# Table of Contents

## Articles

<table>
<thead>
<tr>
<th>Page</th>
<th>Title</th>
<th>Author(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>164</td>
<td>Cell Phones and Everything Else: Criminal Law Cases in the Supreme Court's 2013-2014 Term</td>
<td>Charles D. Weisssleberg</td>
</tr>
<tr>
<td>174</td>
<td>A New Model for Civil Case Management: Efficacy Through Intrinsic Engagement</td>
<td>David Prince</td>
</tr>
<tr>
<td>196</td>
<td>Informing Criminal Defendants of the Immigration Consequences of Their Convictions: The Trial Judge's Duty</td>
<td>Kate Ono Rahel &amp; Justin Shilhanek</td>
</tr>
</tbody>
</table>

## Departments

<table>
<thead>
<tr>
<th>Page</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>162</td>
<td>Editor's Note</td>
</tr>
<tr>
<td>163</td>
<td>President's Column</td>
</tr>
<tr>
<td>212</td>
<td>The Resource Page</td>
</tr>
</tbody>
</table>
EDITOR’S NOTE

This issue marks the end of eight years of service by Alan Tomkins as the coeditor of Court Review. While serving as a professor of law and psychology at the University of Nebraska-Lincoln and the director of the University of Nebraska Public Policy Center, Alan has helped us both improve the quality of the articles in Court Review and get us current on this quarterly publication.

Alan’s contributions have been vast, but I will mention a few. He edited our 2007 special issue on procedural justice; organized a special issue on Indian law, including an overview of the Indian Child Welfare Act; recruited the nation’s leading experts on eyewitness evidence to contribute to a special issue tailored for judges; and regularly recruited leading experts to make their work accessible to judges through articles specially adapted for Court Review.

Alan is now taking on a new assignment as Deputy Division Director for the National Science Foundation’s Division of Social and Economic Sciences. I will miss his help as coeditor, but we all wish him well on his new assignment.

I’m pleased to announce that another talented academic, Eve Brank, has agreed to come on board as the coeditor going forward. Eve is an associate professor in the University of Nebraska Law-Psychology Program. She also serves as the treasurer of the American Psychology-Law Society, a division of the American Psychological Association. Having the continued help of a scholar who is well connected to others working in areas of law and social science is a great asset for Court Review and the judges who read it.

We’re pleased to have three articles we think you will find valuable:

• Professor Charles Weisselberg presents his annual review of the criminal decisions in the past Term of the United States Supreme Court. As always, he provides some analysis of the decisions and a discussion of key cases already on the schedule for the present Term.

• Colorado trial judge David Prince considers ways to mold the management of civil litigation around procedural-justice and organizational-management research findings. Prince discusses how these findings should frame a judge’s thinking about case management and makes specific suggestions.

• Two recent graduates of the University of Iowa College of Law, Kate Ono Rahel and Justin Shilhanek, devoted much of their work in an immigration-law course during their third year to preparing an article for Court Review. They and I agreed that a review of potential ramifications of the Padilla v. Kentucky case, with guidelines for trial judges, would be useful. Their excellent product concludes this issue.—Steve Leben

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Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. Court Review seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for Court Review are set forth on page 173 of this issue. Court Review reserves the right to edit, condense, or reject material submitted for publication.

Advertising: Court Review accepts advertising for products and services of interest to judges. For information, contact Shelley Rockwell at (757) 259-1841.

Cover photo, Mary S. Watkins (maryswatkins@mac.com). The cover photo is the Jasper County Courthouse in Carthage, Missouri. Built in 1894, the courthouse was listed on the National Register of Historic Places in 1973.

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They say what happens in Vegas stays in Vegas. Well, the American Judges Association (AJA) met this October in Las Vegas and nothing will simply stay there. The educational sessions gave those in attendance an in-depth look at important issues to the judiciary. There were sessions that dealt with every aspect of judging, including a presentation by Melissa Fitzgerald, former star of West Wing and current director of Justice for Vets, on veterans treatment courts. There was also time for a little fun, such as the fantastic AJA banquet featuring the Motown-infused music of InDemand, which had everyone dancing late into the night. Not only was the food and music wonderful, you would be amazed at how well some judges can dance. There was also a chance for judges spanning the United States and Canada to share their experiences and problems. All of those in attendance would agree that the conference helped make them a better judge.

The AJA exists to help make its members better judges. One of the ways it does this is through the annual educational conference, but we do so much more. We are the leading institution in North America on the important issue of procedural fairness. We will soon be offering a set of video-education sessions on this important issue. In addition, we have just produced six one-hour videos on judging and domestic violence that are available to any AJA member without cost. You can find a link to it on our website, www.amjudges.org.

Speaking of our website, you should check it out. It is filled with information that will help you as a judge. Our website hosts a lively and interesting blog (the AJA blog, blog.amjudges.org). There are also past issues of the our journal, Court Review, where you can find articles about a broad range of legal issues. Of course those of you reading this column don't have to do that for the present issue—it's in your hands. Still, if you have missed or lost a past issue, it is there for you.

The AJA is also your voice when it comes to important issues affecting the judiciary. As your voice, the AJA issues white papers that are the standing position of our organization. These white papers issued in the name of our membership have impacted the international discussion on judging. Our white papers also can be found on the website.

Currently, the AJA is taking a serious look at how we can improve our organization to better help all of you. We are thinking long-term about our structure and how we can represent every judge in North America. We will be working to strengthen the relationship between Canadian and American judges, looking to expand our membership, and thinking of ways to improve our already excellent conferences.

Our organization seeks to reach and to represent every judge. We want to be the voice for every judge, but to do that we need your help. We need an energetic membership, as sustaining a strong North American judicial organization is not an easy task.

Come to our Midyear Conference in Fort Meyers, Florida, in April and learn how to deal with the stress of being a judge. Or plan to attend our Annual Educational Conference in Seattle, Washington in September and join us for an in-depth discussion about procedural fairness, among other issues. Send an interesting tidbit to the AJA blog or offer to write a serious article for Court Review.

Do more than be a member. Join one of the many AJA committees and share your thoughts about making us all better judges. Think about running for the Board of Governors and working to grow the AJA. Get involved, if in no other way then by sending me an email with advice, asking me to share it with the membership. Lend us your voice, to strengthen our voice in the ongoing debate about role of judges. I hope you enjoy the rest of this issue of Court Review and when you set it down, you will take up the AJA.
Cell Phones and Everything Else:
Criminal Law Cases in the Supreme Court’s 2013-2014 Term

Charles D. Weisselberg

As in the past few years, most of the action in the Supreme Court's 2013-2014 Term was on the civil side of the docket. On the criminal side, the undisputed blockbuster was Riley v. California, a seminal ruling about searches of cell phones incident to arrest. Riley is significant for several reasons, not the least of which is that it displays the justices' understanding of new technologies (at last!) and their recognition that cases involving today's technologies are difficult to decide by simple reference to the brick-and-mortar world. This article starts with Riley and other Fourth Amendment decisions then moves to the Court's Fifth, Sixth, and Eighth Amendment rulings and to a smattering of federal criminal and habeas cases. It concludes with a brief preview of the 2014-2015 Term.

FOURTH AMENDMENT

The Court issued an interesting assortment of Fourth Amendment rulings last Term. Riley was the most significant holding, though there were also important opinions addressing traffic stops and anonymous tips, warrantless entries into the home, and the use of deadly force during high-speed chases.

WARRANTLESS SEARCHES OF CELLULAR PHONES

Riley v. California, which was consolidated with United States v. Wurie, involved the searches incident to arrest of two cellular phones. In the first case, Riley was arrested following a traffic stop. He had a "smart phone" in his pants pocket. About two hours after the arrest, a detective examined the contents of the phone. The detective found videos and photographs, which eventually connected Riley to a shooting. In the second case, defendant Wurie was arrested for a suspected drug sale. At the station house, officers seized a "flip phone," a somewhat quaint form of technology, and noticed that the phone was receiving calls from a source identified as "my house." Using the call log on the phone, officers identified the defendant's apartment. In a subsequent warrant search, police seized narcotics, a firearm, and cash. The question in both cases was whether law enforcement officers could obtain the data from the cell phones without warrants. In an unanimous decision, the Court held that warrants are required before searching cell phones that are seized incident to arrests.

Chief Justice Roberts's opinion is a primer on the search-incident-to-arrest doctrine, which is an exception to the warrant requirement. In Chimel v. California, the justices found that officers who arrest a suspect inside a home may search the area within the suspect's immediate control but may not conduct a warrantless search of the remainder of the home. Such an extensive search did not fit within the exception to the warrant requirement "because it was not needed to protect officer safety or to preserve evidence." Then in United States v. Robinson, the Court narrowed the search-incident-to-arrest exception in the context of automobile searches, holding that it authorizes a warrantless search only when the arrestee is unsecured and within reaching distance of the passenger compartment or when it is reasonable to believe that evidence relating to the crime of arrest is in the car. Drawing on these cases and others, the Chief Justice derived the general rule that exempting a type of search from the warrant requirement requires an assessment of "the degree to which it intrudes upon an individual's privacy and ... the degree to which it is needed for the promotion of legitimate governmental interests." While Robinson's categorical rule strikes the appropriate balance in the context of physical objects, that rule should not be extended to searches of digital content on cell phones.

Officers are free to examine the physical aspects of a cell phone to ensure that it cannot be used as a weapon. However, digital data stored on a phone do not pose a risk to officers. While there may be a risk of destruction of evidence, such as by remote wiping, officers may take reasonable measures to minimize the risk, such as turning off phones or placing them in Faraday bags. On the other side of the balance, "cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, wallet, or a purse." The Court recognized that many cell phones are more like minicomputers with telephone capability. Phones collect distinct types of information, such as addresses, notes, bank statements, and videos, which may tell more in combination that any single record. In addition, the whole of a person's life can be reconstructed through thousands of photographs labeled with dates, locations, and descriptions, which is different than what may be gleaned from a few photographs in a wallet. Phones are pervasive. "Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day." And phones may also link to files stored in the cloud. For these reasons and others, the Court found that a

Footnotes

7. Id. at 2484-85.
8. Id. at 2483-87.
9. Id. at 2488-89.
10. Id. at 2490.
A warrant is generally required before a search of a cell phone seized incident to arrest.\textsuperscript{11} In so ruling, the justices rejected several suggestions for a limited authority to search, such as permitting searches of call logs only (as had occurred in \textit{Wurie}) or allowing searches of cell phone data if officers could have obtained the same information from a pre-digital counterpart.

Although the case holds that a warrant is generally required for a search of digital data on a cell phone, the Court was careful to emphasize that other case-specific exceptions may still justify a warrantless search in an individual case. The exigent-circumstances exception could support, for example, a search when a suspect is texting an accomplice about to detonate a bomb, or a child abductor who has information on his cell phone about the child's location.\textsuperscript{12} The Court's holding was unanimous, although Justice Alito concurred to state his views about the rationales for the search-incident-to-arrest doctrine and to note that he would be willing to reconsider the question in this case if legislatures assessed the needs of law enforcement and the privacy interests of phone owners, and drew reasonable distinctions based on categories of information or other variables.\textsuperscript{13}

\textit{Riley} is an extremely significant ruling, as the Court itself recognized. But it has also spawned a number of questions that courts will need to address. Will evidence be excluded in searches that pre-date \textit{Riley}?\textsuperscript{14} Does \textit{Riley} generally prohibit warrantless searches of digital data in devices other than cellular phones?\textsuperscript{15} Does the emphasis on the privacy interests in \textit{Riley} indicate that other types of searches of digital data will require an individualized showing?\textsuperscript{16} What must be in a warrant authorizing a search of a phone?\textsuperscript{17} I suspect that articles reviewing future Terms of the Court will address some of these questions.

\section*{WARRANTLESS ENTRIES TO THE HOME—CONSENT AND CURTILAGE}

Officers have long been entitled to search a home, even a jointly occupied home, if one of the residents consents. Eight years ago, in \textit{Georgia v. Randolph},\textsuperscript{18} the Court held that a warrantless search of a shared dwelling—over the express refusal of consent by a resident who is physically present—cannot be deemed reasonable based upon the consent of another resident. The question in this Term's case, \textit{Fernandez v. California},\textsuperscript{19} was whether the \textit{Randolph} rule applied when one resident granted consent after a non-consenting resident was removed from the premises. When officers came to Fernandez's door, he stated, "You don't have any right to come in here. I know my rights." He was arrested because officers suspected that he had assaulted his co-resident, who granted consent to search an hour later.\textsuperscript{20} In a 6-3 opinion authored by Justice Alito, the Court distinguished \textit{Randolph} and found that the search did not violate the Fourth Amendment.

Characterizing \textit{Randolph} as a "narrow exception" to the general rule that a resident of a jointly occupied dwelling may consent to search, the majority emphasized that the physical presence of the objecting resident was essential to the holding in \textit{Randolph}.\textsuperscript{21} Fernandez was properly arrested, and "an occupant who is absent due to a lawful detention or arrest stands in the same shoes as an occupant who is absent for any other reason."\textsuperscript{22} The Court rejected the argument that Fernandez's earlier refusal to consent should have remained valid. First, the argument is inconsistent with social expectations; visitors may well decline to enter a home when one resident objects but then return and enter when the objecting resident is not present. Second, the argument raises practical concerns, such as how long the objection remains effective, who is charged with knowledge of the objection, and how a continuing objection should be registered. Finally, denying the other resident the power to consent would fail to honor his or her rights and wishes.\textsuperscript{23} Justice Scalia joined the majority opinion but also wrote separately to note his disagreement with the holding in \textit{Randolph} and to address an argument that Fernandez had a right under property law to exclude police.\textsuperscript{24}

Justice Ginsburg, joined by Justices Sotomayor and Kagan,

\footnotesize{11. Id. at 2493.  
12. Id. at 2494.  
13. Id. at 2495, 2495-97 (Alito, J., concurring).  
16. \textit{See, e.g., United States v. Saboonchi}, 2014 U.S. Dist. LEXIS 102261 (D. Md. July 28, 2014) (finding that \textit{Riley} does not diminish the scope of the border-search exception; note, however, that the search in the case was supported by reasonable suspicion).  
17. \textit{See, e.g., Hedgepath v. Commonwealth}, 2014 Ky. LEXIS 436 (Sept. 18, 2014) (search warrant expressly authorized seizure of cell phones; though the warrant did not limit the parts of the cell phone that could be searched or the files or data that were sought, the clear thrust of the warrant was for evidence related to assaults).  
20. Id. at 1130.  
21. Id. at 1133-34.  
22. Id. at 1134.  
23. Id. at 1134-37.  
24. Id. at 1137 (Scalia, J., concurring). Justice Thomas likewise expressed his disagreement with \textit{Randolph}. Id. at 1138 (Thomas, J., concurring).}
In [the dissenters’] view, conjectures about social expectations do not shed light on the constitutionality of the search . . . .

dissented. They saw the case as a straightforward application of Randolph. Fernandez was present when he stated his objection to officers and, one hour later, they “could scarcely have forgotten” that he refused consent. In their view, conjectures about social expectations do not shed light on the constitutionality of the search, given the distinctions between private interactions and police investigations. They also countered the argument that applying Randolph to these facts would pose practical problems. In their view, police could readily have obtained a warrant and should have done so. The dissenters “would honor the Fourth Amendment’s warrant requirement and hold that Fernandez’s objection to the search did not become null upon his arrest and removal from the scene.”

Stanton v. Sims, a per curiam decision, is interesting because it notes (but does not resolve) a Fourth Amendment question that continues to split the courts. The Court in Stanton found that an officer who entered the curtilage of a property while pursuing a misdemeanor suspect was entitled to qualified immunity in a civil-rights action. The justices remarked that “federal and state courts nationwide are sharply divided on whether an officer with probable cause to arrest a suspect for a misdemeanor may enter a home without a warrant while in hot pursuit of that suspect.” Because the law on this question was not clearly established, the Court summarily reversed the court of appeals and found that the officer should receive qualified immunity.

TRAFFIC STOPS AND ANONYMOUS TIPS

Navarette v. California addressed the question whether a somewhat spare anonymous tip provided reasonable suspicion to support a traffic stop. A 911 caller reported that a pickup truck had run her off the road. The caller provided a description of the truck, location, and plate number. An officer spotted the vehicle shortly thereafter and followed it for about five minutes before pulling it over. Navarette was the driver of the truck, which contained marijuana. A closely divided Court upheld the stop and thus the subsequent seizure.

Writing for the Court, Justice Thomas noted that by reporting that she had been run off the road, the caller necessarily claimed eyewitness knowledge of Navarette’s dangerous driving. This basis of knowledge distinguished the tip held to be insufficient in Florida v. J.L., where an anonymous caller simply reported that a young black male in a plaid shirt at a bus stop was carrying a gun. In providing details about the pickup truck and Navarette’s driving, the tip was closer to that upheld in Alabama v. White. There, an anonymous tipster told police that a woman would drive from a specific apartment building to a hotel. The tipster described the vehicle and stated that the woman would be transporting cocaine; officers were able to corroborate the innocent details. The Navarette Court also pointed out that the identification and tracing features of the 911 system provided additional justifications for reliance on the call. After finding the tip to be sufficiently reliable, the justices concluded that “the behavior alleged by the 911 caller, viewed from the standpoint of an objectively reasonable police officer, amount[s] to reasonable suspicion of drunk driving.”

In a sharply worded dissent, Justice Scalia (joined by Justices Ginsburg, Sotomayor, and Kagan) challenged the majority’s conclusion that the tip was reliable as well as the inference that the driver was intoxicated. The dissenters disagreed that the information in the 911 call bore sufficient indicia of reliability, particularly as the identity and location of the vehicle were not based on intimate knowledge. “Unlike the situation in White, that generally available knowledge in no way makes it plausible that the tipster saw the car run someone off the road.” Moreover, the caller did not assert that the driver was drunk. At most, the call conveyed that the driver did some apparently non-typical thing that forced the tipster from the road. Finally, the officer who followed the truck for five minutes did not observe any traffic violations, which should have discredited the claim that the driver was intoxicated. The dissenters suggested that the Court’s ruling will be taken to mean that “[s]o long as the caller identifies where the car is, anonymous claims of a single instance of possibly careless or reckless driving, called in to 911, will support a traffic stop.”

DEADLY FORCE AND HIGH-SPEED PURSUITS

In Plumhoff v. Rickard, the justices considered whether officers could be liable for shooting and killing a suspect and passenger during a high-speed car chase. An officer stopped Rickard’s car for having only one headlight. When asked for his license, Rickard sped away. Pursued by police, Rickard reached speeds of over 100 miles an hour before eventually leaving the highway and colliding with a police cruiser in a parking lot. Officers approached on foot, but Rickard continued to maneuver his vehicle, and officers fired three shots into the car. When Rickard managed to speed away again, the officers fired 12 more rounds. Rickard and a passenger died from a combination of gunshot wounds and injuries sustained during an ensuing crash.

25. Id. at 1138 (Ginsburg, J., dissenting).
26. Id. at 1144.
27. 134 S. Ct. 3 (2013).
28. Id. at 4. The collection of citations in the decision may assist courts addressing the issue.
30. It appears that the caller also provided her name. But the recording was not introduced into evidence, and the courts treated the tip as anonymous. Id. at 1687 n.1.
34. Id. at 1692, 1693 (Scalia, J., dissenting).
35. Id. at 1692.
37. Id. at 2019-20.
Though the Court had distinguished Scott v. Harris, where the justices found that an officer did not violate the Fourth Amendment by ending a car chase with a technique that put the driver at risk of injury or death. Here, as in Scott, “Rickard’s flight posed a grave public safety risk,” and “the police acted reasonably in using deadly force to end that risk.” Next, the Court rejected the claim that even if deadly force was authorized, officers acted unreasonably in firing 15 shots, noting that “during the 10-second span when all the shots were fired, Rickard never abandoned his attempt to flee.”

