorized to adjudicate issues of both fact and law, but they seldom intervene in factual matters and tend to limit their judgment to questions of law.¹⁸ The underlying rationale is that on appeal, judges usually are not directly exposed to witnesses and other types of evidence. This does not negate the ability of the appellate court to examine whether the factual basis for the decision of the lower court is anchored on sound evidentiary foundations, but the de facto appeal practice is not one of de novo review.¹⁹ Our study focuses primarily on mandatory criminal appeals, which are regulated in a slightly different manner than civil appeals under Israeli law. We describe only the criminal appeals process here and refer the reader to our description of civil appeals elsewhere.²⁰

In criminal cases, a verdict issued by the district court sitting in the first instance can be appealed to the ISC as a matter of right.²¹ A verdict issued by the magistrate court in the first instance can be appealed to the district court as a matter of right. In Israel, both prosecution and defense have symmetrical rights of appeal, as the prosecution is authorized to appeal a defendant's acquittal. When a case is initiated in the magistrate court and appealed to the district court, both the prosecution and the defense can petition the ISC for a second appellate review.²²

The requirements governing discretionary ISC appellate review laid down in *Chenion Haifa v. Matzat Or*,²³ the most cited precedent in Israeli caselaw,²⁴ apply to criminal and civil cases.²⁵ *Chenion Haifa* states that the ISC should grant discretionary review only when significant legal or public issues are at stake that transcend the interests of the litigating parties. Such legal or public issues may include, for example, conflicting rulings by lower courts or matters of constitutional significance. Under this standard, the lower-court result should not affect the decision to grant a discretionary appeal. Therefore, according to the standard of review, a defendant's argument concerning the stigmatizing effect of conviction²⁶ or even the

severity of punishment are not grounds for a second appellate review.²⁷

A single justice usually reviews a request for discretionary appeal, but a panel of three justices can also review the request.²⁸ When a three-justice panel reviews the request, the panel is authorized to treat the request as an actual appeal and can decide the case on its merits.²⁹ As discussed previously, discretionary appeals are usually based on a preliminary screening by a single justice, a process we explore elsewhere.³⁰

PERCEPTIONS OF ISC JUSTICES

Methodology

We used an online survey to ask members of the Israeli legal community their opinions of the degree to which individual justices favored the state or defendants in criminal cases. The survey's first part asked respondents to rate each justice based on the respondent's view of the justice's pro-prosecution or pro-defendant tendencies. The second part asked respondents about their position in the Israeli legal community.³¹ In an initial survey of the Israeli legal community in September and October 2011 and in a follow-up survey limited to law students in November 2011, recipients were invited to participate through an email containing a hyperlink to an online survey site. The invitations were sent to the following: (1) faculty members of all university and college law schools in Israel; (2) all alumni of Tel Aviv University Law Faculty; (3) approximately 150 current law students at Tel Aviv University belonging to the classes of 2012 through 2014, as well as advanced-degree students; (4) all public defenders in Israel; (5) many prominent law firms operating in Israel; (6) a select group of prestigious criminal lawyers; and (7) the Attorney General's office. We lacked direct access to public prosecutors; therefore, we requested that the Attorney General's office assist us in internally distributing the survey. It is unclear whether the survey was distributed, and we suspect that it was not. The few responses we received from public prosecutors were probably due to their parallel affiliations (such as Tel Aviv University alumni). The online software allowed a recipient to provide

17. Each panel also has the power to decide to expand its size, and the Court can also decide to initiate a "further hearing" in which a panel of five or more justices will rehear a case decided by a smaller ISC panel. A single justice may hear petitions for injunctions, temporary restraining orders, or other interim rulings, as well as for an order nisi, but a single justice may not refuse to grant an order nisi or make it contingent on only some of its assertions. A single justice may hear appeals against interim rulings by district courts or against the verdict of a single district-court judge hearing an appeal from a case in a magistrate's court. Courts Law (Consolidated Version) §§ 26, 30.

18. See CrimA 4297/98 Hershtik v. State of Israel 54(4) PD 673, 682 (2000) (Isr.).

19. See CrimA 125/50 Ya'akovitch v. Attorney General 6(1) PD 514 (1952) (Isr.).

20. Theodore Eisenberg, Talia Fisher & Issi Rosen-Zvi, *Israel's Supreme Court Appellate Jurisdiction: An Empirical Study*, 96 CORNELL L. REV. 693, 700-04 (2011).

21. See Courts Law (Consolidated Version) § 41(a).

22. Unlike the situation in civil cases, interim trial-court decisions in

criminal cases cannot be appealed except under limited circumstances, such as judicial disqualification. Criminal Procedure Law (Consolidated Version), 5742-1982, 36 LSI 35, §§ 146-47 (1981-1982) (Isr.).

23. CA 103/82 *Chenion Haifa v. Matzat Or* 36(3) PD 123 (1982) (Isr.).

24. See Eisenberg, Fisher & Rosen-Zvi, *supra* note 20, at 702 n.48.

25. See DC 4927/92 *State of Israel v. Ben Yehuda* (unpublished opinion) (1992) (Isr.).

26. CrimA 1245/93 *Shtarkman v. State of Israel* 47(2) PD 177 (1993) (Isr.).

27. DC 3251/91 *Yishai v. State of Israel* PD 45(5) 441 (1991) (Isr.). Prior work questions adherence to the *Chenion Haifa* standards. Eisenberg, Fisher & Rosen-Zvi, *supra* note 20, at 720.

28. Criminal Procedure Rules, 5734-1974, § 44(7) (Isr.).

29. Criminal Procedure Law (Consolidated Version), 5742-1982, 36 LSI 35, § 205 (1981-1982) (Isr.).

30. Eisenberg, Fisher & Rosen-Zvi, *supra* note 7.

31. The survey appears as an appendix to Theodore Eisenberg, Talia Fisher & Issi Rosen-Zvi, *Actual Versus Perceived Performance of Judges*, 35 SEATTLE L. REV. 615 (2012).

only one response per justice.

The survey asked respondents to “rank each justice according to your view of their pro prosecution or pro defendant views” on a five-point scale, which was coded as follows:

- Very pro prosecution: 1
- Somewhat pro prosecution: 2
- Neither pro prosecution nor pro defendant: 3
- Somewhat pro defendant: 4
- Very pro defendant: 5

Respondents could reply that they had “no opinion” about a justice. The survey included all 16 ISC justices who served in 2006 to 2007.

