2013

Court Review: The Journal of the American Judges Association
49:4 (2013)- Whole Issue

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T
his issue features our annual review of the past Term’s decisions of the
United States Supreme Court. Our regular contributors, Professor Todd Pet-
tys, of the University of Iowa College of Law, and Professor Charles Weis-
selberg, of Berkeley Law, review the civil and criminal decisions in separate arti-
cles. Once again, they have concentrated on the issues most of concern to judges
in state courts, which represents the majority of the American Judges Associa-
tion’s membership.

As both professors note, the big decisions this Term came on the civil side, so
we start with Professor Pettys review of those cases—including the striking down
of key parts of the Defense of Marriage Act and the Voting Rights Act. Other civil
cases included ones determining how far a city can go in giving or withholding
land use permits before being required to pay for the property; one limiting the
ability of lawyers to use personal information from state motor-vehicle databases to solicit
clients; and another ruling (added to three in the prior Term) reversing a state court that had failed
to enforce arbitration agreements under the Fed-
eral Arbitration Act. Professor Pettys also reviews
cases being heard in the October 2013 Term.

On the criminal side, Professor Weisselberg
reviews several significant Fourth Amendment
decisions, including one on obtaining and analyz-
ing an arrested person’s DNA (approved 5-4), one
determining that detailed evidence about the
qualifications of a drug-sniffing dog wasn’t
needed, and one holding that a dog sniff on the
front porch of a home was a search subject to Fourth Amendment safeguards.
Weisselberg also reviews a key Fifth Amendment case involving whether a defen-
dant’s silence may be mentioned if a suspect doesn’t expressly invoke the right to
silence in a non-custodial interview or interrogation (yes, 5-4). Professor Weis-
selberg also reviews cases being heard in the October 2013 Term, and he reviews
some of the caselaw developments that have already taken place interpreting last
Term’s key decisions.

Our third article looks at whether implicit bias affects jury decisions and, if
so, what can be done about it. Researchers Jennifer Elek and Paula Hannaford-
Agor review existing research on the effect of implicit bias on juries; they also
review potential steps that might help to lessen that effect.

Our final article examines an interesting question involving the Model Code
of Judicial Conduct, which was updated by the American Bar Association in
2007 to include the term “domestic partner” and to make judges subject to con-
ict-of-interest rules regarding domestic partners to the same extent they were
previously subject to those rules with respect to spouses. Andrew Stankevich
notes that some states have not adopted this provision, perhaps because the state
isn’t friendly to gay and lesbian rights. Stankevich suggests that this is a short-
sighted approach with respect to this specific issue, since the failure to include
domestic partners arguably makes less strict conflict-of-interest rules applicable
to gay and lesbian judges.—Steve Leben

Cite as: 49 Ct. Rev. ___ (2013).
It is a privilege and honor to begin my term as your president, especially at a time when AJA is so well respected and highly regarded as the largest judge-only organization in North America.

As I write, I have recently returned from the fantastic 53rd education conference in Hawaii where we were honored by welcoming letters from Hawaii Governor Neil Abercrombie, U.S. Senator Brian Schatz, and U.S. Representative Colleen Hanabusa. Hawaii Chief Justice Mark Recktenwald came in person to open the conference. If you missed this uplifting event and the chance to interact with more than 150 of the best judges in North America and the stellar faculty of 29 distinguished experts in their respective fields, take a moment to go to the “Conference” section of our website (www.amjudges.org) to explore the educational materials from the conference. You too will be proud to say that you are an AJA member!

During the business meetings in Hawaii, the members of the Executive Committee and the Board of Governors had a chance to review AJA’s current statement of purpose, which is “to promote and improve the effective administration of justice; to maintain the status and independence of the judiciary; to provide a forum for the continuing education of its members and the general public; and for the exchange of new ideas among all judges.”

AJA has been successful because of the strategies it has been using to advance our registered brands: Making Better Judges and the Voice of the Judiciary. There are important roles to be served by robust, voluntary, nongovernmental organizations—made up of judges—in the constellation of volunteer organizations that support and work diligently to achieve the ideal of having judicial organizations (courts) that are open to all and efficiently deliver justice that is credibly fair and impartial based on well-understood principles of the rule of law.

To remain so actively engaged, AJA will need to continue to attract new members, the life’s blood of volunteer organizations like AJA; increase the number of AJA members who work actively to achieve the mission and goals of AJA; develop a larger core of AJA members who will take on important leadership functions in the organization; and improve communication and collaboration with other organizations that have similar goals of improving courts.

As your leadership team begins its year, we will be informed by recognizing what AJA has been doing well and we will strive to do even better and with a broader impact in proven activities like educational programs at conferences; its publications—Court Review, Benchmark, and our blog; and encouraging and publishing white papers like the 2007 paper on procedural fairness, the 2010 paper on judicial selection and retention, and the 2012 paper on judicial decision making (all available on our website). We will soon unveil and market a new web-based education product on domestic violence (see the inside back cover of this issue for more information). We will use our voice in collaboration with partners like Justice at Stake, the American Judicature Society, the National Center for State Courts, the Conference of Chief Justices, the Conference of State Court Administrators, and new groups like the National Forum on Criminal Justice to promote the use of evidence-based practices and to make improvements to the civil and criminal justice systems.

As we go about achieving our mission, we will be more mindful of and informed by the emphasis placed on particular issues by the National Center’s publication, Trends in State Courts, and by the priorities set by the Conference of Chief Justices. Therefore, AJA will focus on civil and criminal justice reform, access to justice, evidence-based sentencing, other evidence-based court-reengineering initiatives, and advancing the interest in therapeutic justice.

We recognize that building a strong constituency for courts and judges will require more engagement by our individual members with the communities in which we live and work. Not only will we encourage our members to be more involved with educating the public about the value of the work we do in our democracies to deliver justice to all, we expect to develop a toolkit to make it easier for judges to engage ethically and effectively.

I encourage you to become more involved with AJA, your judges’ organization. I am confident that by increasing your level of participation, you will be rewarded by being more enthusiastic about your work. I know I have been.

This year’s motto will be: we’re in touch, so you be in touch with us. I look forward to hearing from you.
The Supreme Court’s October 2012 Term likely will be remembered best for the Justices’ landmark ruling in United States v. Windsor, striking down Section 3 of the Defense of Marriage Act, and for the jurisdictional ruling in Hollingsworth v. Perry that helped to reopen the door for same-sex marriages in California. Many also will long remember Shelby County v. Holder, invalidating Section 4 of the Voting Rights Act and thereby freeing a number of states and localities from the preclearance requirements under which they had operated for decades. Crowded behind those headline-dominating decisions are a host of other broadly consequential rulings on issues ranging from racial preferences in higher education, to ratcheting up the requirements for voter registration, to seeking standing in federal court on the basis of anticipated injuries. I briefly review the Court’s most noteworthy civil decisions here, letting a set of alphabetized headings dictate the order in which I take them up.

ADMINISTRATIVE LAW
Auer Deference

The Court’s holding in Decker v. Northwest Environmental Defense Center is not likely to be of much interest outside the world of environmental-law specialists, but the case served as a vehicle for three Justices to signal an issue of potentially enormous significance in the larger world of administrative law. Decker concerned a dispute about the need for National Pollutant Discharge Elimination System permits covering storm water flowing off logging roads into nearby rivers. Citing Auer v. Robbins, the Court deferred to the Environmental Protection Agency’s interpretation of its own regulations and held that permits were not required. It is the continued viability of Auer deference that three Justices questioned.

The leading skeptic was Justice Scalia, who wrote separately to declare that “[c]onough is enough” and that the time has come “for us to presume (to coin a phrase) that an agency says in a rule what it means, and means in a rule what it says there.” Calling Auer “a dangerous permission slip for the arrogation of power,” Justice Scalia argued that it violates “a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands.” Joined by Justice Alito, Chief Justice Roberts wrote separately to say that it would be inappropriate to take on the question of Auer deference in this case because it had not been thoroughly argued by the parties, but that the issue might indeed merit the Court’s attention in the future.

Chevron Deference

Two months later, in City of Arlington v. FCC, Justice Scalia led a majority of the Court in defending a different species of interpretive deference, with Chief Justice Roberts and Justices Kennedy and Alito warning in dissent about the dangers of expanding administrative agencies’ already vast powers. The issue in City of Arlington was whether the Federal Communications Commission’s interpretation of its own statutory jurisdiction was entitled to Chevron deference. Under federal statutory law, state and local zoning authorities must respond “within a reasonable period of time” when providers of wireless telecommunications seek approval to build the towers and antennas that their services require. After the FCC specified the number of days within which zoning authorities ordinarily must respond to siting applications, the City of Arlington, Texas, and other municipalities sought judicial review, arguing that the FCC lacked the authority to say what Congress meant by “reasonable period of time.” The FCC contended that it held the power to resolve the ambiguity, and that its determination that it possessed this interpretive power was itself entitled to Chevron deference.

Writing for the majority, Justice Scalia concluded that Chevron deference is indeed appropriate for agencies’ interpretations of statutory ambiguities concerning the scope of their own authority. He explained that the proposed distinction between jurisdictional and nonjurisdictional statutory interpretations is “a mirage,” “an empty distraction,” and a distinction that would require federal judges to engage in “waste[ful] . . . mental acrobatics” akin to those of a “haruspex, sifting the entrails of vast statutory schemes.” In every case concerning an agency’s statutory interpretations, the Court said, the question is always the same: has the agency “gone

Footnotes
1. 133 S. Ct. 1326 (2013).
2. 519 U.S. 452, 461 (1997) (stating that the Court will defer to an administrative agency’s interpretation of its own regulations unless that interpretation is “plainly erroneous or inconsistent with the regulation”) (internal quotation omitted).
3. Justice Breyer recused himself because his brother, U.S. District Judge Charles Breyer, was sitting by designation on the Ninth Circuit panel that heard the case below.
4. Decker, 133 S. Ct. at 1339, 1344 (Scalia, J., concurring in part and dissenting in part).
5. Id. at 1341 (Scalia, J., concurring in part and dissenting in part).
10. Id. at 1870.
11. Id. at 1870-71.
beyond what Congress has permitted it to do.”12

Joined by Justices Kennedy and Alito, Chief Justice Roberts dissented, expressing grave reservations about the broad scope of administrative agencies’ powers in modern American government. The Chief Justice argued that, with “hundreds of federal agencies poking into every nook and cranny of [the average citizen’s] daily life,” the Court should be loath to expand agencies’ powers still further.13 “An agency interpretation warrants [Chevron] deference,” the Chief Justice wrote, “only if Congress has delegated authority to definitively interpret a particular ambiguity in a particular manner. Whether Congress has done so must be determined by the court on its own before Chevron can apply.”14

Arbitration
Honoring the Federal Arbitration Act

In three rulings handed down during the prior Term,15 the Court expressed frustration with lower courts for failing to follow the requirements of the Federal Arbitration Act (FAA). In November 2012, the Court picked up where it left off by unanimously reversing a judgment of the Oklahoma Supreme Court in Nitro-Lift Technologies, LLC v. Howard.16 Nitro-Lift had entered into contracts with two of its employees. Those contracts contained noncompetition clauses, as well as clauses requiring arbitration to settle any differences that might arise between the parties. After the employees left Nitro-Lift to work for a competitor, Nitro-Lift sought to enforce the noncompetition agreements through arbitration. The employees, however, went to state court seeking a declaration that the noncompetition agreements were unenforceable under state law. The Oklahoma Supreme Court found that the noncompetition agreements were “void and unenforceable as against Oklahoma’s public policy.”17 In a unanimous per curiam ruling, the Supreme Court reversed, explaining that the FAA permitted the state courts to pass judgment on the validity of the arbitration provisions themselves, but—having accepted the trial court’s determination that those provisions were valid—the Oklahoma Supreme Court improperly “assumed the arbitrator’s role by declaring the noncompetition agreements null and void.”18

Class Arbitration

In two cases last Term, the Court addressed issues relating to class arbitration. Building on the previously established principle that “a party may not be compelled . . . to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so,”19 in a unanimous decision in Oxford Health Plans LLC v. Sutter20 confronted a dispute between a health-insurance company and a proposed class of physicians. On two separate occasions, the insurer had asked an arbitrator to determine whether the insurer and the physicians had agreed upon class arbitration (as some of the physicians contended), and on both occasions the arbitrator determined that they had. The insurer then asked a federal court to vacate the arbitrator’s determination under Section 10(a)(4) of the FAA, arguing that the arbitrator had “exceeded [his] powers.”21

Led by Justice Kagan, the Court unanimously ruled that it would be inappropriate to disturb the arbitrator’s finding that class arbitration was within the scope of the parties’ agreement. The Court stressed that it was not necessarily agreeing with the arbitrator’s reading of the contract.22 Rather, the Justices’ decision turned on the narrow scope of judicial review:

All we say is that convincing a court of an arbitrator’s error—even a grave error—is not enough. So long as the arbitrator was “arguably construing” the contract—which this one was—a court may not correct his mistakes under § 10(a)(4). The potential for those mistakes is the price of agreeing to arbitration.23

12. Id. at 1869.
13. Id. at 1879 (Roberts, C.J., dissenting). The majority did not believe its ruling expanded agencies’ power. See, e.g., id. at 1872 (“The U.S. Reports are shot through with applications of Chevron to agencies’ constructions of the scope of their own jurisdiction.”).
14. Id. at 1883 (Roberts, C.J., dissenting). Justice Breyer wrote separately. Although he denominated his opinion a concurrence in part and a concurrence in the judgment, he substantively aligned himself, in part, with the dissent. See, e.g., id. at 1876 (“The question whether Congress has delegated to an agency the authority to provide an interpretation that carries the force of law is for the judge to answer independently.”).
21. 9 U.S.C. § 10(a)(4) (authorizing federal courts to vacate arbitrators' awards “where the arbitrators exceeded their powers”).
22. Joined by Justice Thomas, Justice Alito filed a brief concurrence, underscoring the implausibility of the arbitrator's finding on the merits and indicating that—absent a decision like the one the insurer made here to submit the issue to the arbitrator in the first instance—courts should be reluctant to find that the availability of class arbitration is indeed an issue for arbitrators to decide. In her opinion for the Court, Justice Kagan emphasized that the Court has not yet determined whether “the availability of class arbitration is a so-called ‘question of arbitrability’” that courts ordinarily can review de novo. See Oxford Health Plans, 133 S. Ct. at 2068 n.2.
23. Id. at 2070 (quoting E. Associated Coal Corp. v. Mine Workers, 531 U.S. 57, 62 (2000)).
[A] majority of the court ruled in favor of Amex, stating that “the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim.”

The class-arbitration issue in American Express Co. v. Italian Colors Restaurant\textsuperscript{24} proved to be more controversial. Merchants who accepted American Express (Amex) cards brought a class-action lawsuit against the company, arguing that Amex violated federal antitrust laws by using its monopoly power in the market for charge cards to force the merchants to pay above-market fees for transactions involving Amex credit cards. Amex sought to compel individual arbitration pursuant to a contractual arbitration clause, pointing out that the merchants not only had agreed to arbitrate any claims they might have against the company, but also that they had waived their ability to pursue their claims as a class. The merchants objected, arguing that their individual best-case recoveries would amount to only a fraction of the costs they each would have to incur to prove the merits of their antitrust claims. To preclude them from collectively pursuing their claims in court, they argued, thus would frustrate the purposes of the antitrust laws by effectively shielding Amex from liability.

Led by Justice Scalia, a majority of the Court ruled in favor of Amex, stating that “the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim.”\textsuperscript{25} The Court acknowledged that, in past cases, it had developed an “effective vindication” doctrine, under which a court may invalidate an arbitration agreement if it amounts to “a prospective waiver of a party’s right to pursue statutory remedies.”\textsuperscript{26} The Court found, however, that “the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy.”\textsuperscript{27} Joined by Justices Ginsburg and Breyer, Justice Kagan dissented, arguing that the case fell squarely within the effective-vindication doctrine.

COPYRIGHTS: THE FIRST-SALE DOCTRINE

In Kirtsaeng v. John Wiley & Sons, Inc.,\textsuperscript{28} the Court finally brought clarity to the application of the first-sale doctrine to goods manufactured abroad—an issue on which it had reached an unilluminating 4-4 split in 2010.\textsuperscript{29} Under the Copyright Act, a copyright owner generally has the exclusive right to distribute copies of the copyrighted work. Under Section 109(a) of the Act, however, the copyright owner can only control the first sale of a given copy—once someone else has become the copy’s lawful owner, that new owner can sell or distribute the copy however he or she would like.

The first-sale doctrine’s application to goods manufactured within the United States is clear. But what about goods manufactured abroad? Suppose, for example, that a book publisher charges more for a copyrighted textbook in one region of the world than another, and wants to prevent a profit seeker from buying copies in the inexpensive region and then selling those copies in the more expensive region at prices somewhat lower than those charged by the publisher itself. Does the first-sale doctrine cut off the publisher’s ability to complain? By a 6-3 vote, the Kirtsaeng Court answered that question in the affirmative. Led by Justice Breyer, a majority found no evidence that, when settling upon the language of Section 109(a), Congress intended to impose a geographical restriction on the first-sale doctrine’s application.\textsuperscript{30} Manufacturers of copyrighted works who wish to segment their international markets will now likely take their fight to Congress.

FEDERAL JURISDICTION

THE MARRIAGE CASES

The two intensely watched marriage cases that the Court decided last Term—Hollingsworth v. Perry\textsuperscript{31} and United States v. Windsor\textsuperscript{32}—yielded the Term’s highest-profile jurisdictional rulings. The facts in Hollingsworth will still be fresh in most readers’ minds. In the fall of 2008, California voters approved Proposition 8, banning same-sex marriage. When two same-sex couples filed a lawsuit challenging Prop 8’s constitutionality, California officials refused to defend it. In place of those officials, the district court permitted Dennis Hollingsworth and others who had led the charge on Prop 8 to intervene as parties. Following a trial, the district court declared Prop 8 unconstitutional. When Hollingsworth appealed, the Ninth Circuit asked the California Supreme Court to weigh in on whether Hollingsworth had the power to defend Prop 8 (collectively referred to here as “Hollingsworth”) to intervene as parties. Following a trial, the district court declared Prop 8 unconstitutional. When Hollingsworth appealed, the Ninth Circuit asked the California Supreme Court to weigh in on whether Hollingsworth had the power to defend Prop 8 on the state’s behalf. After California’s high court confirmed that he did, the Ninth Circuit took jurisdiction and affirmed the district court’s ruling (albeit on grounds narrower than those that the district court had cited). The Court granted Hollingsworth’s petition for certiorari, asking the parties to brief both the merits and the question of Hollingsworth’s standing.

The Justices ultimately divided 5-4, although not along familiar ideological lines. Disposing of the case entirely on jurisdictional grounds, Chief Justice Roberts wrote for the majority, joined by Justices Scalia, Ginsburg, Breyer, and Kagan. The Court first determined that Hollingsworth himself had no personal stake in the case; his only interest was a generalized desire “to vindicate the constitutional validity of a

\begin{itemize}
\item 24. 133 S. Ct. 2304 (2013).
\item 25. Id. at 2309.
\item 26. Id. at 2310 (emphasis omitted) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985)).
\item 27. Id. at 2311.
\item 28. 133 S. Ct. 1351 (2013).
\item 30. Joined by Justice Kennedy and (in part) by Justice Scalia, Justice Ginsburg dissented. She argued, \textit{inter alia}, that the Court’s ruling was at odds with the position taken by the United States in international negotiations, and thus “risks undermining the United States’ credibility on the world stage.” Kirtsaeng, 133 S. Ct. at 1385 (Ginsburg, J., dissenting).
\item 31. 133 S. Ct. 2652 (2013).
\item 32. 133 S. Ct. 2675 (2013).
\end{itemize}
generally applicable California law.”