Finally, even had there been a Fourth Amendment violation, officers would still be entitled to qualified immunity. In Brosseau v. Haugen, the Court surveyed lower-court decisions and held that an officer did not violate clearly established law in firing at a fleeing vehicle to prevent harm to officers and citizens in the area. Brosseau was not distinguishable on the facts. Moreover, there was no showing that between the time of the shooting in Brosseau (1999) and the events in this case (2004), there had emerged either controlling authority or a robust consensus of cases that would alter the analysis.

FIFTH AMENDMENT

There were no police interrogation cases on the docket this year, in contrast to other recent Terms, though the Court issued a ruling on the privilege against compelled self-incrimination in a different context. There were two additional Fifth Amendment opinions: a per curiam decision reaffirming basic principles of the Double Jeopardy Clause and an interesting opinion about the role of the federal grand jury.

PRIVILEGE AGAINST COMPULSED SELF-INCrimINATION

The self-incrimination case was Kansas v. Cheever, where a defendant unsuccessfully argued that the Fifth Amendment prohibited the State from rebutting defense testimony with an expert who had previously examined the accused pursuant to a court order. Cheever had at one point been charged with a federal capital charge. He filed a notice that he intended to introduce evidence relating to methamphetamine intoxication with respect to his ability to form the specific intent required for the charged crime, and the District Court ordered a psychiatric evaluation. The federal charge was subsequently dismissed, and Cheever was prosecuted in state court for the same killing. At his trial, Cheever put forth a defense of voluntary intoxication and introduced expert evidence that his use of methamphetamine had damaged his brain. In rebuttal, the State called the psychiatrist from the federal case, who testified that Cheever had shot the decedent because of his antisocial personality, not because his brain was impaired from drug use. The justices unanimously rejected Cheever’s Fifth Amendment claim in an opinion authored by Justice Sotomayor.

Cheever’s argument was based upon an inappropriately narrow reading of two prior decisions, Estelle v. Smith and Buchanan v. Kentucky. In Smith, the use of a court-ordered examination violated the Fifth Amendment where the defendant neither initiated the examination nor put his mental capacity at issue. The Buchanan Court had distinguished Smith and allowed expert testimony because the defendant had introduced an affirmative defense of extreme emotional disturbance, a mental-status defense. In this Term’s case, the justices rejected Cheever’s claim that voluntary intoxication is not a mental disease and hence that Buchanan would not apply. Instead, the Court made clear that Buchanan sets forth a broader rule: “where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit an offense, the prosecution may present psychiatric evidence in rebuttal.” “Any other rule would undermine the adversarial process.” Though the Court rejected Cheever’s primary Fifth Amendment claim, the case was remanded for the state courts to determine whether the expert’s testimony exceeded the proper scope of rebuttal.

In addition to Cheever, the justices decided another self-incrimination case, White v. Woodall. But Woodall is more of a ruling about the scope of federal habeas corpus than the Fifth Amendment and is reviewed in the habeas part of this article.

DOUBLE JEOPARDY

The Double Jeopardy Clause case, Martinez v. Illinois, was a straightforward reaffirmation of the rule that jeopardy attaches when the jury is empaneled and sworn. The defendant’s trial was continued numerous times; several of the continuances were due to the State’s inability to locate key witnesses. On the morning of trial, the prosecution participated in jury selection and then again moved to continue the trial. The motion was denied. The State told the judge it would not participate in the trial, but the jury was sworn. When the prose-

38. Justices Ginsburg and Kagan both joined as to the judgment but did not join the entire opinion.
40. Id. at 222.
41. Id.
43. Id. at 2023 (citations omitted).
44. 134 S. Ct. 596 (2013).
47. 134 S. Ct. at 601.
48. Id.
49. Id. at 603.
The majority opinion stands as a strong statement about the role of the federal grand jury.

The Supreme Court declined to call any witnesses, the defendant's motion for a directed verdict of not guilty was granted. The Illinois Supreme Court held that Martinez was never placed in jeopardy because the State had declared—before the jury was sworn—that it would not participate in the trial. The Supreme Court summarily reversed, rejecting this "functional" approach to Double Jeopardy: "There are few if any rules of criminal procedure clearer than the rule that 'jeopardy attaches when the jury is empaneled and sworn.'" And because "the trial court's action was an acquittal," Martinez could not be retried.

CHALLENGES TO THE GRAND JURY'S PROBABLE-CAUSE DETERMINATION

Federal law permits a court to freeze the assets of an indicted defendant if the assets could be forfeited upon conviction. In United States v. Monsanto, the Court upheld the constitutionality of such an order so long as it is based upon a finding of probable cause to believe that the property will ultimately be subject to forfeiture. As the justices explained in the most recent decision, Kaley v. United States, finding has two components. There must be probable cause to believe "(1) that the defendant has committed an offense permitting forfeiture, and (2) that the property at issue has the requisite connection to that crime." The Kaleys were indicted in federal court for transporting stolen medical devices and money laundering, and the government obtained an order freezing certain assets, including a certificate of deposit that the defendants sought to use to pay their lawyer. They sought a hearing to challenge the first part of the grand jury's determination—that there was probable cause to support the charges themselves. In a 6-3 opinion authored by Justice Kagan, the Court found that the issue raised by the Kaleys "has a ready answer, because a fundamental and historic commitment of our criminal justice system is to entrust those probable cause findings to grand juries."

The majority opinion stands as a strong statement about the role of the federal grand jury. There is "no authority for looking into and revising the judgment of the grand jury upon the procedural rules that are part of the criminal process. Kaley, 134 S. Ct. at 1101.

The government has a substantial interest in seizing forfeitable assets without a hearing. While the Kaleys have a vital interest in retaining counsel of their choice, an asset freeze resulting in the deprivation of counsel of choice is only erroneous when unsupported by a finding of probable cause. The Court's analysis therefore turned on the probable value of a judicial hearing to uncover a mistaken finding of probable cause. They concluded that a judicial hearing would provide "little benefit" because the probable-cause determination "is not a high bar."

Chief Justice Roberts, joined by Justices Breyer and Sotomayor, wrote a forceful dissent, emphasizing the importance of the Sixth Amendment right to counsel. The Chief Justice did not consider a hearing on the seizure to be "mere relitigation of the grand jury proceedings." The judge's decision was based on the evidence presented at the hearing would have no necessary legal or logical consequence for the underlying prosecution because it would be based on different evidence and used for a different purpose. If the judge sides with the defendants, he will simply hold that the prosecution has not met its burden at that hearing to justify freezing their assets. "The Government may proceed with the prosecution, but the Kaleys will have their chosen counsel at their side." The dissenters were also not persuaded by the majority's Mathews analysis. They concluded that the government's concerns were exaggerated, the value of additional proceedings was significant, and the issues "implicate some of the most fundamental precepts underlying the American criminal justice system."
SIXTH AMENDMENT

Hinton v. Alabama\(^2\) provided the justices with an opportunity to apply the performance prong of Strickland v. Washington\(^3\) to an attorney error that led counsel to select an unqualified defense expert. Hinton was suspected of killing two restaurant managers during two separate robberies. After being identified as a suspect in a third (non-fatal) robbery, officers arrested Hinton and recovered a .38 caliber revolver. The State’s experts concluded that bullets fired in all three robberies came from the same gun. Hinton was charged with two counts of capital murder. The State’s case turned on whether its experts could convince the jury that all of the bullets came from the .38. Hinton’s lawyer knew he needed a firearms and toolmark examiner. He asked the trial court for funds for an expert, and the court initially authorized up to $1,000, mistakenly believing that that was the limit under state law. In fact, the applicable statute had been amended to permit a request for any reasonable expenses. But counsel did not know that either. He hired the best expert he could find for the money, even though he knew that his expert was not sufficiently qualified. The defense expert was discredited at trial, and Hinton was convicted. In a post-conviction proceeding, Hinton’s lawyer presented evidence from three well-qualified experts. All three said that they could not conclude that the bullets were fired from Hinton’s gun. In a per curiam opinion, the Court summarily reversed the state courts’ denial of relief.

Under the first prong of Strickland, “it was unreasonable for Hinton’s lawyer to fail to seek additional funds to hire an expert where that failure was based not on any strategic choice but on a mistaken belief that available funding was capped at $1,000.”\(^7\) The “attorney’s ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point [was] a quintessential example of unreasonable performance under Strickland.”\(^7\) This was not a case about the “hiring of an expert who, though qualified, was not qualified enough.”\(^7\) Rather, the failure was in not understanding the resources that state law made available to counsel, leading him to select an expert that he himself deemed unqualified. The Court remanded for the state courts to assess whether this deficient performance was prejudicial under the second prong of Strickland. “[I]f there is a reasonable probability that Hinton’s attorney would have hired an expert who would have instilled in the jury a reasonable doubt as to Hinton’s guilt had the attorney known that the statutory funding limit had been lifted,” Hinton would be entitled to a new trial.\(^7\)

EIGHTH AMENDMENT

This Term’s case, Hall v. Florida,\(^7\) is an important sequel to Atkins v. Virginia,\(^7\) where the Court held that the Eighth and Fourteenth Amendments prohibit the execution of individuals with intellectual disabilities.\(^3\) The Florida Supreme Court interpreted a state statute to require a showing of an IQ of 70 or less to establish an intellectual disability. Florida judicial decisions establish that someone who scores above 70 “does not have an intellectual disability and is barred from presenting other evidence that would show his faculties are limited.”\(^8\) Hall, who was convicted and sentenced to death, challenged the strict IQ cutoff. At a sentencing before Atkins, he introduced substantial evidence of disability, including school records and expert testimony. At a post-Atkins hearing, he presented the results of nine IQ evaluations over the course of 40 years, but for evidentiary reasons the court excluded the two scores below 70. Applying the 70-point threshold, Hall’s Atkins claim was rejected. The Supreme Court reversed in a 5-4 decision authored by Justice Kennedy.

“This rigid rule,” the majority held, “creates an unacceptable risk that persons with intellectual disability will be executed, and this is unconstitutional.”\(^7\) The Court first assessed how Florida’s rule complies with medical practices and understandings. The medical community defines intellectual disability by three criteria: “significantly subaverage intellectual functioning, deficits in adaptive functioning . . . , and onset of these deficits during the development period.”\(^7\) Florida’s rigid rule contravenes established medical practice in two respects: it treats an IQ score as final and conclusive evidence of intellectual disability when experts would consider other evidence as well, and it relies on the single numerical score while not recognizing that the score is imprecise. With respect to the latter point, the Florida statute defines “significantly subaverage intellectual functioning” as performance that is two or more standard deviations from the mean on a standardized intelligence test; with the mean IQ test score of 100, two or more standard deviations from the mean would be a score of approximately 70 points. However, each IQ test also has a “standard error of measurement,” or “SEM,” reflecting “the inherent imprecision of the test itself.”\(^7\) The SEM means that a person’s score is best understood as a range. For example, a score of 71 is considered to reflect a range of 66 to 76 with 95% confidence and a range of 68.5 to 73.5 with 68% confidence.\(^7\) Florida’s

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74. 134 S. Ct. at 1088.
75. Id. at 1089.
76. Id.
77. Id. at 1089-90.
80. The term “mental retardation” has been replaced with “intellectual disability.” Hall, 134 S. Ct at 1900.
81. Id. at 1994 (citation omitted).
82. Id. at 1990.
83. Id. at 1994.
84. Id. at 1995. The reasons why scores may fluctuate can include “the environment or location of the test; the examiner’s demeanor; the subjective judgment involved in scoring certain questions on the exam; and simple lucky guessing.” Id. (citations omitted).
85. Id.
strict cutoff of 70 does not take the SEM into account.

The Court then turned to practices in other states and found that “[a] significant majority . . . implement the protections of Atkins by taking the SEM into account.”86 After reviewing legislation in the various states and the courts’ interpretation of these statutes, as well as post-Atkins legislation to abolish the death penalty altogether, the justices concluded that “every state legislature to have considered the issue after Atkins—save Virginia’s—and whose law has been interpreted by its courts has taken a position contrary to that of Florida.”87 Taking into account the actions of the states, the justices’ own independent judgment, and the views of medical experts, the Court found Florida’s strict cutoff unconstitutional. “This Court agrees with the medical experts that when a defendant’s IQ test score falls within the test’s acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits.”88

Justice Alito, joined by Chief Justice Roberts and Justices Scalia and Thomas, dissented. They disagreed with the majority’s analytical framework. To assess “the evolving standards of decency that mark the progress of the maturing society,” one looks to “the standards of American society as a whole” and not “the evolving standards of professional societies.”89 The dissenters emphasized that state legislation provides the clearest evidence of contemporary values. Of the states that impose the death penalty, they counted 10 as not requiring the SEM to be taken into account, 12 that consider the SEM, and 9 that have not taken a definitive position. “These statistics cannot be regarded as establishing a national consensus against Florida’s approach.”90 Justice Alito disagreed with the Court’s analysis of the SEM and also concluded that Florida does in fact account for the SEM by permitting defendants to introduce multiple test scores.91 The dissenters were especially critical of the majority’s reliance on the views of professional organizations. They raised a number of concerns, including that “the Court’s approach implicitly calls upon the Judiciary either to follow every new change in the thinking of these professional organizations or to judge the validity of each new change.”92

FEDERAL CRIMINAL LAW

As usual, the Term included a number of decisions construing the reach of federal criminal statutes. Two decisions—Burrage v. United States93 and Rosemond v. United States94—are interesting primers on fundamental aspects of criminal liability. This section of the article reviews these opinions in some detail and then briefly summarizes the holdings in a few other cases.

The issue in Burrage was actual causation. Marcus Burrage sold heroin to Joshua Banka, a long-time drug user. Banka died after a night in which he used the heroin plus a host of other drugs. Burrage was charged with drug distribution under a provision containing a 20-year mandatory minimum sentence when “death or serious bodily injury results from the use” of the controlled substance. At trial, medical experts testified that the heroin was a contributing factor in Banka’s death, but they could not say whether he would have lived had he not taken the heroin. The statute does not define the term “results from.” The Court held that “at least where use of the drug distributed by the defendant is not an independently sufficient cause” of the death or injury, “a defendant cannot be liable under the penalty enhancement provision of 21 U.S.C. § 841(b)(1)(C) unless such use is a but-for cause of the death or injury.”95

Writing for the Court,96 Justice Scalia reviewed basic principles of actual causation. A statute providing for liability when a thing “results” usually requires proof that the harm would not have occurred but for the defendant’s conduct.97 The Model Penal Code also “reflects this traditional understanding,” stating that conduct “is the cause of a result” if “it is an antecedent but for which the result in question would not have occurred” and this is “the minimum requirement for a finding of causation when a crime is defined in terms of conduct causing a particular result.”98 The justices were not persuaded to adopt a different standard due to the difficulty of proving causation in drug-overdose deaths. While several states consider an act or omission a cause-in-fact if it was a “substantial” or “contributing” factor in producing a result, the Court declined to adopt this interpretation of the statute.99 Congress could have written the statute in these terms had it chosen to do so. Moreover, in light of the rule of lenity, the Court “cannot give the text a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant.”100

Rosemond addressed the mental state required for aiding-and-abetting liability. Rosemond was involved in a drug sale. When a would-be purchaser ran away without paying, either Rosemond or a co-felon fired a gun at him. Rosemond was

86. Id. at 1996.
87. Id. at 1998.
88. Id. at 2001.
89. Id. at 2001, 2002 (Alito, J., dissenting) (citation omitted; empha-
sis in original).
90. Id. at 2004.
91. Id. at 2009-12.
92. Id. at 2006.
95. 134 S. Ct. at 892.
96. Justice Alito joined all but one part of the opinion. Justices Gins-
burg and Sotomayor joined in the judgment. Id. at 892 (Ginsburg, J., concurring in the judgment).
97. Id. at 887-88.
98. Id. at 888 (quoting Model Penal Code § 2.03(1)(a)).
100. Id. at 891.
charged under 18 U.S.C. § 924(c) with using or carrying a firearm during and in relation to a drug-trafficking crime. He was tried for the § 924(c) count under alternative theories: either he was the shooter or he aided and abetted the shooter. The case afforded the justices the opportunity to review the scope of aiding-and-abetting liability. The majority ruled that a defendant who does not know that a co-felon is bringing a gun to a drug sale may not be convicted of aiding and abetting the co-felon’s act of using or carrying the firearm.

Justice Kagan’s opinion for the Court begins with the actus reus of the offense. “The common law imposed aiding and abetting liability on a person (possessing the requisite intent) who facilitated any part—even though not every part—of a criminal venture.” 103 Rosemond’s participation in the drug deal satisfied the affirmative-act requirement. But “an aiding and abetting conviction requires not just an act facilitating one or another element, but also a state of mind extending to the entire crime.” 102 The intent must reach beyond a simple drug sale to an armed drug sale. “An intent to advance some different or lesser offense is not, or at least not usually, sufficient: Instead, the intent must go to the specific and entire crime charged—so here, to the full scope (predicate crime plus gun use) of § 924(c).” 103 That intent will be satisfied when an active participant in a drug transaction knows that a confederate will carry a gun. In that case, the accomplice has decided to join in the venture with full awareness of its scope. However, for that to be true, the accomplice must know of the firearm in advance, so he can make the relevant legal and moral choice. It must be “knowledge at a time the accomplice can do something with it—most notably, opt to walk away.” 104 The Court rejected Rosemond’s claim that liability should only attach if an accomplice affirmatively wants a confederate to use a gun: it is enough that the defendant has, with full knowledge, chosen to participate in the scheme.

Justice Alito, joined by Justice Thomas, agreed with much of the majority’s opinion but strongly disagreed with the conclusion that a conviction requires an aider and abettor to have a realistic opportunity to refrain from engaging in the criminal conduct. In his view, this rule represents an “unprecedented alteration of the law of aiding and abetting and of the law of intentionality generally.” 105 He wrote that the majority converted what was an affirmative defense into a part of the required mens rea for the offense.

Two other decisions are worth noting. Paroline v. United States, 106 like Burrage, addresses causation, but in a narrower context. The majority in Paroline held that a defendant convicted of possession of child pornography could be ordered to pay restitution to the child depicted in the photographs only for those losses proximately caused by the defendant’s offense conduct. To determine the proper amount of restitution, “a court must assess as best it can from available evidence the significance of the individual defendant’s conduct in light of the broader causal process that produced the victim’s losses.” 107 And in Bond v. United States, 108 the Court found that the Chemical Weapons Convention Implementation Act of 1998 does not reach “a purely local crime: an amateur attempt by a jilted wife to injure her husband’s lover” by spreading chemicals on a mailbox, car door, and doorknob, “which ended up causing only a minor thumb burn readily treated by rinsing with water.” 109 The majority construed the Act not to apply, insisting “on a clear indication that Congress meant to reach purely local crimes, before interpreting the statute’s expansive language in a way that intrudes on the police power of the States.” 110 Three justices concurred in the judgment; they would have gone further and found the application of the Act unconstitutional. 111

HABEAS CORPUS

In several recent Terms, the Court has emphasized the limited scope of federal habeas corpus review. The 2011-2012 Term, for example, was marked by six summary reversals of lower-court decisions that had granted habeas corpus relief to state inmates. 112 There were two significant cases this Term, White v. Woodall 113 and Bart v. Titlow, 114 that again underscored the limited nature of federal habeas review.