The survey’s second part asked respondents to self-identify with one of the following groups (each group’s number of respondents is in parentheses): (a) private practitioner with an emphasis on civil law (civil attorneys) (23); (b) private practitioner with an emphasis on criminal law (criminal attorneys) (16); (c) law professor (23); (d) state attorney (6); (e) public defender (16); (f) law student (73); and (g) other (9). For some purposes, we combined the criminal attorneys and public defenders into a single group labeled “defense lawyers.” We aggregated these groups because they represent criminal defendants and might be expected to have similar views of justices.

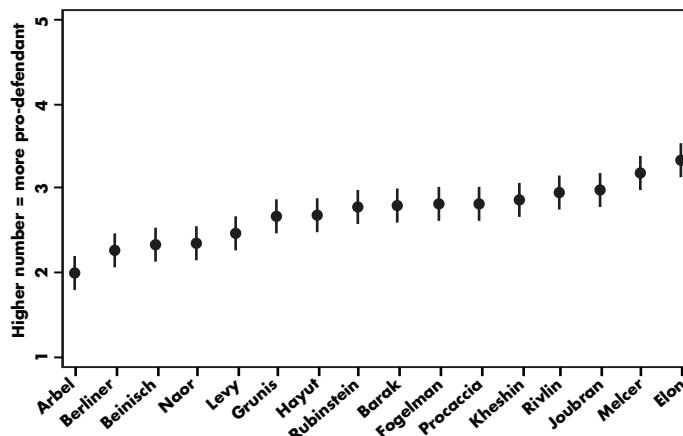
The results of our earlier work—used in the analysis below—describe the actual pattern of justices’ votes³² and were not made publicly available until the survey period closed. The surveys yielded 2,656 responses pertaining to individual justices provided by 166 respondents. We removed the “no opinion” responses from the analysis, resulting in 2,106 responses. The “Total” column in Table 1 shows the responses for each justice less the “no opinion” responses, which ranged from a high of 158 for Justice Barak to a low of 94 for Justice Berliner. The “Total” row in Table 1 shows the number of responses from each respondent group without the “no opinion” responses. When appropriate, our analysis accounts for the nonindependence of observations by the same respondent. Due to the sampling process, we cannot be sure that the respondents are a random draw from the Israeli legal community, and our findings are subject to this limitation. Although we solicited a broad range of respondents, we could not ensure responses to our invitations.

Survey Results

Table 1 and Figure 1 report the pattern of results by justice and respondent group. The first row of Table 1 shows the mean responses of the respondent groups for each justice on the five-point scale described previously. The second row shows the number of respondents with respect to that justice. For example, the first two rows of the “Civil Attorneys” column show that civil attorneys had a mean response of 1.91 based on 23 respondents with respect to Justice Arbel.

The overall mean of the 2,106 responses was 2.70, which is

FIGURE 1.
MEANS AND 95% CONFIDENCE INTERVALS OF PERCEPTIONS OF JUSTICES
ALL RESPONDENTS



Note: The figure shows the results of a survey of the Israeli legal community in the fall of 2011 that asked about the respondents’ perceptions of ISC justices as pro-state or pro-defendant. Responses were on an ordinal scale of one to five, with one being the most pro-state. The y-axis shows the mean response for each justice across all survey respondents. The lines represent the 95% confidence intervals for each justice. Justices are ordered along in x-axis in ascending order of pro-defendant perception.

somewhat below the nominally neutral response of three on the survey’s five-point scale. Given that the ISC affirmed over 80% of the mandatory criminal appeals,³³ it is understandable why the respondents regarded justices as being somewhat favorable to the state. Indeed, only the state attorneys’ responses averaged above three, and their mean of 3.03 barely exceeds that number.

Figure 1 shows the mean response for each justice, designated by the filled circles, and a measure of the uncertainty in the responses. The uncertainty measure consists of the upper and lower 95% confidence intervals, indicated by the lines emanating from the circles. The mean responses are taken from the justice means in Table 1. The x-axis depicts the justices, with the justice perceived as most favorable to the state appearing closest to the origin and the justice perceived as most favorable to defendants included as the last justice on the x-axis. Thus, Justice Arbel was perceived as most favorable to the state and Justice Elon was perceived as least favorable. The confidence intervals suggest that statistically significant differences exist for several pairs of justices. For example, no overlap in confidence intervals exists for Justice Arbel and any justice other than Justice Berliner. Only two justices have lower 95% confidence intervals that exclude three, but several justices have upper 95% confidence intervals that exclude three.

The groups with presumably greater experience and information about ISC activity perceived the court differently. Table 1 shows that perceptions of criminal attorneys and public defenders did not substantially differ in their means. The data also indicate that defense lawyers divide the justices into three groups, with five justices (Arbel, Berliner, Beinisch, Naor, and Levy) perceived as substantially pro-state, four justices (Rubin-

32. Eisenberg, Fisher & Rosen-Zvi, *supra* note 11.
33. Eisenberg, Fisher & Rosen-Zvi, *supra* note 11. Affirmance rates of about 80% in mandatory-jurisdiction criminal cases are not unusual. Theodore Eisenberg & Geoffrey P. Miller, *Reversal, Dis-*

sent, and Variability in State Supreme Courts: The Centrality of Jurisdictional Source, 89 B.U. L. REV. 1451, 1479 tbl.4 (2009) (showing such rates in mandatory-jurisdiction criminal cases resolved by U.S. state supreme courts).

stein, Kheshin, Melcer, and Elon) perceived as moderately pro-defendant, and the remaining seven justices perceived as being between the other two groups.