Turning to the more difficult legal question, the majority found that Hollingsworth did not have standing to assert the interests of the State of California, notwithstanding the California Supreme Court’s finding to the contrary. Hollingsworth had argued that he was authorized to speak as an agent of the people of California, but the Court disagreed, pointing out that Hollingsworth and his fellow Prop 8 proponents “answer to no one; they decide for themselves, with no review, what arguments to make and how to make them,” they are not subject to removal, and they owe no fiduciary obligations to the people of California.

Joined by Justices Thomas, Alito, and Sotomayor, Justice Kennedy dissented, arguing that the California Supreme Court’s findings regarding Hollingsworth’s power to speak for the state were “fully sufficient to establish the standing and adversity that are requisites for justiciability under Article III.” Far from finding Hollingsworth’s autonomy problematic, Justice Kennedy argued that Hollingsworth’s independence was integral to California’s embrace of ballot initiatives. The initiative system provides Californians with a vehicle for circumventing state officials, Justice Kennedy said, and it undermines that system “if the very officials the initiative process seeks to circumvent are the only parties who can defend an enacted initiative when it is challenged in a legal proceeding.”

In Windsor, the fight was over Section 3 of the Defense of Marriage Act (DOMA). Section 3 stated that, for purposes of all federal statutory and administrative law, the term “marriage” referred only to heterosexual unions and the term “spouse” referred only to individuals joined in such unions. Pursuant to federal tax laws and DOMA, the federal government collected estate taxes totaling more than $360,000 from Edith Windsor after Windsor’s female spouse died. Windsor filed suit alleging a violation of her equal-protection rights, accurately pointing out that she would not have been required to pay those federal taxes if her spouse had been a man. Just as California officials declined to defend Prop 8 in Hollingsworth, the Obama Administration declined to defend DOMA but said that it would continue to obey that legislation and would withhold the disputed funds pending completion of the judicial proceedings. Given the Executive’s decision not to defend Section 3, the House of Representative’s Bipartisan Leadership Advisory Group (BLAG) petitioned to intervene to defend the legislation. The district court granted BLAG’s petition, but ultimately ruled in Windsor’s favor on the merits. After the Second Circuit affirmed, both the United States and BLAG petitioned for certiorari—the United States seeking affirmance and BLAG seeking reversal. The Court granted the United States’ petition, asking the parties to address both the constitutionality of Section 3 and whether the Court had jurisdiction to say anything about the matter.

Joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, Justice Kennedy wrote for the majority, finding that the Court had jurisdiction. The Court distinguished between standing requirements imposed by Article III and those imposed by the Court in the name of prudence. In this case, Justice Kennedy wrote, the United States satisfied the requirements of Article III (notwithstanding its agreement with the Second Circuit and with Windsor) because the national treasury stood to lose the money that Windsor contended was rightly hers. The Court acknowledged that a prevailing party ordinarily lacks standing to appeal, but said that this was a prudential concern rather than a dictate of Article III. The Court concluded that it was appropriate to take jurisdiction because BLAG—even if not formally a proper party to the action—had provided the Court with a “sharp adversarial presentation of the issues,” and vast resources would have to be spent on Section 3 litigation involving thousands of people across the country if the Court refused to hear Windsor’s case. (I discuss the Court’s ruling on the merits elsewhere in this overview, under the “Fifth Amendment” heading.)

Justice Alito filed a dissenting opinion in Windsor, but he agreed that the Court had jurisdiction. For Justice Alito, the key to the Court’s power to hear the case lay in BLAG’s intervention and vigorous advocacy on DOMA’s behalf. “[I]n the narrow category of cases in which a court strikes down an Act of Congress and the Executive declines to defend the Act,” he wrote, “Congress both has standing to defend the undefended statute and is a proper party to do so.”

Finding no jurisdiction, Justice Scalia dissented, joined by Justice Thomas and, in part, by Chief Justice Roberts. Accusing the majority of making a “jaw-dropping” assertion of judicial authority, Justice Scalia said that the Court had never before agreed to decide a legal question “when every party agrees with both its nominal opponent and the court below on that question’s answer.” He argued that the majority “envisions a Supreme Court standing (or rather enthroned) at the apex of government, empowered to decide all constitutional questions, always and everywhere ‘primary’ in its role.”

**STANDING AND FUTURE INJURIES**

Although overshadowed by Hollingsworth and Windsor, another broadly consequential jurisdictional ruling came down in Clapper v. Amnesty International USA. In that case, attorneys, journalists, human-rights workers, and others sought declaratory and injunctive relief concerning 50 U.S.C.

34. Id. at 2666.
35. Id. at 2668 (Kennedy, J., dissenting).
36. Id. at 2671 (Kennedy, J., dissenting).
37. BLAG’s decision to intervene fell along party lines, with the three Republican members favoring the move and the two Democrats opposing it.
38. 133 S. Ct. at 2688.
39. Id. at 2714 (Alito, J., dissenting).
40. Id. at 2698 (Scalia, J., dissenting).
41. Id. at 2700 (Scalia, J., dissenting).
42. Id. at 2698 (Scalia, J., dissenting) (quoting the majority opinion).
43. 133 S. Ct. 1138 (2013).
In future cases, courts and litigants will scrutinize the majority’s discussion of the two competing standards.

§ 1881a, a provision of the FISA Amendments Act of 2008. Under Section 1881a, the Foreign Intelligence Surveillance Court may grant the Attorney General and the Director of National Intelligence permission to conduct surveillance on the electronic communications of individuals who both are not “United States persons” and are reasonably believed to be located outside the country, even if the government does not precisely specify the locations where the surveillance will occur. The plaintiffs claimed that Section 1881a violates the First and Fourth Amendments, Article III, and the separation of powers.

To demonstrate that they had standing to challenge the legislation’s constitutionality, Amnesty International USA and the other plaintiffs advanced two theories of harm. First, they argued that there was an “objectively reasonable likelihood” that the government would conduct surveillance on some of the individuals with whom the plaintiffs would have future communications. Second, they said that the fear of such surveillance was already prompting them to engage in costly measures aimed at avoiding government interception, such as traveling long distances to communicate with their contacts in person.

Dividing 5-4 along familiar lines, the Court held that the plaintiffs lacked standing. Writing for the majority, Justice Alito invoked the Court’s prior indication that “threatened injury must be certainly impending to constitute injury in fact.” In the eyes of the majority, the plaintiffs’ first theory of harm failed to meet that stringent requirement because it relied upon “a highly attenuated chain of possibilities.”

With respect to the plaintiffs’ second theory of harm, the Court found that the plaintiffs could not manufacture standing by incurring present-day costs aimed at avoiding future speculative harms. Justice Alito conceded in a footnote that some of the Court’s prior standing cases used language less daunting than “certainly impending” to characterize the standard the Court uses to evaluate claims of future injuries; sometimes, he acknowledged, the Court has said there must be “a substantial risk” that the harm will occur. The majority concluded that, “to the extent that the ‘substantial risk’ standard is relevant and is distinct from the ‘clearly impending’ requirement,” the plaintiffs had failed to meet it.

Writing for the dissent, Justice Breyer concluded that the harms claimed by the plaintiffs were “as likely to take place as are most future events that commonsense inference and ordinary knowledge of human nature tell us will happen.” The dissent argued that the majority’s insistence upon certainty conflicted with numerous prior cases in which federal courts have adjudicated “actions for injunctions and for declaratory relief aimed at preventing future activities that are reasonably likely or highly likely, but not absolutely certain, to take place.”

In future cases, courts and litigants will scrutinize the majority’s discussion of the two competing standards. Did the Clapper Court stress the “certainly impending” language because issues of national security were at stake? Or does Clapper instead signal that five Justices might now be inclined to demand a more compelling showing in all cases in which plaintiffs seek standing on the strength of feared future harm?

THE ALIEN TORT STATUTE

In Kiobel v. Royal Dutch Petroleum Co., the Court found that the Alien Tort Statute (ATS) does not provide jurisdiction over causes of action alleging violations of the law of nations occurring within other sovereigns’ territories. Relying upon the ATS for federal jurisdiction, Nigerian nationals now living in the United States had filed suit against Royal Dutch Petroleum Company and two other entities. The plaintiffs alleged that, after they began to protest the environmental effects of the defendants’ oil-exploration activities in Nigeria, the defendants helped the Nigerian Government brutally maltreat the plaintiffs in violation of the law of nations. Led by Chief Justice Roberts, the Court ruled that there was nothing in the text or history of the ATS to rebut the presumption against extraterritorial application of federal statutes. Joined by three colleagues, Justice Breyer concurred in the judgment, arguing that the ATS would have provided jurisdiction if (contrary to fact) the defendants’ conduct had “substantially and adversely affect[ed] an important American national interest.”


45. Clapper, 133 S. Ct. at 1147 (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990), and other authorities).

46. Id. at 1148. Justice Alito explained that the plaintiffs were assuming that the government would indeed attempt to target individuals with whom the plaintiffs were in contact, that the government would rely upon Section 1881a rather than another source of surveillance authority, that the Foreign Intelligence Surveillance Court would approve the government’s surveillance request, that the government would successfully intercept some of the targets’ communications, and that the plaintiffs would be parties to some of those intercepted communications.

47. Id. at 1130 n.5 (quoting Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2754-55 (2010)).

48. Id.

49. Id. at 1155 (Breyer, J., dissenting).

50. Id. at 1160 (Breyer, J., dissenting).

51. Cf. id. at 1147 (“[W]e have often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs . . . .”).

52. 133 S. Ct. 1659 (2013).

53. See 28 U.S.C. § 1350 (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

54. The United States subsequently granted the plaintiffs political asylum. The plaintiffs live in the United States today.

55. Kiobel, 133 S. Ct. at 1671 (Breyer, J., concurring in the judgment). Justice Breyer was joined by Justices Ginsburg, Sotomayor, and Kagan.
Covenants Not to Sue

In Already, LLC v. Nike, Inc., the Court unanimously ruled that a defendant’s covenant claim had been mooted by the plaintiff’s covenant not to sue. Nike had initiated the litigation, alleging that two lines of shoes marketed by Already infringed a Nike trademark. Already counterclaimed, contending that Nike’s trademark was invalid. Months later, Nike gave Already a “Covenant Not to Sue,” promising not to bring any claim against Already concerning Already’s existing designs or any future designs that are “colorable imitations” of Already’s existing products. On the strength of that covenant, Nike moved to dismiss not only its own claim, but Already’s counterclaim, as well. Already resisted, contending that there was still a live dispute between the parties.

Writing for the full Court, Chief Justice Roberts identified the relevant test: “[O]ur cases have explained that ‘a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.’” The Court found that Nike had satisfied that burden here. By its very terms, the covenant was “unconditional[]” and “irrevocable[,]” and Already had failed to identify any realistic circumstance in which it might infringe upon Nike’s trademark and yet not be protected by the covenant.

The International Child Abduction Remedies Act

In Chafin v. Chafin, the Court addressed a jurisdictional matter concerning the Hague Convention on the Civil Aspects of International Child Abduction (the Convention) and its domestic implementing legislation, the International Child Abduction Remedies Act (ICARA). The Convention aims to ensure “the prompt return of children wrongfully removed to another Contracting State.” ICARA gives state and federal courts concurrent jurisdiction to grant a petition for a child’s return to the country in which he or she “was habitually resident immediately before the [wrongful] removal or retention.” In Chafin, the district court had ruled that Mr. Chafin was wrongfully retaining his daughter in the United States and that the girl’s country of habitual residence was Scotland, where she previously had lived with her mother, Ms. Chafin. Within hours of the ruling, Ms. Chafin and her daughter were on a plane bound for Scotland. Mr. Chafin appealed to the Eleventh Circuit, but the appellate court dismissed the appeal as moot, reasoning that it was powerless to secure the child’s return from a foreign country.

The Court unanimously reversed. Writing for the Court, Chief Justice Roberts explained that whether the appellate court could secure the child’s return to the United States was a matter separate from whether the Chafins’ dispute continued to present a live controversy. “Enforcement of the order may be uncertain if Ms. Chafin chooses to defy it,” the Chief Justice wrote, “but such uncertainty does not typically render cases moot.”

The Class Action Fairness Act

In Standard Fire Insurance Co. v. Knowles, the Court unanimously held that a would-be class-action plaintiff cannot defeat federal jurisdiction under the Class Action Fairness Act (CAFA) by stipulating, before class certification, that the class will seek damages less than CAFA’s $5 million jurisdictional threshold. Writing for the Court, Justice Breyer acknowledged that, by stipulating to damages that fall below the applicable amount-in-controversy requirement, an individual plaintiff can indeed defeat federal jurisdiction. The difference here, Justice Breyer explained, was that the named plaintiff lacked the authority to bind absent members of the proposed class because the class had not yet been certified.

Mootness and Offers of Judgment

Whether Genesis Healthcare Corp. v. Symczyk merits mention here depends in part on whether Justice Kagan was right when, in dissent, she advised readers to “[f]eel free to relegate the majority’s decision to the furthest reaches of your mind: The situation it addresses should never arise again.” Readers may decide for themselves. Laura Symczyk filed a “collective action” on behalf of herself and other employees, charging that their employer had violated the Fair Labor Standards Act by refusing to compensate them for some of the time they had worked. The employer served an offer of judgment upon Symczyk, offering to pay all of her damages, fees, and costs, but Symczyk declined to accept. The employer then moved to dismiss the case as moot. The Third Circuit found that Symczyk’s individual claim was indeed moot but that the larger collective action was not. When the employer took the case to the Supreme Court, Symczyk failed to seek certiorari on the Third Circuit’s finding that her individual claim no longer presented a live controversy.

Writing for the five-member majority, Justice Thomas said

56. 133 S. Ct. 721 (2013).
57. Id. at 727 (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 328 U.S. 167, 190 (2000)).
58. Id. at 728.
59. 133 S. Ct. 1017 (2012).
61. See id. Art. 3; see also 42 U.S.C. § 11603(a) (granting concurrent jurisdiction to federal and state courts); id. § 11603(d) (directing courts to decide these cases “in accordance with the Convention”).
62. Chafin, 133 S. Ct. at 1025.
63. 133 S. Ct. 1345 (2013).
64. 133 S. Ct. 1523 (2013).
65. Id. at 1533 (Kagan, J., dissenting).
66. Collective actions under the Fair Labor Standards Act bear a resemblance to class actions but are a different procedural animal. See 29 U.S.C. § 216(b) (authorizing “one or more employees [to sue] for and in behalf of himself or themselves and other employees similarly situated”).
Although the Court did not hold that same-sex couples have a constitutional right to marry, there is much in the Court’s decision that could easily lay the groundwork for such a ruling.

that, given Symczyk’s failure to preserve her right to challenge the lower court’s mootness ruling, the Court would assume, without deciding, that her individual claim was indeed moot. Because no other employee had opted in as a plaintiff, Justice Thomas wrote, Symczyk’s entire lawsuit “became moot when her individual claim became moot, because she lacked any personal interest in representing others in this action.”66 Writing for the four dissenters, Justice Kagan argued that the starting premise of the Court’s ruling was “bogus” because Symczyk’s refusal to accept her employer’s offer of judgment did not suffice to moot her individual claim: after Symczyk refused to accept the offer, she continued to have the same personal stake in the litigation that she had before the offer of judgment was made. Because cases like Symczyk’s should never become moot in the future, she wrote, courts should “never need to reach the issue the majority resolves.”67 Justice Kagan passed along some advice: “[A] friendly suggestion to the Third Circuit: Rethink your mootness-by-unaccepted-offer theory. And a note to all other courts of appeals: Don’t try this at home.”68

FIFTH AMENDMENT: DOMA AND SAME-SEX MARRIAGE

As explained above in the summary of the Court’s leading jurisdictional rulings this past Term, Justice Kennedy joined with the Court’s four Democratic appointees in Windsor, ruling that the Court had jurisdiction to adjudicate the constitutionality of Section 3 of the Defense of Marriage Act (DOMA). The same coalition of Justices concluded that Section 3 was unconstitutional. Justice Kennedy devoted several paragraphs to the proposition that, “[b]y history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States.”70 The majority ultimately concluded, however, that it was unnecessary to decide whether Section 3 violated constitutional principles of federalism. Instead, the Court used its observations about states’ traditional prerogatives to help fuel its finding that Section 3 violated the Fifth Amendment’s Due Process Clause and its implicit principles of equality.

The majority found that states choosing to recognize same-sex marriages had conferred upon those couples “a dignity and status of immense import.”71 Through DOMA, Justice Kennedy wrote, Congress had sought “to injure the very class [that New York and other states recognizing same-sex mar-

riages have sought] to protect.”72 In the eyes of the majority, “DOMAs unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage” helped to reveal that both the purpose and the effect of that legislation was “to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.”73 Justice Kennedy said that Section 3 “demeans” same-sex couples and “humiliates” their children.74 Such legislation, the Court found, violates the protections afforded to same-sex couples by the Fifth Amendment. Although the Court did not hold that same-sex couples have a constitutional right to marry, there is much in the Court’s decision that could easily lay the groundwork for such a ruling further down the road.

Chief Justice Roberts filed a brief dissent, emphasizing that the Court was not reaching the question of whether a state today may refuse to permit same-sex marriages. Justice Alito also dissented, joined in relevant part by Justice Thomas, arguing that the majority’s analysis was driven by an ill-founded conception of substantive due process and that “the Constitution simply does not speak to the issue of same-sex marriage.”75 The most strongly worded dissent, however, was filed by Justice Scalia and joined in relevant part by Justice Thomas. Justice Scalia accused the majority of deciding the case based upon a confused hash of pronouncements regarding federalism, due process, and equality, which ultimately boiled down to an indefensible conception of substantive due process. Justice Scalia argued that Section 3 should be given nothing more stringent than rational-basis review and that it could easily survive it, based upon such governmental objectives as avoiding difficult choice-of-law issues and honoring prior Congresses’ legislative intentions. He said that the majority had merely supplanted what it saw as a “hateful moral judgment” with a morality that the majority deemed “superior,”76 and he unhappily predicted that a majority of the Court will later follow the path foreshadowed by much of Justice Kennedy’s language and flatly demand that all states permit same-sex couples to marry.

FIRST AMENDMENT: SPEECH

By a 6-2 vote in Agency for International Development v. Alliance for Open Society International, Inc.,77 the Court invalidated a provision of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the Leadership Act). Through that legislation, the federal government provides billions of dollars to nongovernmental organizations to help globally combat the ailments signified in the statute’s title. As a condition of receipt of Leadership Act funds, however, Congress required grant-seeking organizations to adopt “a policy explicitly opposing prostitution and sex trafficking.”78 A group of domestic organizations challenged the law, explaining that while they did not favor prostitution, they

68. Id. at 1535 (Kagan, J., dissenting).
69. Id. at 1534 (Kagan, J., dissenting).
70. 133 S. Ct. 2675, 2689-90 (2013).
71. Id. at 2692.
72. Id. at 2693.
73. Id.
74. Id. at 2694.
75. Id. at 2716 (Alito, J., dissenting).
76. Id. at 2709 (Scalia, J., dissenting).
feared that adopting the required policy would alienate some of the governments and prostitutes with whom they worked.

With Chief Justice Roberts writing for the majority, the Court held that the challenged condition violated the organization's First Amendment speech rights. Chief Justice Roberts explained that, in some cases, an organization that objects to a condition on the receipt of federal funds is left to secure its own remedy by simply declining the funds, while in other cases the Court has found that funding conditions unconstitutionally burden recipients' speech rights. Acknowledging that the line between the two classes of cases “is hardly clear,” the Court said that the distinction “is between conditions that define the limits of the government spending program . . . and conditions that seek to leverage funding to regulate speech outside the contours of the program itself.” Here, the Court found that the spending condition went beyond defining Congress's program, by trying to restrict what a grant recipient could say “when participating in activities on its own time and dime.”