Woodall pleaded guilty to capital charges. At his penalty-phase trial, he called character witnesses but did not testify himself. His lawyer asked the trial judge to instruct the jury that the defendant is not compelled to testify and that he should not be prejudiced by the decision not to testify. In a 6-3 opinion written by Justice Scalia, the Woodall Court found that while a previous case, Carter v. Kentucky, 115 required a no-adverse-inference instruction at the guilt phase, prior decisions from the Supreme Court did not clearly establish such a right at the penalty phase. Thus, the state court’s decision was not “contrary” to clearly established federal law as determined by the Supreme Court. Nor was the state court’s holding an unrea-

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102. Id. at 1248.
103. Id.
104. Id. at 1249-50.
105. Id. at 134 S. Ct. 1252, 1253 (Alito, J., concurring in part and dissenting in part).
107. Id. at 1727-28.
102. Id. at 1248.
103. Id.
104. Id. at 1249-50.
105. Id. at 134 S. Ct. 1252, 1253 (Alito, J., concurring in part and dissenting in part).
107. Id. at 1727-28.
109. Id. at 2083.
reasonable application of Supreme Court precedent. To obtain habeas relief on that ground, a petitioner must show that the state court's ruling "was an error well understood and comprehended in existing law beyond any possibility for fair minded disagreement."116 There was no such error here. “The appropriate time to consider the question [of an instruction at the penalty phase] as a matter of first impression would be on direct review, not in a habeas case governed by [28 U.S.C.] § 2254(d)(1).”117 Justices Breyer, Ginsburg, and Sotomayor dissented, arguing that Carter and Estelle v. Smith118 together compelled a no-adverse-inference instruction at the penalty phase of a capital trial.119

In Burt v. Titlow, the Sixth Circuit found that Titlow was entitled to habeas corpus relief due to the ineffective assistance of her second lawyer, who had advised her to withdraw her guilty plea and go to trial. According to the Circuit, the state court's reason for finding no ineffective assistance—that the withdrawal of the plea followed Titlow's assertion of innocence—was based upon an unreasonable interpretation of the factual record. The Supreme Court disagreed, applying the “doubly deferential” standard of review of an ineffective-assistance-of-counsel claim on federal habeas corpus. In an opinion by Justice Alito, the Court found that the record supported the state court's factual finding that the new lawyer advised withdrawal of the plea only after a claim of innocence. After accepting that factual determination, the Circuit's ineffective-assistance-of-counsel analysis could not be sustained. “Although a defendant's proclamation of innocence does not relieve counsel of his normal responsibilities under Strickland [v. Washington], it may affect the advice counsel gives.”120 The state court's conclusion that the advice satisfied Strickland fell within the bounds of reasonableness under the federal habeas corpus statute.121

A LOOK AHEAD

So far, the October 2014 Term is a bit light on criminal cases. But there are a few worth noting.

One well-publicized case, Elonis v. United States,122 arose from the defendant's postings on Facebook; the legal issue is whether a conviction for threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten. A Confrontation Clause case is on the docket. The issue in Ohio v. Clark123 is whether a child's statements to a daycare teacher, who has a mandatory duty to report suspected child abuse, are testimonial within the meaning of the Confrontation Clause. Another significant case is Rodriguez v. United States,124 which concerns whether an officer was lawfully entitled to extend an already-completed traffic stop to bring in a narcotics-detection dog. The case may be important if it generally addresses extensions to these stops.

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117. Id. at 1707.
119. Id. at 1707, 1710 (Breyer, J., dissenting).
120. 134 S. Ct. at 17 (citing Strickland v. Washington, 466 U.S. 668 (1984)).
121. Justice Sotomayor concurred and noted that Titlow failed to present sufficient evidence about counsel's advice to warrant habeas corpus relief. Id. at 18 (Sotomayor, J., concurring). Justice Ginsburg concurred in the judgment due to a practical inability to reoffer the same plea bargain as before. Id. at 19 (Ginsburg, J., concurring).
122. No. 13-983.
123. No. 13-1352.
124. No. 13-9972.
125. No. 13-604.
126. No. 13-7431.
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A New Model for Civil Case Management: Efficacy Through Intrinsic Engagement

David Prince

Most trends in reforming our civil litigation system in recent decades have been based on a “high tech” paradigm—reformers assume the system will be more efficient if we create enough self-executing procedures that issues are resolved automatically and people are kept away from the courthouse. The paradigm is akin to an automated system for answering the telephone at a busy company; just push the right button and you will automatically be transferred to your destination. This article suggests an alternative “high touch” approach that applies the principles of procedural justice to achieve more efficient “distributive justice” (a fair and just result). The testing experience of a seven-year pilot program and the behavioral science research underlying procedural justice are consistent with the following thesis: A civil case management system should achieve greater efficiency, participant cooperation, and participant satisfaction by eschewing the modern trend of dispute suppression and prefab case management in favor of a philosophy that, informed by the behavioral sciences, is based on disputant engagement that tailors case management to the individual needs of the case. Put more succinctly, effective civil case management is tailored to the individual needs of the participants. While a controlled evaluative study is needed, the pilot testing and the existing behavioral science research tell us that the goal of civil case management should be giving each civil case the degree of management it needs (whether greater or lesser) through early, hands-on, and individualized engagement of the judge with the disputants. To continue the telephone analogy, rather than an automated telephone-answering system, a live, knowledgeable, and engaged receptionist will be more effective for the company and the customer, more satisfying for the customer, and more economical and efficient for all.

Civil litigators, parties, and judges have long been dissatisfied with civil case management. In 2006, a group of experienced civil litigators and trial court judges assembled to launch an experiment in civil case management. Our goals were modest. We did not have the ability to change the existing rules of civil procedure, so we sought to work within them. Our collective instinct was that the trend of rule-based, automated management of civil litigation impaired rather than improved the delivery of distributive justice. We also suspected that the automation approach exacerbated rather than resolved the problems in civil litigation. We wanted to make the path to dispute resolution more efficient and trim away the most common distractions to let everyone involved focus their resources on the core of the civil dispute. Our suspicion was that a “high touch” approach of active and engaged case management would be more effective. We started a pilot as a test bed for experimenting with different techniques.

What we learned was that this modest goal leads to revolutionary realizations in civil case management. The lessons we learned reduced one participating judge’s civil caseload by 58%. While a more rigorous quantitative study involving control groups is needed, this bespoke approach appeared to reduce substantially the judge-time required per case—reaping the double benefit of a lower caseload as well as less time required per case.

We started our project by surveying the various procedural approaches used around the country to improve civil case management. We looked at the rocket docket, differential case management, motions dockets, trial-setting tripwire, and many others. Fortunately, we had reflective people with real-world experience in each of the approaches that could assess firsthand the benefits and shortcomings of these approaches. We quickly realized we were trying to start our journey from the starting point. We took a conventional step back and asked what drives the problems in civil litigation. We realized this was also too myopic. We steered back further and asked what drives civil litigation. Once we answered that question, a new approach revealed itself. However, we then had to start our experiment to realize that the true foundation lay in asking what drives human behavior. Over time, the pilot project revealed that the solution to the problems in civil case management lay, not in defining specific procedures, but in adapt-

Footnotes

1. The concept of “high touch” vs. “high tech” is drawn from Mega-trends by futurist John Naisbitt (Warner Books, 1982).

2. For example, the United States District Court for the Eastern District of Virginia. For information, see http://www.leclairryan.com/files/Uploads/Documents/Rocket%20Docket%20EDVA%20FAQ.pdf.

3. For example, the United States District Court for the Northern District of Ohio. For information, see Local Rule 16.1 at http://www.ohnd.uscourts.gov/assets/Rules_and_Orders/Local_Civil_Rules/Rule161.pdf.

4. For example, the presentment process in the United States District Court for the Northern District of Illinois. For information, see Local Rule 5.3 at http://www.ilnd.uscourts.gov/_assets/documents/Rules/LR2012.pdf.

5. The trial tripwire can take many forms ranging from an early deadline for all cases to set trial or prohibiting a trial setting until the case is fully prepared and certified as ready for trial. For one example, consider the trial-setting process in the state courts of Colorado stated in Colo. R. Civ. Pro. 16(b)(4).
ing a new philosophy of civil case management by pursuing individualized engagement based on what academics call an “intrinsic motivation” model.

The key building blocks to achieving both efficient and effective case management define a philosophy of civil case management. These three foundational blocks can be summarized as follows:

- Procedural Justice Matters—How One Charts the Course Is as Important as the Course
- The Verdict Is Not the Goal—One Must Determine the Destination to Chart the Course
- The Lawyer Is the Judge’s Ally—Work with the Crew, Not Against Them

A philosophy built on these three principles, in turn, leads to four core strategies:

- Bring ’Em In and Engage, Engage, Engage
- Ask Why
- Streamline and Customize Case Management
- Engage Disputes to Eliminate Distractions

Implementation tactics for an individual judge will then be driven by a combination of these principles, the local legal culture, and the judge’s skills and experience.

This philosophy and these strategies evolved over time through the test bed of the pilot. But as the individualized-engagement model evolved, anecdotal observations indicated it was remarkably more successful than the mainstream model of remote rule-based case management. A review of the latest research from the world of the behavioral sciences explained and confirmed the anecdotal observations and apparent results achieved in the pilot’s field experiments. The ultimate proposal of this article is that future civil-case-management reform should follow the paths pioneered in the problem-solving courts; specifically, it should be informed by; and based upon, the empirical data now available explaining human behavior and motivation.

Section II of this article will provide the reader with a brief overview of behavioral and management research advances relevant to civil case management. Then, we will examine the primary existing model for civil case management with the aid of this research and the reader’s experience with the mainstream existing model. If the idea of reading about behavioral science research is too soft and fuzzy, skip to sections III and IV. There, this article will propose a new model to inform future civil case management based on this research and, more importantly, real-world experience. After discussing the philosophies and strategies of a new engagement-based model for civil case management, this article will delve into the nuts and bolts of implementation tactics through a case example in section V. Section VI then provides some thoughts on a path forward.

By the conclusion, you will know the strategies necessary to revolutionize your approach to civil case management. Instead of devoting your time to litigating the litigation, you will be able to clear away the distractions and focus your time on providing effective, productive court services to the parties. You can focus the bulk of your judicial civil time and attention on the meaty analyses requiring a judge rather than on the endless review of briefing on distracting issues. The lawyers in your case will also be able to streamline their work. In the end, your approach to civil case management will yield more effective, more efficient, and more satisfying solutions to your community.

**PROCEDURAL JUSTICE AND DEVELOPMENTS IN BEHAVIORAL SCIENCE**

**A. JUDGES AS PROJECT MANAGERS**

In 1986, the Administrative Conference of the United States adopted recommendations for addressing perceived problems in our litigation procedures. The adjudication process was believed to suffer from delays, excessive expense, and unproductive legal maneuvering. This, in turn, was seen as interfering with achieving substantive justice. The Conference called for judges to take away from the lawyer control of case management. The Conference noted that “many judges, informed scholars and other experienced observers now cite lawyer control of the pace and scope of most cases as a major impediment” to the litigation process.6

Moving a civil dispute through the litigation process to conclusion is an exercise in project management. The mid-twentieth-century view of the litigation process assigned the judge a passive role, if any, in that project management. The judge’s role was to provide fair and impartial decisions of disputes (distributive justice) brought to the judge, and little else. As indicated by the Conference report, a major shift began several decades ago when the judge was increasingly expected to provide active management of the litigation. As the Conference observed in 1986, “[i]n the federal judicial sphere, and increasingly in the state judiciary, a consensus is developing that efficient case management is part of the judicial function, on par with the traditional duties of offering a fair hearing and a wise, impartial decision.” Once the judge was assigned the role of project manager, a managerial philosophy had to be selected.

Project management challenges the manager to move a group of people to accomplish a goal. In addition to identifying the tasks required, project management requires influencing behavior, gaining compliance, and achieving acceptance of the manager’s authority. How one approaches these tasks is based on the managerial philosophy of the manager.

**B. TWO MODELS OF MANAGEMENT PHILOSOPHY**

Those who study management and human behavior tend to identify two broad types of managerial philosophy or management models. The language varies by author, but they often differentiate between a traditional management model of extrinsic command and control and an emerging model of

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Tom Tyler . . . has spent more than two decades studying the question: Why do people obey the law?

Tom Tyler . . . has spent more than two decades studying the question: Why do people obey the law? In his work, *Psychology and the Design of Legal Institutions*, Tyler explains our two models in the context of designing credible and effective systems of law.

Tyler describes the traditional model as one based on “social control” of human behavior through use of extrinsic rules that create a system of punishments and rewards for compliance with those rules. He often refers to this as a “deterrence”-based model for directing the behavior of individuals. He observes that this model is heavily dependent on an extensive system that allows leaders to monitor or surveil the behavior of individuals to distribute proper rewards and punishments based on rule compliance. This surveillance component is a necessary foundation for an extrinsic system because the success of a deterrence model is largely dependent on the individual’s belief that he or she is likely to be caught and punished for breaking the rules. For example, I sit at the red light without moving because I expect something bad will happen if I run the light. Through a review of the existing research, Tyler demonstrates that the deterrence model is ultimately resource intensive and relatively ineffective in securing individual compliance and cooperation. If there is no traffic around, I do not expect to be caught, and the light is particularly long, I may run the red light.

Tyler explains that the social-control model’s reliance on punishment for violating rules results in participants being less likely to follow the rules when they are not under surveillance. The control model “create[s] an adversarial relationship,” which leads the participants “to grow less compliant” with the rules and “less willing to help” (i.e., less cooperative). As the rules under a control model are simply imposed on the participants without their input or consent, the participants also see those rules as lacking legitimacy. This, in turn, contributes to a reduction in compliance. Any young associate that has had to face an experienced and obstreperous opponent “alone” in the confines of a telephone conference to negotiate a deposition date or document production will recognize Tyler’s academic explanation of the experience. Tyler concludes that the deterrence model “is a very high cost strategy [because of the implementation and policing resources required] that yields identifiable, but weak, results.”

Tyler describes the second model as one based on “legitimacy and morality.” By “legitimacy,” he means a system that strives to win the consent, compliance, and cooperation of the participants through involvement. By doing so, the leader/manager gains authorization from the participants to lead and make decisions. “Legitimacy, therefore, is a quality possessed by an [individual], a law, or an institution that leads others to feel obligated to obey its decisions and directives.”

By “morality,” Tyler means that the standards or rules governing conduct are internalized by the participants as private values—as their own feelings of responsibility and obligation. Once this internalization is achieved, the participants self-regulate to comply with those standards.

If I understand and accept that my community has decided that we should have a traffic light at this intersection because it is a dangerous blind curve and a fast heavy truck could be coming at any moment without warning, I accept the rule that we must stop when the light is red. I internalize this rule and believe honoring it is part of being responsible. I tend to honor the requirement to stop even when it makes me late and I cannot see a reason to stop on this particular night. As a result, I am more likely to stay stopped at the red light even if I am sure I will not get ticketed for running it and doubt I would get hit if I ran the light this time. Tyler explains:

Self-regulation can occur based upon legitimacy, morality, and/or both.

The police and courts, as an example, depend heavily upon the widespread voluntary compliance of most of the citizens most of the time. This compliance presumably allows authorities to focus their attention upon those individuals and groups whose behavior seems to be responsive only to threats of punishment. The legal system would be overwhelmed immediately if it were required to regulate the behavior of the majority of citizens solely through sanctioning or the threat of sanctioning.

Morality and legitimacy are achieved, Tyler argues from the research, through following the precepts of procedural justice.

8. Id.
9. Id. at 11.
10. Id.
11. Id. at 12.
12. Id. at 17.
13. Id. at 22-27.
14. Id. at 12.
15. Id. at 21-22.
16. Id. at 23.
17. Id. at 29.
18. Id. at 28.
19. Id. at 32-33.
The key dimensions of procedural justice are as follows:20
• **Voice**: The participant must feel heard in the proceedings;
• **Neutrality**: Decision-making must appear unbiased and principled;
• **Respect**: The participant must believe he or she was treated with dignity;
• **Trust**: The participant must believe the decision-maker is taking into account the participant’s needs and sincerely trying to address the litigants’ needs. The label “trust” for this parameter can be a miscue to one with a law degree. One researcher has referred to this parameter more descriptively as “helpfulness” rather than “trust.”21

Even Tyler’s elements of procedural justice can be boiled down to the simple ideas that a person will be more satisfied and likely to cooperate with decisions made by an authority if that person believes the decision was fair. The research tells us that the single most important factor in determining whether the person believes the decision was fair is not the decision itself. Instead, it is whether the person believes he or she had a chance to speak and be heard in the decision process.22

Interesting research by Lind, Kanfer, and Earley examined this point.23 The researchers used the scenario of giving work assignments to personnel. Participants were given three approaches to handing out work assignments. In the first scenario, the participant was simply given an assignment. In the second scenario, the participant was told of a tentative schedule and then asked for feedback. The schedule was then adjusted to come closer to that proposed by the participant. In the third scenario, the researcher handed out the work schedule and stated it would not be changed. However, the researcher then asked for opinions from the participants. After receiving the opinions, the researcher stayed with the initial assignments. Predictably, the scenario in which participants were allowed to provide their input before the decision was made was viewed as the fairest (which, in turn, means it was the most likely to be followed). The surprising result for many is the perception of fairness for the third scenario, in which participants were told the schedule would not be changed, were then given a chance to provide input only after the decision was made, and then basically had all their input rejected when the researcher confirmed the original decision. This third scenario was still viewed as substantially fairer than the first, when no “voice” was permitted. Thus, even an admittedly “sham” opportunity to provide input makes a person substantially more likely to follow rules and procedures than simply imposing them on the person with no chance to speak.

In summary, Tyler concludes that a rule-making system (which is analogous for our purposes to a system for manage-ment of a civil lawsuit) is dramatically more likely to achieve acceptance, compliance, and efficiency through cooperation by using a fair system to allow the individuals being ruled (the disputants in our analogy) to participate in shaping those rules so that they will internalize the standards as their own. Tyler's 2006 research reveals that an individual's belief in the legitimacy of the rules at issue is five times more important to their decision whether to follow those rules than their perceived risk of punishment for breaking them.24 His research further reveals that what he calls the “morality” factor is 15 times as important to compliance as the risk factor.25

Our second author is Daniel Pink. He is a respected writer on issues of interest to the business world such as organizational management. In his 2009 book *Drive: The Surprising Truth About What Motivates Us*, he labels the two management-philosophy models as Motivation 2.0 based on Type X behavior and Motivation 3.0 based on Type I behavior. For simplicity, this article will refer to Type X (think “X” for “extrinsic”) and Type I (think “I” for “intrinsic”). Pink draws a now-familiar distinction between the models. “Type X behavior is fueled more by extrinsic desires than intrinsic ones. . . . Type I behavior is fueled more by intrinsic desires than extrinsic ones.”26

Type X is the traditional model of management that has dominated business management for a century. In business management, Type X assumes that people will not do their work unless closely controlled, monitored, and driven by their manager. It assumes that employees are motivated through a system of providing rewards for desirable behavior and punishments for undesirable. Simply put, Type X-based management seeks to define the path for the employee to follow in detail and then rewards desirable behavior and punishes undesirable behavior to achieve a smooth-functioning employee “machine.”27 Advanced research on Type X-based management explains that rewards are substantially more effective than punishments in achieving results.28 Type X-based management is an alternative description of the same “extrinsic motivation” principles described by Tyler as a “social control” or “deterrent” model.