The few state-attorney responses produced imprecise estimates. Nevertheless, a noticeable difference was their generally more pro-defendant perception of the ISC. Table 1 shows that their mean perception score was 3.03, which makes them the only group that regarded the justices as pro-defendant on our scale. Nine justices had mean perception scores of three or

more, so the pro-defendant average of state attorneys was not a consequence of extreme views of one or two justices. Within this generally more pro-defendant perception, state attorneys shared with defense lawyers the relative perceptions of Justices Arbel, Berliner, and Levy as being pro-state. Thus, the two groups with direct litigation experience—defense lawyers and state attorneys—while representing clients with opposing interests, shared a view of Justice Levy as being relatively pro-state. Law professors had the opposite perception of him. In

TABLE 1. PERCEIVED PROPENSITY OF VOTING FOR DEFENDANT OR STATE, BY JUSTICE AND RESPONDENT GROUP

JUSTICE	CIVIL ATTORNEYS	CRIMINAL ATTORNEYS	LAW PROFESSORS	LAW STUDENTS	PUBLIC DEFENDERS	STATE ATTORNEYS	OTHER	TOTAL
Arbel	1.91	1.40	1.53	2.34	1.63	2.17	2.25	1.98
	23	15	19	59	16	6	8	146
Barak	2.76	2.25	2.29	3.04	2.63	3.40	3.13	2.80
	21	16	21	71	16	5	8	158
Beinisch	2.09	1.56	1.68	2.88	1.88	2.83	2.57	2.35
	22	16	22	67	16	6	7	156
Berliner	2.00	2.20	2.21	3.00	1.15	2.50	2.80	2.28
	18	15	14	25	13	4	5	94
Elon	3.50	3.25	3.79	3.06	3.57	3.75	3.40	3.33
	16	12	14	49	14	4	5	114
Fogelman	2.83	2.85	2.43	3.11	2.46	3.00	3.00	2.83
	18	13	14	27	13	5	8	98
Grunis	2.53	2.56	2.47	2.78	2.79	2.75	3.00	2.69
	19	16	19	59	14	4	7	138
Hayut	2.57	2.29	2.29	2.89	2.73	3.00	3.00	2.69
	21	14	17	55	15	5	7	134
Joubran	3.10	2.73	2.50	3.20	3.00	2.60	2.71	2.99
	20	15	18	64	15	5	7	144
Kheshin, D	3.07	2.90	2.67	2.72	3.38	3.25	2.75	2.87
	14	10	12	53	13	4	4	110
Levy	2.22	1.53	3.05	2.76	2.00	2.00	3.00	2.47
	23	15	19	54	15	6	7	139
Melcer	2.94	3.83	3.29	2.94	3.31	3.80	3.67	3.20
	16	12	14	48	16	5	6	117
Naor	2.05	1.79	2.16	2.75	1.81	2.80	2.71	2.37
	22	14	19	63	16	5	7	146
Procaccia	2.64	2.33	2.50	3.20	2.20	3.50	3.13	2.83
	22	15	18	61	15	4	8	143
Rivlin	2.60	3.00	2.76	3.07	2.58	4.00	3.13	2.95
	15	16	17	54	12	4	8	126
Rubinstein	2.95	3.20	2.25	2.64	3.19	3.67	2.50	2.79
	22	15	20	56	16	6	8	143
Total	2.57	2.44	2.44	2.89	2.51	3.03	2.91	2.70
	312	229	277	865	235	78	110	2106

Note: The table shows the results of a survey of the Israeli legal community in the fall of 2011 that asked about the respondents' perceptions of ISC justices as pro-state or pro-defendant. Responses were on an ordinal scale of one to five, with one being the most pro-state.

contrast, the state attorneys' perception of Justice Joubran was closer to the perception of law professors than it was to the perception of defense lawyers. Defense lawyers regarded Justice Joubran as relatively pro-defendant, whereas law professors and state attorneys regarded him as more pro-state.

A consistent result across all groups was the pro-state perception of Justice Arbel. She was perceived as the most pro-state justice, or one of the most pro-state justices, by all groups. Justices Elon and Melcer were consistently regarded as pro-defendant, and a substantial group of justices was perceived as between the two extremes by all groups. Regression models, not reported here, confirm the pattern in Table 1. All justices were perceived to be more pro-defendant than Justice Arbel, and that those differences were statistically significant.

We defer possible explanations of the survey results until after we report the justices' actual votes.

ISC JUSTICES' ACTUAL PERFORMANCES COMPARED TO PERCEPTIONS

To compare perceptions with justices' actual voting behavior, we used the justices' votes in cases. We used data employed in earlier studies of ISC appellate cases, which included discussions of the data's limitations.³⁴ We describe here relevant aspects of the data.

The case outcomes with which we compare perceptions are mandatory- and discretionary-jurisdiction criminal cases decided by the ISC in the years 2006 and 2007. The study includes every ISC substantive opinion available online via the official Israel Judicial Authority (IJA) website for cases decided during that time period. Since the IJA website contains all of the cases decided by the ISC,³⁵ the resulting database provides a complete picture of ISC doctrinal decisional activity.

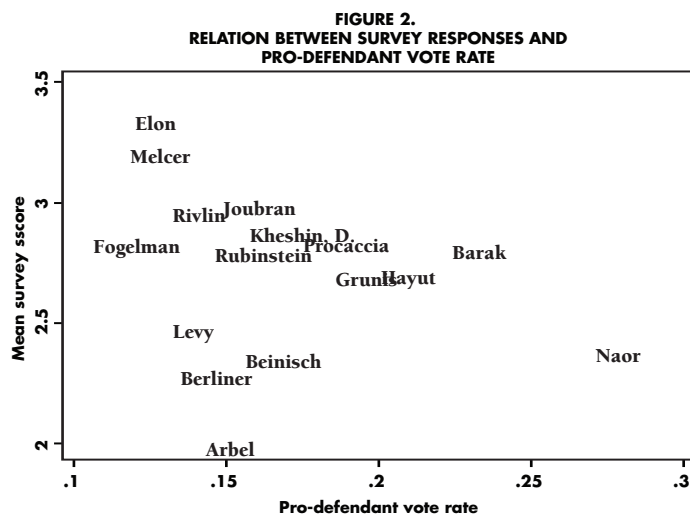
The cases identified by the above methods were coded by student research assistants. Before the student coding, the authors designed a data form to structure the coding. After review of the performance of the form and the students in an initial set of cases, the form was revised and a final form constructed. The students used that revised form to code the cases under our supervision.