Joined by Justice Thomas, Justice Scalia dissented, arguing that “a central part of the Government’s HIV/AIDS strategy is the suppression of prostitution, by which HIV is transmitted. It is entirely reasonable to admit to participation in the program only those who believe in that goal.” The “real evil” of the majority's ruling, Justice Scalia wrote, is that it exposes the federal government to lawsuits whenever it “distinguishes[es] between [grant] applicants on a relevant ideological ground.”

FOURTEENTH AMPENDMENT: AFFIRMATIVE ACTION

Proponents of race-conscious admissions decisions at public colleges and universities may have breathed at least a shallow sigh of relief when—more than eight months after oral argument—the Court in Fisher v. University of Texas at Austin finally handed down its ruling. By using a race-neutral admissions calculus and by automatically offering admission to all high-school students graduating in the top 10% of their respective classes, the university had been achieving a measure of diversity in its undergraduate population. Concluding that it needed still more racial diversity to achieve its objectives, the university added race to the array of factors that it would explicitly consider when making at least some of its admissions decisions. Abigail Fisher, a white applicant, was there-

Rather than strike down the university’s use of race in its admissions decisions (as many predicted), the Court opted by a 7-1 vote to remodel the case . . . for a second look.

PATENTS: HUMAN GENES

Can a patent be obtained on some of your genes once they have been isolated from the surrounding DNA material in which they appear? No, because those isolated genes remain products of nature. Can a patent be obtained on synthetically created DNA? Perhaps, because it is not naturally occurring. So held the Court in Association for Molecular Pathology v. Myriad.

80. Id. at 2330; see also id. (“By requiring recipients to profess a specific belief, the [condition] goes beyond defining the limits of the federally funded program to defining the recipient.”).
81. Id. at 2333 (Scalia, J., dissenting).
82. Id. at 2335 (Scalia, J., dissenting).
83. 133 S. Ct. 2411 (2013).
84. In the last year in which those two admissions methods were used, for example, the University secured an entering class of undergraduates that was 4.5 percent African-American and 16.9 percent Hispanic.
87. 133 S. Ct. at 2417. In a one-paragraph concurrence, Justice Scalia—who continues to oppose Grutter—said that he “join[ed] the Court's opinion in full” for the very reason that the parties had not asked the Court to revisit Grutter here. Id. at 2422 (Scalia, J., concurring).
88. Id. at 2420 (quoting Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 236 (2011)).
89. Id.
90. Id. at 2426 (Thomas, J., concurring).
Myriad's synthetically created DNA material . . . was potentially patentable because "the lab technician unquestionably creates something new when [producing it]."

SOVEREIGN IMMUNITY: THE LAW-ENFORCEMENT PROVISO

In Millbrook v. United States, the Court resolved a circuit split concerning the "law enforcement proviso" of the Federal Tort Claims Act (FTCA). Kim Millbrook alleged that, while in the custody of the Federal Bureau of Prisons, correctional officers sexually assaulted him. He filed suit against the federal government under the FTCA, which waives the government's sovereign immunity from a wide range of tort suits. The government claimed immunity, arguing that, under the statute's law-enforcement proviso, the government is liable for its law-enforcement officers' intentional torts only when those torts occur in the course of executing a search, seizing evidence, or making an arrest, none of which was the case here. The Third Circuit accepted the government's argument and dismissed the case. The Court unanimously reversed and reinstated Millbrook's claim, finding no basis in the statute's plain text for the Third Circuit's interpretation. The Court held that the law-enforcement proviso's waiver of immunity "extends to acts or omissions of law enforcement officers that arise within the scope of their employment, regardless of whether the officers are engaged in investigative or law enforcement activity, or are executing a search, seizing evidence, or making an arrest." 96

SUPREMACY CLAUSE: PREEMPTION

VOTER REGISTRATION AND PROOF OF CITIZENSHIP

Three preemption rulings particularly merit mention. In Arizona v. Inter Tribal Council of Arizona, Inc., the Court found that the National Voter Registration Act of 1993 preempted Arizona's requirement that an individual present documentary proof of citizenship when registering to vote. The nation's standard voter-registration form requires an applicant to swear under penalty of perjury that he or she is a United States citizen. Arizona went further by demanding a copy of the applicant's passport, birth certificate, or other documentary proof of citizenship. Led by Justice Scalia, a majority of the Court found Arizona's requirement preempted. 99

Justice Scalia nevertheless explained for the majority that the door is not necessarily closed on Arizona's effort to insist upon documentation of citizenship. The Court categorically declared that the Elections Clause gives the states—not Congress—the power to determine who may vote. (That is a significant holding in its own right.) The Court further observed that, under federal law, a state may ask the federal government's Election Assistance Commission (EAC) to supplement the standard voter-registration form with additional requirements aimed at helping the state determine whether a given applicant meets the state's prescribed voter qualifications. Arizona can thus ask the EAC to amend the registration form used in Arizona by requiring documentary proof of citizenship. 101 If the EAC refuses to approve the state's request, the

91. 133 S. Ct. 2107 (2013).
92. Id. at 2117.
93. Id. at 2119. I say "potentially" because the Court stated in a footnote that it was not deciding whether the synthetically created DNA at issue met the other requirements of patentability. See id. at n.9. The Court merely held that the synthetically created DNA was not a "product of nature" and so did not trip over that particular patent-law obstacle.
94. 133 S. Ct. 1441 (2013).
95. See 28 U.S.C. § 2680(h) (stating, in pertinent part, that the government waives its immunity from assault-and-battery claims based upon the "acts or omissions of investigative or law enforcement officers of the United States Government").
96. Millbrook, 133 S. Ct. at 1446.
97. There were others. In Mutual Pharm. Co., Inc. v. Bartlett, 133 S. Ct. 2466 (2013), for example, the Court ruled 5-4 that the Federal Food, Drug, and Cosmetic Act preempted "state-law design-defect claims that turn on the adequacy of a drug's warnings." Id. at 2470.
98. 133 S. Ct. 2247 (2013).
99. Justice Scalia was joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan. He also was joined in relevant part by Justice Kennedy, who wrote separately to express disagreement with the majority about the applicability of the presumption against preemption to federal legislation promulgated under the Elections Clause. The majority found the presumption inapplicable. Justice Kennedy cautioned against treating the Elections Clause differently from other constitutional delegations of federal power. Justices Thomas and Alito filed separate dissents, rejecting the majority's finding of preemption.
100. See Marty Lederman, Pyrrhic Victory for Federal Government in Arizona Voter Registration Case?, SCOTUSBLOG, June 17, 2013, http://www.scotusblog.com/2013/06/pyrrhic-victory-for-federal-government-in-arizona-voter-registration-case/ ("This unanimous holding resolves a long-unresolved question about Congress's power to determine who may vote in federal elections. . . ."). Professor Lederman argues that a number of enacted and proposed federal laws may now be constitutionally suspect. See, e.g., id. ("The holding would . . . appear to preclude any future efforts to enact a federal statute restricting state felon disenfranchisement laws.").
101. Indeed, Arizona already sought such permission back in 2005, but the EAC's commissioners divided 2-2 on how to respond and so the request was not approved. Arizona did not follow that (in)action with a petition for judicial review. The Court stated that it was not aware of any reason why Arizona could not refile its request with the EAC, with the hope of securing a favorable ruling.
Court said, then the Administrative Procedures Act authorizes the state to seek judicial review. In their separate dissents, Justices Thomas and Alito pointed out the not-insignificant complication that the EAC currently does not have any members, and so might not be in the business of fielding states’ requests. The majority responded by suggesting that, if the EAC remains defunct, Arizona “might” be able either to obtain mandamus relief or “to assert a constitutional right to demand concrete evidence of citizenship apart from the [standard federal form].”

MEDICAID AND TORT RECOVERIES

In Wos v. E.M.A., the Court held that a state’s irrebuttable, one-size-fits-all statutory presumption that a given percentage of a Medicaid beneficiary’s tort recovery was allocated for medical expenses and thus is owed to the state is incompatible with the Medicaid Act’s clear mandate that a State may not demand any portion of a beneficiary’s tort recovery except the share that is attributable to medical expenses.

The Court thus found that federal law preempted North Carolina’s irrebuttable presumption that one-third of a Medicaid beneficiary’s tort recovery was for medical costs. Joined by Justices Scalia and Thomas, Chief Justice Roberts argued in dissent that neither Congress nor the Department of Health and Human Services had ever clearly stated “that segregating medical expenses from a lump-sum recovery must be done on a case-specific, after-the-fact basis, rather than pursuant to a general rule spelled out in advance.”

LIFE-INSURANCE BENEFICIARIES

In Hillman v. Maretta, all of the Justices agreed (albeit for differing reasons) that the Federal Employees’ Group Life Insurance Act (FEGLIA), which creates a life-insurance program for federal employees, preempted a Virginia statutory provision concerning the rightful ownership of life-insurance proceeds. FEGLIA states that an employee may designate a beneficiary “in a signed and witnessed writing” and that any change of beneficiary must be made in writing and filed with the federal government. A Virginia statute stated, however, that divorce automatically terminates a life-insurance-beneficiary designation benefiting the former spouse. The Virginia legislation further stated that, if the termination-upon-divorce provision were preempted, then the person who would have received the insurance benefits absent the preemption had a cause of action against the former spouse. Warren Hillman (a federal employee) designated his then-spouse Judy Maretta as his FEGLIA beneficiary, but he failed to change the designation after the marriage ended and he married Jacqueline Hillman. After Warren died and the government paid the insurance proceeds to Judy, Jacqueline filed an action against her pursuant to the Virginia statute. The parties agreed that FEGLIA preempted Virginia’s termination-upon-divorce provision but disagreed about the fate of the provision that purported to make Judy liable to Jacqueline for the proceeds she had received.

Led by Justice Sotomayor, a majority of the Court found that Virginia’s assignment of a cause of action to Jacqueline conflicted with the policies and purposes underlying FEGLIA. The Court reasoned that one of Congress’s purposes was to ensure that the “duly named beneficiary will receive the insurance benefits and be able to make use of them.” Because Virginia’s assignment of a cause of action undermined that federal purpose, the Court found it preempted.

TAKINGS: LAND-USE PERMITS

A well-known pair of sibling cases—Nollan and Dolan—operates to ensure that a governmental body cannot use its power to grant or withhold land-use permits to get for free what the Takings Clause would otherwise require it to pay just compensation to obtain. Nollan and Dolan do that constitutional work by establishing that a government cannot condition its approval of a land-use permit on the landowner’s willingness to surrender an interest in his or her property, unless there is a “nexus” and “rough proportionality” between the condition that the government wishes to impose and the effects that the landowner’s proposed new land use is expected to have. The application of Nollan and Dolan to conditions demanding the relinquishment of an interest in real property is clear. But what if the government instead demands that the
landowner pay money? Do the nexus and rough-proportionality tests still apply?

Dividing 5–4 along familiar lines, the Court answered that question affirmatively in Koontz v. St. Johns River Water Management District. The government in that case demanded that a permit seeker either reduce the size of his proposed development or pick up the tab for mitigation projects (such as replacing culverts or filling in ditches) on other properties to which the landowner had no connection. “Mindful of the special vulnerability of land use permit applicants to exhortionate demands for money,” Justice Alito and his colleagues in the majority concluded that Nollan and Dolan should apply to governmental demands for real property and money alike. Writing for the dissenters, Justice Kagan argued that takings concerns are absent when a government demands the payment of money rather than the transfer of an interest in real property, and she warned that the majority’s ruling threatens to “turn[] a broad array of local land-use regulations into federal constitutional questions.”

TITLE VII

In a pair of rulings handed down on the final Monday of the Term, the Court construed Title VII in ways that many employers are likely to celebrate and many employment-discrimination plaintiffs are likely to lament.

In Vance v. Ball State University, with Justice Alito writing for the majority, the Court ruled 5–4 that a person is a “supervisor” for purposes of Title VII—and that his or her actions can thus create vicarious liability for the employer under Title VII—only when the person has been authorized by the employer to make significant changes in the plaintiff’s employment status (such as by hiring, firing, demoting, or transferring the plaintiff).

In University of Texas Southwestern Medical Center v. Nassar, with Justice Kennedy writing for the majority, the Court ruled 5–4 that a plaintiff bringing a retaliation claim against an employer under Title VII must prove that retaliation for the plaintiff’s opposition to workplace discrimination was but-for cause of the adverse employment action that he or she suffered. Based on its reading of the text, structure, and history of Title VII, the Court refused to adopt the lesser requirement that a plaintiff prove only that retaliation was one of multiple motivating factors for the employer’s actions.

Joined by Justices Breyer, Sotomayor, and Kagan, Justice Ginsburg dissented in both cases. In Vance, she argued that the Court’s precedents made clear that “harassment by an employee with power to direct subordinates’ day-to-day work activities should trigger vicarious employer liability.” In Nassar, she argued that the majority had undermined Congress’s effort to provide employees with strong protection against retaliation for trying to vindicate their workplace rights. Justice Ginsburg closed both of her dissents with a plea to Congress to restore what she believed was Title VII’s intended meaning.

VOTING RIGHTS ACT: SECTION 4 AND PRECLEARANCE

In its penultimate public session of the Term, a closely divided Court in Shelby County v. Holder produced a monumental ruling on the Voting Rights Act of 1965 (the Act). Section 5 of the Act required certain states and localities to obtain the approval of the United States Attorney General or a three-judge federal court before making any changes in their voting laws or procedures. The point of the preclearance requirement was to ensure that a given jurisdiction’s proposed changes did not serve as intended or unintended vehicles for racial discrimination in that jurisdiction’s electoral affairs. Section 4 provided the coverage formula for determining which states and localities were subject to Section 5’s preclearance requirement. As it had for roughly four decades, Section 4 targeted jurisdictions based on data (such as voter-registration and voter-turnout figures) from the late 1960s and early 1970s. In 2006, opting to leave that coverage formula unchanged, Congress extended the Act’s preclearance regime for an additional 25 years.

The Court in Shelby County declared Section 4’s coverage formula unconstitutional. Writing for the five-member majority, Chief Justice Roberts repeatedly invoked the opinion he wrote for the Court four years earlier in Northwest Austin Municipal Utility District No. One v. Holder. In that case, the Court in dictum had expressed skepticism about the constitutionality of the Act’s preclearance system, stating that “the Act imposes current burdens and must be justified by current needs.” Congress took no action in the interim, however, and the Shelby County Court concluded that the time had come for the Justices to respond.

Chief Justice Roberts stated that the Act’s preclearance

113. 133 S. Ct. 2586 (2013).
114. Id. at 2603.
115. Id. at 2612 (Kagan, J., dissenting).
117. 133 S. Ct. 2517 (2013).
118. Vance, 133 S. Ct. at 2459 (Ginsburg, J., dissenting).
119. 133 S. Ct. 2612 (2013).
120. Wholly apart from this preclearance regime, Section 2 of the Act makes it illegal for a jurisdiction to use any “voting qualification[,] . . . standard, practice, or procedure” that amounts to racial discrimination. 42 U.S.C. § 1973(a). Section 2 was not at issue in Shelby County, and its constitutionality is not seriously questioned. But for a variety of reasons—such as that Section 2 places the burden of proof on the party alleging discrimination, Section 2 often provides a vehicle for relief only after racial discrimination has occurred, and those bent on discrimination have historically been remarkably imaginative in finding ever-new ways to carry out their discriminatory intentions—many civil rights leaders have long regarded Sections 4 and 5 of the Act as critical to the legislation’s success in helping to eradicate racial discrimination in voting.
122. Id. at 203.
regime sat in strong tension with two constitutional principles: states ordinarily regulate their own elections and the federal government ordinarily must treat the states as “equal sovereign[s],” making no distinctions between them.\(^{123}\) Under the Act, the Court explained, “[s]tates must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own,”\(^{124}\) and nine states and several additional jurisdictions are singled out for a preclearance requirement that other states and localities can wholly ignore. Chief Justice Roberts said that Section 4’s coverage formula “is based on decades-old data and eradicated practices,”\(^{125}\) pointing out, for example, that in the covered jurisdictions today, there no longer is any significant difference in voter-turnout rates among whites and African-Americans. The Court stopped short of striking down Section 5’s preclearance requirement,\(^{126}\) but held that Section 5 must remain idle unless and until Congress devises a coverage formula “based on current conditions.”\(^{127}\)

Joined by Justices Breyer, Sotomayor, and Kagan, Justice Ginsburg dissented. Invoking mere rationality review,\(^{128}\) she argued that Congress had gone to extraordinary lengths in 2006 to assess the continuing problem of racial discrimination in the jurisdictions captured by Section 4’s coverage formula, and that the factual record made it clear—including in Shelby County itself—that Congress had ample reasons to keep Section 4’s coverage formula in force. “Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes,” she wrote, “is like throwing away your umbrella in a rainstorm because you are not getting wet.”\(^{129}\)

**OTHER NOTABLE RULINGS**

In *Maracich v. Spears*,\(^{130}\) the Court held that the Driver’s Privacy Protection Act of 1994 (DPPA) does not permit attorneys to obtain or use individuals’ personal information from a state’s department of motor vehicles for the “predominant purpose” of soliciting possible clients. In an opinion by Justice Kennedy, the majority found that allowing attorneys to use drivers’ personal information to solicit clients would substantially undermine Congress’s goal of protecting individuals’ privacy.

In *McBurney v. Young*,\(^{131}\) the Court unanimously held that neither the Privileges and Immunities Clause of Article IV nor the dormant Commerce Clause barred Virginia from limiting the benefits of its Freedom of Information Act to Virginia citizens.

In *Adoptive Couple v. Baby Girl*,\(^{132}\) the Court construed key provisions of the Indian Child Welfare Act of 1978 in favor of a non-Indian couple who had adopted a girl of partially Indian descent, and against the girl’s biological father, who initially showed no interest in acting as the girl’s parent and who had never had custody of the child until, in the girl’s 27th month, a state court ordered the adoptive couple to transfer the child to him.

In *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*,\(^{133}\) the Court held that proof of the materiality of a defendant’s alleged misrepresentations is not a prerequisite to class certification in a federal securities-fraud action. Amgen had taken the contrary position, arguing that proof of materiality at the class-certification stage is necessary to satisfy Rule 23(b)(3)’s requirement that “questions of law or fact common to class members predominate over any questions affecting only individual members.” The Court explained that because the issue of materiality is adjudicated under an objective standard, the issue’s resolution is certain to be common to all class members.

In *FTC v. Actavis, Inc.*,\(^{134}\) the Court helped to clear the way for the Federal Trade Commission to bring antitrust actions against patent holders and alleged patent infringers (usually, if not always, the makers of brand-name and generic pharmaceuticals, respectively) who enter into “pay to delay” (or “reverse payment”) agreements. In such an agreement, an alleged patent infringer agrees to accept financial payment from the patent holder in exchange for delaying its effort to bring the allegedly infringing product to market.

In *Lefemine v. Wideman*,\(^{135}\) the Court held that obtaining an injunction ordering a defendant to comply with the Constitution can be sufficient to change the legal relationship between the litigants and thereby render the plaintiff a “prevailing party” entitled to attorney’s fees under 42 U.S.C. § 1988.

**LOOKING AHEAD**

The Court will tackle a number of interesting and broadly consequential issues next Term. In one of its most widely anticipated cases, the Court in *NLRB v. Noel Canning*\(^{136}\) will

\(^{123}\) *Shelby County*, 133 S. Ct. at 2624.

\(^{124}\) Id.

\(^{125}\) Id. at 2627.