A classic example of Type X-based management is a traditional twentieth-century manufacturing assembly line. The employee is placed at a station on a factory floor overlooked by a manager’s window. The employee is given detailed instructions based on a time-and-motion study of exactly how to insert tab A into slot B. The employee must conform strictly to

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21. Michael Rempel, Research Director at the Center for Court Innovation, presenting *The Role of the Judge* at the Annual Conference of Colorado Drug Court Professionals (April 10, 2012).
24. Tyler, supra note 7, at 31.
25. Id.
27. Id. at 17.
28. Id.
Like Tyler in reviewing research on the rule of law, Pink reviews the available research from the fields of business management and behavior. He concludes that Type X-based management is generally unsuccessful for most modern business environments and can make employees underachievers, as well as more likely to pursue unethical behavior. One of Pink's more intriguing findings is that paying bonuses for meeting specified goals actually harms the performance of an employee or group of employees over time when they perform work that requires more than rote repetition of defined steps. This finding was based on pioneering research by Harlow and Deci. Deci pursued a research model testing different ways of getting people to form various patterns with certain puzzle-like pieces. He divided them into two groups: one that was paid based on their level of performance and one that was not paid. He had the two groups assemble certain patterns over a three-day period. He ultimately found that the unpaid group performed markedly better than the paid group.

Pink explains Type I-based management as relying on the employee's own intrinsic motivations to achieve the manager's desired results. While he uses different language, his explanation of the research on this form of management is remarkably similar to Tyler's procedural-justice concept. Pink identifies three elements of Type I-based management: autonomy, mastery, and purpose.

Pink explains that the human being's natural state is to be autonomous and self-directed. Consequently, the more autonomous and self-directed a person can be, the more productive the person will be. While a manager must ultimately direct the goal for the benefit of the organization, the employee should retain as much autonomy as possible over what they do, how they do it, and when they do it. As in the workload research regarding voice by Lind, Kanfer, and Earley, that autonomy can be minimal: it may be as little as an opportunity to be heard on the rules and production targets being set.

For his second element, Pink explains that motivating an employee most effectively requires a manager to recognize the individual's desire to be fully engaged. Humans need to feel that they are making progress in their work. This feeling is a substantial motivator. Pink refers to this feeling of progress as "mastery." People want to feel that they are honing their own skills.

In the context of civil case management, mastery may be served by giving the lawyers the chance to explain and, when appropriate, try their ideas on how best to take the case to conclusion. I once had one of those dozen-lawyer initial case-management conferences in a mechanics-lien case. One lawyer stepped forward to explain a system they had used in another case for streamlining the claims process and some suggested refinements. The other lawyers found the ideas intriguing. We discussed the process and implemented it for our case. Viewed through Pink's lens, this was a courtroom version of working with the participants' needs for mastery. More commonly, mastery for us will merge into the other two of Pink's elements. Even the example given could also be characterized as serving autonomy or purpose.

For his final element, Pink states that "[h]umans, by their nature, seek purpose—to make a contribution and to be part of a cause greater and more enduring than themselves." Despite the high-sounding language, the "purpose" need not be to save the world; "purpose" need be only something beyond the individual's personal interest. For our purposes, "purpose" can be seen simply as involving the participants in defining the goals for the litigation and the steps in its management. The element can be served by discussing why any particular procedure, deadline, or page limit has been set where it is in this particular case (for example, "We set the deadline for supplementing disclosures on this date because of the parties' respective accounting cycles and the need to accommodate the accounting experts' tax-season schedules.").

One study reviewed by Pink illustrates the concept of "purpose." He notes that one of the most underutilized words in management is "why." Adam Grant, a University of Pennsylvania psychologist, researched call-center employees—not the first group of employees that comes to mind when one thinks of jobs with a higher "purpose." He divided the employees into two groups. One group worked as normal. The other group was given a "purpose" for their work performed substantially better than the other group.
To return to the assembly-line analogy, recall the American automotive industry in the late 1980s and early 1990s. That factory floor was effectively the example of extrinsic management previously described and had been since Henry Ford perfected it. By the 1980s, there was considerable discussion of changing management philosophies in the American automotive factory to mimic those in a Japanese automotive factory. The “revolutionary” changes were to engage the line workers in discussions of how the assembly line was organized and the sequencing of the work and to get their input on the best ways for them to do their work. Managers were to have line workers identify ways each could better contribute to the final product. They were to treat each employee as a highly skilled master at their task rather than a disposable cog. Managers were to focus everyone on the need for high-quality work to keep the factory in business as well as the need for line workers to provide a product in which they could take pride. A key symbolic act was authorizing any person on the factory floor to halt the assembly line to fix a problem. Viewed through the prism of Pink’s paradigm, these developments all focused on Type I motivation, serving the worker’s need for autonomy, mastery, and purpose.

In considering Pink’s discussion of “purpose” and Tyler’s discussion of “voice,” I am reminded of the Continental Army drillmaster “Baron” von Steuben, who famously complained about American soldiers:

> You say [to a Prussian soldier], “Do this” and he does it, but [in America] I have to say, “This is why you ought to do that,” and then [the American soldier] does it.  

The Baron, despite deriding it, was actually far ahead of his time in management philosophy.

While each approaches the issues from a different perspective, Tyler and Pink reach the same conclusion after reviewing extensive research into human behavior. Both conclude that, whether designing a legal system or a management system, one will achieve substantially more efficient, effective, and rewarding results by designing the system based on intrinsic rather than extrinsic motivation.

**C. THE TWO MODELS APPLIED TO CIVIL CASE MANAGEMENT**

**1. Extrinsic-Model Civil Case Management**

Decades have passed since the Administrative Conference of the United States observed that our litigation systems suffered from widespread dissatisfaction and procedural problems that were ultimately impeding the judiciary’s core function of delivering just results. The primary recommendation of the Conference was for the judiciary to undertake the role of project manager to move litigation through to conclusion.

Court systems have largely accepted this new obligation to be project managers. In civil litigation, court systems have generally approached this task by adopting rules aimed at creating a more defined path for civil litigation. Rules adopted at the jurisdiction level and at the local level set timelines for each phase of litigation. Generic deadlines were established for filing briefs, as were standardized page limits. In the 1990s, perceived abuses of discovery were addressed with limits on the number of the various discovery tools that could be used. Also, affirmative-disclosure rules were added to move the cases down the path. Later, codes of prohibited deposition conduct were developed. Some of these codes managed the very words to be spoken during the deposition at certain points of conflict. Limits were placed on the numbers and length of depositions. Some courts set prerequisites to setting trial dates. Others set aggressive trial dates and then applied a formula to set other deadlines based on that trial date. A system of sanctions for straying from the defined litigation path has also evolved over time. Development of Rule 11 was the initial approach. The affirmative-disclosure model was accompanied by a prohibition (which evolved to be rather porous) on use at trial of information not timely disclosed. Fee shifting based on frivolous and groundless litigation was developed and expanded. Many jurisdictions also expanded the judge’s power to impose sanctions in discovery disputes on a largely discretionary basis. Some courts developed “fill in the box” forms for summary-judgment motions that narrowly restricted presentation of such motions. More recently, discovery has continued to be trimmed back, and a focus is developing on restricting or eliminating expert witnesses as a cost-saving measure.

Each of these trends has followed the theme set by the Conference in 1986. They each focus on reducing participant control, reducing flexibility, and reducing direct involvement between the judge and the participants to yield a more automated management system. In the terminology of Pink and Tyler, they primarily seek to reduce participant autonomy and voice.

As explained by Tyler and Pink, the management model the courts have been using is the same management model that has dominated American governance and business management for a century: the extrinsic model. The dominant approach to civil litigation management has relied on what is essentially a set of boilerplate timelines and limitations backed up by extrinsic sanctions for violation and, to a lesser extent, a degree of incentives for compliance. Our approach has been very much like Henry Ford’s factory floor. The approach casts the judge in the role of drover herding the case and participants down a generically defined path of gates and chutes from as remote a position as possible.

Tyler and Pink’s research would predict that the dominant model applied to civil case management would result in poor self-regulation by participants, extensive time spent on sanc-

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Too frequently, the community has tasted the civil court’s pudding and rejected it.

The reader’s own experience should be sufficient to detail the shortcomings in the extrinsic model for civil case management. Any time judges assemble to discuss civil case management, someone will inevitably observe that “there is nothing civil about civil litigation.” This observation will be followed by a period of telling horror stories about egregious behavior by lawyers in civil cases. A similar assembly of civil litigators will yield similar tales of obstreperous behavior by opposing counsel. The litigators will add to these stories disturbing tales of arbitrary restrictions and timelines imposed on them by autocratic judges or court systems that all but barred them from any reasonable opportunity to present the merits of their case. An assembly of sophisticated civil-litigation clients will yield these categories of stories as well as considerable discussion about the staggering costs of these frustratingly ineffective experiences.41

The original cliché was that the proof of the pudding is in the eating. The steady trend for several decades now has been civil disputants increasingly turning to “alternate dispute resolution.” That trend has many positives, but the judiciary must be mindful that in turning to other fora, the disputants are turning away from the courts. They do not reject our civil courts in favor of other fora because of their overriding dissatisfaction with our quality and credibility. Too frequently, the community has tasted the civil court’s pudding and rejected it.

The body of work on human behavior exemplified by Tyler and Pink also explains some of the reasons for the dissatisfaction with the existing system. The participants are given no voice and no autonomy. Participants are given no role in defining the purpose of the proceedings. Paths, deadlines, limits are generically set with no accommodation (or, rarely, very little) for the unique needs of the participants.

Tyler notes that such an extrinsic-compliance model requires that the participants be certain they will be sanctioned for non-compliance, extensive resources devoted to some form of surveillance system, and widespread dissatisfaction with the system of management as well as the results. More pointedly, they predict that our standard civil-case-management model would encourage unethical behavior. The reader can evaluate the validity of these predictions.

2. Intrinsic-Model Civil Case Management

This article proposes pursuit of the intrinsic model, a model based on active engagement with the participants, using the principles of procedural justice. The cornerstone of modern developments in behavioral and management research, exemplified in this article by Tyler and Pink, is that a leader will achieve substantially more by engaging on an individualized basis with those to be led and giving the participants as much input as reasonably possible. The research predicts that an engagement-based model of case management will require fewer resources than the existing model and will result in the participants having greater satisfaction with and trust in our court system.

One does not need the research to predict this result, however. Common sense and life experience make the same prediction. Anyone reading this article has likely already reached the conclusion that the dominant model for civil case management of the last few decades is unsatisfactory. Life experience demonstrates that being treated like a number and being herded through the line at the archetypal Department of Motor Vehicles makes people less cooperative, less compliant, and less satisfied with the results they receive.

Applying this research to court systems is not new. Intrinsic-management models, specifically in the form of procedural justice, have now been used for a considerable time in the drug-court model (including problem-solving courts, treatment courts, and collaborative courts). Because of their usual model of grant funding, drug courts have been particularly well vetted by empirical research. That testing research confirms the predictions of greater cooperation and compliance with court direction when case management is based on an

41 In fact, there have been a number of surveys that confirm the widespread dissatisfaction among members of the bar as well as their clients. See, e.g., Final Report of the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System 2 (2009):

In short, the survey revealed widely-held opinions that there are serious problems in the civil justice system generally and that the discovery system, though not broken, is badly in need of attention. Judges increasingly must serve as referees in acrimonious discovery disputes, rather than deciding cases on their merits. From the outside, the system is often perceived as cumbersome and inefficient. The emergence of various forms of alternate dispute resolution emphasizes this point.
intrinsinc model.\textsuperscript{42} The intrinsic model is also gaining adherents in the realm of domestic-relations cases.\textsuperscript{43}

Our pilot program provided a real-world laboratory to identify mechanisms for implementing this engagement model to civil litigation. While a controlled experiment and further study is required, our observations of those mechanisms in action suggest the promised rewards are real. More importantly, tampering the process allows the participants and the judge to stop litigating the litigation. In turn, this allows participants to focus on resolving the core disputes and allows the judge to spend her or his time on improving the court's delivery of distributive justice—that fair and just result the community needs. The remainder of this article shares the practical lessons our pilot taught us in trying to implement an engagement model.

\textbf{THE PHILOSOPHICAL FOUNDATIONS}

For those readers that skipped the section giving the high-altitude view of developments in behavior research, the ultimate lesson is easily summarized and is supported by common sense as well as the research. Your child needs an important medical procedure, but it is unusual and you are not sure of your family's health-insurance coverage or if any prerequisites to coverage must be addressed. Do you want to call the insurance company and get (a) a prerecorded voice telling you to push 1 or 2 to select among options that seem to have no application to your problem, (b) have a live person answer the phone in a hurried voice only to say “please hold,” return after several minutes, distractedly ask, “what department?” with the sound of a clicking keyboard and multiple other voices in the background, and then transfer you without explanation before you even complete a sentence only to find you have been transferred to voicemail for watercraft claims, or (c) have a live person answer the telephone in a pleasant and professional voice, ask you how they can be of help, demonstrate that they have some input on what is being done and that there is a purpose to what they are being asked to do. The less these aspects of an individual's need to be acknowledged are addressed, the more dissatisfied, uncooperative, and non-compliant the person will be.

Tyler states that his research specific to court systems demonstrates that the converse is also true. The more the individual participant's need to be acknowledged is served, the more satisfied, cooperative, and non-compliant the person is.\textsuperscript{48} This increased satisfaction remains robust even when the person does not get the outcome wanted.\textsuperscript{49} The result is that the single most effective tool in get-

\textbf{A. PROCEDURAL JUSTICE MATTERS— HOW ONE CHARTS THE COURSE IS AS IMPORTANT AS THE COURSE}

Tyler is the founder and leading exponent of a movement known as procedural justice. For our purposes, the procedural-justice movement can be summarized as teaching the lesson that litigants care as much (and, proponents would argue, more) about whether they were treated fairly as whether they win.\textsuperscript{44} This research also tells us that the single most important factor in increasing compliance, cooperation, and satisfaction with court rulings is the quality of the judge's interaction with the participants.\textsuperscript{45} A successful civil-case-management model must address the need for a quality interaction between the participants and the judge.

Tyler and Pink identify the elements needed to ensure a model that will promote quality interaction between leader and team. Tyler defines them as voice, neutrality, respect, and trust. Pink defines them as autonomy, mastery, and purpose.

In the context of a civil-case-management model, we can focus on Tyler's elements of voice and trust as well as Pink's elements of autonomy and purpose. For this discussion, these are all ultimately different aspects of the same idea. Every person (read lawyer or client, depending on the stage of the proceeding) has an ingrained need to feel heard and addressed as an individual. Voice acknowledges that the individual wishes to have a chance to speak and be heard.\textsuperscript{46} Trust acknowledges that each individual has unique needs, one of which is to feel those needs are being addressed.\textsuperscript{47} Pink adds that people need to feel that they have some input on what is being done and that there is a purpose to what they are being asked to do. The less these aspects of an individual's need to be acknowledged are addressed, the more dissatisfied, uncooperative, and non-compliant the person will be.

Tyler states that his research specific to court systems demonstrates that the converse is also true. The more the individual participant's need to be acknowledged is served, the more the person is satisfied.\textsuperscript{48} This increased satisfaction remains robust even when the person does not get the outcome wanted.\textsuperscript{49} The result is that the single most effective tool in get-

\begin{itemize}
  \item \textsuperscript{42} Burke & Leben, supra note 20, at 6.
  \item \textsuperscript{43} See, e.g., Gene C. Colman, Procedural Fairness and Case Conferences, 20 \textbf{CANADIAN J. FAM. L.} 379 (2004) (discussing procedural-fairness principles applied to family-law proceedings).
  \item \textsuperscript{44} Burke & Leben, supra note 20, at 6. See also Brian Bornstein & Hannah Dietrich, \textit{Fair Procedures, Yes. But We Dare Not Lose Sight of Fair Outcomes}, 44 \textbf{CT. REV.} 72 (2007) (discussing importance of outcome and disputing contention that procedural justice is more significant factor in predicting satisfaction than distributive justice).
  \item \textsuperscript{46} Burke & Leben, supra note 20, at 12-13.
  \item \textsuperscript{47} Id.
  \item \textsuperscript{48} Id. at 7.
  \item \textsuperscript{49} Id. at 6.
\end{itemize}
Civil case management should be crafted to give the parties an effective resolution (distributive justice) as efficiently as possible.

To achieve “trust,” the court must seek to provide purpose. For simplicity, the term “purpose” is used in this article to refer to the destination that the party is seeking to reach. A client of a lawyer who represents a business may have a purpose that is a distributive justice or a procedural justice concern. However, the client’s purpose is not always clear. Sometimes the client’s purpose is a matter of vanity. Getting a judgment is only one step, and far too often a pyrrhic step, toward the client’s actual goal. The party’s actual goal is what drives litigation, not winning a verdict. Understanding this basic truth is the ultimate incentive to achieving efficient and effective civil litigation management. For if the litigation is driven by the clients’ goals, civil case management should also be given the purpose of serving the collective legitimate goal of the parties.

This basic concept is also expressed in the procedural-justice movement. As noted above, one dimension of procedural justice is called “trust” (and can be described as “helpfulness” for our purposes). This term refers to the need of the participant to believe that the court has an interest in serving the participant’s needs. To achieve “trust,” the court must seek to address actual, individualized purposes rather than assume a ubiquitous purpose of a favorable verdict.

To return to our mythical question of why litigation participants do what they do, ask the judge for the purpose of civil case management and most will say “to reach the end.” Consequently, civil case management under the traditional model is too frequently designed like the automated telephone system—designed to get people to the end of the telephone call with as little effort from the entity receiving the call as possible. Like that caller, far too many people get nothing out of the litigation experience so managed—at least, nothing beyond termination of the call after a great deal of frustration and a very large telephone bill.

However, under an intrinsic model, the purpose of the litigation drives its management. Civil case management should be crafted to give the parties an effective resolution (distributive justice) as efficiently as possible. If the goal is to provide parties with the most effective resolution available, the judge must attempt to determine the goals of the parties—the purpose of the litigation. Identifying the goals of the participants to the litigation—even if only the goals that participants are willing to reveal—can allow the judge to identify an effective practicality of the participant’s desires and needs, either may be the dominant factor driving the judge’s actions.

50. See generally id. at 12-13 (noting that higher satisfaction leads to higher compliance).

51. For simplicity, the term “purpose” is used in this article to reference both the desires and the needs of the participant. The two are often different. Depending on the circumstances and the relative

52. See Burke & Leben, supra note 20, at 6 (discussing the “trustworthy authorities” dimension).
resolution that is within the court's ability to provide. That, in turn, allows the judge to define the purpose of the litigation. When necessary, the judge can also re-set participants’ unreasonable expectations to the kinds of resolutions the court can actually provide. Moreover, identifying an effective and available resolution can allow the judge to identify the most efficient path to that resolution—if you don’t know the destination, you cannot chart the course.

Civil case management can learn valuable lessons from its colleagues in criminal and domestic case management. As referenced earlier, these fields are seeing rapid growth in what they call “problem-solving” courts or “collaborative” courts. While one can debate at length the specifics of these courts, their foundational insight is irrefutable. The problem-solving-court movement is based on the realization that a person's participation in a court case is usually a symptom that is driven by an underlying problem. If that problem can be addressed effectively, everyone is better served. Additionally, as long as that problem is not addressed, the person will continue to consume court and community resources. The same general concepts apply to civil litigation, though hopefully with considerably fewer substance-abuse and mental-health issues.

A critical first step in a problem-solving-court case is for the participants to articulate collectively the goal. Having recognized a goal, the participants then identify (as best they can) the issues that prevent the client from achieving that goal. Problem-solving courts follow this method on the macro and the micro levels. Again, the same conceptual approach is highly effective in civil case management. Whether focused on the litigation as a whole or an individual issue that has arisen, the civil judge that takes a few minutes to have a “live” discussion with the participants to identify the current goal and the impediments will find his or her cases running substantially smoother and requiring remarkably few court resources.