The outcome variable is each justice's vote in each case. "Vote for defendant" is a dummy variable recording the direction of each justice's vote. A justice's vote favored the state if a justice voted to affirm a decision on an appeal brought by a defendant or reverse a decision on an appeal brought by the state. A vote favored the defendant if it was a vote to affirm a decision on an appeal brought by the state or to reverse a decision on an appeal brought by the defendant. A justice's vote could differ from the case's outcome if a justice dissented, which

rarely occurred in the ISC in the time period studied.³⁶ We excluded about 4.5% of votes in mandatory-jurisdiction criminal cases because they involved votes that we did not characterize as favoring the defendant or the state, such as "approved in part and denied in part."

Table 2, based on our earlier work,³⁷ reports each justice's votes for mandatory and discretionary cases. It also shows the number of each type of case (mandatory or discretionary) the justices voted in and each justice's rank, as measured by the justice's rate of voting for defendants. The dominant pattern was that the state was more successful than criminal defendants.³⁸ The lowest rate at which any justice voted in favor of the state was 72%, as shown in the first numerical column. The range of pro-defendant vote percentages was broader in discretionary cases, but these percentages were based on far fewer cases than the mandatory-case percentages. The ISC grants review in a small fraction of discretionary cases.

Regression analysis in our earlier work controlled for non-random aspects of case assignment—case-category specialization, workload, and seniority—as well as for the most serious crime present in a case, and the gender of defendants.³⁹ It confirmed that Table 2's mandatory-case columns provided a reasonable ordering of justices' tendencies to vote for the state or defendants. By exploiting the use of random case assignment and controlling for nonrandom aspects of case assignment, the methodology accounted for the varying merits of cases pre-



Note: The figure shows the relation between survey scores and justices' votes in mandatory-jurisdiction criminal cases. Survey scores are from the fall 2011 survey of the Israeli legal community shown in Table 1, which asked about respondents' perceptions of ISC justices as pro-state or pro-defendant. Responses were on an ordinal scale of one to five, with one being the most pro-state. The rates at which justices voted for the state's position in mandatory-jurisdiction criminal cases were based on cases decided by the ISC in the years 2006 and 2007.

34. Eisenberg, Fisher & Rosen-Zvi, *supra* note 7; Eisenberg, Fisher & Rosen-Zvi, *supra* note 11; Eisenberg, Fisher & Rosen-Zvi, *supra* note 20, at 709.

35. We tested the comprehensiveness and accuracy of the database by comparing it with data obtained from the ISC's secretariat. This comparison suggested that the IJA website data are indeed comprehensive, covering the full gamut of cases. The website does not include cases decided in camera. But since those cases are an insubstantial fraction of the cases decided by the Court, the omis-

sion does not materially affect the analysis here. See Courts Law (Consolidated Version), 5744-1984, 38 LSI 271, § 70(a) (1983-1984) (Isr.).

36. Eisenberg, Fisher & Rosen-Zvi, *supra* note 7.

37. Eisenberg, Fisher & Rosen-Zvi, *supra* note 11, at 283 tbl.18.

38. The state is more successful both in cases appealed by defendants and in cases appealed by the state. *Id.*

39. *Id.* at 279 tbl.17.

sented to justices. Differences in justices' rates of voting for the two parties are thus reasonably attributable to justices, not to case characteristics.

How do the perceptions compare with the justices' performances as reflected in Table 2? We first compare performance in mandatory-jurisdiction cases with survey scores. We then compare performance in discretionary-jurisdiction cases with survey scores.

Survey Scores and Mandatory-Jurisdiction Case Performance

Figure 2 shows the relation between survey scores and justices' votes in mandatory-jurisdiction cases. The data points in Figure 2, indicated by justices' names, represent each justice's rate of voting for defendants, as shown on the x-axis, and that justice's mean survey score, as shown on the y-axis. For example, Justice Naor voted for defendants in 27.8% of her cases, the highest rate of any justice. Her mean survey score, as shown in Table 1, was 2.37, well below the overall survey mean. Her combination of votes and survey scores is therefore represented by her location in the lower-right portion of Figure 2. If survey perceptions reflected justices' observed rates of voting for defendants, then the data points should flow from

lower left to upper right. That is, a justice with a relatively high rate of voting for defendants who is also perceived as being relatively pro-defendant should be located in the upper-right portion of the figure. A justice with a relatively low rate of voting for defendants who is also perceived as being relatively pro-state should be located in the lower-left portion of the figure.

The figure shows an unexpected pattern. The data flow, if anything, from upper left to lower right. A simple correlation coefficient was negative but insignificant (-.27; p = .307), suggesting little association between perceptions and voting patterns. Justices perceived as pro-defendant tended to vote for the state. Perceptions of Justice Naor were relatively pro-state, but her voting pattern was most favorable to defendants. Justices Elon and Melcer show the opposite combination: perceived to be pro-defendant but with low rates of voting for defendants. Justice Fogelman, who had the most pro-state voting pattern, was perceived to be relatively neutral. No justice who was perceived as being relatively pro-defendant (Justices Elon, Melcer, Joubran, and Rivlin) actually tended to vote for defendants.⁴⁰ Justice Arbel's position was distinctive. As Table 1 and Figure 1 show, she was the justice perceived to be the most pro-state. Yet she was average in her rate of pro-state votes. We conclude that

TABLE 2. RATE AND RANK OF JUSTICES' VOTING FOR STATE BY JURISDICTIONAL SOURCE

JUSTICE	MANDATORY CASES		DISCRETIONARY CASES		JUSTICE'S MANDATORY CASE RANK	JUSTICE'S DISCRETIONARY CASE RANK
	Rate favoring defendant	N	Rate favoring defendant	N		
Fogelman	.12	168	1.00	4	2	13
Elon	.13	167	.80	5	2	4
Melcer	.13	86	1.00	3	2	13
Levy	.14	829	.87	23	4	12
Rivlin	.14	142	.80	5	4	4
Arbel	.15	351	.82	17	6	8
Berliner	.15	274	.60	5	6	2
Joubran	.16	446	.80	20	8	4
Rubinstein	.16	434	.85	20	8	10
Beinisch	.17	150	.57	7	10	1
Kheshin, D.	.17	195	.80	5	10	4
Procaccia	.19	138	.85	13	12	10
Grunis	.20	169	1.00	5	13	13
Hayut	.21	215	.83	6	14	9
Barak	.23	43	1.00	1	15	13
Naor	.28	154	.60	5	16	2

Note: The table shows the rate at which each justice voted for the state's position in mandatory and discretionary criminal cases. A vote favored the state if it was to affirm an appeal brought by a defendant or to reverse an appeal brought by the state. A vote favored the defendant if it was to affirm an appeal brought by the state or to reverse an appeal brought by the defendant. The last two columns show the ordinal rank of each justice for mandatory and discretionary cases. The ordinal rank is based on the rate at which justices voted for the state in criminal cases, with a lower rank corresponding to voting more often for the state. The cases are mandatory- and discretionary-jurisdiction criminal cases decided by the ISC in the years 2006 and 2007.