\(^{126}\) In a concurring opinion, Justice Thomas said that he would have preferred to strike down Section 5’s preclearance requirement as well, forecasting that it is “inevitable” that Section 5 will be found unconstitutional if Congress ever settles upon a new coverage formula. *Id.* at 2632 (Thomas, J., concurring).

\(^{127}\) Id. at 2631.

\(^{128}\) The majority did not explicitly identify the standard of review it applied. *Cf. Northwest Austin*, 557 U.S. at 204 (noting that the two leading candidates were rational-basis review and review for congruence and proportionality, and declining to choose between them). The majority did state, however, that Congress behaved “irrationally” when it opted in 2006 not to update Section 4’s coverage formula. *Shelby County*, 133 S. Ct. at 2631.

\(^{129}\) *Shelby County*, 133 S. Ct. at 2650 (Ginsburg, J., dissenting).

\(^{130}\) 133 S. Ct. 2191 (2013).

\(^{131}\) 133 S. Ct. 1709 (2013).

\(^{132}\) 133 S. Ct. 2552 (2013).

\(^{133}\) 133 S. Ct. 1184 (2013).

\(^{134}\) 133 S. Ct. 2223 (2013).

\(^{135}\) 133 S. Ct. 9 (2012) (per curiam).

\(^{136}\) No. 12-1281.
take up an ongoing battle between the White House and some in the Senate concerning the ability of the President to make recess appointments during recesses that occur within a single enumerated session of the Senate, to make recess appointments to fill vacancies that exist (but did not arise) during a recess, and to make recess appointments when the Senate is convening every three days in pro forma sessions.

Affirmative action will make another prominent appearance on the Court's docket, when the Court in Schuette v. Coalition to Defend Affirmative Action considers the constitutionality of Michigan’s ban on the use of race and sex in admissions decisions at that state’s public colleges and universities.

Campaign finance will also likely return to the headlines, when the Court in McCutcheon v. Federal Election Commission considers the constitutionality of the Bipartisan Campaign Reform Act's biennial limits on how much money a person can contribute to federal political candidates and to non-candidate committees.

The Court will have an opportunity in Town of Greece v. Galloway—a case involving prayers at legislative sessions—to bring greater clarity to its famously tangled Establishment Clause jurisprudence.

In McCullen v. Coakley, the Court will consider whether Massachusetts has committed viewpoint discrimination in violation of the First Amendment's Speech Clause by the way in which it regulates who may enter and speak in areas located near the entrances to abortion-performing clinics.

In Bond v. United States—a case involving the Chemical Weapons Convention, alleged marital infidelities, and the malicious placement of harmful chemicals on mailboxes and doorknobs—the Court will be asked to decide whether the Chemical Weapons Convention Implementation Act reaches the petitioner’s conduct and, if it does, whether Congress exceeded its delegated powers by (on the petitioner's account) authorizing federal criminal prosecutions for conduct that the Constitution reserves for state and local officials to address.

In Madigan v. Levin, the Court will confront a circuit split on whether employees of state and local governments may avoid the remedial regime set forth in the Age Discrimination in Employment Act by bringing age-discrimination actions under 42 U.S.C. § 1983 and the Equal Protection Clause.

Those who enjoy the complexities of federal jurisdictional law will find at least five cases to celebrate next Term. In one of multiple consumer-protection actions across the country alleging price-fixing by makers of liquid-crystal display (LCD) panels, the Court in Mississippi ex rel. Hood v. AU Optronics Corp. will be asked to resolve a circuit split on whether a state’s parens patriae action is removable to federal court as a “mass action” under the Class Action Fairness Act. In Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas, the Court will consider the degree to which federal courts and litigants are bound by forum-selection agreements. In Sprint Communications Co. v. Jacobs, the Court will take on the task of clarifying the application of Younger abstention in civil cases. In a sequel to Kiobel, the Court in DaimlerChrysler AG v. Bauman will determine whether a foreign corporation may be sued in the United States under the Alien Tort Statute based solely on the presence in this country of one of that corporation’s subsidiaries. In Walden v. Fiore, the Court will determine whether the Constitution and the general federal-venue statute permit a Georgia police officer to be sued in Nevada for conduct in which he allegedly engaged in Georgia after confronting the plaintiffs on suspicion of drug activity at Atlanta’s Hartsfield-Jackson International Airport.

Other issues on the Court’s docket for the coming Term include the standing requirements for bringing a false-advertising claim under the Lanham Act; the cognizability of disparate-impact claims under the Fair Housing Act; the conditions under which airlines and their employees enjoy immunity under the Aviation and Transportation Security Act when reporting potential security threats to the Transportation Security Administration; and a trio of cases concerning the Securities Litigation Uniform Standards Act, among many others.

137. No. 12-682.
138. No. 12-536.
139. No. 12-696.
140. No. 12-1168.
141. No. 12-158.
142. No. 12-872.
143. No. 12-1036.
144. No. 12-929.
145. No. 12-815.
147. No. 11-965.
148. No. 12-574.
151. Air Wis. Airlines Corp. v. Hoeper (No. 12-315). More specifically, the Justices will determine whether it is proper for a court to deny immunity under the ATSA without first determining that the statements made to the TSA were materially false.
152. Chadbourn & Parke LLP v. Troice (No. 12-79); Proskauer Rose LLP v. Troice (No. 12-88); Willis of Colorado, Inc. v. Troice (No. 12-86).

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No matter how you roll the dice, you’ll always come out a winner with AMCAD.
For readers who would like to review the truly momentous cases of the Supreme Court's last Term, I heartily recommend Professor Todd E. Pettys's article, More than Marriage: Civil Cases in the Supreme Court's 2012-2013 Term, which also appears in this issue of Court Review. During this past Term, like the one before it, the real blockbusters were on the civil side. But the Court's criminal docket was not without its charms. The justices wrestled with the collection of DNA evidence from arrestees, canine sniffs at the front door, non-custodial suspects' silence in the face of questioning, and increased minimum sentences based on facts not submitted to the jury. This article reviews these and other criminal cases that may most interest jurists and lawyers in state courts, and concludes with a brief glimpse at the October 2013 Term.

FOURTH AMENDMENT

Of all the criminal-law-related rulings this past Term, the Fourth Amendment decisions were perhaps the most significant. The Court issued important holdings on collecting forensic evidence (DNA and blood) without a warrant, using narcotics detection dogs, and detaining residents during a warrant search. The decisions regarding blood draws (McNeely v. McNeely) and detentions (Bailey v. United States) matter a lot in day-to-day policing. The DNA case (Maryland v. King) may well spur state legislatures to enact or revise laws for obtaining DNA from arrestees. Altogether, these rulings will influence police and courts for many years to come.

DNA, BLOOD, AND WARRANTS

In Maryland v. King, an important and much-awaited ruling, the Court held that the Fourth Amendment does not prevent the government from obtaining and analyzing arrestees' DNA. Alonzo King was arrested for assault for allegedly menacing a group of people with a shotgun. At booking, jail personnel used a cheek swab to take a DNA sample, pursuant to the provisions of the Maryland DNA Collection Act. The sample was analyzed, and King's DNA profile was uploaded into Maryland's DNA database. It was subsequently forwarded to the national database supervised by The FBI (CODIS), and matched to a DNA profile from a DNA sample collected in an unsolved 2003 rape case. King was convicted of rape, but the Maryland Court of Appeals struck down part of the Act authorizing officers to collect DNA from felony arrestees. The Supreme Court reversed in a 5-4 decision authored by Justice Kennedy, and joined by Chief Justice Roberts and Justices Thomas, Breyer, and Alito.

The Court found that the process of obtaining a DNA sample was a search, but that the search was reasonable within the meaning of the Fourth Amendment. The legitimate government interests served by the Act are well-established and include "the need for law enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody." Justice Kennedy described the process of obtaining a DNA sample and adding it to various databases. In a lengthy portion of the opinion, the majority contended that obtaining an arrestee's DNA is a critical part of identifying the arrestee so that the government will know with certainty who is in its possession, whether the arrestee poses a danger and should (for example) not be released on bail, and other matters. The Court analogized to fingerprint evidence and an old photo-based system of categorizing arrestees. The justices also noted the gentle process for obtaining a swab, compared with a venipuncture or surgical procedure, and appeared reassured by the protections of the Act, which requires the DNA profile to be entered in the database only after a judicial officer finds probable cause to detain. Further, the DNA sample must be destroyed if the individual is acquitted or unconditionally pardoned. The majority concluded that the "DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure."3

Justice Scalia penned the dissent, arguing that the category of constitutionally permissible suspicionless searches does not include searches designed to serve the ordinary needs of law enforcement. In the view of the dissenting justices, the Maryland Act and the process followed in King's case were in no way focused upon identifying King or in serving any other administrative purpose. The dissent is a frankly devastating rejoinder to the claim that the evidence was obtained for identification purposes. The dissenters summed their position up this way: "DNA testing does not even begin until after arraignment and bail decisions are already made. The samples sit in storage for months, and take weeks to test. When they are tested, they are checked against" profiles in a federal database of unsolved crimes, rather than the profiles in the database of individuals who have been arrested and convicted, "which could be used to identify them."4

The dissenting justices also disagreed with the analogy to fingerprint identification, as well as the majority's claim that the process of DNA testing and entry into the national registry could take much less time in the future. According to the dissenters, the question was whether King's search was reasonable,
not whether some hypothetical search in the future would be.

Turning from DNA to blood, the issue in Missouri v. McNeely5 was whether the natural metabolism of alcohol in the blood stream amounts to a per se exigency, thus allowing officers to obtain blood samples without a warrant in all drunk-driving cases. In a 5-4 ruling, the Court rejected the argument, and required the government to establish exigent circumstances on a case-by-case basis.

The majority’s opinion, authored by Justice Sotomayor, noted that a warrantless search of the person is reasonable only if it falls within a recognized exception, such as exigent circumstances. The Court examined its prior ruling in Schmerber v. California,6 where a blood draw was permitted. That case, the majority said, fit comfortably within decisions applying the exigent-circumstances exception. A significant delay in testing will negatively affect the probative value of the test results. However, “it does not follow that we should part from careful case-by-case assessment of exigency and adopt the categorical rule proposed by the State.”7 “[W]here police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.”8 Justice Kennedy joined the majority opinion but wrote separately to say that this case did not provide an appropriate vehicle to give greater guidance to law enforcement about the existence of exigent circumstances.9

Four justices dissented in whole or in part. The primary dissent was written by Chief Justice Roberts (joined by two others); it contended that “[a] police officer reading this Court’s opinion would have no idea—no idea—what the Fourth Amendment requires of him, once he decides to obtain a blood sample from a drunk driving suspect who has refused a breathalyzer test.”10 The Chief Justice underscored the evanescence of blood evidence. The destruction of alcohol in the blood stream “is not simply a belief . . . ; it is a biological certainty . . . . Evidence is literally disappearing by the minute.”11 Noting that many jurisdictions provide for electronic warrant applications, and that there may be time to obtain a warrant in many cases, these three Justices also rejected the State’s proposed rule. But they propounded a different test, providing for an exception to the warrant requirement if an officer could reasonably conclude that there was not time to seek and receive a warrant before blood could be drawn, or if the officer did not receive a response before blood could be drawn.12 Justice Thomas also dissented. In his view, the rapid destruction of evidence should permit a warrantless blood draw in every situation where police have probable cause to arrest a drunk driver.13

THE DOGGY DUO

Two “canine sniff” cases issued during the past Term. The first was Florida v. Harris,14 where all members of the Court agreed that if a dog “alert” provides probable cause to search, the Fourth Amendment does not require the State to present an extensive set of records to establish the dog’s reliability.

The case arose from a routine traffic stop. A sheriff’s officer pulled over a truck, noticed that the driver appeared nervous, and that he had an open can of beer. After consent to search was refused, the deputy returned to the car with his narcotics detection dog, Aldo, who “alerted” on the driver’s side door handle. A search of the car did not disclose any of the drugs that the dog was trained to detect, but the officer found pseudoephedrine, which is used in manufacturing methamphetamine. While the defendant was out on bail, he encountered the officer and dog once more, and the dog again “alerted” on the door. This time nothing was found. The Florida Supreme Court found that to demonstrate a dog’s reliability and establish probable cause, the State needed to produce more than simply the fact that the dog had been trained and certified. The dog’s training and certification records, experience and training of the officer handling the dog, and field performance records must also be produced.15

Reversing, the Court emphasized that its prior decisions established that probable cause is a “practical and common-sensical standard,” in which one looks at the totality of the circumstances.10 The test “is not reducible to ‘precise definition or quantification.’”17 Noting that the Court has “rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach,” the justices unanimously rejected the ruling below.18 The defendant argued that the dog had actually shown himself untrustworthy, because he twice indicated that particular drugs were present, but they could not be found. The Court was not persuaded, perhaps influenced by the claim that the door had residual odor from the driver’s hands. Moreover, the justices were not convinced that documents such as field performance records were necessarily accu-

5. 133 S. Ct. 1552 (2013).
7. McNeely, 133 S. Ct. at 1561.
8. Id. In a part of her opinion for a plurality of the Court, Justice Sotomayor also rejected a categorical rule proposed by the Chief Justice under which a warrantless blood draw would be permitted if the officer could not obtain a warrant in the time it would take to bring the suspect to a hospital or similar facility and obtain medical assistance. Id. at 1563-67 (Sotomayor, J., joined by Justices Scalia, Ginsburg, and Kagan).
9. Id. at 1568 (Kennedy, J., concurring in part).
10. Id. at 1569 (Roberts, C.J., joined by Justices Breyer and Alito, concurring in part and dissenting in part).
11. Id. at 1570-71.
12. Id. at 1573.
13. Id. at 1574 (Thomas, J., dissenting).
15. Id. at 1055.
16. Id.
17. Id. (quoting Maryland v. Pringle, 540 U.S. 366, 371 (2003)).
18. Id. at 1055-56.
Jardines marks something of a shift in even Justice Scalia’s analysis of a property-based theory of a search.

rate, since they would not contain (for example) false negatives.

**Harris** is not of great import, other than to signal the Court’s current reluctance to assess the overall reliability of narcotics detection dogs. The other half of the doggy duo is much more significant.

**Florida v. Jardines** presented the question of whether a dog sniff at a front door is a search within the meaning of the Fourth Amendment. Officers received an unverified tip that marijuana was being grown in Jardines’s home. Two detectives, including one with a drug-sniffing dog, went onto the front porch of the home. The dog, Franky, sat down at the base of the front door, indicating the strongest location for odors he was trained to detect. On the basis of the dog’s behavior, a detective obtained a warrant, and a subsequent search revealed marijuana plants. The Florida Supreme Court found that the use of the dog was a search within the meaning of the Fourth Amendment that was not supported by probable cause. In a 5-4 decision, the U.S. Supreme Court agreed.

Writing for the majority, Justice Scalia drew on his opinion in the previous Term’s blockbuster, **United States v. Jones**, for the proposition that a search occurs “[w]hen ‘the Government obtains information by physically intruding on persons, houses, papers, or effects’ . . . .” That part of **Jones** had garnered five votes, but a different group of five than in **Jardines**. Nevertheless, the **Jardines** majority found that officers were in the curtilage of the house—“the area ‘immediately surrounding and associated with the home’”—which enjoys protection as part of the home itself. The justices determined that the implicit license typically granted to visitors to approach a home does not extend to officers who bring a trained dog to explore the area in the hopes of discovering incriminating evidence. There is no customary invitation for that act. **The Fourth Amendment right to be free in one’s home from unreasonable governmental intrusion ‘would be of little practical value if the State’s agents could stand in a home’s porch or side garden and trowel for evidence with impunity.’** Justice Kagan authored a concurrence for three of the justices in the majority, finding in addition that the action was a search because it infringed on a reasonable expectation of privacy, a point the majority opinion did not address.

Justice Alito dissented in an opinion joined by the Chief Justice, and Justices Kennedy and Breyer. They argued that “[t]he law of trespass generally gives members of the public a license to use a walkway to approach the front door of a house and to remain there for a brief time.” They saw no basis to distinguish between welcome and unwelcome visitors, and of course this implied license to approach the front door extends to the police because officers are ordinarily allowed to approach a front door, knock, and attempt to speak to an occupant. The detectives did not exceed the scope of this license when they used a dog at the front door. In addition, the dissenting justices would find that there is no reasonable expectation of privacy with respect to odors emanating from the home that may be detected by a person or a dog. They noted that a previous decision already rejected the claim that the use of a narcotics dog is the same as using a thermal-imaging device.

**Jardines** is important for several reasons. Of course, it is significant for limiting what officers may do with a narcotics detection dog. But more generally, it is the first Supreme Court ruling interpreting the landmark **Jones** case. It marks something of a shift in even Justice Scalia’s analysis of a property-based theory of a search. In **Jones**, Justice Scalia tied his historical analysis of the Fourth Amendment to common-law trespass. In **Jardines**, his opinion for the majority does not even contain the word trespass, although it still takes a property-based approach.

In the wake of **Jardines**, some courts have analyzed whether officers were within the scope of the “license” granted to ordinary visitors. Some courts reference the law of trespass while others do not.

19. For an argument in favor of such an assessment, see Illinois v. Caballes, 543 U.S. 405, 410-11 (2005) (Souter, J., dissenting) (“What we have learned about the fallibility of dogs . . . would itself be reason to call for reconsidering [the] decision against the intentional use of a trained dog as a search. The portent of this very case, however, adds insistence to the call . . . .”).


21. Aldo . . . and now Franky? This is by no means a robust sample, but is there a trend towards somewhat mild names? Compare Harris and Jardines, supra, with United States v. Dickerson, 873 F.2d 1181, 1183 (9th Cir. 1988) (“Brutus”); Matheson v. State, 870 So. 2d 8, 10 (Fla. Dist. Ct. App. 2d Dist. 2003) (“Razor”).

22. 133 S. Ct. at 1414 (quoting United States v. Jones, 132 S. Ct. 945, 950-51 n.3 (2012)).

23. Id. at 1414 (quoting Oliver v. United States, 466 U.S. 170, 180 (1984).)

24. Id. at 1416.  

25. Id. at 1414.  

26. Id. at 1418 (Kagan, J., concurring).  

27. Id. at 1420 (Alito, J., dissenting).  

28. Id. at 1425 (citing Illinois v. Caballes, 543 U.S. 405, 409-10 (2005)). The thermal-imaging device case is, of course, **Kyllo** v. United States, 533 U.S. 27 (2001).


31. See, e.g., State v. Campbell, 300 P.3d 72, 78 (Kan. 2013) (officer “affirmatively chose to conceal his identity by covering the [apartment door] peephole and affirmatively positioning himself to block the occupant’s ability to determine who was standing at the door . . . . ‘No customary invitation’ permits approaching someone’s door in this manner,” quoting **Jardines**, 133 S. Ct. at 1416; McClintock v. State, 2013 Tex. App. LEXIS 7124, 7 (Tex. App. Houston 1st Dist. June 11, 2013) (dog sniff within curtilage “exceeds the implicit license granted by custom that allows strangers to approach a home and briefly solicit its occupants . . . .”).
DETENTIONS DURING WARRANT SEARCHES

Over 20 years ago, the Court decided Michigan v. Summers, and upheld the detention of a resident during the search of his home. Summers was walking down his front steps when he was detained. The defendant in this Term’s case, Bailey v. United States, was detained about a mile from his home, where officers were about to execute a search warrant. In a 6-3 decision authored by Justice Kennedy, the Court determined that the detention could not be upheld as incident to a lawful search.