In summary, civil litigation is driven by trying to achieve a client's goal. Effective and efficient civil case management is driven by recognition of those goals and identifying the impediments to achieving them. While the parties’ goals will be highly varied, the goal is rarely as simple as paying the full “sticker price” for litigation and winning a verdict after trial. Consequently, a justice-delivery system should strive to provide its customers with effective and efficient resolutions addressing their goals or, at the least, their needs. Systems that ignore their customers’ goals will continue to generate more dissatisfaction and wasted resources than justice. They will also continue to undermine public confidence in the judiciary as a credible method of resolving disputes. A civil court should be seen as a problem-solving court rather than a verdict assembly line.

To revisit the analogy of the itinerant cargo captain, the captain cannot assume delivery by the fastest course is always the goal. The owner may need a particular sequence or market timing to serve other obligations. If the captain does not learn of the owner’s goals, the captain will not likely be successful in delivering the most efficient and effective service to those goals.

C. THE LAWYER IS THE JUDGE’S ALLY—WORK WITH THE CREW, NOT AGAINST THEM

Pink notes that at the heart of the traditional model of business management is a view that the worker is the enemy and, if not closely supervised, will accomplish nothing. A similar premise about lawyers underlies the dominant model of civil case management. The Conference observed in 1986 that lawyer control of case management was the problem. The Conference’s goal was to take control away from the lawyer—the apparent enemy. Also as noted, a common complaint today is that “there is nothing civil about civil litigation.” At the heart of the traditional models of civil case management is a view that the lawyer is the root of the problem. However, in an intrinsic-motivation-and-engagement model, the lawyer is a key participant in effective and efficient case management. This can be one of the greatest leaps of faith a judge interested in an engagement model must take. However, years of experimenting with this model in our pilot courtrooms suggest it works. Tyler and Pink’s research not only predicts that it will work, it also explains why it works.

The effectiveness of this strategy is again rooted in the principles of procedural justice and serving participant needs and goals. The secret for the judge seeking efficient and effective case management is to realize that the individual lawyer is as much a participant in the process as the party. In fact, for many of the most distraction-prone issues in the litigation, the lawyer is the primary participant. Thus, procedural-justice research is as applicable to the lawyer as to the client. The judge can achieve considerable results by recognizing the value of serving the lawyer’s needs for voice and trust. Despite the stereotype that popular media and much of the legal profession have built, even civil litigators are human beings that respond positively to being treated respectfully and individually. And, like other human beings, they respond poorly to being smothered with boilerplate and ignored.

This is a philosophy that is easy to test and implement. In the modern era of civil litigation, face time with the judge is extraordinarily rare. The growth of the bar and technology make face time between lawyers relatively uncommon as well. This isolation and modern digital communication leads to a degree of false courage and hyper-partisanship. These factors give the judge considerable power to leverage his or her time


54. See generally Bruce J. Winick, Therapeutic Jurisprudence and Problem Solving Courts, 30 Fordham Urb. L.J. 1055, 1085 (2002) (discussing behavioral contracting and the need to tailor systems to individual circumstances, which, in practice, is done by identifying the individual’s goals and obstacles to be addressed in achieving those goals).
to resolve issues dividing the lawyers. The simple expedient of the judge meeting in person with the lawyers and demonstrating that the lawyers have the judge’s full attention is a remarkable elixir. Disputes that can consume dozens of hours of expensive attorney time as well as dozens of pages of dense legal briefs begin to melt away.

In a very different context, Father Mike Surufka discussed the challenges of addressing difficult and debilitating problems with his parishioners. He described the “transformative power” of simply listening as follows:

[T]he first step is always to listen, to see what is actually happening in the life of this person. That has more transformative power than just about anything. For somebody really to know that they were heard at a very deep level.

The truth is that in the modern world (in and out of court), the most precious and persuasive gift one can bestow upon another person is one’s genuine and undivided attention.

One cannot be too Pollyannaish. We must recognize that, whether consciously or unconsciously, the lawyer’s goals are not always the same as the client’s. The judge must be mindful of this distinction in working with the lawyers. A useful tactic is to require the lawyer to articulate the client’s goal at every interaction. This exercise helps keep the client’s goals foremost in the minds of all and helps the individual lawyer as well as the judge prioritize those client goals.

Returning to our ship captain, the captain may be in charge of the ship, but the crew does the bulk of the actual labor. In our example, the captain gets a new crew with each ship, and the crew members are more loyal to the owner that pays them than a single-voyage captain. Working with that crew and communicating with them to earn their trust may not always be the key to surviving the trip, but it will always be the key to an efficient voyage with a cohesive crew.

THE STRATEGIES

These philosophical foundations point to a better model of case management, a model with an engaged judge pursuing effective and efficient individualized case management. This case-management philosophy can be implemented by following four simple strategies.

A. BRING ’EM IN AND ENGAGE, ENGAGE, ENGAGE

As noted earlier, face time with the judge is exceedingly rare today and, as a result, is one of the most powerful tools available to the judge. The whole idea of the engagement model and the core lessons from Tyler and Pink require direct engagement with the participants to provide voice and define purpose. This need not be a lengthy and involved exercise, either. The research from drug courts tells us that a judge need spend only three minutes with a defendant to satisfy the desire for voice. In civil litigation, the time requirement will vary significantly by the issue being addressed, but the judge should not assume he does not have time to engage. Based on the experience in the pilot, the judge will gain time. Bring the participants into the courtroom for a live discussion as early in the case as possible, and then bring them in when any issue seems to be developing. Engagement simply cannot be achieved through documents—and a few minutes of face time can avoid hours of reading unnecessary briefs and seeking clarification.

The judge should use every interaction with the participants to demonstrate that she is engaged with their case. The judge should use each interaction to foster a culture among the team of collaborative problem solving. Through the judge’s interactions, she will set the expectations of the participants as well as demonstrate the elements of procedural fairness. She will, thereby, gain the participants’ cooperation, compliance, and ultimate satisfaction with the result.

A “bring ‘em in” strategy requires the judge (in person or through trained staff) to maintain engagement by monitoring the developments in the case shown by the pleadings. If briefing on a legitimate substantive issue is unclear, avoid the distraction of a misunderstanding in a ruling or unclear further briefing by spending five minutes in person or by telephone with the lawyers to get clarification. Making time to squeeze in a live interaction with the relevant participants on an expeditious basis before the judge drives home or during lunch will pay substantial benefits to his schedule in the long run.

A few years ago, I had a civil case filed by a prisoner challenging an administrative decision by the prison officials. Having a status conference that involves a pro se prisoner can be a logistical challenge and unpleasant. So, I disregarded our engagement philosophy and followed a more mainstream approach. The case raised some complex issues, and the briefs were like ships passing in the night on some issues. I thought I could decipher the issues, and I ruled on the briefs without ever having direct contact with the participants. The plaintiff prisoner appealed my ruling. The appellate court followed the same philosophy I had, ruling on ambiguous briefs without ever having direct contact with the participants to resolve those ambiguities. The appellate court deciphered the briefs dramatically differently than I had. The appellate court remanded the case to my court with instructions that were indecipherable to me based on my understanding of the case. At this point, I realized I was caught in the fallacy of trying to

55. See Nat’l Drug Court Inst., The Drug Court Judicial Benchbook 51-52 (Douglas B. Marlowe & William G. Meyer eds., 2011) (discussing the importance of the court’s interaction with participants to reinforce perceptions of equitable treatment); Douglas B. Marlowe et al., The Judge Is a Key Component of Drug Court, 6 Drug Ct. Rev. 1, 1-34 (2004) (discussing the value, if any, of frequent status hearings and judicial intervention).
achieve efficiency by avoiding engagement. Before either side could file a motion or a brief, I issued an order to set a status conference and identified the issue to be addressed as clarifying the parties’ understanding of the issues on remand. Despite my experience, I was a bit worried about the procedural havoc a sophisticated pro se prisoner plaintiff could cause if given the opportunity. As I took appearances for the telephone status conference, I could hear similar concerns in the form of aggressiveness from the prisoner’s attorney. As the pro se party was the plaintiff, I took a deep breath and gave the prisoner the first chance to give his view of the issues. He spoke for less than three minutes. At the conclusion of the three minutes, we were all on the same page and could see clearly the path forward.

At this point, the case was about one and a half years old. The case had occupied time and resources in my court as well as the appellate court. The case had occupied prison and attorney-general resources. The case had also occupied the prisoner during that time. Much of that one and a half years of litigation was wasted and could have been avoided by me investing those few minutes for the status conference at the beginning. We quickly packaged more clearly the key legal issue for appellate review (which was what would be necessary for the needs of both sides in the case). We later received a well reasoned and helpful appellate opinion resolving the novel legal issue. Given the unique history and issue in the case, I held a further status conference. I was rewarded with strong expressions of satisfaction with our legal system from both the prison lawyer and the pro se prisoner—as well as a stipulated concrete end to a case that could have spanned several more years.

B. ALWAYS ASK WHY, OR, KNOW THE GOAL TO SET THE PURPOSE

As noted, the purpose of the civil litigant in pursuing litigation is not the goal of obtaining a verdict. Instead, civil litigation is driven by the goals of the parties to the litigation. The closer the judge can get to understanding the civil-litigation participants’ separate goals (their reasons for pursuing the litigation), the more efficiently the judge can guide the litigation to an effective resolution. Do not misunderstand this as converting the judge into a counselor of some kind. The judge’s job is not to be a therapist, business consultant, or mediator. Neither should one confuse the judge understanding the participants’ stated goals with adopting those goals as the purpose of the litigation. To serve procedural justice and intrinsic motivation, the judge need only demonstrate appreciation and reasonable accommodation of the participants’ separate goals in setting the judge’s purpose for the case. The judge’s job is to identify the most effective resolution that is proper for a court to provide and then reach that resolution as efficiently and productively as possible. Identifying the participants’ stated goals serves only to inform the judge in accomplishing this task. Resolving the lawsuit often will not resolve the parties’ competing goals. The litigation is only one aspect of that contest, and the judge is only responsible for resolving the litigation dimension of the problem. However, the more the judge understands the participants’ underlying goals, the more the judge can identify what the courthouse can legitimately provide to the participants that will be productive. Once the judge identifies what the courthouse can provide, the judge can get the case focused on an efficient and effective path to that resolution.

Put another way, Pink refers to the word “why” as the most underutilized word in business.58 It is also the most underutilized word in civil litigation. A judge should frequently ask the participants “why.” Why is your client pursuing this litigation? Why are you filing that motion? Why does your client want to oppose that motion? Why do you want additional time? Why do you oppose granting additional time? Why does your client want that discovery? Why does your client want to resist that discovery? Why will trial take that many days?

By way of example, if the parties truly need a trial, they usually only need the trial on a small number of central disputes. The judge can streamline the discovery and the pretrial proceedings to focus the proceedings on those genuine issues and get the trial done as quickly as possible. If the parties need an appellate ruling on a narrow question of unsettled law for the benefit of their industry, the case can be structured to get to the ruling without wasting resources on any more ancillary issues or discovery than absolutely necessary. If the real goal of the side that will pay is to put off the payment until the next quarter, and this is practical for the receiving side, the case can be managed to do as little as possible until the next quarter and then ramp it up rapidly if needed. If the goal of one party is to delay the inevitable inappropriately, the case can be put on a rocket docket and aggressively policed for delaying tactics. In the same vein, if the party’s goal is not legitimate or not available through the courthouse, the judge can disabuse that party of that illegitimate goal or, if unsuccessful, manage the case to a quick resolution.

The judge should also keep in mind that the first answer to the question is often not truly the answer to the question. A rule of thumb popular among business-management consultants is that a leader must ask herself why she wants to pursue a policy five successive times to get down to the real purpose. Only then, when she has peeled back the layers to the core rea-

57. The closer the lawyer gets to understanding his or her client’s true goal (and/or needs) and how to achieve it, the more effective, the wiser, and the more successful the lawyer will be.
58. Pink, supra note 26, at 137.
59. I can recall more than one early case-management conference in which I asked what a party’s goal was, only to hear a goal utterly unrelated to the litigation. I would then ask how the lawsuit would accomplish the stated goal. Some cases largely ended as a result of asking that question, though a few weeks might have been required before that happened. On rare occasion, I found myself explaining to a party what issues a court could and could not address in the lawsuit.
The Swedes have a concept called “lagom,” [that] means neither too little nor too much.

The strategy of asking why works on the micro level of each individual procedural or discovery issue as well as, if not better than, it works at the macro level of the overall path to resolving the litigation, and it is considerably easier to implement. This is particularly true for the judge with limited experience with civil clients and the nature of their true goals. The good news for the judge with limited civil experience is that substantial gains in docket efficiency can be achieved by focusing primarily on the micro level, the level at which every judge has sufficient experience and knowledge to apply these principles.

This strategy is also well suited for simple and low-risk tests of the overall civil-case-management approach proposed in this article. Pick an isolated issue or case and give this approach a trial run. The test need be no more sophisticated than asking each side to identify its goals and its concerns in a real-time discussion—ask each “why,” and then ask again. With surprising frequency, a path to resolution will reveal itself almost immediately without any further action by the judge. The speed with which that path to resolution can be accomplished will also be surprising when compared to the time needed for the judge to digest all those briefs and attachments filed under an extrinsic-model, management-by-boilerplate system.

C. STREAMLINE AND CUSTOMIZE, PURSUE “LAGOM”

For courts, we now exist in a world of continuing resource scarcity and rising productivity demands. Courts must work smarter in case management. Unfortunately, most current trends among judges in civil case management assume that generic and remote case management (management by boilerplate) promises reduced courthouse workloads. This promise is illusory and, in practice, usually counterproductive. This philosophy equates more prepackaged case management with less work for the judge. This philosophy emphasizes the “fire-and-forget” rules that are billed as self-executing and are said to require no involvement from the court. The approach creates a rigid path (or, in differential case management, a small selection of paths) leading to trial and is said to free the judge of any involvement other than conducting the trial. The promises made by this self-executing approach to heavily prepackaged case management are an alluring temptation to overworked judges. The extensive body of research supporting the procedural-justice movement and intrinsic-motivation model directly refutes this premise, demonstrating that boilerplate justice reduces compliance rather than raising it.

If one talks to the lawyers doing the actual litigation, they report that an inordinate amount of their expensive time and their clients’ resources is spent on navigating (both through and around) those “self-executing” rules. Those lawyers also reveal that they frequently ignore those complex layers of rules and simply resort to self-help. If one talks to the judge in a candid mood, the judge will quickly reveal that he or she spends a great deal of time administering those “self-executing” rules, much like the parent negotiating with the three-year-old about how many peas satisfy the requirement that the child take one bite.

If one spends a few minutes reviewing the discovery motions filed in a court that embraces the self-executing-rule philosophy, the misnomer will become readily apparent. Inevitably, pages and pages of briefing are devoted to disputing the meaning, application, and exceptions to those extensive rules that were supposed to be self-executing. One is inevitably put in mind of the old speaker’s cliché that the rules of golf are but a few pages while the decisions interpreting those rules occupy volumes.

The judges do not like these process disputes, the lawyers do not like these process disputes but feel forced into them, and the clients always know that process disputes are a waste of their money and resources. The model of ever-deeper layers of boilerplate and ever-less individual engagement of the judge with the participants is counterproductive. The model simply promotes litigating the litigation instead of pursuing a productive path to a credible resolution.

Moreover, experience teaches that these elaborate procedures frequently prove unnecessary. Returning to discovery disputes (the bane of the civil judge’s docket), many judges have experimented with elaborate requirements and limitations. Compliance requires at least an hour of attorney time on one side for the narrowest and simplest of disputes. However, in most instances, a five-minute telephone call between counsel and the judge could resolve the issue. Ultimately, efficiency is achieved by eliminating, not multiplying, the unnecessary.

The research behind the procedural-justice movement should teach us that serving the participant’s need for individualized treatment increases court productivity while ignoring that need increases court workload. Civil litigation is driven by the goals of the participants; civil case management should be as well.

The Swedes have a concept called “lagom.” The term means neither too little nor too much. Lagom is a standard that is reminiscent of Goldilocks evaluating porridge, chairs, or beds. The judge interested in efficient and effective case management should strive to achieve lagom in the time and resources he or she devotes to each case. The judge should also seek lagom in the time and resources of the parties that are consumed. Also, the judge should seek lagom in the degree of disruption to the wider community resulting from the pendency of the litigation. The question is not how many trials have been held, how many cases have been resolved, or how many experts retained; the right questions are whether the court has given the parties resolutions needed, whether the

60. See Burke & Leben, supra note 20, at 7.
parties have accepted and used those resolutions, and how efficiently those resolutions were provided.

D. ENGAGE THE SMALL DISPUTE TO ELIMINATE THE DISTRACTION

This strategy shares a common root with streamlining but addresses more directly the judge’s attitude toward dispute resolution. Many court systems faced with rising caseloads and fed up with seemingly endless and picayune squabbles over discovery and other pretrial motions erect substantial barriers between the lawyers and the judge—the court’s version of that automated telephone-answering system. Effectively, this type of system is designed to suppress disputes rather than resolve the issues. Rather than dispute suppression, the judge should pursue a policy of engagement.

Dispute suppression is neither efficient nor effective case management. These efforts often backfire on the judge by intensifying and multiplying the disputes when they finally reach the boiling point. Also, dispute suppression is fundamentally unfair to the parties. In most disputes, one side will be working from a position of relative weakness. If the court’s goal is simply to suppress disputes so that issues will not be brought to the courthouse, one side is likely to have a substantial advantage in the court’s absence.

Instead, the judge should affirmatively engage the discovery and procedural disputes. Doing so quickly and efficiently eliminates them as distractions and focuses the resources of the parties and the court on the core issues in the case. Eliminating these distracting side trips quickly and efficiently keeps everyone on the central path to resolution.

Consider the example of a typical discovery dispute. The lawyers exchange a request and an objection about a discreet set of records. The lawyers then craft letters under a local rule requiring them to confer, letters that primarily serve a posturing role. Due to that false courage that results from the lawyers interacting digitally, the letters drive them to harden their positions. The lawyers are moving quickly by litigation standards, and these opening exchanges consume only a few weeks. One side then files a motion, pouring pent-up agitation and frustration onto the pages and consuming hours of research and crafting time. The opposing lawyer receives the opening motions and stewed on it. The discovery dispute is sufficiently central to the overall discovery effort, and the rhetoric is heated enough that all other discovery halts as a result of the dispute. The opposing lawyer submits a response brief at the deadline, typically about three weeks after the motion was filed. The lawyers confer with their clients. Each has a conscious or unconscious eye toward justifying to their clients the bill for the time spent on the discovery dispute and explains how obstructionist the other party/lawyer has become in the case. The moving lawyer then prepares and files a reply brief, raising the level of animosity yet again and adding other complaints about the opponent’s behavior to strengthen the motion. This, in turn, leads to a side trip from the discovery distraction to a dispute over whether a sur-reply brief will be permitted.

These various motions drone on for weeks, sometimes months, consuming substantial party resources. The judge notices the rising tide of discovery and procedural pleadings. But, overwhelmed by a daunting caseload and schooled in the idea that such disputes are little more than ego-driven jousting between civil lawyers, keeps shuffling them to the bottom of the priority list. As the lawyers receive silence from the courthouse, they fill the void with more pleadings and an ever-spiraling level of animosity. When the judge finally decides to tackle the pile of pleadings, she must devote hours to reviewing and re-reviewing the dense briefing. The briefing is so distracted by battles between the lawyers, her primary chore is separating the wheat from the chaff. The question inevitably on her lips throughout hours of reviewing these briefs is “what is the issue they actually want me to decide?” The judge’s frustration grows as her scarce time ticks away, and she ends up issuing a relatively rushed ruling. While legally correct and adequate, the ruling gives little explanation and demonstrates little analysis of the individual case. Given the length of briefing, the abrupt and minimalist ruling leaves both lawyers dissatisfied with the result and complaining loudly to their clients about the broken civil litigation system.