40. Justices Levy and Berliner were perhaps the justices with the best match of perceptions of their voting tendency and their actual voting patterns. They were both perceived as being relatively pro-state, and both voted in favor of the state more than most other justices. Conversely, Justice Rivlin was perceived as fourth most

favorable to defendants, yet his voting pattern tended to be more pro-state. A substantial number of justices were perceived as being neither very pro-state nor very pro-defendant, and their voting patterns reflected that neutrality.

justices' actual voting patterns in mandatory criminal cases contribute nothing whatsoever to explaining perceptions of justices as being pro-state or pro-defendant.

Survey Scores and Discretionary-Jurisdiction Case Performance

We previously noted justices' significantly different voting patterns in mandatory and discretionary cases.⁴¹ Discretionary cases, for which basic statistics are reported in Table 2 above, therefore provide a second possible basis for explaining the survey-scores pattern. Figure 3 shows the relation between survey scores and justices' performance in discretionary cases. The data points are again indicated by justices' names, with justices' rates of voting for defendants (now in discretionary cases) shown on the x-axis and their mean survey scores shown on the y-axis. The expected pattern of data flow from lower left to upper right is recognizable, though imperfect. A justice with a relatively high rate of voting for defendants was generally perceived as being relatively pro-defendant.

A simple correlation coefficient was positive and nearly significant (.47; $p = .065$), suggesting a reasonably strong association between perceptions of justices as pro-state or pro-defendant and how justices voted in discretionary-jurisdiction cases. If one excludes the most outlying point in the figure, Justice Arbel (discussed below), the coefficient was .56 and significant at $p = .029$. However imperfect an association Figure 3 portrays, it is much closer than Figure 2's mandatory-case pattern in exhibiting the expected relation between survey scores and voting patterns.

RECONCILING PERCEPTIONS AND REALITY

The above results suggest two differing relations between perceptions and reality—a positive association between justices' votes in discretionary-jurisdiction cases and a negative, insignificant association in mandatory-jurisdiction cases. This Part explores that difference, as well as intergroup differences among survey respondents. It also adds a second possible source of influence regarding perceptions of justices' performances: coverage in the media.

Differences Based on Jurisdictional Source and Group Affiliation

It is plausible that justices' votes in discretionary cases would better explain survey scores than votes in mandatory cases. Justices are supposed to grant review in discretionary

cases based on each case's importance. Though this principle is often not honored,⁴² if a case's importance plays some role in discretionary-case selection, then the average discretionary case is likely more important than the average mandatory case. Thus, it is reasonable that a more important class of cases would play a greater role than mandatory cases in shaping the public's perceptions of judicial voting tendencies. Yet, the Court reviews so few discretionary cases compared to mandatory cases—about 3% the number of mandatory cases—that it is puzzling that discretionary cases influence the legal community's perception so heavily.

Another factor is likely to help explain the influence of discretionary cases. Attorneys and law students do not read and code all cases heard by the Court, and they are probably unaware of the patterns we report in mandatory cases. Mandatory cases therefore cannot be a basis for their perceptions, and discretionary cases may shape perceptions by default.

Even in discretionary cases, however, the perception and reality for Justice Arbel do not match. She is perceived as the most pro-state justice, which is not supported by her voting in either mandatory or discretionary cases. For many justices, the small number of discretionary cases they hear makes those cases an imprecise measure of the justices' behavior. But Justice Arbel has the fourth highest number of discretionary-case participations (17), and Table 2 shows that she ranks as the eighth most favorable justice for defendants (as well as the sixth most favorable in mandatory cases). Thus, the legal community's perception of her has no basis in these voting patterns. Justice Arbel served for several years (1996–2004) as the State Attorney of Israel and thus head of the State Attorney Office, which represents the state in court. Perceptions of Justice Arbel may be influenced more by her relatively recent association with the state than by her actual performance in criminal cases.⁴³

Some of the perception patterns may be explained not only by the justices' behavior but also by the survey respondents' characteristics. Table 1 shows law professors to have a relatively pro-state view of justices and state attorneys to have a relatively pro-defendant view of justices. We noted above that state attorneys differ significantly from both criminal lawyers and from public defenders.

The significant differences between the state attorneys and the defense lawyers may represent what psychology researchers call "naïve realism."⁴⁴ "[P]eople do not fully appreciate the subjective status of their own construals, and, as

41. Eisenberg, Fisher & Rosen-Zvi, *supra* note 11, at 283.

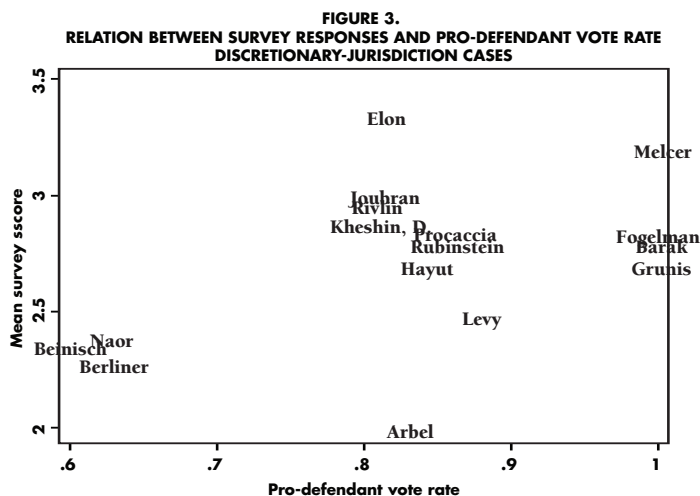
42. Eisenberg, Fisher & Rosen-Zvi, *supra* note 20, at 720.