The majority found that the law-enforcement interests listed in Summers did not support Bailey’s detention. First, detaining someone who has left the premises is not necessary for reasons of officer safety; police can mitigate any risk by taking routine precautions, such as posting someone near the door in the event a resident returns. Second, detention of a former occupant is unnecessary to facilitate the orderly completion of the search. Third, detention does not serve the interest of preventing any damage to the integrity of the search. According to the Court, “[t]he categorical authority to detain incident to the execution of a search warrant must be limited to the immediate vicinity of the premises to be searched,” and Bailey was detained “at a point beyond any reasonable understanding of the immediate vicinity of the premises . . . .” Three of the justices in the majority also joined a concurring opinion by Justice Scalia. They wrote separately to emphasize that Summers established a categorical, a bright-line rule, contrary to the Court of Appeals’ balancing approach. To resolve the issue in this case, “a court need ask only one question: was the person seized within ‘the immediate vicinity of the premises to be searched,’” and Bailey was detained “at a point beyond any reasonable understanding of the immediate vicinity of the premises . . . .” Three of the justices in the majority also joined a concurring opinion by Justice Scalia. They wrote separately to emphasize that Summers established a categorical, a bright-line rule, contrary to the Court of Appeals’ balancing approach. To resolve the issue in this case, “a court need ask only one question: was the person seized within ‘the immediate vicinity of the premises to be searched?’” Conducting a Summers seizure incident to a search is not a right that the government has; it is an exception to the rule that would otherwise make the seizure unlawful. “Summers embodies a categorical judgment that in one narrow circumstance—the presence of occupants during the execution of a search warrant—seizures are reasonable despite the absence of probable cause.”

Justice Breyer, joined by Justices Thomas and Alito, dissented. In their view, the stop and detention was reasonable based on a variety of factors cited by the lower court, including that the premises were subject to a valid search warrant, the defendant in custody “failed to invoke the privilege when he refused to respond to police questioning for 2 hours and 45 minutes,” and that the detention “will, in my view, turn out to be quite significant over the long term.”

FIFTH AMENDMENT

No Miranda cases made it onto the docket this past Term. The justices issued only one Fifth Amendment opinion, Salinas v. Texas. But Salinas will, in my view, turn out to be quite significant over the long term. It has important implications for policing as well as for what it means to take the nickel (assert the Fifth Amendment privilege). The defendant in Salinas was suspected of shooting two brothers. Officers came to his home, where he handed over his shotgun and agreed to go with them to the police station for questioning. During a non-custodial interview, officers asked him if his shotgun would match the shells found at the murder scene. Salinas did not answer and instead looked down at the floor. At trial, the State introduced evidence of his silence and reaction. In a 5-4 decision, the Supreme Court found no violation of the Fifth Amendment, though the majority split on the reasons.

Justice Alito delivered the judgment of the Court. In an opinion joined by the Chief Justice and Justice Kennedy, he wrote that Salinas’s Fifth Amendment claim failed because he simply remained silent and did not expressly invoke the privilege. There are several circumstances in which an individual need not expressly invoke to avail herself of the Fifth Amendment’s protections. A defendant “need not take the stand and assert the privilege at his own trial,” and Griffin v. California prohibits comment on the decision not to testify. Moreover, due to the compelling pressures of an unwarned custodial interrogation, an individual need not expressly invoke. Likewise, the privilege need not be affirmatively asserted where there are threats, such as the withdrawal of government benefits, where assertion itself would be incriminating. But the three-justice plurality declined to create what they characterized as another exception to the invocation requirement; among other reasons, mere silence in the face of questioning does not put police on notice that the privilege is itself the reason for the decision not to answer. And contrary rule “would also be very difficult to reconcile with Berghuis v. Thompkins,” where a defendant in custody “failed to invoke the privilege when he refused to respond to police questioning for 2 hours and 45 minutes.”

33. 133 S. Ct. 1031 (2013).
34. The Court remanded so that the Court of Appeals could consider whether the stop and detention were lawful under Terry v. Ohio, 392 U.S. 1 (1968). The District Court had upheld the stop on this alternative ground, though the Court of Appeals did not reach it. 133 S. Ct. at 1037, 1043.
35. Id. at 1038-41.
36. Id. at 1041-42.
37. Id. at 1043-44 (Scalia, J., concurring, joined by Justices Ginsburg and Kagan) (citation omitted).
38. Id. at 1044.
39. Id. at 1045 (Breyer, J., dissenting).
40. Id. at 1047-48.
41. 133 S. Ct. 2174 (2013).
43. Id. at 2179.
44. 380 U.S. 609 (1965).
45. 133 S. Ct. at 2180 (citing, e.g., Garrity v. New Jersey, 385 U.S. 693 (1966)).
46. Id. (citing, e.g., Leary v. United States, 395 U.S. 6 (1969)).
47. Id. at 2181-82.
If officers are able to conduct a non-custodial interview or interrogation, and a suspect does not expressly invoke, the State may now comment on her silence.
scribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury. It is no answer to say that defendant could have received the same sentence with or without that fact.” Harris, the Court held, was inconsistent with Apprendi, and was overruled. Justice Breyer concurred and explained that he was not ready to accept the rule in Apprendi. But now, over a decade later, “the law should no longer tolerate the anomaly that the Apprendi/Harris distinction creates.” Justice Sotomayor wrote separately to explain why Harris should be overruled despite the principles of stare decisis.

The Chief Justice penned the primary dissent, arguing that “[o]ur holdings that a judge may not sentence a defendant to more than the jury has authorized properly preserve the jury right as a guard against judicial overreaching.” Where, as here, a sentence is imposed within the range authorized by the jury's verdict, there is no such risk of judicial overreaching. The jury's verdict authorized the judge to impose a seven-year sentence for precisely the reason he imposed it. The Sixth Amendment does not demand more. Justice Alito dissented separately, arguing that while stare decisis is not an inexorable command, “[i]f the Court is of a mind to reconsider existing precedent, a prime candidate should be Apprendi . . . .”

Alleyne is an important ruling, which state courts are beginning to address. It may be worth noting that the federal courts have already reached different outcomes on whether resentencing is required when an Alleyne error is found. Several circuits have found the error to be harmless, but others have automatically reversed.

**DOUBLE JEOPARDY**

A Michigan statute defines the offense of burning a dwelling house. Even though the evidence suggested that the defendant in Evans v. Michigan had burned an occupied house, he was tried on charges of burning “other real property,” which is set out in a different section of the statute. At the conclusion of the prosecution's case, Evans moved for a directed verdict of acquittal on the theory that an essential element of the offense was that the structure was not a dwelling house, and the State had failed to meet its burden. The trial court granted the motion. As it turned out, the trial judge misinterpreted state law. Burning “other real property” is a lesser included offense, and the State is not required to disprove the greater offense. Does the Double Jeopardy Clause prohibit retrial? In an 8-1 decision, the Supreme Court said it does.

Justice Sotomayor's majority opinion is a primer on long-standing principles of double-jeopardy law. The Double Jeopardy Clause forbids a retrial following a court-decree acquittal even if it is based on an erroneous foundation. A mistaken acquittal is still an acquittal. It is unreviewable whether a judge directs a jury to return a verdict of not guilty or enters the verdict herself. The acquittal precludes retrial even if it is based on an erroneous decision to exclude evidence, a mistaken understanding of the evidence required for conviction, or a misconstruction of the statute defining the requirements to convict. While there may be a retrial following a procedural dismissal as opposed to a substantive ruling, here the trial court evaluated the State's evidence. The Court's prior decisions “all instruct that an acquittal due to insufficient evidence precludes retrial, whether the Court's evaluation of the evidence was 'correct or not.'” The majority rejected the State's arguments for a different outcome in the case at bench; among other things, it was unpersuaded that the erroneous addition of an extraneous element of the offense was any different than a simple misinterpretation or misconstruction of the statute. And it did not matter that the acquittal was sought by the defendant. Justice Alito was the sole dissenter.

**SPEEDY TRIAL**

Finally, in Boyer v. Louisiana, the Court dismissed the petition for writ of certiorari as improvidently granted. The Court had accepted the case to determine whether the State's failure to fund counsel for an indigent defendant for five years should be weighed against the State for speedy trial purposes. Justice Alito, joined by Justices Scalia and Thomas, concurred in the order of dismissal, saying that the record did not show that much of the delay was caused by the State, and thus review had been granted on the basis of a mistaken factual premise. Four

63. Id. at 2163. Justices Ginsburg, Breyer, Sotomayor, and Kagan joined in this ruling. Another portion of Justice Thomas's opinion, reviewing common law, early American practice, and the right to a jury trial, was joined by three other justices.
64. Id. at 2166, 2166 (Breyer, J., concurring in part and concurring in the judgment).
65. Id. at 2164 (Sotomayor, J., concurring, joined by Justices Ginsburg and Kagan).
66. Id. at 2167, 2169 (Roberts, C.J., joined by Justices Scalia and Kennedy).
67. Id. at 2170.
68. Id. at 2172, 2172 (Alito, J., concurring).
71. 133 S. Ct. 1069 (2013).
72. Id. at 1074-76 (citations omitted).
73. Id. at 1075-76 (citation omitted).
74. Id. at 1081 (Alito, J., dissenting). His opinion contains a lengthy discussion of the origins of the prohibition against double jeopardy, the underlying purposes of the doctrine, the definition of an acquittal, and policy considerations.
75. 133 S. Ct. 1702 (2013) (per curiam).
76. Id. at 1702, 1704 (Alito, J.).
The justices dissented. They concluded that delay resulting from a State's failure to fund an indigent's defense should weigh against the State and that any remaining factual issues could be resolved on remand.77

RETROACTIVITY AND THE EX POST FACTO CLAUSE

The Court decided three cases that relate to the retroactive application of law. The retroactivity issues were assessed under different legal principles—habeas doctrine, the Ex Post Facto Clause, and the Due Process Clause—but it seems appropriate to consider them together.

RIGHT TO COUNSEL/ADVICE ABOUT IMMIGRATION CONSEQUENCES

Three Terms ago, the Court decided Padilla v. Kentucky,78 and held that the Sixth Amendment right to effective assistance of counsel includes the right to advice on the immigration consequences of a guilty plea, at least where the consequences of the conviction are clear. Lower courts split on the question whether Padilla applies retroactively. In Chaidez v. United States,79 the justices found that the decision was not applicable to people whose convictions became final before Padilla was announced. Writing for six members of the Court, Justice Kagan analyzed the retroactivity question under the framework of Teague v. Lane.80 A decision is not applied retroactively if it is a “new rule,” meaning one which “breaks new ground or imposes a new obligation” on the government.81 A case sets forth a new rule “if the result was not dictated by precedent existing at the time the defendant's conviction became final.”82 Padilla, said the Court, would not have created a new rule had it only applied Strickland v. Washington83 ineffective-assistance-of-counsel standard to a new factual situation. But Padilla did more. It “considered a threshold question: Was advice about deportation 'categorically removed' from the scope of the Sixth Amendment right to counsel because it involved only a 'collateral consequence' of a conviction, rather than a component of the criminal sentence?”84 Padilla's holding about the former distinction between direct and collateral consequences pointed to the conclusion that it announced a new rule.85 Justice Thomas concurred in the judgment only, maintaining that Padilla was wrongly decided.86

Justices Sotomayor and Ginsburg dissented. In their view, “Padilla is built squarely on the foundation laid out by Strickland” and “relied upon controlling precedent.”87 The dissenting justices were not persuaded that Padilla’s discussion of direct and collateral consequences indicated that it was establishing a new rule. They contended that the Padilla Court said it had never previously distinguished between direct and collateral consequences in defining the scope of effective assistance of counsel, and the Padilla majority expressly declined to consider whether that distinction was appropriate in that case.88 The dissenters argued that “[w]hat truly appears to drive the majority's analysis is its sense that Padilla occasioned a serious disruption in lower court decisional reasoning. . . . But the fact that a decision was perceived as momentous or consequential, particularly by those who disagreed with it, does not control in the Teague analysis.”89

EX POST FACTO CLAUSE

The petitioner in Peugh v. United States80 committed bank fraud in 1999 and 2000. In 2010, he received a sentence of 70 months in federal prison. Peugh claimed that his sentence violated the Ex Post Facto Clause91 because the judge applied the Federal Sentencing Guidelines range in effect at the time of sentencing (70-87 months) rather than the range in effect when the offense was committed (30-37 months). The Ex Post Facto Clause prohibits—among other things—laws “that change[] the punishment, and inflict[] a greater punishment, than the law annexed to the crime, when committed.”92 Did the Guidelines amendment accomplish such a change, inasmuch as the Court decided in United States v. Booker93 that the Guidelines are advisory, not mandatory? In a 5-4 opinion written by Justice Sotomayor, the Court said yes.

Critical to the majority was the understanding that it is not necessary for a law to increase the defendant’s maximum eligible sentence in order to violate the Ex Post Facto Clause. Nor does the fact that the sentencing court has a degree of discretion defeat such a claim, though the possibility must be more than mere speculation. “The touchstone” of the inquiry is whether the change in law “presents a ‘sufficient risk of increasing the measure of punishment attached to the covered crimes.’”94 Justice Sotomayor explained that while the Guidelines are advisory, the sentencing judge uses the range as the starting point in the analysis. “That a district court may ultimately sentence a defendant outside the Guidelines range does not deprive the Guidelines of force as the framework for sentencing.”95 Moreover, the significance of the Guidelines is underscored by the fact that appellate review for reasonableness uses the Guide-
lines as a benchmark, and a mistake in calculating the Guidelines is procedural error. Contrary to the government's arguments, the majority considered the Guidelines to have more force than merely nonbinding policy statements. In the end, the Court saw this case as closest to Miller v. Florida, where a change in Florida’s guidelines scheme was held to violate the Clause. Florida’s guidelines provided a presumptive sentencing range, and clear and convincing reasons had to be given for a departure from that range. The majority in Peugh concluded that applying the amended Guidelines to the defendant violated the Ex Post Facto Clause.77

Justice Thomas wrote the dissent, joined by the Chief Justice and Justices Scalia and Alito. They countered the majority's claim that the Guidelines were more like binding law because an incorrect calculation is reversible error. In the dissenters' view, “the fact that courts must give due consideration to the recommendation expressed in the correct Guidelines does not mean that the Guidelines constrain the district court's discretion to impose an appropriate sentence; it simply means that district courts must consider the correct variables before exercising their discretion.” Moreover, “[i]t is difficult to see how an advisory Guideline, designed to lead courts to impose sentences more in line with fixed statutory objectives, could ever constitute an ex post facto violation.” Writing for himself in another part of his opinion, Justice Thomas contended that the opinion also demonstrated the unworkability of the Court’s ex post facto jurisprudence, and that the Court should return to the original meaning of the Clause. He argued that the justices should not adhere to prior cases that find a violation when there is a sufficient “risk” of an increased sentence.100

**THE DUE PROCESS CLAUSE—RETROACTIVITY**

While the Ex Post Facto Clause does not measure the retroactive application of a judicial decision, the Due Process Clause does. In Metrish v. Lancaster, a federal habeas corpus petitioner challenged the retroactive application of a decision from the Michigan Supreme Court. Beginning in 1973, Michigan’s intermediate appellate courts began recognizing a diminished-capacity defense to negate the mens rea element of first-degree murder. In 1975, the Michigan Legislature passed a law that set forth the requirements of a defense based upon mental illness or mental retardation. The 1975 Act was amended in 1994, to clarify who bore the burden of proof. In 2001, the Michigan Supreme Court held that defendants could not raise diminished capacity, as it was not included within Michigan’s comprehensive statutory scheme. Lancaster's offense took place in 1993. At his trial, the judge applied the 2001 decision retroactively and denied Lancaster's request to present evidence of diminished capacity. In a unanimous opinion by Justice Ginsburg, the Court found that Lancaster was not entitled to habeas corpus relief.

The Court compared Lancaster's claim to the two primary precedents, Bouie v. City of Columbia and Rogers v. Tennessee. Bouie was not on point; there, a decision of the South Carolina Supreme Court was retroactively applied to make an act criminal that was otherwise not proscribed. Rogers was closer. In that case, the Tennessee Supreme Court retroactively abolished the common-law “year-and-a-day rule” in murder cases. The decision not to adhere to the rule in Rogers's case did not violate the Due Process Clause principle of fair warning because the rule was widely viewed as an outdated relic, and had only a tenuous foothold in Tennessee. Lancaster's claim is “arguably less weak” than that rejected in Rogers, since diminished capacity was not an outdated relic and has been acknowledged repeatedly by the Michigan Court of Appeals. However, Lancaster could not meet the demanding standards required for federal habeas corpus relief. He would need to establish an unreasonable application of federal law. And “[d]istinguishing Rogers, a case in which we rejected a due process claim, . . . does little to bolster Lancaster's argument that the [state court's] decision unreasonably applied clearly established federal law . . . This Court has never found a due process violation in circumstances remotely resembling Lancaster's case . . . .”105

**DUE PROCESS—BURDEN OF PROOF**

The Court also decided an interesting case about the assignment of the burden of proof. The defendant in Smith v. United States was charged with conspiracy and other crimes relating to his alleged role in a drug distribution organization. He claimed that the conspiracy counts were barred by the five-year statute of limitations, pointing to the fact that he was in prison on other charges for the last six years of the charged conspiracy. The trial court instructed the jury that the burden is on the defendant to prove withdrawal from a conspiracy by a preponderance of the evidence. On appeal, he argued that it was the government's burden to disprove a defensive withdrawal before the limitations period. In an opinion by Justice Scalia for a unanimous Court, the justices disagreed.

The opinion rehearsed the relevant basic principles. While the Due Process Clause assigns the government the burden of proving every fact necessary to constitute the crime beyond a reasonable doubt, proof of the nonexistence of all affirmative

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97. Peugh, 133 S. Ct. at 2088. Writing for a plurality, Justice Sotomayor also argued in another part of her opinion that the holding was consistent with the principles of fairness that animate the Clause. See id. at 2084-85.
98. Id. at 2088, 2090 (Thomas, J., dissenting, joined by Chief Justice Roberts and Justices Scalia and Alito).
99. Id. at 2091.
100. Id. at 2093-95 (Thomas, J., dissenting).
104. Lancaster, 133 S. Ct. at 1791-92.
105. Id. at 1792.
106. 133 S. Ct. 714 (2013).
defenses is not constitutionally required. The prosecution is foreclosed from shifting the burden to the defendant only when an affirmative defense negates an element of crime. However, where an affirmative defense instead excuses conduct that would otherwise be punishable, but does not negate any of the elements of the offense itself, the government does not have a constitutional duty to overcome the defense beyond a reasonable doubt. The Court found that withdrawal did not negate an element of Smith's conspiracy crime. “Commission of the crime within the statute-of-limitations period is not an element of the conspiracy offense.”107 Thus, “[w]ithdrawal terminates the defendant's liability for postwithdrawal acts of his co-conspirators, but he remains guilty of conspiracy.”108 In another part of the opinion, the Court noted that Congress was free to alter the assignment of proof with respect to the existence or nonexistence of withdrawal.

FEDERAL CRIMINAL LAW

One federal criminal appeal, United States v. Davila,109 may be of interest.110 While it primarily involves the construction of Federal Rule of Criminal Procedure 11, it also briefly discusses the sorts of errors that are considered to be structural.

The defendant in Davila was dissatisfied with his legal representation, and complained that his attorney had advised him to plead guilty. In what all parties later agreed was a clear violation of Rule 11(c)(1), the Magistrate Judge essentially urged him to plead guilty and cooperate with the government in this or other cases. He said that to obtain the sentence reduction for “acceptance of responsibility,” which is regularly given defendants who plead guilty, Davila had to “come to the cross.”111 Davila pleaded guilty several months later. The Supreme Court unanimously held that any Rule 11 violation of this type is assessed for harmless error; reversal is not automatic.