Consider how this all-too-typical discovery issue is handled under an engagement strategy instead of a suppression strategy. The court has a rule prohibiting the counsel from filing a discovery motion until first getting the court’s permission at a live status conference. A corollary of this rule is that the judge makes herself available to the parties within two business days of being requested. The lawyers exchange a discovery request and objection. The lawyers then connect by telephone. As they cannot resolve their dispute, they jointly call the judge’s clerk. The judge’s clerk works them in during the lunch break in the ongoing jury trial the same day. The two lawyers appear as scheduled. The judge asks each lawyer what the lawyer is trying to accomplish and to identify the lawyer’s concerns. The lawyers nearly always reach a resolution at that stage. If they do not, the judge may have to ask more pointed questions. If no agreement is then reached, the judge nearly always has enough information to issue a ruling immediately. The dispute has interrupted the litigation path to resolution for a matter of days once the objection was issued. The dispute has consumed minimal party resources. The dispute has generated no less than 10 minutes of the judge’s time. The dispute has occupied less than 10 minutes of the judge’s time. The dispute has consumed minimal party resources. The dispute has generated no meaningful hostility or impediments to relations between the parties or the lawyers.

More importantly, the handling of this dispute has established a culture of cooperative problem solving in the case. Future distracting disputes have largely been eliminated for that case and, to a degree, for other cases involving the same participants. The court is also established as a credible means of resolving disputes.

This example is not theoretical. This example unfolded countless times during the last seven years of the engagement-based civil-case-management project in our court.

A VIEW OF THE REALIZED MODEL

Tactics for implementing these strategies must be individualized to the local legal culture and the judge’s strengths. Some-
In the most general of terms, the engaged judge should
• convene a case management conference with all participants as early as possible,
• establish a culture within the case of a team approach to resolving problems as quickly as possible,
• identify how (or whether) the litigation will serve the goals of the participants,
• evaluate the management needs of the case with the participants, and
• streamline the discovery-and-procedural-motions process.

What follows is a description of a sample implementation of the model.

Phase Implementation by Case Issue Rather Than Case Type. First and foremost, the judge must decide where to start. One of the advantages of the management-by-engagement approach is that implementation can be scaled to the judge’s individual needs and resources. If the judge is nervous about a full-scale implementation, she can define a scope of implementation to fit her comfort level. However, manufacturing complex systems for diverting types of cases for implementation should be avoided. In other words, the judge should not create an automated system of rules to implement his engagement model. One should learn from the mistakes made in our pilot program. We learned that, in the long run, time spent on defining types of cases for implementation will be wasted and often generate unnecessary opposition.

We started our civil-case-management pilot project with the premise that a judge simply does not have time to apply an engagement approach to all cases. This is also the most common objection raised by judges hearing about this model for the first time—“I don’t have time for this.” Consequently, our pilot followed the lead of many civil-case-management projects. We spent considerable time researching, negotiating, deciding, and defining what cases would be included in the pilot and what cases would be excluded. Our goal was simply to divert what we thought would be a manageable number of cases from the general pool of cases. However, defining the scope of cases in a pilot inevitably involves one in hotly contested political battles between segments of the bar. This consumed considerable time and expended substantial blood-pressure points. Anyone reading this article has likely observed similar undertakings. This article does not describe the specific design or operation of our pilot because, in hindsight, all that work was unnecessary and, worse, counterproductive. To the extent engaging in those discussions had any impact, they made the success of the project more difficult by generating unnecessary angst over distracting and political side disputes between segments of the bar.

Once I had experience with our pilot and learned the case-management approach described in this article, I found that our organizing principle had been wrong. Efficient and effective case management through judicial engagement means less judge time devoted to the civil caseload rather than more. The trick is applying the judge’s time at the right point in the case and in the right way—a stitch in time saves nine. Consequently, I expanded beyond our pilot population and applied these philosophies to my entire civil caseload. The result was a lower caseload and less time required for each case. I saw my civil caseload drop by 58% once I started managing by engagement.

The easiest and most effective means of implementing management by engagement is to start by case issue. The judge must train his staff to find discovery motions as soon as they are filed. Upon the filing of such a motion, the judge should have his clerk contact the lawyers and “bring ‘em in” on an expedited basis. As the judge gains comfort with an engagement approach, he should start bringing cases in for early case-management conferences. If the judge does not feel he can call all newly filed cases in, he should choose any method convenient under his administrative system for identifying cases and bringing them in—even a random system would be fine. As the judge gains experience, he will quickly learn that finding time to bring in all his cases produces a net gain in time available for civil cases.

Many judges handling civil dockets have limited experience with civil litigation and are reluctant to pursue management at the macro level. Experienced and inexperienced civil judges have concerns about trying to manage the overall case to the perceived legitimate goals of the parties. The good news is that a judge can reap the vast majority of the benefits of civil case management by engagement without ever expanding beyond the micro level—applying it simply to scheduling, procedural motions, and discovery disputes. Management by engagement at the macro level carries a greater risk of moving in the wrong direction or overstepping the proper bounds of the judge’s role. Management at that level is also rarely needed. Thus, a judge should rarely engage in it unless the circumstances are crystal clear, and it should be discouraged until the judge is fully comfortable with engaged management at the micro level.

Upon Case Filing. Once a judge has decided to apply the model to an entire case, the model starts from the day the case is filed. The more aggressive devotees of the extrinsic model would trigger an exhaustive form case-management order at the outset of the litigation to lay down the ground rules. With

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62. However, I did exclude the routine collection cases such as credit-card collection cases that regularly ended with a default judgment.

I “engaged” with those cases only when a defendant entered an appearance.
an engagement model, the judge also needs to set the tone from the outset. As the authority figure, the judge will be building a culture within the community of that case, whether she realizes it or not. That culture will determine how participants approach issues in the future. At the outset of the case, the judge should start reflecting that this case will be guided by an actively engaged judge. Instead of responding to a filing with silence or with an automated extrinsic-model boilerplate case-management order, the judge should issue an order directing the plaintiff’s counsel to set an initial case-management conference within a relatively brief deadline. The order should also note briefly that participants should be prepared to address the issues in the case and set a schedule for resolving them. I would require the conference within 45 days of the filing, knowing that I may or may not have all defendants by that time but also knowing that if I didn’t, that would be an issue to address rather than a reason to delay the conference. Remember, under the engagement model, the judge is taking affirmative, even aggressive, control of the management of the case—the judge is just going to use the tools of procedural justice and intrinsic motivation to facilitate that control.

Avoid Lengthy Boilerplate Case-Management Orders. Remember that “perfect” boilerplate initial case-management order? The idea is to have the participants in each case feel as though they are being treated individually. Nothing invalidates that effort faster than receiving an order that is reminiscent of a cell-phone service agreement. No matter how uniform the judge’s case-management approach, the judge should make her written case-management orders look as short and individualized as possible.

I started civil case management with a standard order that had checkboxes so I could quickly use one form to address nearly any issue likely to arise in a case. I would just check the applicable box and send out the order. It was a very efficient system for issuing orders, but this efficient tool worked against the efficiency of the overall system. Each party received several pages of order even if the applicable portion was but a single sentence. I found a low familiarity with the substance of the orders I issued. Like that cell-phone service agreement, nobody was bothering to read my efficient boilerplate orders. I switched to an order that still drew from a list of standardized phrases, but the actual order issued to the parties eliminated everything other than the truly applicable language. Most orders went from a few pages to a couple of sentences. As predicted by the procedural-justice research, familiarity and compliance with the streamlined orders rose noticeably.

Better yet, the judge should address case-management standards in person at the initial case-management conference. People are inundated by documents these days, and most of them are boilerplate with little application, so they do not get read. A judge will be more effective if she explains in a live discussion the procedures used in her courtroom rather than to try and issue a tome that will only be checked later to argue a violation. Consider the irony of a common order used today that explains at length what qualifies as a genuine, good-faith satisfaction of the obligation of counsel to confer before bringing a dispute to the court. The order usually explains that a live conversation is required between the lawyers, rather than an exchange of voicemails, emails, faxes, or form letters. The irony is that this mandate of effective live communication is communicated through a boilerplate form, the very means of communication being banned due to its inherent ineffectiveness. The judge should leverage her time; she should invest a little face time to explain the process and reap the benefits of a smoother case down the road.

The Initial Case-Management Conference. The most significant and productive 15 minutes of work by the engagement-model judge is the initial case-management conference. In the conference, the judge sets the standards to which the participants will rise or fall. The judge establishes the tone and culture of the case. (Silence from the bench will also set a tone and culture for the case—one that is contrary to the interests of the judge and the community.)

The judge should start the “live” conference by taking appearances and making sure any clients are introduced. The judge should greet each person by name, specifically including clients if present. The judge should briefly explain the philosophy he plans to pursue in management of the case. Assuming the judge has adopted the approaches to motions described below, those processes and their reasons should be explained. The judge should explain his commitments to the case as well as what he expects of the lawyers. He should explain that most cases, no matter how complex, usually boil down to just a couple of key issues to be addressed. He might also explain that these issues may or may not include an issue for resolution by the court. The judge should state his goal for the conference of having a candid discussion to identify the critical path for the litigation to reach a resolution of value to the parties. If the judge feels the need, he should also try to set the lawyers at ease by explaining that the session is intended for brainstorming and that statements will not be considered admissions or binding unless a party explicitly states it is agreeing to be bound.

Next, the judge should turn to each side and ask them to explain the two or three core issues they think the case boils down to. He should ask any follow-up questions to help him understand, and he should not hesitate to reveal any confusion he may have. The judge should demonstrate his attention and engagement in the discussion. As part of this discussion, the judge will be asking the “why” questions and trying to determine the parties’ goals and reach consensus on a “purpose” for the litigation.

Next, the judge should build on the purpose defined for the litigation to start charting the course. Depending on the information revealed so far, the judge will want to ask about anticipated motions, discovery needs, expert needs, any potential obstacles to timely completion, and what is needed to make settlement discussions productive. The flow of these discussions will vary depending on the case. The judge should always ask the participants to identify as specifically as possible the steps they plan to take, keeping in mind the value of asking “why” when appropriate and getting consensus on the
The classic wisdom of judges from Jarndyce v. Jarndyce does to the community. As a scathing indictment of the court system and the damage it used this example of protracted and self-consuming litigation takes only 15 minutes. With lawyers that have been schooled sufficiently clear that the judge can go ahead and determine a clo-

sion date. The problem-solving-court model disagrees, time immemorial is that nothing resolves a case like a near and certain trial date. The problem-solving-court model disagrees, emphasizing that the conclusion must be reached when the defendant is ready and that times will vary significantly by person. Here, our experience suggests the traditional approach to civil case management is the more effective path. A firm trial/closure date is important as a symbolic end date. The firm trial/closure date is important under an intrinsic-motivation model for two reasons.

First, communicating to the participants that the litigation process will have a definite end serves the procedural-justice element of engendering trust. In the current environment, the participants need to know the court is sensitive to the limits of their resources and the need to conclude litigation. At this time, participants generally do not have this impression of the civil-litigation process.

The second reason is more foundational. Too few judges and litigation participants appreciate that every litigation involves a silent partner, the community. The community has a fundamental interest in having an effective and credible mechanism for resolving disputes peacefully. Maintaining the credibility of the court system for resolving civil disputes is critical. A court system that permits—or worse, encourages—Sisyphusian endless litigation does not provide its community with a credible means of peaceful dispute resolution and thereby destabilizes that community. Charles Dickens did not describe the Jarndyce v. Jarndyce lawsuit in Bleak House as an ode to the credibility of the English Court of Chancery. He used this example of protracted and self-consuming litigation as a scathing indictment of the court system and the damage it did to the community.

I learned to ask the lawyers to propose target dates before I offered dates. I was consistently surprised how frequently they agreed on trial targets sooner. . . .

purpose and/or value of any step. The judge should then ask when the party can take the step and when the other side can take a responsive step. Throughout these discussions, the judge is honoring the participants’ needs for voice, helpfulness, autonomy, mastery, and purpose. These discussions should then be brought to conclusion with specific timelines—noting that the timeline may include a date for deciding on a future step if setting the date for a potential future step is premature.

In most initial status conferences, the path will be sufficiently clear that the judge can go ahead and determine a closure plan for the litigation. Frequently, this will be the trial date, discussed below.

With practice, an initial case-management conference on a standard personal-injury case with lawyers new to the model takes only 15 minutes. With lawyers that have been schooled in the model on both sides, it can literally be done in as little as 5 minutes. In the spirit of lagom, a complex case may take an hour and may require more than one setting as parties are joined and issues evolve.

Trial/Closure Dates. The classic wisdom of judges fromJarndyce v. Jarndyce is that because of volume, continuing a trial would only owe a duty of effective and efficient resolution of cases to the direct participants, they owe the community a duty of maintaining the availability to all of a credible means of resolving disputes, whether large or small. Ultimately, this is the role of the courts. The courts provide a safety valve to a community by providing a credible method of resolving individual disputes peacefully. A community that does not have a credible institution for resolving disputes peacefully is not sustainable.

Therefore, the judge should set a trial/closure date as early in the case as possible. The procedural-justice variation on this guidance is that the judge must give the participants voice in the setting of the case schedule and trial date (or other procedural closure date if a trial is not required). More importantly, the judge must make sure the participants felt heard in the setting of the schedule, even if their proposal was not adopted.

To satisfy procedural fairness, the judge should conduct the trial/closure-date selection live when the schedule for the case is set. I started on the bench with a very experienced clerk. She had a host of rules and tactics to deal with traditional telephone trial settings and approached them as a battle of wills. (Never give a trial date beyond X months. Never give more than three trial dates. Know that they will always take the last date given. At the first sign of a problem, threaten them with involving the judge. After X follow-up calls or Y days, make them talk to the judge or pick a date for them.) She was usually gentle and persuasive “closer,” yet she still spent considerable time on the chore of setting trial dates. I then spent considerable time on the disputes or requests to reset that followed. We shifted to a procedural-justice approach to trial settings, and I handled them live at the initial status conference. Suddenly, the process reduced to a few minutes of my time and mere seconds for my clerk. Eventually, I learned to ask the lawyers to propose target dates before I offered dates. I was consistently surprised how frequently they agreed on trial targets sooner than I had planned to force on them. I remember one contract dispute where they agreed to set trial in two months at a conference held one month after the case was filed.

Once the trial date is selected, the judge faces an often nerve-wracking challenge. Nearly every court is required to set a trailing trial docket, which creates a tension between keeping trial dates and the knowledge that only one case can be tried at a time. The principles of intrinsic motivation tell us that a forthright and candid discussion with the participants at the outset is the right approach. Statistically, a judge could set as many as 20 cases for trial on a given day and still have high confidence that only one will need to go to trial. We usually set eight per trial day. I would then explain to the participants that the court would move heaven and earth to give them their trial date, to include finding another judge if available at the last minute. I then explained, truthfully, that after six years handling a civil docket, I had never once continued a civil trial for lack of judicial resources to try it on schedule. I went on to explain that because of volume, continuing a trial would inevitably happen someday. I then explained how I would decide which case would be continued (greatest need would go, not oldest) and why I could not make that decision until the last moment. Motions to continue trial dates all but disappeared. Calls to my clerk asking, “where do we stand?” on the
trial docket also largely disappeared. The research behind procedural justice likely explains why.

**Subsequent Case-Management Conferences.** At the conclusion of the initial case-management conference, the judge must decide if scheduled follow-up conferences will be needed. If a critical piece of information is expected from a third party or a largely dispositive motion is to be resolved by a certain time, the judge should consider setting a status conference just after that key date to help keep the case moving. While a useful tool, relatively few civil cases will actually require these. However, the offer alone from the bench helps define a culture of engaged problem solving.

**Ban Written Discovery and Procedural Motions.** At the initial case-management conference, the judge should explain that no party may file a discovery or procedural motion until conferring live with the other lawyer(s) and then collectively conferring with the judge. The judge must then commit to be available for such a call quickly, say within two business days of getting it. The strategies section includes a discussion of this approach. The following is a transcript of a typical discovery conference.

**Judge:** Counsel, how can I help you today?

**Jones:** I have not received financial records we requested, and we cannot proceed with our expert's work without them. With our schedule, we need those records by next week.

**Smith:** The request was dramatically overbroad and seeks highly sensitive and irrelevant records.

**Judge:** Ms. Jones, why does your client want these records?

**Jones:** We need to know what business they've actually been doing over the years.

**Judge:** Why do you need these records? What specific information are you seeking?

**Jones:** We need to confirm their claim that they did $1 million in business through six orders with Company X. My client does not trust the disclosure, so we need to see the P&L to be sure they are telling us everything. Judge, this is a damages and credibility issue, and the records are clearly within the scope of discovery.

**Judge:** Mr. Smith, why is your client opposing this discovery?

**Smith:** We have given them everything they are entitled to in disclosures, and we've told them about the orders. They are asking for our entire financial records, and that is highly confidential information. They are in direct competition with us, and we're not willing to provide that information.

**Judge:** Ms. Jones explains that her client wants to confirm the disclosure made in the pleading with original records. If you have already disclosed it, would those records still be confidential? Why wouldn't your client provide that confirmation?

**Smith:** We don't oppose giving copies of confirming source documents. But, judge, they asked for our P&L. The P&L doesn't even show the individual orders. And it obviously shows the overall economics of our company, which is confidential and not within the scope of discovery.

**Judge:** Does your client have documents such as work orders, invoices, and payment records that would confirm the disclosure in the pleading?

**Smith:** Yes, and we can make those available.

**Judge:** Ms. Jones, would that get your client the information he needs?

**Jones:** Judge, we don't trust that they will give us everything, but that would be a good start. These parties were partners, and there is a great deal of bad blood between them. We'd want to verify if they told us the sun rose in the morning.

**Judge:** Ms. Jones, is there someone at defendant's operation that your client does trust?

**Jones:** My client trusts Ms. Donaldson in accounting. Smith: I'm sure my client would agree to have Ms. Donaldson do the search and gather the records for production. She could also provide an affidavit attesting that these are all the transactions with Company X.

**Jones:** That would get us what we need.

**Judge:** When can we get this done?

**Smith:** Monday.

**Jones:** That would be acceptable.

**Judge:** Thank you, counsel, for your work resolving this issue.

Whether procedural, discovery, or even substantive law, these conferences follow a simple formula. The judge should plan to get the participants together live for a “real time” discussion rather than by filings. The judge should find out the purpose behind each side's action, whether it is a request or an objection. Usually, a solution presents itself to the participants. On rare occasions, an issue will have to be decided by the judge. In most cases, the judge will have sufficient information to make the decision right then. If not, a narrowly tailored schedule can be set to get the judge any information or materials needed to allow a decision.

**Expand the Ban to Substantive Motions.** Once the judge has established that no discovery or procedural motion may be filed until after the movant has consulted with the other side and discussed it with the judge, the judge should consider expanding that procedure to all motions. The substantive briefing that results will be much more focused and useful to the judge.