43. A similar effect may be at work for Justice Beinisch. She served as the State Attorney of Israel from 1989 to 1995. Figure 2 indicates that perceptions of her do not match well with the rate at which she voted for defendants in mandatory-jurisdiction cases. She was the most pro-state justice in discretionary-jurisdiction cases, but that is based on only seven decisions. The pro-state view of her may stem from her prior position.

From 1972 to 1979, Justice Naor served as Deputy State Attorney in the Ministry of Justice. She is also regarded as relatively pro-state. Other justices have also served the government in high legal offices. Justice Barak served as Israel's Attorney General from

1975 to 1978, and Justice Rubinstein served as Attorney General from 1997 to 2004. Neither is perceived as very pro-state. There may be a difference between the way the public perceives former Attorneys General (less pro-state) compared to how the public perceives former state attorneys (more pro-state). Attorneys General have often publicly defied the government by refusing to represent the state when they thought the state was in the wrong. State attorneys, on the other hand, are not in a position to defy the state, and they are in charge of all the criminal trials.

44. Robert J. Robinson et al., *Actual Versus Assumed Differences in Construal: "Naïve Realism" in Intergroup Perception and Conflict*, 68 J. PERSONALITY & SOC. PSYCHOL. 404, 405 (1995).



Note: The figure shows the relation between survey scores and justices' votes in discretionary-jurisdiction criminal cases. Survey scores are from the fall 2011 survey of the Israeli legal community shown in Table 1, which asked about respondents' perceptions of ISC justices as pro-state or pro-defendant. Responses were on an ordinal scale of one to five, with one being the most pro-state. The rates at which justices voted for the state's position in discretionary-jurisdiction criminal cases were based on cases decided by the ISC in the years 2006 and 2007.

such, they do not make sufficient allowance for the uncertainties of construal when called on to make behavioral attributions and predictions about others.”⁴⁵ A similar effect has been reported in an experiment that assigns participants roles as defense lawyers or prosecutors.⁴⁶ If lawyers tend to identify with their clients' positions beyond the objective merits of their cases, then both state attorneys and defense lawyers may not fully appreciate the subjective status of their own views in shaping their perceptions of ISC justices. Their inflated perception of the merits of their clients' positions translates into an altered view of how the justices treat their clients. Defense

lawyers think the justices are more out of line with their clients' innocence or deserved lower sentences, and therefore, they tend to perceive justices as relatively pro-state. State attorneys think the justices are more out of line with the state's view of guilt or deserved higher sentences and therefore tend to perceive justices as relatively pro-defendant. Evidence exists that lawyers, like other people, also misperceive their own performance and behavior.⁴⁷

Perceptions and Media Coverage

Perceptions of legal performance can be shaped by media coverage,⁴⁸ so media characterizations of justices may influence perceptions of them. To explore this influence, we surveyed newspaper coverage of the 16 justices appearing in the questionnaire. The newspaper survey included all articles in two leading Israeli newspapers⁴⁹—*Yediot Aharonot* (Ynet) and *Ma'ariv* (NRG)—that are available online. These articles should reasonably reflect media coverage because the vast majority of articles published in the last decade in these central newspapers are available online. Our sample includes only articles relating to the criminal-case decisions of each of the justices, thereby excluding all references relating to other judicial activities (especially in the constitutional realm). In order not to skew the results, we did not double count similar articles that appeared in both newspapers. The time period included in the online survey was from 2003 through most of 2011. Table 3 shows the percentage of newspaper articles that reported pro-defendant tendencies out of the total pool of references to each of the justices.⁵⁰

As with the justices' votes in mandatory and discretionary cases, the question arises whether survey responses were associated with media reporting. Figure 4 shows the relation between justices' survey scores and the percentage of media

45. *Id.* at 404.

46. ANDREAS GLÖCKNER & CHRISTOPH ENGEL, MAX PLANCK INST. FOR RESEARCH ON COLLECTIVE GOODS, *ROLE INDUCED BIAS IN COURT: AN EXPERIMENTAL ANALYSIS* (2012), available at http://www.coll.mpg.de/pdf_dat/2010_37online.pdf.

47. Theodore Eisenberg, *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 272 WASH. U. L.Q. 979, 980, 988 (1994) (finding, for example, that 32% of lawyers report that they never request court-ordered compensation in excess of normal hourly rates, but judges report that only 11% of lawyers never make such requests); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1504 (1998) (noting that “there is suggestive evidence that self-serving bias does affect lawyers and judges as well as other actors”); George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 150 (1993) (finding self-serving interpretation of fairness in study that included law students).

48. E.g., WILLIAM HALTOM & MICHAEL McCANN, *DISTORTING THE LAW: POLITICS, THE MEDIA, AND THE LITIGATION CRISIS* ch. 5 (2004). As claimed by Bogoch and Holzman-Gazit, “Not only is the media the main source of knowledge about law for the public at large, but it is also an important resource for legal professionals and members of the political elites as well.” Bryna Bogoch & Yifat Holzman-Gazit, *Mutual Bonds: Media Frames and the Israeli High Court of Justice*, 33 LAW & SOC. INQUIRY 53, 54 (2008).

49. According to the 2010 TGI Research survey, *Yediot Aharonot* and

Ma'ariv jointly enjoyed an exposure rate of 47.5% for all individuals above the age of 18. The biannual TGI survey measures newspaper readership among other topics. See Hagai Kraus, *TGI Survey: Israel Today Increases the Gap*, WALLA (Jan. 18, 2011), <http://b.walla.co.il/?w=/1781680>.

50. In addition to articles about the justices' general criminal-case decisions, special attention was focused on the press coverage of the high-profile case of former Israel President Moshe Katzav, who was convicted of rape and other charges in December 2010. Isabel Kershner, *Israeli Court Upholds Rape Conviction of Ex-President*, N.Y. TIMES, Nov. 10, 2011, at A8, available at <http://www.nytimes.com/2011/11/11/world/middleeast/israels-supreme-court-upholds-rape-conviction-of-ex-president.html>. ISC consideration of his appeal began on August 7, 2011, by Justices Arbel, Joubran, and Naor. The justices in the Katzav case received wide media coverage during the time our survey was conducted. Discussion in the media about the justices began when the panel was selected; thus, much of the coverage occurred before our survey. The defendant's conviction was upheld by the ISC panel on November 10, 2011. This media coverage included op-eds and profile articles that depicted both Justices Arbel and Naor as exhibiting strong pro-state tendencies, while Justice Joubran was overall portrayed as less pro-state. This may have affected the public perception with respect to these particular justices.