Writing for the Court, Justice Ginsburg first noted that Rule 11(h) specifically provides that a variance from the rule “is harmless error if it does not affect substantial rights.”112 The justices rejected the claim that this type of violation, which occurs before a defendant decides whether to plead guilty, should be treated differently than the sort of procedural errors that can occur during a plea colloquy. Under the plain language of Rule 11, and consistent with the Advisory Committee's commentary, both are amenable to review for harmless error. “Structural error” refers to a very limited class of errors that “trigger automatic reversal because they undermine the fairness of a criminal proceeding as a whole,” and this error does not fit within that category.113 The Court remanded for the lower courts to assess the error in light of the full record. Justices Scalia and Thomas concurred. They agreed that a defendant must be prejudiced to obtain relief, but would have reached that conclusion by applying the plain language of Rule 11, without reference to the Advisory Committee's comments.114

HABEAS CORPUS

There are several noteworthy federal habeas cases from the last Term. The Court took on the question of competency and habeas, as well as a more ordinary set of cases concerning procedural default and habeas practice under the Antiterrorism and Effective Death Penalty Act (AEDPA).

RIGHT TO COMPETENCE

Does a federal habeas corpus petitioner, who is challenging a state capital conviction, have a right to stay the habeas proceeding if he is not competent to proceed? In Ryan v. Gonzales and Tibbals v. Carter,115 the Court said no.

The case arose from two separate habeas corpus petitions, one in the Sixth Circuit and one in the Ninth. The Courts of Appeals both stayed the proceedings, albeit on the basis of different statutory provisions. The Court's unanimous opinion, written by Justice Thomas, found no statutory basis for a stay. There is no right to competence in the text of 18 U.S.C. § 3599, the statute that provides federal habeas petitioners on death row the right to federally funded counsel. Nor may such a right be implied from the statutory right to counsel—that would not be consistent with the Court's constitutional precedents. An incompetent defendant may not be tried, but that protection stems from the Due Process Clause. The Court has never said it is derived from the Sixth Amendment right to counsel. Further, a right to competence cannot be found in 18 U.S.C. § 4241, which generally applies only to federal criminal defendants (not state defendants who become federal habeas petitioners). The Court did, however, note that District Courts have discretion to grant stays. In one of the cases, the District Court did not abuse its discretion in denying a stay, because all of the claims were record-based or resolvable as a matter of law, irrespective of the petitioner's competence. In the other case, the Court remanded to determine whether there is a likelihood that the petitioner will regain competence in the foreseeable

107. Id. at 720.
108. Id. at 719.
109. 133 S. Ct. 2139 (2013). Disclosure: I joined an amicus curiae brief submitted on behalf of a number of law professors in this case.
110. I apologize to readers if I have excluded some notable decisions. A few close calls included United States v. Kebodeaux, 133 S. Ct. 2496 (2013) (the Constitution's Necessary and Proper Clause affords Congress the power to require federal sex offenders to register, even if they completed their sentences prior to the Act; Kebodeaux did not, however, address any ex post facto claims)
111. 133 S. Ct. at 2144.
112. Id. at 2143 (quoting Fed. R. Crim. P. 11(h)). See also Fed. R. Crim P. 52(a) (“Any error ... that does not affect substantial rights must be disregarded.”).
113. Davila, 133 S. Ct. at 2149 (citations omitted).
114. Id. at 2150 (Scalia, J., concurring, joined by Justice Thomas).
future and whether the claim could substantially benefit from his assistance.

What is most interesting about this opinion is how it conceives the role of the federal courts in capital habeas cases. “Given the backward-looking, record-based nature of most federal habeas proceedings, counsel can generally provide effective representation to a habeas petitioner regardless of the petitioner’s competence.”116 Citing Cullen v. Pinholster117 and Harrington v. Richter,118 the justices emphasized that review is usually limited to the record that was before the state court.119 “Attorneys are quite capable of reviewing the state-court record, identifying legal errors, and marshaling relevant arguments, even without their clients’ assistance.”120

ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT/PROCEDURAL DEFAULT

A few procedural default cases are worth a brief mention. In McQuiggin v. Perkins,121 the Court ruled 5-4 that “actual innocence,” if proved, can provide a gateway to federal habeas corpus review, even if the petitioner failed to file her petition within AEDPA’s one-year limitations period. Trevino v. Thaler122 provided an opportunity to revisit Martinez v. Ryan,123 which was decided last Term. In Martinez, a state law required a claim of ineffective assistance of trial counsel to be raised in an initial-review collateral proceeding (instead of on direct review), and the Court found that ineffective assistance of state counsel in the collateral proceeding may excuse the failure to raise the claim about trial counsel. The Trevino Court examined Texas’s procedural system and determined that it does not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal. In a 5-4 ruling, the justices found no distinction between (1) a system “that denies permission to raise the claim on direct appeal” and (2) a system “that in theory grants permission but, as a matter of procedural design and systemic operation, denies a meaningful opportunity to do so . . . .”124

The Court also addressed the circumstance in which a state criminal defendant attempts to raise a federal claim and a state court rules against the defendant in an opinion that addresses some issues but does not expressly address the federal claim. In Johnson v. Williams, the justices held that a federal habeas court “must presume (subject to rebuttal) that the federal claim was adjudicated on the merits.”125 The justices were unanimous in finding that the presumption was not rebutted simply because the state court addressed some but not all of the claims. The opinion noted that “it is not the uniform practice of busy state courts to discuss separately every single claim to which a defendant makes even a passing reference.”126 While the Court found that the presumption was not rebutted, it also rejected the State’s argument that the presumption should be made irrebuttable. Justice Scalia concurred, arguing that the presumption should only be rebuttable by a showing, based on the text of the court’s order or upon practice in the jurisdiction, that the judgment did not purport to decide the federal question.127

Finally, during the 2011-12 Term, the Court granted certiorari and summarily reversed in six habeas corpus cases. As I wrote a year ago, the justices did so to underscore AEDPA’s demanding standards.128 This year, the justices continued the practice, but with fewer cases—three—all from the Ninth Circuit. In Marshall v. Rodgers,129 they reversed the circuit’s grant of habeas relief, finding that there is no clearly established federal law, as determined by the Supreme Court, with respect to a criminal defendant’s ability to assert his right to counsel once he has validly waived it. The Court criticized the Court of Appeals for its “mistaken belief that circuit precedent may be used to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced.”130 Another summary reversal came in Nevada v. Jackson,131 where the state courts excluded evidence of a rape victim’s prior uncorroborated allegations of rape by the defendant, largely because the accused did not give notice of his intent to introduce extrinsic evidence. While it is well-established, as a general principle, that a defendant has a meaningful opportunity to present a complete defense, “[n]o decision of this Court clearly establishes that this notice requirement is unconstitutional.”132 Finally, in Ryan v. Schard,133 the justices ruled that the Court of Appeals abused its discretion in failing to issue its mandate after Supreme Court review was denied; the Circuit sua sponte sought to reconsider an argument it had previously rejected.

In McQuiggin v. Perkins, the Court ruled 5-4 that “actual innocence,” if proved, can provide a gateway to federal habeas corpus review, even if the petitioner failed to [timely] file her petition . . . .

116. Id. at 704.
119. 133 S. Ct. at 705, 708-09.
120. Id. at 705.
121. 133 S. Ct. 1924 (2013).
122. 133 S. Ct. 1911 (2013).
124. 133 S. Ct. at 1921.
126. Id. at 1094.
127. Id. at 1099 (Scalia, J., concurring).
130. Id. at 1430.
132. Id. at 1993.
133. 133 S. Ct. 2548 (2013) (per curiam).
A LOOK AHEAD

As this article goes to press, the Court’s 2013 Term has just begun. It is still quite early for a full preview, but there are a few cases to watch. The justices will consider whether the Fifth Amendment is violated when a State uses a court-ordered mental evaluation to rebut a capital defendant’s showing about his mental state; whether the government can obtain an ex parte order to freeze assets that a defendant needs to retain counsel, and not provide a pretrial, adversarial hearing on the underlying charges; if officers who receive an anonymous tip about a drunk or reckless driver need to corroborate dangerous driving before stopping the vehicle; what standards and relief are appropriate for a claim that a defendant would have pled guilty but for ineffective assistance of counsel; and whether a resident must be personally present to object when officers ask a cotenant for consent to search a dwelling, or whether a previous objection remains effective. It should be another interesting year.

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First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making

By Jennifer K. Elek & Paula Hannaford-Agor

Over the past three decades, court leaders across the country have taken aggressive steps to confront racial bias in the courts. Recent efforts include in-depth judicial education and training about how an individual’s unconscious attitudes (including culturally learned associations or generalizations that we tend to think of as stereotypes) introduce unjustified assumptions about other people and related evidence that can distort a person’s judgment and behavior. This phenomenon is now referred to as implicit bias to differentiate it from explicit or intentional bias. Judicial-education programs focus on raising judicial awareness about implicit bias and introducing techniques that judges may use to help minimize the impact of implicit bias on judicial decision making.

Despite high levels of interest and genuine commitment to racial fairness in the justice system, disparate treatment of racial minorities persists and pervades all stages of the criminal justice process. Jury trials are a particularly troubling component of the justice system with regard to the potential for racial bias. Courts have extremely limited opportunities to educate jurors about the pernicious effects of complex psychological phenomena like implicit bias and how these implicit forms of bias may distort jurors’ interpretation of trial evidence. Jurors are randomly selected from the local community. Other than statutory qualifications such as U.S. citizenship, age (adults 18 or older), and the ability to speak and understand English, state courts have no educational, occupational, or personal experience requirements to be eligible for jury service. Most jurors in this country serve only for the duration of the trial (typically two to three days) and then are released from service. No time is available during this short period to provide the type of in-depth education on implicit bias that judges and court staff may receive. Instead, judges and lawyers are increasingly looking to existing opportunities within the jury-selection and trial period (e.g., juror orientation, voir dire, jury instructions) in which to inform jurors about the propensity of implicit bias to affect decision making and to provide concrete strategies to minimize the impact of implicit bias on jury verdicts.

This article focuses on several of these interventions and the factors that may increase or undermine their effectiveness. Most Americans are aware of the existence of explicit bias and its effects on decision making generally, but implicit bias is still a relatively new concept about which many people in the justice system are unaware. The first section of this article discusses the difference between explicit bias and implicit bias and why contemporary researchers have become more convinced that much of the disparity in legal outcomes for African-Americans compared to whites is likely due to implicit bias. We then describe different interventions that have been proposed to reduce the impact of implicit bias, and findings from empirical research about their effectiveness. One complication of these interventions is that some otherwise well-intentioned approaches can provoke a backlash effect in which the individuals exposed to the intervention are actually more likely to make judgments or behave in ways that manifest prejudice. In the context of administering these interventions with trial jurors, there are a number of pros and cons, many of which involve purely logistical concerns. We conclude with an update about interventions that are currently being tried, including a pilot test of an implicit-bias jury instruction.

THE IMPACT OF IMPLICIT BIAS IN THE JUSTICE SYSTEM

Judges, lawyers, and court staff have long recognized that explicit, or consciously endorsed, racial prejudices have no place in the American justice system. The Code of Judicial Conduct in most states expressly prohibits judges from engaging in bias, prejudice, or harassment on the basis of race, gender, ethnicity, or other factors, and the code even extends the prohibition to court employees over which the judges have control and to lawyers appearing in cases before them. In fact, most judicial-performance evaluations include measures of judicial impartiality as a major focus. The underlying justification for this prohibition is that discriminatory speech or behavior undermines public perceptions of judicial impartiality and competence. In contemporary society, most people recognize that explicit racial bias is normatively bad, and they make efforts to suppress biased behaviors or speech, even if they consciously recognize that they have those attitudes.

What often surprises members of the court community and other professionals is that more subtle biases or prejudices can operate automatically, without awareness, intent, or conscious control. Personal attitudes and acquired knowledge often help individuals function more efficiently by making it easier for the brain to recognize and respond quickly to new people or situations. But some attitudes, especially racial and cultural stereotypes, distort decision making by unfairly influencing judgments about others. Although explicit or consciously endorsed racial prejudices in contemporary American society may be on the decline, this subtler form of implicit racial bias persists.

Over the past few decades, a number of specialized tests have

Footnotes

1. ABA Model Code of Jud. Conduct R. 2.3 (2011). Twenty-seven states have adopted the language of Rule 2.3 or substantially similar language.
been developed to help researchers identify, measure, and study implicit forms of bias. One of the most popular is the Implicit Association Test (IAT), developed by researchers in the mid-1990s at Yale University and the University of Washington. The IAT operates under a basic premise of human cognition that when an idea is consistent with a person’s attitudes or cultural understanding, he or she will be able to mentally associate concepts related to that idea more quickly and easily than if the idea is inconsistent with a person’s attitudes or cultural understanding. In an early version of the IAT, for example, researchers measured the amount of time it took people to associate pictures or words representing flowers or insects with positive attributes (“good”) and with negative attributes (“bad”) by hitting right or left keys on a computer keyboard. Because flowers are generally viewed as intrinsically good and insects as intrinsically bad (or at least significantly less good), most were able to hit the keys associating flowers and words indicating positive attributes, and insects and words indicating negative attributes, much faster and with fewer errors than when they asked to associate flowers with words indicating negative attributes or insects and words indicating positive attributes. The difference in the amount of time and the number of errors reflects the strength of the person’s preference for flowers over insects. Interestingly, young boys and entomologists tended to show weaker preferences for flowers over insects compared to young girls and people who do not study insects professionally. This pattern of stronger preferences for more culturally familiar and socially and individually learned concepts has been found to be consistent for IAT tests measuring implicit biases based on race, gender, ethnicity, sexual orientation, age, religion, disability, body weight, and other characteristics developed and employed over the past 15 years. To try an Implicit Association Test, go to www.implicit.harvard.edu.

A large body of empirical literature now documents the existence of implicit biases and their behavioral implications. One recent meta-analysis of 122 research reports found implicit biases to be valuable, independent predictors of social behavior and judgment. Implicit racial bias is the most studied type of implicit bias. Research shows that implicit racial bias can predict the quality of social interactions and decision-making outcomes in a variety of contexts, including voting, hiring, performance assessment, budget setting, policing, and medical treatment. In the context of the American justice system, researchers now point to linkages between implicit racial bias and disparities in detention decisions, jury verdicts, capital punishment, and other sentencing outcomes.6

Research on judicial decision making suggests that judges are affected by implicit bias in ways similar to the general population. In one study of actual trial judges in three jurisdictions, white judges showed strong implicit attitudes favoring whites over blacks (consistent with studies of implicit bias in the general population).7 The judges were presented with three vignettes, two of which did not identify the defendant’s race but some of which included words designed to trigger an association with African-Americans (e.g., Harlem, dreadlocks). The third vignette explicitly identified the defendant as white or black. The judges were asked to recommend a judgment on guilt, to share their confidence in that judgment, and to predict the defendant’s likelihood of future recidivism. Interestingly, judges did not differ in their judgments in the first two vignettes based solely on whether the vignette included cues regarding race, but the judges’ Race IAT was a marginally significant predictor of the harshness of the sentence. Judges whose Race IAT indicated a preference for whites over blacks were more likely to convict the defendant, had greater confidence in that judgment, and believed the likelihood of recidivism to be higher than judges whose Race IAT indicated a preference for blacks over whites. In the third vignette, judges with greater implicit bias against blacks convicted black defendants at the same rate as white defendants, but judges with greater implicit bias in favor of blacks convicted black defendants less frequently than they did white defendants.

Studies of juror decision making also demonstrate the impact of implicit bias on judgments. Levinson and Young, for example, conducted a mock-jury experiment in which mock jurors studied 20 pieces of trial evidence including photographs of a crime scene, one of which was a surveillance camera photograph featuring a masked gunman whose hand and forearm were visible. Half the cases showed light skin on the gunman and half showed dark skin.8 This subtle manipulation of skin color produced significantly different results in jurors’ confidence in their verdict. On a scale of 1 (not at all guilty) to 100 (absolutely guilty), jurors who viewed the dark-skinned gun

2. Kristin A. Lane, Mahzarin R. Banaji, Brian A. Nosek & Anthony G. Greenwald, Understanding and Using the Implicit Association Test: IV: What We Know (So Far) About the Method, in IMPLICIT MEASURES OF ATTITUDES (Bernd Wittenbrink & Norbert Schwarz eds., 2007).
3. Id.
In the discrete area of juror decision making, there is little evidence to suggest a straightforward, simple relationship between defendant race and juror verdict preferences.

In contrast, Eberhardt and colleagues investigated the extent to which capital felony defendants with stereotypically black facial features are more likely to be sentenced to death than defendants without such features. Using a database of death-eligible cases in Philadelphia that advanced to the penalty phase between 1979 and 1999, the researchers identified 44 cases in which a black defendant was convicted of murder. In these cases, they obtained photographs of these defendants and had neutral observers rate each defendant's looks on a scale of 1 (not at all stereotypically black) through 11 (extremely stereotypical). After controlling for nonracial factors known to influence sentencing, they found that defendants who were rated as having less stereotypically black features were sentenced to death in 24.4% of the cases whereas defendants who were rated as appearing more stereotypically black were sentenced to death in 37.5% of the cases. These findings are consistent with previous research that people associate black physical traits with criminality.

Employing the same methodology, Eberhardt and colleagues also examined death-penalty rates in cases in which a black defendant was convicted of murdering a white victim. They then obtained photographs of these defendants and had neutral observers rate each defendant's looks on a scale of 1 (not at all stereotypically black) through 11 (extremely stereotypical). After controlling for nonracial factors known to influence sentencing, they found that defendants who were rated as having less stereotypically black features were sentenced to death in 24.4% of the cases whereas defendants who were rated as appearing more stereotypically black were sentenced to death in 37.5% of the cases. These findings are consistent with previous research that people associate black physical traits with criminality.

These studies and others demonstrate that racial biases in legal decision making often arise in ways not easily or consistently explained by traditional factors such as trial participant demographic characteristics. In the discrete area of juror decision making, there is little evidence to suggest a straightforward, simple relationship between defendant race and juror verdict preferences. Mock-juror studies such as the ones discussed here show some evidence of in-group biases, but studies that focus on the decision making of actual jurors in actual trials find that the relationship between juror and defendant race accounted for only a very small amount of the variance in jury verdicts. Strength of evidence is generally the overwhelming predictor. Garvey and colleagues, for example, examined decision making by more than 3,000 jurors in nearly 400 non-capital felony trials in four jurisdictions. Only in the D.C. Superior Court did the defendant's race affect juror's first votes during deliberations, but even this relationship did not survive into the juries' final verdicts. Strength of the evidence, including the credibility of police testimony, was the strongest factor related to final verdicts.

Similarly, Visher conducted 90-minute in-person interviews with 331 jurors from 38 forcible-sexual-assault trials to examine the effects of juror characteristics, defendant and victim characteristics, and evidentiary factors on juror decision making. She found that juror characteristics accounted for only 2% of the variance in jury verdicts, and defendant and victim characteristics accounted for only 8% of the variance. In contrast, evidentiary factors, especially the use of force and physical evidence, accounted for 34% of the variance. These findings point away from strict demographic explanations for racial disparities in legal decision making and toward a more complex, nuanced alternative: one that explores how the decision maker's attitudes and cognitive schemas inform the perception and interpretation of a host of evidentiary factors critical to fair legal judgment.

PROMISING STRATEGIES FOR COMBATING IMPLICIT BIAS

Social scientists have made great strides in recent years to identify effective (and ineffective) interventions for combating more insidious forms of racial bias. To reduce the effects of implicit forms of bias in judgment and behavior, several interventions have shown promise. We discuss a few of these in turn.