**Re-Purpose the Duty to Confer and ADR Obligation.** At the initial case-management conference when the judge discusses her motions procedure, the judge should use the chance to re-iterate her expectations of a collaborative approach to managing the case. She should explain that the participants are required to confer before bringing any issue to the court. In her usual explanation that a live discussion is required, the judge should go one step further to explain the purpose of the obligation to confer. She can explain that this obligation to confer is expressed in two ways. First, the lawyers must discuss any disagreement before asking the
The judge should conduct a live trial-management conference shortly before the trial. The judge should use her intrinsic-motivation tools to define the issues and flow of the trial as well as to establish the procedures for the different aspects of trial.

**Finally, Set Standards for Yourself as Well.** Succeeding in effective and efficient case management is not merely a matter of setting and maintaining expectations for the lawyers; the judge has to have high standards as well. First, the judge must commit his staff to answering the telephone whenever possible and returning messages within one business day in all other cases. A common complaint among lawyers in many states is that the court's telephone is never answered, and voicemails are not returned for several days. If the judge expects the lawyers to be responsive to his team, the judge's team needs to be responsive to the lawyers. Second, the judge must commit to resolving the distractions on an expedited basis and carving out time to do so even when inconvenient—short-term pain for long-term gain. The judge must also commit to ruling on fully briefed issues on a timely basis.

We published a standard order advising all counsel that if an issue had been fully briefed and no ruling was received within 30 days, the movant was directed to contact the division clerk to advise us, as well as to file a pleading. This was done to demonstrate a commitment to timely rulings and to relieve the angst felt by lawyers with a need for a ruling debating whether to risk the wrath of the judge or clerk by calling to ask for one. While I was annoyed the first few times a law office called four days after 150 pages of briefing had closed asking for a ruling, I soon realized it was a compliment that we had the docket running so efficiently that experienced lawyers actually expected rulings from this division that quickly.

**A PATH FORWARD**

For those readers that skipped section II because the behavioral-sciences discussion sounded too soft and fuzzy, now is the time to go back and read it. The goal of this article is not just to provide the judge with yet another package of case-management tactics that sound vaguely promising. The goal of this article is to change fundamentally our entire approach to litigation management. For decades, judges, litigators, and commentators have approached civil case management as an exercise in subduing spiraling costs and incivility. The dominant paradigm is that extrinsic control is the answer. This paradigm has largely been based on the instincts of a control-based culture (the law) akin to Hobbes' *Leviathan*. The surface-level purpose of this article is to propose shifting from an extrinsic-control philosophy of litigation management to a philosophy of self-regulation based on an intrinsic model of management and the principles of procedural justice.

The more fundamental purpose of this article is to propose that future civil litigation management should be based on research that explains human behavior—and how to manage it. Over the last several decades, litigation-management reform efforts have been based largely on instincts and anecdotes. When empirical data have been referenced, it has generally been symptomatic research rather than root-cause research: Litigation expenses and delays were studied and tactics were developed to suppress those unwanted symptoms. However, litigation managers have rarely looked beyond unwanted symptoms to the behavioral sciences to understand causes.

Only by looking to core causes can a system achieve meaningful progress in improving the process of litigation as well as enhancing the quality of the substantive result (distributive justice). Our colleagues in problem-solving courts have pointed the way to a new path to conflict management and resolution by stepping outside the lore of the law and gaining insights from the solid research of behavioral science and insights from that analogous world of enterprise/project management. The core hypothesis of this article is that future civil-case-management reform should be based on empirical research explaining human behavior first and accounting studies of the litigation process second.

Two potential bridges exist between the old approach to litigation management and the approach proposed here. First is the problem-solving-court movement. Problem-solving courts

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63. Admittedly, our pilot project also originated from this same core.

Only later, as we sought to understand what was happening, did we turn to the behavioral sciences for enlightenment.
have evolved dramatically in the last decade and are on the edge of becoming mainstream approaches to substance abuse in many spheres. These courts have more than a decade of experience in applying the knowledge of the behavioral sciences to the court system. Judges and other personnel in problem-solving courts have worked through the challenges of applying the concepts of procedural justice to the real world. Many of these judges have also learned how to digest material from the very different world of behavioral science. More importantly, the political and social interest in criminal-justice progress has meant extensive, well-funded studies have been done of what works and does not work in problem-solving courts. Any judge interested in making meaningful progress in any form of litigation management should seek the insights offered by our colleagues in the world of problem-solving courts.

The second bridge is the current trend in the dialogue about civil case management. In this article, I have used the word “trend” in the statistician’s sense of the word, a tendency or direction shown over time or data points—in this case, the pursuit of an extrinsic-control model in various forms over several decades. However, the term also has a pop-cultural meaning of the very latest idea being discussed—what’s hot. What’s hot among many commentators on civil case management is a budding movement called “proportionality.” The proponents of “proportionality” advocate the need to focus the litigation at the outset through active judicial involvement. They also promote the need to eliminate distracting litigation steps that have become rote and serve little productive purpose. Additionally, the Rule 1 project of the Institute for the Advancement of the American Legal System (“IAALS”) calls for empirically based efforts to improve the civil justice system. IAALS is a vocal proponent of proportionality.

Proportionality’s focus on an engaged judge that tailors discovery to individual case needs could serve as an excellent training ground for judges. Proportionality is, nonetheless, merely a means in service of a larger end. If the end being pursued is creating a new tactic serving an extrinsic model that seeks only to make litigation a faster and cheaper road to trial, it will achieve little more than the “rocket docket” or “differential case management” have achieved. To use Daniel Pink’s taxonomy, we need to move to Motivation 3.0 rather than just refine the existing model to Motivation 2.1. If proportionality is viewed as a stepping stone to gain the skills needed to implement a genuine intrinsic-motivation model (Motivation 3.0) as discussed here, it can be the pathway to dramatic improvements in litigation management and gains in community confidence in our court system.

Every litigation involves a silent partner: the community. The community has a fundamental interest in having a mechanism for delivering dispute resolutions. This mechanism must be credible. For our purposes, that community credibility has two components. First and foremost, it must be effective—meaning that it is accepted by the participants and the community as a fair result that actually resolves the issue. Second, it must be delivered efficiently—if justice is only available to a well-funded few or after interminable delay, the delivery system is not a credible mechanism for the community.

Judges managing civil cases must remain mindful that they not only owe a duty of effective and efficient resolution of cases to the direct participants, they owe the community a duty of maintaining the availability to all of a credible means of resolving disputes fairly, whether large or small. Ultimately, this is the role of the courts. The courts provide a safety valve to a community by providing a credible method of resolving individual disputes fairly and peacefully. A community that does not have a credible institution for resolving disputes fairly and peacefully is not sustainable.

A pernicious result of the decades-long drift in our civil litigation system is the corrosive effects of large numbers of clients settling cases based exclusively on the costs of litigation. When expense—rather than the merits of a dispute—is consistently the driving motive in dispute resolution, the system ceases to function as a credible mechanism for the community to resolve disputes. Without a credible means of reaching peaceful dispute resolution, the community must eventually cease to function.

The converse is also true. If the system’s primary focus becomes cheap-and-fast resolutions where perceived justice and fairness suffer, the system again lacks credibility. If cheaper and faster are the primary goals, one might as well install a computer terminal using a random-number generator to resolve civil disputes.

The strong trend in recent decades to move civil litigation to alternate-dispute-resolution systems is the greatest claxon calling us to change our approach. Arbitration is the most common alternate, and it is a system with few procedural or substantive protections for achieving distributive justice. Also, the degree of quality one gets in arbitration is heavily influenced by one’s economic resources—not a healthy trend in a nation founded on the goal of equal access to justice for all. People are not flocking to the benefits of arbitration; they are fleeing the negatives of our current litigation process.

I do not believe these are signs of a dispute-resolution system that is structurally wrong—i.e., that our adversarial system is the wrong model. My confidence in the basic design of our court system has never been stronger. Instead, I think they are signs that our approach to managing the human beings in our court system suffers a basic philosophical flaw—the pursuit of an extrinsic-command-and-control model instead of an intrinsic-motivation model. Reform cannot focus merely on reducing the costs and delays of delivering distributive justice; it must do so while serving the participants’ need for procedural justice, or it will continue to suffer a systemic lack of credibility. The path ahead is the intrinsic model.

64. See PINK, supra note 26, at 75.
CONCLUSION

Criticism of the inefficiencies and delays within the current civil litigation system is widespread. Many tactics have been tried in recent years to ameliorate the perceived negative characteristics of our litigation system—suppress distracting discovery and motion disputes as well as uncivil conduct by lawyers while pushing cases to move faster to trial. Nonetheless, dissatisfaction with civil litigation remains widespread in the community as well as among participants. Prior civil-litigation-management efforts have clung to a traditional enterprise-management philosophy based on extrinsic command and control. A new approach is needed.

Many have recognized that the time is ripe for a significant change in how we manage civil litigation. For example, a primary reason IAALS exists is to improve our system. The Conference of Chief Justices adopted a resolution in late 2011 encouraging pilot projects to improve civil case management. The question is what will drive the next revision to civil case management.

Civil-litigation-management reformers should take their cue from their colleagues in the problem-solving-court movement. They should look beyond the traditions of the legal sector for insights. They should move beyond asking what parts of the current civil litigation system we want to suppress and ask the broader questions of what drives human behavior and how we can use that knowledge to make our litigation system work better. They should look to the empirical data available in the behavioral sciences. That data, most accessible to the legal professional through the procedural-justice movement, tell us that we should move to an intrinsic model of litigation management.

An intrinsic or engagement-based model will eliminate or minimize distractions, reduce resources required for each case, reduce caseloads by achieving faster resolutions, and free judges to provide more thoughtful and well-crafted rulings. An intrinsic model will also increase participant acceptance of and satisfaction with the resolution ultimately reached.

By engagement through an intrinsic model, judges can achieve efficient and effective case resolutions that still deliver just results. Moreover, management by engagement will increase the parties’ satisfaction with the case results and, correspondingly, increase the public’s confidence in our court system. So, engage today.

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A noncitizen charged with a criminal offense faces a dual risk of serious consequences: in addition to the sentence that could be imposed as a result of his criminal conviction, a noncitizen defendant may also face severe immigration consequences, including removal from the United States, if he is convicted of a crime. We recommend that trial court judges advise noncitizen defendants of the potential immigration consequences of their criminal convictions so that immigrants are fully informed of their rights. In section I, we first explain the United States Supreme Court’s decision in Padilla v. Kentucky, which held that attorneys must advise their clients of the immigration consequences of their convictions. We demonstrate that trial court judges have a similar duty to advise noncitizen defendants because they have always played a role in ensuring effective assistance of counsel and ensuring knowing and voluntary pleas.

In section II, we summarize the areas of immigration law in which a criminal conviction or the sentence imposed by a trial court judge can have serious implications for noncitizens. In section III, we examine the various approaches currently taken by states that have imposed a statutory duty on judges to advise noncitizen defendants about the immigration consequences of their convictions. Based on an analysis of the strengths and weaknesses of these statutory advisements, we present a model judicial advisement in section IV that ensures a non-immigrant defendant receives adequate advice and is fully informed about the potential immigration consequences of a criminal conviction.

I. TRIAL COURT JUDGES’ DUTY TO UPHOLD DEFENDANTS’ RIGHTS INCLUDES PROTECTING THE RIGHT TO ACCURATE, INFORMED IMMIGRATION INFORMATION

In this section, we examine the role of trial court judges when noncitizen criminal defendants appear before them. This section starts by addressing the recent United States Supreme Court decision in Padilla v. Kentucky, which created affirmative obligations for defense attorneys to advise their clients regarding the immigration consequences of criminal convictions. Next, we demonstrate that trial court judges have a similar duty based on their preexisting duties to ensure effective assistance of counsel and to ensure guilty pleas are knowing and voluntary.

A. PADILLA V. KENTUCKY: IMMIGRANT DEFENDANTS HAVE A RIGHT TO KNOW ABOUT POTENTIAL REMOVAL FROM THE UNITED STATES

The United States Supreme Court decision in Padilla v. Kentucky clarified defense counsel’s obligations with respect to immigration advice but left open the question of judges’ roles in ensuring noncitizen defendants understand the immigration consequences of their criminal convictions. We recommend that judges should also play a role in advising immigrants of the consequences of their criminal convictions based on judges’ preexisting obligations to protect the due-process rights of criminal defendants.

1. Padilla v. Kentucky: Facts and Holding

In 2010, the United States Supreme Court decided Padilla v. Kentucky, which held that criminal defense attorneys are required to advise their clients of the potential immigration consequences of their guilty pleas. José Padilla was a lawful permanent resident and native of Honduras who had been legally present in the United States for 40 years. Mr. Padilla was also a veteran of the Vietnam War, a fact the Supreme Court noted in the first paragraph of its opinion. Mr. Padilla was charged with transporting a large quantity of marijuana in his trailer and pled guilty on the basis of his attorney’s erroneous advice. His attorney advised him to plead guilty because the attorney believed that Mr. Padilla “did not have to worry about immigration status since he had been in the country so long.” This advice was, unfortunately, incorrect. The federal Immigration and Nationality Act (“INA”) dictates that

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Footnotes

2. Id. at 1477.
3. Id. Justice Stevens authored the majority opinion of the court, joined by Justice Kennedy, Justice Ginsberg, Justice Breyer, and Justice Sotomayor. Justice Alito concurred, joined by Justice Roberts, and Justice Scalia authored a dissenting opinion in which Justice Thomas joined. Id. at 1477, 1487, 1494.
4. Id. at 1477–78.
5. Id. at 1478 (quoting Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008)) (internal quotation marks omitted).
an alien who is convicted of a controlled-substance violation is automatically subject to removal.\(^6\)

As a result of his conviction following his guilty plea, Mr. Padilla was placed in removal proceedings. He raised a post-conviction challenge to his criminal conviction, alleging that his attorney's incorrect advice amounted to ineffective assistance of counsel.\(^7\) The Supreme Court of Kentucky denied Mr. Padilla's claim without a hearing, holding that removal was a mere “collateral consequence” of a criminal conviction and therefore did not fall under the purview of the Sixth Amendment's effective-assistance doctrine.\(^8\) Under the collateral-consequences doctrine, a defendant must make a plea with full knowledge of the direct consequences of his conviction in order to satisfy due process.\(^9\) If a defendant makes a plea and is unaware of the collateral consequences, however, the plea still withstands constitutional scrutiny.\(^10\) On appeal, the United States Supreme Court held that effective assistance of counsel requires an attorney to advise her client whether a criminal conviction carries a risk of removal.\(^11\) The Court held that the collateral-consequences doctrine did not apply to severe immigration consequences, such as removal from the United States. Instead, the Court summarily concluded that the Sixth Amendment itself requires affirmative immigration advice.\(^12\)

The Court referenced recent changes in immigration law, noting that the system had evolved from one that allowed trial court judges to influence which convictions would result in removal to one that requires automatic removal as the result of many criminal convictions.\(^13\) The Court stated that these “changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction.”\(^14\) In light of these serious consequences, the Court concluded that counsel's failure to provide immigration advice could constitute ineffective assistance of counsel.\(^15\)

The test for ineffective assistance of counsel was set forth in a 1984 United States Supreme Court case, \textit{Strickland v. Washington}. \textit{Strickland} states that for a defendant to prove he received ineffective assistance of counsel, he must prove first that his counsel's performance was deficient, and second, that but for counsel's deficient performance, the outcome of the case would have been different.\(^16\) In the specific context of Mr. Padilla's case, the Court concluded under \textit{Strickland} first prong that counsel's performance was deficient. The Court stated that the consequence of automatic removal resulting from a conviction of transporting marijuana was clear from the plain text of the immigration statute and that counsel was therefore deficient for failing to advise his client of that fact.\(^17\) With regard to \textit{Strickland} second prong, the court remanded to the lower Kentucky courts to determine whether Mr. Padilla would not have pled guilty but for his counsel's erroneous statement that he would suffer no immigration consequences.\(^18\)

\section*{2. What Padilla Requires from Attorneys}

Before \textit{Padilla}, state courts and the United States Courts of Appeals had split on the issue of whether defense counsel had a duty to advise his client of the immigration consequences of a guilty plea or conviction.\(^19\) Despite attempting to standardize and clarify defense counsel's duty with respect to immigration advice, the \textit{Padilla} opinion did not address how specific defense counsel's advice must be.\(^20\)

Under the specific facts of \textit{Padilla}, the Court stated that Mr. Padilla's attorney should have advised him that a guilty plea would have resulted in removal because the immigration statute at issue was clear that any controlled-substance violation triggered automatic removability.\(^21\) The Court was less forceful, however, in declaring the type of advice that would be required in other scenarios.\(^22\) Acknowledging that immigration law is “complex” and “a legal specialty of its own,” the Court opined that when the immigration consequences of a conviction were less certain than in Mr. Padilla's case, a defense attorney would not be required to provide a detailed warning on the specific immigration consequences.\(^23\) Instead, in those scenarios, “a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.”\(^24\)

6. INA § 237(a)(2)(B)(i) (“Any alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance, other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.”).
8. \textit{Id}.
10. \textit{Id}.
12. \textit{Id}. at 1482.
14. \textit{Id}. at 1480.
15. \textit{Id}. at 1486 (“[W]e now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.”).
17. \textit{Padilla}, 130 S. Ct. at 1483. (“This is not a hard case in which to

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\(^{18}\) Another issue left open by the Court and later resolved was whether \textit{Padilla} would apply to incorrect immigration advice given before 2010. See infra Section I.B.2.
\(^{19}\) \textit{Id}. at 1483; see also INA § 237(a)(2)(B)(i).
\(^{20}\) \textit{Padilla}, 130 S. Ct. at 1483.
\(^{21}\) \textit{Id}.
\(^{22}\) \textit{Id}.
Justice Alito concurred in the judgment but disagreed that defense attorneys should have an affirmative duty to provide immigration advice. Rather, he stated his belief that counsel should either refrain from giving any immigration advice at all or provide noncitizen clients with a general warning of potential immigration consequences while encouraging them to consult an immigration attorney for specific advice. The majority opinion rejected this approach, citing the “absurd” effect it would have of incentivizing attorneys to remain silent on immigration matters, even where accurate and rudimentary immigration advice was readily available. The majority’s rejection of Justice Alito’s approach demonstrates the Court’s concern that noncitizens receive accurate and informed advice and militates in favor of judicial advisements in addition to those provided by attorneys.

*Padilla* makes clear that although defense attorneys are not expected to become immigration-law experts, they are expected to research the relevant immigration statutes and apply settled caselaw when giving their clients immigration advice. In contrast to this affirmative duty on attorneys, the Court did not explicitly address the role of trial court judges in advising noncitizen defendants. The next section explains why trial court judges should also take steps to uphold noncitizens’ rights.

### B. WHY *PADILLA* REQUIRES TRIAL COURT JUDGES TO ENSURE NONCITIZEN DEFENDANTS ARE INFORMED ABOUT THE IMMIGRATION CONSEQUENCES OF A CONVICTION

The *Padilla* opinion was clear with respect to the fact that defense attorneys have an affirmative duty to provide immigration advice, even though it is not entirely certain how specific this advice must be. For judges presiding over criminal prosecutions of noncitizens, however, the implications of *Padilla* were less explicit. This section will examine judges’ preexisting duties to protect defendants’ rights. We conclude that these preexisting duties, combined with the Court’s concern for noncitizen defendants as expressed in *Padilla*, require trial court judges to take steps to protect noncitizen defendants, including advising them of their rights and the risk of removal.

#### 1. Trial Court Judges’ Preexisting Duty to Ensure Effective Assistance of Counsel Includes the Right to Accurate Immigration Advice

In *Strickland v. Washington*, the United States Supreme Court recognized the right to the effective assistance of counsel for all criminal defendants. *Strickland* set a high bar for criminal defendants attempting to allege their trial counsel was ineffective. In the context of a plea, *Strickland* requires a showing that the defendant would have chosen to proceed to trial rather than pleading guilty, but for his counsel’s deficient advice.