TABLE 3. NEWSPAPER COVERAGE OF ISC JUSTICES' CRIMINAL DECISIONS, 2003-2011

JUSTICE	MANDATORY CASES		DISCRETIONARY CASES
	NUMBER OF ARTICLES	NUMBER OF PRO-DEFENDANT	PERCENT OF PRO-DEFENDANT
Arbel	17	1	5.9
Barak	5	1	20.0
Beinisch	7	1	14.3
Berliner	16	2	12.5
Elon	6	4	66.7
Fogelman	4	2	50.0
Grunis	16	12	75.0
Hayut	9	2	22.2
Joubran	12	5	41.6
Kheshin, D.	5	3	60.0
Levy	1	1	6.3
Melcer	4	1	25.0
Naor	3	3	60.0
Procaccia	18	3	16.7
Rivlin	6	3	50.0
Rubinstein	7	2	28.6

Note: The table shows the rate at which each justice voted for the state's position in mandatory and discretionary criminal cases. A vote favored the state if it was to affirm an appeal brought by a defendant or to reverse an appeal brought by the state. A vote favored the defendant if it was to affirm an appeal brought by the state or to reverse an appeal brought by the defendant. The cases are mandatory- and discretionary-jurisdiction criminal cases decided by the ISC in the years 2006 and 2007.

stories portraying a justice as pro-defendant. The correlation coefficient was positive and nearly significant (.48; $p = .059$), suggesting a reasonable association between media coverage and perceptions. This result is similar to, but slightly stronger than, the association between survey scores and discretionary-case outcomes. If one excludes the most outlying justice in the figure, Justice Naor, the correlation coefficient was .61 and significant at $p = .017$. So both discretionary-case votes and media reports were associated with perceptions of justices to a much greater degree than mandatory-case votes.⁵¹ Discretionary-case outcomes and media reports were not linearly correlated (coefficient = .13; $p = .633$).

Media coverage is most helpful in explaining perceptions of Justice Arbel. Her votes in both mandatory- and discretionary-jurisdiction cases are not consistent with the perception of her as the most pro-state justice. She was mentioned in more articles than all but one of the justices in our media survey. Those articles, as shown in Table 3, may be the reason for the pro-

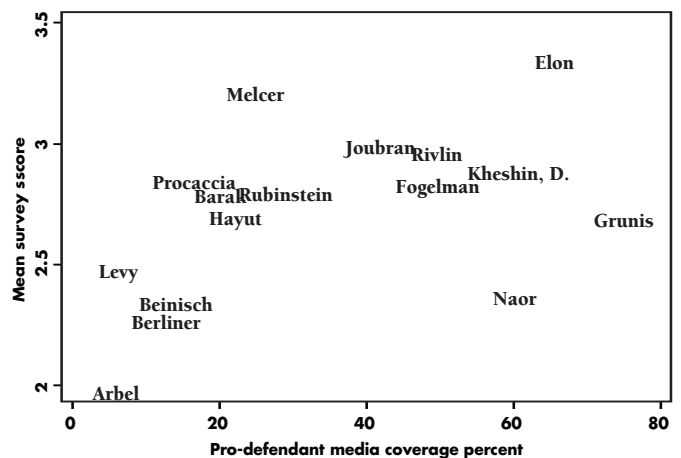
state perception. Although Justice Elon was referred to in fewer articles, the pattern of his media coverage may help explain the perception of him as pro-defendant despite his voting pattern in mandatory cases, which tended to favor the state.

The precision of the media-coverage survey score and discretionary-case survey score relations are subject to the limitation of small numbers of observations. Table 3 shows few newspaper stories for several justices, and Table 2 shows few discretionary cases for several justices. Nevertheless, the available evidence is that both media coverage and discretionary-case voting patterns better explain perceptions of justices than do voting patterns in the mass of criminal cases, which are reviewed under mandatory jurisdiction.

CONCLUSION

Recognizing the gap between perception of judges' voting activity and how they actually vote is important to fairly evaluate judges. We have presented evidence that a small number of discretionary cases and media reports shape perceptions more than the mass of mandatory-jurisdiction cases. The perception that a judge is biased toward the state or the defendant can be inconsistent with the judge's voting pattern in the mass of cases, as our data show for some ISC justices. As we demonstrated, Justice Arbel is perceived as the most pro-state justice with no basis for that perception in her voting record. Justice Naor is perceived as pro-state but in fact voted for defendants more than any other justice in mandatory-jurisdiction cases. Justices Elon and Melcer are perceived as pro-defendant with no basis for that in their voting pattern in mandatory-jurisdiction cases. Suggestions or innuendo that these justices are

FIGURE 4. RELATION BETWEEN SURVEY RESPONSES AND MEDIA COVERAGE



Note: The figure shows the relation between survey scores and media reporting about ISC justices in criminal cases. Survey scores are from the fall 2011 survey of the Israeli legal community shown in Table 1, which asked about respondents' perceptions of ISC justices as pro-state or pro-defendant. Responses were on an ordinal scale of one to five, with one being the most pro-state. Newspaper coverage was based on the media results reported in Table 3.

51. Characterization of justices in the media may be associated with an ISC institutional feature we explore elsewhere, justices' votes in cases in which they write the Court's opinion. Theodore Eisenberg, Talia Fisher & Issi Rozen-Zvi, *Group Decision Making on Appellate Panels: Presiding Justice and Opinion Justice Influence in*

the Israel Supreme Court, 19 PSYCHOL. PUB. POL'Y & L. (forthcoming Aug. 2013).

biased in favor of one party or the other in criminal cases might be demonstrably unfair.