EDUCATION INTERVENTIONS

In general, basic education about the existence of implicit forms of bias and how these can manifest in judgment is an important first step. Personal awareness of one’s own potential for any type of cognitive bias is necessary before an individual is capable of engaging in efforts to correct for it. Although simply being aware of the potential for racial bias may prompt
some individuals to pursue corrective action, it is not sufficient to ensure that debiasing efforts consistently reduce or prevent expressions of implicit bias.\textsuperscript{16} Individuals must understand the nature of implicit bias—what it is and how it can affect judgment—to increase the likelihood that the corrective efforts they engage in are effective.\textsuperscript{17} And they must also possess the motivation to fully implement such debiasing efforts.

In framing an educational message on implicit bias, however, the appeal used has important ramifications. For example, one set of studies has shown that some types of individuals are angered and feel threatened by external pressure to comply with mandatory nondiscrimination standards.\textsuperscript{18} When away from the watchful eye of the authority figure setting the standards for compliance, these individuals are more likely to engage in biased decision making, presumably in attempts to “reassert their personal freedom.”\textsuperscript{19} Thus if an authority designs the educational message to pressure individuals to comply with social or institutional standards for racial fairness, this extrinsic motivation to regulate prejudice can incite hostility and generate backlash that may increase expressions of racial prejudice. Legault and colleagues showed that exposing individuals to educational messages designed to compel adherence to racial fairness generated more explicit prejudice (in the form of self-reported racial attitudes) and implicit prejudice (in the form of reaction time measures like the IAT) than a no-intervention alternative. That approach shows that forced-compliance interventions can actually increase expressions of prejudice over doing nothing.\textsuperscript{20} In contrast, Legault and colleagues also found that educational messages designed to inform and appeal to personal standards for egalitarianism (i.e., to generate intrinsic motivation to regulate prejudice) reduced expressions of explicit and implicit prejudice compared to the no-intervention alternative. Thus interventions designed to educate individuals in an effort to encourage buy-in at a personal level and appeal to these personal egalitarian standards are more likely to reduce expressions of prejudice and avoid harmful backfire effects than programs in which authorities force individuals to comply with external anti-prejudice standards.

In addition, the effectiveness of an educational intervention can depend on the ideology underlying the approach. The traditional institutional approach to racial fairness, referred to in relevant literature as the colorblindness approach, explicitly directs individuals to ignore race and other differences. This popular colorblindness strategy underlies the mandate that judicial decision makers disregard extralegal factors like race and gender when weighing the evidence. Given the mounting evidence that messages using intrinsic appeals are more effective at reducing prejudice than messages conveying an external pressure to comply, the colorblindness approach is not an optimal bias-reduction strategy. This approach has been shown to generate greater individual expressions of racial bias on both explicit and implicit measures compared to a multiculturalism approach that promotes the value of diversity and encourages individuals to appreciate group differences.\textsuperscript{21} In addition to other research showing that a colorblindness approach to reducing expressions of racial prejudice often backfires,\textsuperscript{22} a multiculturalism approach has been shown to improve the likelihood that a person will accurately detect instances of racial discrimination when observed, whereas a colorblindness approach produces a reduced likelihood of detection. This trend suggests that the colorblindness approach may appear to work to improve racial fairness but in actuality may result in an underreporting of incidents of racial discrimination.\textsuperscript{23}

The counterproductive effects of particular strategies in the promotion of racial fairness can spread beyond individuals in the immediate educational environment. The mainstream popularity of the colorblindness approach can prompt white individuals, in response to implied (but unspoken) social cues to ignore race, to spontaneously adopt a colorblindness strategy to avoid the appearance of racial bias when interacting with a black partner. Strategic demands to ignore race as part of a colorblindness approach to reducing racial prejudice can produce unintentional, “ironic” effects: One study showed that as white individuals devoted mental resources to the task of ignoring race, they had fewer resources available to dedicate toward monitoring and controlling their nonverbal behavior in social interactions with black partners. As a result of this cognitive

17. See Timothy D. Wilson & Nancy Brekke, Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations, 116 PSYCHOL. BULL. 117 (1994); Dwayne T. Wegener et al., Flexible Correction of Juror Judgments: Implications for Jury Instructions, 6 PSYCHOL. PUB. POLY & L. 629 (2000). For example, engaging in a strategy like perspective-taking (i.e., imagining how one would feel and act if in the stigmatized person’s shoes or if seeing the world from their point of view) has been shown to decrease expressions of implicit and explicit bias. Adam D. Galinsky & Gordon B. Moskowitz, Perspective-Taking: Decreasing Stereotype Expression, Stereotype Accessibility, and Ingroup Favoritism, 78 J.

19. Id. at 486.
More diverse juries tend to produce decisions less biased by the defendant’s race . . .

resource strain, white participants actually exhibited less friendly non-verbal behavior toward the black partner than was observed when white participants interacted with a white partner.24 Other research indicates that this kind of discriminatory non-verbal behavior can negatively influence the subsequent perceptions and responses of the stigmatized individual or individuals25 and may hinder future efforts to engage in interracial interaction.26

Thus, educational initiatives promoting racial fairness should focus not just on the individual, but also on the climate of the organization as a whole. When peers and leadership figures demonstrate behavior consistent with the multiculturalism approach, these expressions of egalitarian goals and beliefs will positively influence others in the community.27 Other educational efforts to change racial attitudes through diversity-training courses have also helped to at least temporarily reduce individuals’ expressions of implicit and explicit racial biases.28

CONTACT AND EXPOSURE INTERVENTIONS

Generally, increased interracial contact seems to have a positive effect on both implicit and explicit attitudes.29 Exposure to individuals who contradict prevailing cultural or social stereotypes can, in particular, reduce the expression of implicit racial biases. This works when people have an opportunity to see or interact with stigmatized group members in respected leadership roles or as role models, or otherwise observe them behaving in a manner that contradicts prevailing social stereotypes.30 Simply imagining stigmatized group members in counterstereotypic ways can also reduce the expression of implicit biases.31 Even individuals who engage in extensive practice mentally countering or negating stereotypes appear to be able to successfully reduce implicit biases based on those stereotypes over time.32

More diverse juries tend to produce decisions less biased by the defendant’s race, presumably because they force jurors to engage with one another on an equal basis in deliberations and to expressly confront different conclusions about the trial evidence that were reached based on the jurors’ unique life experiences and attitudes, including implicit biases.33 Although more research is needed on the precise mechanisms by which jury diversity affects juror decision making, it appears that the presence of minorities on a jury not only brings more diverse perspectives to the table, but it also increases white juror awareness of race-related concerns in a way that stimulates a more thorough and more factually accurate evaluation and discussion of trial evidence.

INTERVENTIONS THAT CLARIFY STANDARDS FOR JUDGMENT

Discrimination tends to emerge more in ambiguous decision-making contexts than straightforward ones.34 White-majority juries more often convict and recommend harsher sentences for black defendants than white defendants when the prosecution presents weak or ambiguous evidence against them.35 Other studies show that mock juries are more likely to discriminate against black defendants than white defendants in verdict and sentencing decisions when presented with mixed or incriminating but inadmissible evidence.36 To check for poten-

35. Chadee, supra note 12.
tial bias, a decision maker may look to determine if he or she has reasonable justification for the decision based on legitimate decision-making factors. However, this research shows that it is difficult for decision makers to realize when their decisions are influenced by race, ethnicity, gender, or other extraneous factors if other selective information can be used to support their decision.

People may not be able to identify and correct for bias in ambiguous contexts because decision-making standards tend to change to rationalize judgments that are actually influenced by extraneous factors. In a seminal series of studies, Uhlmann and Cohen showed that when evaluating male and female job applicants for a gender-stereotypical job (e.g., a stereotypically masculine position as a police chief), people’s perceptions about the credentials needed to be successful at the job tended to shift post hoc to justify gendered decision making.

That is, regardless of whether the male had “street smarts” or a strong educational background, people tended to justify their decision to select the male candidate over the female candidate by claiming that whichever credential the male had (but that the female did not) was more important to the job. Most telling is the fact that these decision makers thought they were providing an objective, rational, unbiased decision about the best candidate to hire.

If clear decision-making criteria are defined at the outset, however, the type of “shifting standards” effect that can unintentionally result in discrimination may be eliminated. In a follow-up study by Uhlmann and Cohen, people who committed to clear priorities about the criteria they would use in making the police-chief hiring decision showed no evidence of gendered decision making, but people who did not make such a commitment and relied more on discretionary, selective justification made decisions that were biased by gender. This shows that clarified decision-making standards can reduce stereotyping and discrimination in outcomes.

**POTENTIAL APPLICATIONS OF INTERVENTION STRATEGIES FOR USE WITH JURIES**

Although interventions have shown promise in reducing the effects of implicit bias on judgment and behavior more generally, not all of these strategies lend themselves well to practical application in jury decision making. We discuss some potential intervention strategies for use with juries below and consider the feasibility of each.

**EDUCATE JURORS ON IMPLICIT BIAS**

Education or training on the topic of implicit bias has been provided to judges and court staff in some states. However, even the most conservative of these educational initiatives take a significant amount of time to implement and require substantial resources and preparation. To introduce training during jury selection, courts would need to have trainers available to present educational material to prospective jurors, the time to implement a seminar that would likely last one to two hours at minimum due to the complexity of the subject matter, and the resources to allow prospective jurors to explore the topic through feedback or the opportunity for practice. Moreover, most Americans now live in jurisdictions that employ a one-day/one-trial term of service.

This system substantially reduces the burden of jury service on individual jurors by distributing it across a much larger pool of prospective jurors. Courts that have implemented this system necessarily had to abandon the earlier practice of summoning prospective jurors for an “Orientation Day” and now conduct a brief juror orientation (typically 20-30 minutes) in the morning when jurors report and before they are sent to courtrooms for jury selection. The combination of resources required for an educational program on implicit bias plus the lack of time in which to present such a program makes it unlikely that any court would pursue this intervention option.

**RAISE AWARENESS OF IMPLICIT BIAS WITH IATS OR RACE-RELEVANT VOIR DIRE QUESTIONING**

A number of alternative interventions have been suggested for use in jury selection, but little is yet known about their efficacy in reducing bias. For example, the administration of IATs to jurors and the addition of race-relevant voir dire questioning have been proposed as means of raising juror awareness about implicit bias and alerting jurors to its potential influence on their decisions. Although such approaches may help to reduce expressions of bias, these options are impractical in many courts for many of the same reasons discussed with regard to the educational-seminar option above. Costs associated with these techniques (e.g., printing and processing of questionnaires at a time when states are facing new and significant budgetary challenges) and limited existing court resources (e.g., computer access for potential jurors to take the IAT, or trained staff to code and process a paper-and-pencil version of the test) preclude these options from consideration in many jurisdictions.

37. Uhlmann & Cohen, supra note 34.
39. Gregory E. Mize, Paula L. Hannaford-Agor & Nicole L. Waters, The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report (2007). Under a one-day/one-trial term of service, prospective jurors report to the courthouse on the summons date. If a juror is sworn as a trial juror or alternate, he or she serves for that trial and is released from further service at the completion of the trial. If a juror is not selected as a trial juror or alternate, he or she is released at the end of the reporting day.
41. Regina A. Schuller, Veronica Kazoleas & Kerry Kawakami, The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom, 33 LAW & HUM. BEHAV. 320 (2009); Sommers, supra note 33.
The potential efficacy of . . . debiasing agents must be examined and demonstrated empirically . . . before courts are encouraged to use them . . .

The National Center for State Courts’ State-of-the-States Survey of Jury System Improvement Efforts further illustrates the limited viability of debiasing interventions during voir dire. In nearly 12,000 jury trials, judges and lawyers reported that they spent two hours on average to select a jury, a task that also involves confirming jurors’ qualifications and ability to serve for the length of the trial and investigating each juror’s ability to be fair and impartial if selected as a trial juror. Most judges and lawyers would not embrace new debiasing interventions during voir dire due to the additional time involved. States also vary in the extent to which voir dire is judge-dominated or attorney-dominated, but in either case, voir dire is perhaps the most individualistic stage of the trial. Judges have a great deal of discretion in how they conduct voir dire and are protective of that discretion as a matter of judicial independence. In a judge-dominated voir dire state, the likelihood of training the entire trial bench on how to use debiasing interventions effectively in all cases, and then ensuring that they actually apply that training, is very remote. Doing so in a lawyer-dominated voir dire state is even more remote given the complete absence of a unified bar. For consistent use in the majority of state courts, a realistic practical remedy for implicit bias in juror decision making must be not only effective but also expedient and economical.

ASSEMBLE DIVERSE JURIES

Convention assumes that deliberations among a demographically diverse group of jurors are more likely to facilitate a thorough and fair evaluation of the evidence because different perspectives are presumed to be represented in the discussion. Moreover, as indicated above, research shows that when white jurors expect to engage with a diverse jury, they tend to approach deliberations in a way that promotes a more thorough and factually accurate evaluation of the evidence.43

It is not always possible, however, to ensure a racially diverse jury. This may be of particular concern in jurisdictions with relatively homogeneous jury pools, which comprise the great majority of state courts. For example, the jury-eligible population of black/African-Americans comprises less than 10 percent of the total jury-eligible population in more than three-quarters of counties in the United States. Those counties encompass more than half of the total U.S. population.44 Unfortunately, even in more diverse communities, jury panels often fail to fully reflect community demographic characteristics due to non-systematic exclusion of minorities from jury pools,45 reductions in the size of trial juries,46 and the pervasive discriminatory use of peremptory challenges.47

STRENGTHEN THE JURY DECISION-MAKING PROCESS

The past two decades have seen a dramatic change in judges’ management of jury trials. The traditional view that juror impartiality is best served when jurors maintain a strictly passive role has gradually given way to the view that jurors are active learners and perform best when given commonplace decision-making tools to better understand and remember trial evidence. These tools include permitting jurors to take notes, permitting jurors to submit written questions to witnesses, permitting jurors to discuss the evidence before final deliberations, instructing jurors on the basic elements of the law they will be told to apply before the evidentiary portion of the trial, and providing jurors with written copies of jury instructions.48 Evaluations of each of these innovations have shown that they are effective decision-making aids in terms of improved comprehension of the evidence and law and increased retention of evidence presented at trial. By emphasizing the importance of juror comprehension of the evidence and law, these types of tools provide jurors with a stronger framework for decision making and lead to greater clarity about the basis for their collective verdict, which theoretically should reduce the potential for implicit bias to skew the verdict. No research has been conducted to explicitly examine the relationship between these jury-trial innovations and implicit bias. Although there is some reason to believe these tools may be helpful for this purpose, it is premature to conclude that these innovations will reduce the impact of implicit bias on jury verdicts. The potential efficacy of these tools as debiasing agents must be examined and demonstrated empirically, through rigorous scientific research, before courts are encouraged to use them as implicit-bias interventions.

USE SPECIALIZED JURY INSTRUCTIONS ON IMPLICIT BIAS

Historically, courts have relied extensively on jury instructions to guide juror decision making because this approach is relatively inexpensive, expedient, and easy to administer to

42. Mizé et al., supra note 39.
43. Sommers, supra note 33.
Each new jury. However, research studies have provided mixed evidence of its utility in practice. On one hand, most studies confirm that jurors take their responsibility to apply the law provided by the trial judge seriously, spending up to one-quarter of their deliberation time focused on jury instructions. On the other hand, although most jurors in actual trials report that they understand the law relatively well, research shows that jurors have fairly low levels of comprehension regarding the basic legal principles articulated in jury instructions. But when Diamond and her colleagues observed actual jury deliberations in 50 civil trials, they found that nearly 80% of the jurors’ comments about the instructions were accurate and nearly half of the incorrect comments were ultimately corrected during deliberations. This led Diamond and her colleagues to surmise that jurors in actual trials might be “able to assist one another in ways not captured on post-deliberation questions or in studies of individual respondents.” The implication from this research is that to understand the full impact that any jury instruction (including a specialized implicit-bias jury instruction) may have on juror decision making, one should examine it in a context in which group deliberations take place.

It is not yet known whether a well-crafted jury instruction could help to mitigate the effect of implicit racial bias in juror decision making. Studies show that individuals can control the behavioral expression of implicit biases in specific laboratory contexts if provided with a concrete strategy for bias reduction. In addition, whether or not jurors are motivated to produce a fair and just outcome can determine whether debiasing instructions are followed. However, pattern jury instructions developed for use in state and federal jury trials rarely incorporate these characteristics, relying instead on the simple admonition that jurors should not let “bias, sympathy, prejudice, or public opinion influence your decision.” Moreover, jury instructions tend to be written in an authoritarian legal style that, in the context of implicit bias, may ultimately prove counterproductive by triggering a backlash effect.

**Conclusions**

It is clear that members of the court community are coming to understand the general problem posed by implicit bias and are clamoring for readily available solutions on which they can act. As the court community has become more knowledgeable about implicit bias and more aware of the potential for harm in judicial decision making, judges and lawyers have expressed a great deal of interest in extending intervention efforts to jurors through the development of a specialized jury instruction on implicit bias. Judge Mark Bennett of the U.S. District Court, Northern District of Iowa, was the first trial judge known to have incorporated this approach in jury trials. More recently, the Criminal Justice Section of the American Bar Association has convened a committee to develop a toolbox of options intended to reduce the impact of implicit bias in court proceedings, including a jury instruction on implicit bias. The topic of implicit-bias instructions has also been a recurring theme on listserv discussions among members of pattern jury instruction committees. Through these efforts and others, several versions of implicit-bias jury instructions are now or will soon be available for use. Unfortunately, existing research suggests the possibility that an implicit-bias jury instruction may produce a backlash effect that actually exacerbates expressions of both implicit and explicit bias. This effect may not be universal: Specialized


52. See Diamond, Rose & Murphy, supra note 49.


55. See supra notes 18-20 and accompanying text.

56. Judge Bennett, a former civil-rights lawyer, shares his unnerving discovery of his own disappointing IAT results in Mark W. Bennett, Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions, 4 HARV. L. & POLY REV. 149 (2010). For a description of the Committee and its work, see http://www.americanbar.org/groups/criminal_justice/voir_dire.html.

57. The PJI Listserv is an online discussion group hosted by the NCSC and composed of chairs and reporters and state and federal pattern-jury-instruction committees.

58. SJF-13-N-082 (Pilot Test of an Implicit Bias Jury Instruction).
implicit-bias jury instructions may successfully reduce expressions of bias with some types of jurors but elicit backlash from others. Consequently, to prevent the dissemination of harmful jury instructions that produce backlash effects, we strongly recommend that new jury instructions be carefully evaluated using rigorous empirical methods to determine their overall and differential effectiveness before they are broadly promoted for use in the courtroom.

To begin this process, the National Center for State Courts (NCSC) is currently engaged in an effort to test the efficacy of an implicit-bias jury instruction. With funding from the State Justice Institute, the NCSC has undertaken a project to draft a model jury instruction on implicit bias and, using mock-jury methods with a vignette of a fictitious trial, to pilot test the instruction to determine its effectiveness in minimizing the impact of implicit bias in juror decision making. The results of the pilot study, which should be available in late 2013, will help inform the direction of future efforts to address implicit bias in jury trials.

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Promoting Nonpartisan Judicial Integrity:
An Evaluation of the American Bar Association’s Inclusion of the Term “Domestic Partner” in the 2007 Model Code of Judicial Conduct

Andrew Stankevich

In 2007, the American Bar Association (ABA) updated the Model Code of Judicial Conduct (the “Code”) to include the term “domestic partner,” which it defined as “a person with whom another person maintains a household and an intimate relationship, other than a person to whom he or she is legally married.” The ABA asserted the importance of adding “domestic partner” to the Code was that “commonplace ‘non-traditional’ relationships that exist outside marriage are deserving of treatment equal to that afforded marital relationships in evaluating their potential conflict-of-interest implications.” This update recognized “the fact that it is desirable to have a uniform system of ethical principles that applies to all individuals serving a judicial function.”

Many states have amended their Codes of Judicial Conduct (CJCs) to include the term “domestic partner.” But the term “domestic partner” is often associated with same-sex relationships and is, for certain purposes, defined to exclude other types of relationships. This paper will argue that some of the states that have chosen not to include the term “domestic partner” in their CJC likely did so as a result of this term’s association with lesbian, gay, bisexual, and transgender (LGBT) advocacy. States that have a history of resisting the advancement of LGBT equality have consistently chosen not to include the term “domestic partner” in their CJC, perhaps to avoid the appearance of support for LGBT equality. The exclusion of the term “domestic partner” in these states’ CJCs reflects a partisan stance and is based on an incomplete understanding of the benefits gained by including the term in a CJC. This paper will also acknowledge and discuss why some states chose not to include the term “domestic partner” in their CJCs, despite a history of support for LGBT equality. Further, this paper will argue that the ABAs introduction of the term “domestic partner” in the 2007 Code is an intelligent and effective promotion of judicial integrity, which should be adopted by all states, notwithstanding their stance on LGBT issues.

I. “DOMESTIC PARTNERSHIPS” REFER TO MANY DIFFERENT TYPES OF RELATIONSHIPS, BUT THE TERM HAS BEEN WIDELY USED TO PROMOTE LGBT EQUALITY.

A plain reading of the ABAs definition of “domestic partner” includes unmarried heterosexual and same-sex couples whose relationships are comparable to those of lawfully married couples, but who are not married. This definition of “domestic partner” is open enough to potentially include polyamorous or polygamous intimate relationships. The ABAs definition could also refer to a close, platonic relationship between people who live together, since the Code’s use of the term ‘intimate’ suggests that sexual relations are not an inherent prerequisite. Yet, the term “domestic partner” has been used extensively by LGBT advocates, including advocates in the legal profession. In November 2007, for example, the Bar Association for San Francisco issued a report on the best practices for employers to use to promote LGBT equality and inclusion within their workforce. For example, the report urged employers to create an LGBT-inclusive culture through the use of affirming language, specifically by using marriage-neutral terms. Specifically, the report explained:

An LGBT attorney who is in a committed relationship appreciates having his or her employer show respect for that relationship. When the law office issues an invitation to a business function to employees and their “spouses” without also including non-marriage specific terminology, the company fails to signal that respect. Outside of [the few states that allow same-sex marriage], “spouse” means opposite-sex husband or wife. Using the term in invitations suggests to LGBT employees that they are invisible to the employer, or that the employer does not respect their relationships. . . . This small change in wording can have a big impact on firm culture.

The term “domestic partner” within the report referred exclusively to same-sex couples.

Footnotes
3. Id. at 5.
4. Model Code, supra note 1, at R. 3.6, cmt. 2.
6. Id. at 11 (emphasis added).
7. Id. at 6 (emphasis added).
8. Id.
Further, the ABA Commission on Sexual Orientation and Gender Identity released a report in 2011 echoing the Bar of San Francisco’s 2007 recommendations, though the ABA has not yet adopted the recommendations. In almost identical language, the ABA Commission’s report encouraged employers to “[e]nsure that social invitations are inclusive by using wording that invites partners, not just spouses,” while defining “domestic partnerships” as same-sex partnerships. Thus, LGBT advocates frequently use the term “domestic partner” to refer exclusively to same-sex couples and to promote LGBT equality.

Likewise, some states have used the term “domestic partner” to refer exclusively to same-sex couples. Instead of the ABAs broad, open-ended definition of “domestic partner,” California explicitly defined “domestic partnership” by statute as a same-sex relationship. California’s Code of Judicial Ethics uses the term “registered domestic partner” to denote a person who has registered for a domestic partnership pursuant to state law or who is recognized as a domestic partner pursuant to the California Family Code. In California, only same-sex couples can apply for a domestic-partnership status, though there is a narrow exception for unmarried heterosexual couples over 62 years of age. In California, a “registered domestic partnership” is a legally recognized relationship that has the same specificity and determinability as a heterosexual marriage. Although the ABA could have defined “domestic partner” to refer only to same-sex relationships, it specifically opted not to do so despite the existence of exclusively LGBT definitions, such as California’s. This is especially true in light of the fact that the ABAs past advocacy for same-sex marriage and LGBT adoption rights is documented.

However, the use of the term “domestic partner” in the Code’s 2007 revisions arguably did not represent similar advocacy. Since California and even the ABAs Commission report define “domestic partner” as referring only to same-sex couples, the ABA would have explicitly defined a “domestic partner” as a member of a same-sex couple if the purpose of including this term was LGBT advocacy. Instead, the inclusion of the term “domestic partner” in the Code practically and intelligently holds all judges to the same level of accountability, regardless of their relationship status or sexual orientation.

II. THE INCLUSION OF “DOMESTIC PARTNER” IN THE 2007 CODE EFFECTIVELY PROMOTES JUDICIAL INTEGRITY

The Code’s standard for when a judge must recuse herself or himself is the most stringent when the case regards the judge’s spouse or domestic partner because it not only requires recusal from a case involving a spouse or domestic partner’s interest, but also from cases which involve the interest of the spouse or domestic partner’s close relatives. This standard is in recognition of the greater importance a spouse or domestic partner’s family may play in a judge’s life when compared to the role of the family of an acquaintance or roommate. Thus, the Code instructs judges to recuse themselves in cases where a person within the third degree of relationship to the judge, the judge’s spouse, or the judge’s domestic partner has more than a de minimis interest in the proceeding, which could be substantially impacted by the proceeding’s outcome.

The Code also requires judicial recusal when the judge, the judge’s spouse, domestic partner, parent, child, or any member of the judge’s family residing in the judge’s household has an economic interest in the subject matter. Thus, the Code expands the grounds for recusal by requiring a judge to withdraw from a case where the judge’s domestic partner, spouse, or a close family member of either has an interest in the case. The ABA explains that the addition of “domestic partner” in Rule 2.11 will require domestic partners and spouses to be treated comparably for purposes of evaluating economic conflicts.

The ABAs 2007 Code appropriately uses “spouse” and “domestic partner” for judicial recusal purposes, as domestic partners influence judges as much as spouses. Since spouses usually play a more important role in a judge’s life than any other person, the Code requires a judge’s recusal for conflicts arising from the judge’s relationship to the spouse and the spouse’s relatives. Of course, if any other person occupies a role in the judge’s life comparable to that of a spouse, then the judicial code should have the same recusal requirements.

Absent the term “domestic partner,” a judicial ethics code could inappropriately fail to mandate a judge’s recusal in cases involving a cohabitating heterosexual partner or a same-sex partner and for people within three degrees of these partners simply because the person is not a “spouse” but rather a “roommate.” If someone with an interest in a case is three familial degrees close to a judge’s roommate, the judge need not recuse herself. A domestic partner should be treated equally to a spouse for purposes of recusal because such a partner could easily influence a judge as much as a spouse and could have more influence over a judge than an estranged, but still lawfully married, spouse. Now that the 2007 Code requires recusal when someone within three degrees of relationship of a judge’s spouse or a judge’s domestic partner has an interest in a proceeding, the integrity of the judiciary is improved. In fact, the ABAs use of “domestic partner” in Rules 2.11 of the Code strategically and practically promotes judicial integrity.

III. MOST LGBT-FRIENDLY STATES INCLUDED “DOMESTIC PARTNER” IN THEIR CJCS

Most states do not specify the sexual orientation of a “domestic partner,” preferring instead to use the Code’s broad definition that is sexuality neutral. Arizona, California, New
Mexico, Hawaii, Delaware, Connecticut, Maryland, Iowa, New Hampshire, Washington, Nevada, Wyoming, Kansas, Montana, Indiana, Utah, Colorado, North Dakota, Nebraska, Tennessee, and Arkansas included the term “domestic partner” in their CJCs. \(^\text{17}\) Iowa, New Hampshire, and Connecticut had all legalized same-sex marriage before the revision of their CJCs to include the term “domestic partner.” For these three states, the term “domestic partner” in their CJCs presumably refers to a person involved in a nonmarital, committed relationship, but not necessarily to a member of a same-sex couple.

Connecticut’s Code of Judicial Conduct arguably promoted LGBT rights by defining “spouse” as a person to whom one is “legally married or joined in a civil union.” \(^\text{18}\) Likewise, in New Hampshire’s code, the definition of “domestic partner” includes parties who have entered into a civil union. \(^\text{19}\) New Hampshire’s Rules of Professional Conduct instruct lawyers that unmarried same-sex or opposite-sex partners “may be at least as important as blood or marital relationships.” \(^\text{20}\)

States that have included “civil union” or “domestic partner” in their CJCs probably did so to recognize that committed relationships that could improperly influence judges can occur outside of legal marriages. Two of the three states that legalized same-sex marriage before revising their CJCs recognized a partner through a “civil union” as the legal equivalent of “spouse” or “domestic partner,” consistent with their history of support for LGBT equality. States with LGBT-friendly public policies who included “domestic partner” in their CJCs, probably did so to ensure that all forms of loving relationships are considered when determining whether a potential conflict exists.

IV. MOST STATES THAT EXCLUDED THE TERM “DOMESTIC PARTNER” FROM THEIR CODES HAVE A HISTORY OF ANTI-LGBT POLICIES, BUT SHOULD STILL INCLUDE “DOMESTIC PARTNER” IN THEIR CODES DESPITE THAT HISTORY.

Many of the states that rejected the term “domestic partner” from their CJCs have a demonstrated history of opposing LGBT equality. Their choice to exclude this term is consistent with that history and in most cases probably dictated this choice. For example, South Dakota, Mississippi, Oklahoma, Missouri, Minnesota, and Maine did not amend their CJCs to include the term “domestic partner.” \(^\text{21}\) In South Dakota, no provision forbids judges from discriminating on the basis of sexual orientation. \(^\text{22}\) Similarly, Missouri declined to introduce “domestic partner” into its revised CJC, but also did not require a judge’s recusal on cases involving the judge’s spouse’s family. \(^\text{23}\) South Dakota, Mississippi, and Oklahoma have no laws that specifically address hate crimes on the basis of sexual orientation. \(^\text{24}\) South Dakota, Mississippi, Oklahoma, and Missouri all also constitutionally prohibit same-sex marriage. \(^\text{25}\) Additionally, South Dakota, Mississippi, Oklahoma, and Missouri do not protect LGBT youth in schools, do not prevent sexual orientation discrimination in housing, disallow hospital visitation, and allow employers to discriminate on the basis of sexual orientation. \(^\text{26}\) In sum, most states that did not include the term “domestic partner” in their CJCs had policies in opposition to LGBT rights.

There are, however, exceptions to the rule that states with anti-LGBT policies did not include the term “domestic partner” and states with pro-LGBT policies did. Take Minnesota and Maine. Although Minnesota and Maine both had laws prohibiting same-sex marriage when they decided to exclude “domestic partner” from their respective CJCs, both states had pro-LGBT public policies. The omission of “domestic partner” in Maine’s and Minnesota’s codes of judicial conduct does not seem to reflect a state policy of opposition to equal rights for LGBT people. Indeed, Minnesota has since passed legislation allowing same-sex marriage, allows same-sex-couple adoption, and joint and second-parent adoption in some jurisdictions, and recognizes the rights of same-sex couples to visit one another in the hospital. \(^\text{27}\) Likewise, Maine provides for some spousal rights and for hospital visitation for same-sex couples, while allowing joint and second-parent adoption for same-sex couples. \(^\text{28}\) Although Minnesota’s and Maine’s CJCs left out the term “domestic partner,” these states do not have a history of opposing LGBT equality. Yet, the absence of “domestic partner” terminology in their CJCs is easily explained.

In fact, Minnesota rejected the term “domestic partner” and chose an even more expansive conflict-of-interest recusal requirement for judges in its state CJC. Minnesota’s Committee for Judicial Ethics decided that a need for recusal arises out of a judge’s “intimate relationship” with any person. \(^\text{29}\) The committee chose to avoid the term “domestic partner” in favor of a descriptive phrase. \(^\text{30}\) Instead of “domestic partner,” the committee used the phrase “a person with whom the judge has an intimate relationship” for determining when judges should

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20. Id.
21. ABA, supra note 17.
27. Id.
28. Id.
30. Id.
reacuse themselves. The Minnesota Code of Judicial Conduct defined “intimate relationship” as “a continuing relationship involving sexual relations as defined in Rule 1.8(j)(1) of the Rules of Professional Conduct.” Although excluding “domestic partner” from Minnesota’s CJC, the committee substituted a phrase that is equally protective of judicial integrity and in keeping with their pro-LGBT policies.

Maine likewise protected judicial integrity and LGBT equality despite not using the term “domestic partner.” Maine amended its CJC in June 2009, but excluded the term “domestic partner.” However, Maine’s CJC was a more expansive definition of family by requiring a judge to be recused when the case involves “a person with whom the judge maintains a close personal relationship.” This definition of family conceivably includes same-sex and opposite-sex partners and therefore protects integrity like the term “domestic partnership.” But at least one recommendation was made in favor of adopting the term “domestic partner” as part of any possible amendments to Maine’s CJC. Although Maine decided to reject the term “domestic partner” from the state’s CJC, the omission of “domestic partner” does not seem to reflect an anti-LGBT state policy. Still, these states are the exception, not the rule.

Although anti-LGBT states may have sought to make their CJCs consistent with their policy regarding sexual orientation, their choice to exclude the term “domestic partner” in their CJCs fails to protect the public from potential and actual conflicts. For example, although Missouri’s CJC did not include “domestic partner” terminology, Missouri has no recusal requirement for a judge’s heterosexual spouse’s relations and therefore creates an equality of treatment, but less protection for the public from judicial conflicts of interest. Missouri’s CJC requires recusal only if a spouse or a person living with a judge has an interest in a case before that judge. Because the ABA probably did not include “domestic partner” within the Code’s terminology only to champion LGBT rights, but also to improve judicial integrity, a state’s anti-LGBT policies should not impact the inclusion of the term “domestic partner” into their judicial ethics codes.

Without equal and codified recusal requirements for judges’ domestic partners, judicial integrity is at risk, and LGBT judges risk becoming targets of ethics complaints despite full compliance with existing state rules. To promote justice, efficiency, and public confidence in state judicial systems, even states with a history of opposing LGBT equality should include “domestic partner” in their CJCs.

V. CONCLUSION

Despite the LGBT rights movement’s use of “domestic partner” and the ABA’s history of support for LGBT equality, the ABA emphasized the improvement of America’s judicial integrity as their reason for inserting “domestic partner” in the 2007 Code. The definition of “domestic partner” in the 2007 Code encompasses heterosexual relationships, but the common usage of the term “domestic partner” connotes advocacy for LGBT people, as demonstrated by the California Family Code and the Bar Association of San Francisco’s report. However, even acknowledging the ABAs LGBT-friendly history, the ABA acted in the public good to create an appropriate regime for determining judicial conflicts in the 2007 Code and did not act only to promote LGBT equality.

Aside from Maine and Minnesota, a state’s policy toward LGBT rights generally determined its choice to include “domestic partner” in its CJC, with anti-LGBT states rejecting the term, even though using “domestic partner” would have been in their best interest. The Statue of Liberty, perhaps the most iconic American symbol, clearly preaches inclusion: “[G]ive me your tired, your poor, your huddled masses yearning to breathe free.” Echoing the Statue of Liberty’s gospel, let us applaud the ABAs practical, integrity-driven policy, which acknowledges that LGBT people serve in the U.S. judiciary and makes appropriate provisions to deal with this reality.

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1. Id.
3. ME. CODE OF JUDICIAL CONDUCT § 3(l) (2009), www.courts.state.me.us/rules_adminorders/rules/JudCondCode8-09.pdf.
4. Id.
5. Letter from J. Adam Skaggs, Senior Counsel, Brennan Ctr. for Justice, and Bert Brandenburg, Executive Director, Justice at Stake Campaign, to Matthew E. Pollack, Executive Clerk, Maine Supreme Judicial Court (May 12, 2011), www.brennen-center.org/content/resource/letter_to_maine_supreme_judicial_court_on_proposed_amendments_to_code_of_co/
American Judges Association, Effective Adjudication of Domestic-Abuse Cases (A Web-Based Training Program for Judges)  
http://education.amjudges.org

The American Judges Association is launching a web-based, comprehensive training program for judges regarding the handling of domestic-violence cases. The program includes presentations by leading experts in the area, with separate modules on:

- The dynamics of domestic violence,  
- Civil-protection orders,  
- Child-custody cases,  
- Evidentiary issues, and  
- Sentencing.

Each module has clearly identified learning objectives, video scenarios and presentations, interactive exercises to check comprehension of key points, and resources to explore for further information. There are courtroom-based scenarios, dynamic panel discussions, and additional interactive content. The program should be of interest both to new and experienced judges; the program truly features outstanding experts that judges otherwise might not have the time, opportunity, or funding to be able to hear.

The program was developed with grant assistance from the Bureau of Justice Assistance, plus help from Futures Without Violence and the National Center for State Courts. This program has been a major project of AJA for the past two years, and we believe this web-based curriculum is the best educational product ever put together for judges on domestic violence. Short of attending an intensive, three- to five-day training program, nothing like this has ever been put together. And it’s totally free to you and your colleagues.

The program was nearing release as we went to press—check the website address above to see whether it’s now up and running. You’ll either find access to the full program or a notice that it will be coming shortly. Please check it out, and let other judges know of this great resource provided by the American Judges Association.

SPEAKERS

JUDICIAL AMBASSADORS: An Outreach Program of the American Psychological Association’s Committee on Legal Issues  
http://www goo.gl/OpAZYE

As part of an ongoing effort to build and maintain effective relationships between the psychological and judicial communities, the American Psychological Association (APA) Committee on Legal Issues maintains an outreach program called Judicial Ambassadors. The Judicial Ambassadors program seeks to bring psychologists and court professionals together in a variety of contexts to facilitate the following goals:

- To make psychological research more accessible to and useful for courts and judges;  
- To work with court officials to develop collaborative research and continuing education programs;  
- To increase psychologists’ understanding of court operations and legal practice;  
- To improve psychological research about legal issues; and  
- To facilitate courts’ ability to apply psychological theories and models in court-related research.

Judicial Ambassadors are drawn from APA’s membership (which includes more than 125,000 psychologists) based on their scientific expertise in the subjects of interest to the court. The Judicial Ambassadors program also has funding to help make experts available to interested judicial organizations for a variety of purposes, including designing and implementing educational programs and workshops, assisting courts with technical projects or program evaluations, and participating in advisory committees.

For more information about the Judicial Ambassadors Program, you can contact Donna Beavers, Office of General Counsel, American Psychological Association, 750 First Street, NE, Washington, DC 20002, email: dbeavers@apa.org.

NEW PUBLICATIONS

Conference of State Court Administrators, 2012-2013 Policy Paper: Evidence-Based Pretrial Release  
http://goo.gl/pk0Wxm

The Conference of State Court Administrators (COSCA) has issued its 2012-2013 policy paper, which urges greater use of evidence-based assessments of pretrial risk of flight and threat to public safety. COSCA has approved white papers on about an annual basis for the past 15 years, highlighting topics believed to be of general interest throughout the United States.

According to the paper, the United States in 2010 had the world's highest total number of pretrial detainees, and pretrial detention has costs for both the public and for detainees. The paper suggests that the use of a validated pretrial-risk-assessment tool fits well within an otherwise effective case-management system. The report concludes with several recommendations, including collaboration between state-court leaders and others (including law enforcement and experts) to support risk-based release decisions of those arrested, reduced reliance on offense-based bail schedules, and the increased collection and use of data. The Conference of Chief Justices (CCJ) endorsed this COSCA policy paper in a CCJ resolution that separately urges reduced reliance on bail schedules and increased use of evidence-based risk assessments.