Perceptions may be shaped by factors we cannot assess here, such as the dominance of a few cases that are regarded as important. Such cases surely influence the public's perceptions. But the full evaluation of a justice should include his or her behavior in the mass of cases as well as in the few. In the non-Israeli context, few studies thoroughly and objectively assess judicial behavior in a manner that would support claims of bias. Studies tend to lack full samples of judges' cases due to limitations of available opinions or nonpublic votes to grant review. Our Israel-based study demonstrates that such limitations can distort perceptions of judicial performance.



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 - Establishing a statewide self-help hotline
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Court Review Author Submission Guidelines

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.

Court Review is received by the 2,500 members of the American Judges Association (AJA), as well as many law libraries. About 40 percent of the members of the AJA are general-jurisdiction, state trial judges. Another 40 percent are limited-jurisdiction judges, including municipal court and other specialized court judges. The remainder include federal trial judges, state and federal appellate judges, and administrative-law judges.

Articles: Articles should be submitted in double-spaced text with footnotes in Microsoft Word format. The suggested article length for *Court Review* is between 18 and 36 pages of double-spaced text (including the footnotes). Footnotes should conform to the current edition of *The Bluebook: A Uniform System of Citation*. Articles should be of a quality consistent with better state-bar-association law journals and/or other law reviews.

Essays: Essays should be submitted in the same format as articles. Suggested length is between 6 and 12 pages of double-spaced text (including any footnotes).

Book Reviews: Book reviews should be submitted in the same format as articles. Suggested length is between 3 and 9 pages of double-spaced text (including any footnotes).

Pre-commitment: For previously published authors, we will consider making a tentative publication commitment based upon an article outline. In addition to the outline, a comment about the specific ways in which the submission will be useful to judges and/or advance scholarly discourse on the subject matter would be appreciated. Final acceptance for publication cannot be given until a completed article, essay, or book review has been received and reviewed by the *Court Review* editor or board of editors.

Editing: *Court Review* reserves the right to edit all manuscripts.

Submission: Submissions may be made either by mail or e-mail. Please send them to *Court Review*'s editors: Judge Steve Leben, 301 S.W. 10th Ave., Suite 278, Topeka, Kansas 66612, email address: sleben@ix.netcom.com; or Professor Alan Tomkins, 215 Centennial Mall South, Suite 401, PO Box 880228, Lincoln, Nebraska 68588-0228, email address: atomkins@nebraska.edu. Submissions will be acknowledged by mail or email; notice of acceptance or rejection will be sent following review.

AMERICAN JUDGES ASSOCIATION FUTURE CONFERENCES

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The Resource Page

Alaska Court System Adopts Fairness Pledge

<http://goo.gl/qHArx>

Under the leadership of Chief Justice Dana Fabe, the Alaska judiciary has posted a new fairness pledge in courthouses throughout the state. Fabe announced the pledge in her January State of the Judiciary address to the Alaska Legislature. She began by discussing the public's expectation of fairness in court, and she continued by contrasting a typical courthouse with a typical hospital:

[I]f you go into a hospital lobby, you will often notice a sign containing a clear statement of your rights as a patient: that you are entitled to be treated with dignity and respect and to have your questions answered. Alaskans who come to court should have the same assurances. So today, I announce a pledge to each litigant, defendant, victim, witness, juror, or other person who is involved in a court proceeding: The judge and court staff will listen to you, treat you with respect, and respond to your questions. We will post this pledge in every courthouse in the state.

It may seem simple and obvious, but it is our belief that this pledge of fairness, consistently offered and openly displayed, will go a long way to remind everyone in our courthouses that ensuring fairness is an

active process, for which there are no short cuts. Courtrooms must be places that foster understanding and respect for our laws, for the people affected by them, and for the judges who endeavor to uphold them. They must be places that help bring a sense of clarity, community connection, and confidence that justice will be served. It is within this spirit that we reaffirm to the people of Alaska that listening, respecting, and explaining are the hallmarks of what justice requires.

The Internet link shown above will take you to a column by Chief Justice Fabe providing additional background about the fairness pledge, which has been placed in each of Alaska's 44 courthouses. The pledge is printed in English as well as six other languages.

Trends in State Courts 2013

<http://www.ncsc.org/trends>

Each year, the National Center for State Courts publishes a book with short pieces by court leaders on trends in the state courts. The 2013 edition was recently published—and is available at this website along with the past editions from 2000 forward.

Topics covered in this year's print edition include:

- Improving child-protection outcomes
- Using courthouse-observation teams

to improve service

- Identifying access-to-justice issues for the poor
- Addressing human trafficking in the courts
- Integrating procedural-fairness principles into a domestic-violence docket
- Exploring steps that have been taken in New Mexico to improve alternative dispute resolution.

In addition to the print version of this publication you'll also find a new online monthly edition of *Trends*, including multimedia clips from authors to highlight and expand on their written pieces.

23rd National College on Judicial Conduct and Ethics

October 23-25, 2013

Chicago, Illinois

<http://www.ajs.org>

Nothing is more important to maintaining public confidence in the judiciary than making sure that judges comport themselves with integrity. Yet judicial-ethics programming is usually interspersed into a lengthy set of educational programs for judges and may not get the attention it deserves.

Most judges can benefit from a more intensive review of judicial-ethics rules and current issues in judicial ethics and discipline. Toward that end, the American Judicature Society sponsors its annual National College on Judicial Conduct and Ethics—and the 23rd annual conference will be held October 23-25 in Chicago.

The gathering provides a forum for judges, staff of judicial-conduct commissions, judicial-ethics-advisory committees, and others to discuss the ethics rules for judges, with a focus on the areas that cause specific problems. Sessions at this year's conference will include:

- Social media and judicial ethics
- Off-bench conduct
- Pro se litigants
- Drawing the line on judicial demeanor
- Judicial disqualification

Registration fees for the conference are \$350 through August 23 (\$375 thereafter).

PLEDGE OF FAIRNESS



The fundamental mission of the Alaska Court System is to provide a fair and impartial forum for the resolution of disputes according to the rule of law. Fairness includes the opportunity to be heard, the chance to have the court process explained, and the right to be treated with respect. The judges and staff of the Alaska Court System therefore make the following pledge to each litigant, defendant, victim, witness, juror, and person involved in a court proceeding:

We will LISTEN to you

We will respond to your QUESTIONS about court procedure

We will treat you with RESPECT