The trial judge is responsible for ensuring that criminal defendants receive due process of law, including verifying that a defendant is aware of all her Sixth Amendment rights and that counsel is performing effectively. Appellate judges see claims of ineffective assistance of counsel in criminal appeals. Now, under *Padilla*, the Sixth Amendment right to effective counsel includes accurate advice on the removal consequences of a criminal conviction, meaning that trial and appellate judges must also be concerned about whether counsel is complying with this new requirement.

This concern for a noncitizen defendant’s right to accurate immigration advice may arise in a number of different scenarios. For example, trial court judges need to consider defense counsel’s ability to provide immigration advice when appointing counsel to an indigent defendant who faces immigration consequences as the result of a conviction. Furthermore, even for non-appointed counsel, an attorney’s general ability to provide competent immigration advice is an important aspect of the Sixth Amendment following the *Padilla* decision. We recommend that judges ensure defense counsel’s ability to provide accurate immigration advice by asking the attorney whether they feel he can properly advise his client on the immigration consequences of a conviction. Trial court judges cannot inquire into the exact nature of immigration advice an attorney gives his client, however, because of attorney-client confidentiality.

Furthermore, the *Padilla* mandate presents a special concern for noncitizen defendants who are not entitled to an appointed attorney. The United States Supreme Court has determined which indigent defendants are entitled to an appointed attorney in a set of three cases, *Argersinger v. Hamlin*, *Scott v. Illinois*, and *Alabama v. Shelton*. These cases state that an indigent criminal defendant charged with a misdemeanor is not entitled to appointed counsel if he does not

25. *Id.* at 1487 (Alito, J., concurring).
26. *Id.*
27. *Id.* at 1484.
29. *See id.*
31. *See generally id.*
32. *See infra Section II.A.*
33. While this duty may arise more commonly on appeal when a defendant raises an ineffective-assistance-of-counsel claim, many commentators agree that judges nevertheless have a duty to ensure effective assistance during trial-level proceedings to the extent possible. *See Judicial Obligations, supra* note 19, at 16 (“From the inception of a criminal process, judges have a general duty to be attentive to the quality of defense counsel.”).
34. See Steven Weller and John A. Martin, *Implications of Padilla v. Kentucky* on the Duties of State Court Criminal Judges 5-6 (work in progress), http://www.sji.gov/PDF/Implications_of_Padilla_for_State_Court_Judges.pdf (hypothesizing that in addition to judicial concerns for attorney competence in appointing counsel for indigent defendants, Padilla might also be implicated when judges select attorneys for inclusion in an indigent defense pool or select private counsel to represent defendants pro bono).
receive jail time for his sentence.\textsuperscript{37} The United States Supreme Court has not addressed what happens when an indigent criminal defendant is charged with a non-jailable offense that may nevertheless lead to his removal.\textsuperscript{38} Given the Padilla Court’s concern for noncitizens, we recommend that trial court judges err on the side of protecting noncitizens’ rights by appointing counsel to indigent defendants charged with non-jailable offenses that carry the risk of removal.

\section{2. When Defendants Can Challenge Inaccurate Immigration Advice Given Before Padilla}

At the time Padilla was decided, it was not clear whether it applied to pre-2010 criminal convictions. Lower courts split on the issue of whether Padilla should have retroactive effect, but in a 2013 case, \textit{Chaidez v. United States}, the United States Supreme Court clarified that it read Padilla to apply only prospectively.\textsuperscript{39} The Court applied the test of retroactivity set forth in \textit{Teague v. Lane}. The Teague retroactivity test states that new rules of criminal procedure apply prospectively, while mere clarifications of existing law are given retroactive effect.\textsuperscript{40} The Court concluded that Padilla announced a new rule because the Padilla Court first had to determine whether immigration advice even fell within the ambit of the Sixth Amendment.\textsuperscript{41} The Court stated that Padilla was the first time that a court had recognized counsel’s affirmative duty to provide accurate immigration advice, despite the fact that many states already required trial courts to ensure counsel had advised his client on the immigration consequences of a plea.\textsuperscript{42} The Court held that Padilla did not have retroactive effect based on its conclusion that requiring defense attorneys to advise their clients on immigration matters was a new rule.\textsuperscript{43}

Justices Sotomayor and Ginsburg authored a strong dissent in \textit{Chaidez}, asserting that Padilla “did nothing more than apply the existing rule of \textit{Strickland}” to the new scenario of defective immigration advice.\textsuperscript{44} The dissent cited other cases in which \textit{Strickland}s application to new factual situations did not trigger prospective-only application\textsuperscript{45} and noted that professional norms regarding immigration advice had evolved with the changing stakes of immigration law to require accurate immigration advice even before the Padilla decision.\textsuperscript{46}

Despite the majority opinion in \textit{Chaidez} declining to retroactively apply Padilla, the Supreme Judicial Court of Massachusetts has decided to give Padilla retroactive effect within Massachusetts.\textsuperscript{47} Before the United States Supreme Court’s ruling in Chaidez, the Massachusetts high court had decided that Padilla should have retroactive effect.\textsuperscript{48} After the Chaidez decision, the Supreme Judicial Court of Massachusetts affirmed that it would continue to apply Padilla retroactively by deciding \textit{Commonwealth v. Sylvain}.\textsuperscript{49} In Sylvain, the defendant pled guilty in 2007 to a drug charge based on his attorney’s erroneous advice that he would not be removed as a consequence.\textsuperscript{50} The issue in Sylvain was whether the defendant should be permitted to bring a Padilla claim despite the fact his conviction predated the Padilla decision.\textsuperscript{51} The Massachusetts high court affirmed its prior decision and re-stated that Padilla should apply retroactively despite the United States Supreme Court’s ruling to the contrary in Chaidez.\textsuperscript{52} The court relied on its ability to independently apply the Teague framework in determining whether a constitutional criminal-procedure rule should have retroactive effect or not.\textsuperscript{53} Under its independent application of \textit{Teague}, the Massachusetts court sided with the Chaidez dissent in concluding that Padilla did not announce a new rule of criminal procedure and therefore had retroactive effect.\textsuperscript{54} The court also held that the Massachusetts constitution independently required accurate immigration advice and that Padilla therefore did not announce a new rule under either the federal or state constitutions.\textsuperscript{55}

The Sylvain decision opened up the possibility that other state courts might choose to apply Padilla retroactively in spite of the United States Supreme Court’s decision in Chaidez.\textsuperscript{56} For example, the New Mexico Supreme Court recently permitted the New Mexico Legal Academics and the National Immigration Project of the National Lawyers Guild to file an amicus brief on the question of Padilla retroactivity.\textsuperscript{57} A Padilla-retroactivity case is also pending in New York.\textsuperscript{58}

The United States Supreme Court’s opinion in Padilla and

\begin{thebibliography}{16}
\bibitem{37. Shelton} Shelton, 535 U.S. at 662.
\bibitem{38. Weller} See also Weller & Martin, supra note 34, at 6 (recognizing the special challenges presented by unrepresented defendants who face immigration consequences).
\bibitem{40. Teague} Teague v. Lane, 489 U.S. 288, 311 (1989).
\bibitem{41. Chaidez} Chaidez, 133 S. Ct. at 1111.
\bibitem{42. Many states} Many states had rules in place before Padilla that required trial court judges to ensure defendants understood the immigration consequences of their pleas. See infra Section III.B.
\bibitem{43. Chaidez} Chaidez, 133 S. Ct. at 1112–13.
\bibitem{44. Id.} Id. at 1114 (Sotomayor, J., dissenting).
\bibitem{45. Id.} Id. at 1115 (Sotomayor, J., dissenting).
\bibitem{46. Id.} Id. at 1116 (Sotomayor, J., dissenting) (“Our application of Strickland in Padilla followed naturally from these earlier observations about changes in immigration law and the accompanying evolution of professional norms.”).
\bibitem{49. Sylvain} Sylvain, 466 Mass. at 423.
\bibitem{50. Id.} Id.
\bibitem{51. Id.} Id.
\bibitem{52. Sylvain} Sylvain, 466 Mass. at 423–24.
\bibitem{53. Id.} Id. at 434 (“[B]ased on our authority to conduct an independent review, ‘[w]e are not required to blindly follow [the Supreme Court’s] view of what constitutes a new rule.’”) (quoting Rhoades v. State, 233 P.3d 61 (Idaho 2010)).
\bibitem{54. Id.} Id. at 435.
\bibitem{55. Id.} Id. at 436 (“For the same reasons that we determined that the Sixth Amendment right enunciated in Padilla was not a ‘new’ rule, we conclude that the defendant’s coextensive right under art. 12 [of the Massachusetts Constitution] does not constitute a ‘new’ rule.”).
\bibitem{57. Brief of} Brief of Amici Curiae, Ramirez v. State, No. 33,604 (New Mexico Supreme Court).
\end{thebibliography}
the divergent approaches to retroactivity taken by the nation's high court and state courts leave this an area of flux. It is possible that in the coming months and years, other states will follow Massachusetts's lead and elect to apply Padilla retroactively under either an independent application of Teague or on state constitutional grounds. We recommend that trial court judges ensure noncitizen defendants' rights are protected in all future cases to avoid unnecessary appeals implicating Padilla.

3. Trial Court Judges Must Ensure Noncitizen Defendants Are Aware of the Immigration Consequences of Pleading Guilty

Trial court judges presiding over criminal proceedings will frequently encounter noncitizen defendants who want to enter a plea of guilty rather than proceeding to trial. Due process and many state and federal rules of criminal procedure place an affirmative duty on judges to ensure that guilty pleas are made knowingly and voluntarily. After Padilla, the trial court should verify that a defendant is aware of the immigration consequences of a conviction before allowing the defendant to enter a guilty plea. For example, the New York Court of Appeals recently decided People v. Diaz, which held that as a matter of due process, the trial court is required to advise a noncitizen defendant that a criminal conviction may result in removal from the United States. We recommend that all trial court judges follow New York's lead and ensure noncitizen defendants are fully informed before pleading guilty.

a. Basic Principles of Due-Process Fairness Require Advising Defendants of Potential Immigration Consequences of Pleading Guilty

The Fifth Amendment and Fourteenth Amendments require that no defendant be deprived of life or liberty without due process of law. For trial judges, this means ensuring that criminal defendants are aware that pleading guilty to a crime constitutes a waiver of certain rights and that defendants undertake such a waiver with full knowledge of its consequences. Rules of criminal procedure in various jurisdictions may also require certain safeguards to protect a defendant's rights during a plea proceeding. Padilla itself was silent on whether its holding extended to require trial judges to determine a defendant's awareness of immigration consequences before accepting a guilty plea. However, the Padilla Court emphasized the severity of removal as a consequence of a criminal conviction and placed an affirmative duty on defense counsel to advise a criminal defendant on immigration consequences before the defendant accepts a plea. Padilla's implications for trial judges during a plea colloquy are complicated by the Court's refusal to classify immigration consequences as either collateral or direct, but given the Court's acknowledgment that immigration advice is essential information and that removal is a serious consequence, we recommend that judges ensure defendants are aware of the immigration consequences of their guilty pleas.

b. Trial Court Judges Should Advise Defendants of the Risk of Removal, Despite the Padilla Court's Unwillingness to Label Removal a "Direct Consequence" of a Criminal Conviction

Courts have struggled to determine what information due process requires a defendant to know and understand before entering a guilty plea. In Brady v. United States, the United States Supreme Court determined that a defendant must make a guilty plea with a full understanding of the direct consequences of his plea. In Hill v. Lockhart, the Court clarified that a plea made without full understanding of the collateral consequences could nevertheless be voluntary, as long as the direct consequences of the plea were made clear. This collateral/direct distinction led courts to debate what qualifies as a direct, as opposed to collateral, consequence of a criminal conviction. Before Padilla, a number of state courts and United States Courts of Appeals had applied the collateral-consequences doctrine to the immigration consequences of a guilty plea and concluded that immigration consequences were collateral.

Padilla itself did not explicitly state whether immigration consequences fell under the ambit of due process required when courts accept guilty pleas. Rather than declaring that immigration consequences are direct consequences of a guilty plea, the Court declined to apply the direct/collateral framework at all. Although the court did not define removal as a "direct" consequence, it nevertheless acknowledged the severity of removal and the importance of accurate immigration advice. We recommend, therefore, that trial court judges ensure defendants are aware of the immigration consequences of their convictions before accepting guilty pleas.

For trial court judges to be able to assess whether defense counsel has given accurate immigration advice and defendants are well-informed when accepting a plea, an understanding of some aspects of immigration law is necessary. The next section

60. U.S. Const. amend. V. XIV.
61. See, e.g., Fed. R. Crim. P. 11(b) (requiring the court to conduct a colloquy before acceptance of a guilty plea); Iowa R. Crim. P 2.8(2)(b) (same).
63. Id. at 1482 (“The collateral versus direct distinction is thus ill-suited to evaluating a Strickland claim concerning the specific risk of deportation.”).
64. Brady v. United States, 397 U.S. 742, 455 (1970) (“A plea of guilty entered by one fully aware of the direct consequences . . . must stand.”) (quoting Shelton v. United States, 246 F.2d 571 (5th Cir. 1957)).
66. See Margaret Colgate Love, Collateral Consequences After Padilla v. Kentucky: From Punishment to Regulation, 41 ST. LOUIS U. PUB. L. REV. 87, 96–98 (2011) (explaining that punishment for a crime is a direct consequence, but civil consequences such as license revocation are collateral).
67. See JUDICIAL OBLIGATIONS, supra note 19, at 12.
68. Padilla, 130 S. Ct. at 1482.
69. Id. at 1486.
turns to the relevant portions of the INA that might be implicated when a trial court convicts and sentences a noncitizen defendant.

II. FEDERAL IMMIGRATION LAW DEFINING THE CONSEQUENCES OF CRIMINAL CONVICTIONS

The federal Immigration and Nationality Act (INA) imposes statutory consequences for immigrants that have been convicted of certain crimes. Only an immigration judge may issue a removal order, but this section illustrates the extent to which a sentence from a criminal proceeding could have the added effect of removal from the United States in an immigration context. This additional consequence makes immigration concerns very important for criminal sentencing by trial court judges.

A. OVERVIEW OF A NONCITIZEN’S REMOVAL BY IMMIGRATION COURT POST CRIMINAL CONVICTION

Immigrants who have been convicted of certain qualifying crimes are removable from the United States by U.S. Immigration and Customs Enforcement (ICE). An immigrant must be convicted of the crime in order to be found removable by an immigration judge: a conviction includes all formal judgments of guilt entered by a court as well as all suspended sentences following a plea of guilty or nolo contendere or where the defendant has admitted sufficient facts to warrant a finding of guilt. Upon conviction, an individual immigrant will generally serve her sentence as mandated by the court; when she is eligible for release from state custody, ICE is notified to take her into custody under a 48-hour maximum detainer. An immigration detainer (Form I-247) is a request from ICE for local law enforcement to temporarily hold an immigrant pending an immigration proceeding or removal.

At this point, removal proceedings may occur: only an immigration court can issue an order for removal from the United States. An immigration court will compare the crime the individual has been convicted of with the relevant federal criminal act, according to the references in the Immigration and Nationality Act. The court will apply either a categorical or a modified categorical approach (discussed in subsection C, below) to determine whether the crime the immigrant has been convicted of matches the statutory requirements under federal law that are identified in the INA. If it does, and the immigrant does not qualify for various forms of relief under immigration law, the immigration judge may issue an order of removal or allow the immigrant to leave the country on her own under “voluntary departure.”

B. IMMIGRATION AND NATIONALITY ACT PROVISIONS REGARDING CRIMINAL CONVICTIONS

Section 237(a)(2) of the INA outlines various criminal offenses that make an alien removable in broad categories, including crimes involving moral turpitude, aggravated felonies, and other miscellaneous offenses, each of which is discussed in this subsection. These specific offenses make an immigrant removable under the procedure outlined in subsection II.A., above. To determine whether a state criminal conviction qualifies as a removable offense under federal law, an immigration judge compares the elements of the state statute with the generic federal definitions: an immigration judge looks at the “ordinary, contemporary, and common meaning” of the [criminal] term [indicated by the INA] by looking to the common law, the contemporary meaning of the term as expressed in state and federal law, and other respected sources such as the Model Penal Code. This immigration-court determination compares state and federal criminal statutes to ascertain the purpose and scope of removability under the INA.

In outlining the qualifying crimes that result in removability, the INA makes distinctions between the “term of imprisonment,” “sentence,” and potential sentence that is imposed on a criminal defendant. A term of imprisonment is defined by the INA as “the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.” This term includes any detention time and the entirety of the sentence imposed. “Sentence” is used for the same definition and includes what is ordered by the court without respect to actual time served by the noncitizen. Conversely, certain INA provisions condition a removable offense on the maximum potential sentence available for the crime under state law. Other removable offenses are conditioned on the time the crime is committed or financial minimums of the crime.

The subsections of INA 237(a)(2) detail the various other criminal offenses that result in removal from the United States: controlled-substance offenses, other than a single offense of personal possession of 30 grams or less of marijuana; convictions that show the immigrant is a drug abuser or addict; possession or sale of unlawful firearms or destructive devices; crimes related to espionage, sabotage, treason, or sedition; removal or allow the immigrant to leave the country on her own under “voluntary departure.”

70. See Immigration and Nationality Act (1965).
71. INA § 101(a)(48)(A).
74. INA § 240B.
75. INA § 237(a)(2).
77. INA § 101(a)(48)(B).
78. Id.
79. See INA § 101(a)(43)(J), (T).
80. See, e.g., INA § 237(a)(2)(A)(ii)(I) (“is convicted of a crime involving moral turpitude committed within five years . . . after the date of admission.”).
81. See, e.g., INA § 101(a)(43)(D) (“if the amount of funds exceeded $10,000.”).
82. INA § 237(a)(2)(B)(i).
83. INA § 237(a)(2)(B)(ii).
84. INA § 237(a)(2)(C).
85. INA § 237(a)(2)(D).
domestic violence, stalking, criminal child abuse, child neglect, or child abandonment; violation of a protection order related to domestic violence; and human trafficking.

Some alternative qualifications for removability in the INA are also crimes, even when they are not codified under Section 237(a)(2) of the Act. For example, an immigrant who is present in the United States without lawful admission (someone who has “entered without inspection”) is in violation of the law but is removable according to Section 237(a)(1)(B) of the INA. Entering into a marriage for the fraudulent purposes of obtaining immigration benefits and document fraud are also crimes located in other subsections of INA Section 237. However, Section 237(a)(2) of the INA is the proper scope for trial court judges: this section includes the circumstances where the conviction of a noncitizen in a criminal court may be reviewed by an immigration judge for removability. The various other removable offenses in the INA are generally litigated only in immigration courts, even when they are also crimes under federal law.

1. Federal Immigration Definition of “Aggravated Felony”

Section 237(a)(2)(A)(ii) of the INA makes immigrants that have been convicted of an aggravated felony removable. “Aggravated felony” as an immigration-specific term refers to a broad class of crimes in federal immigration law, defined in Section 101(a)(43) of the Act. This broad category includes, among others, murder, rape, theft, crimes of violence against a person or property, domestic abuse, stalking, trafficking in drugs or persons, fraud, child pornography, and false documents. Several of these aggravated-felony crimes require that a “term of imprisonment of at least one year” may be imposed or set certain minimums for crimes to qualify (such as “amount of the funds exceeded $10,000.”)

3. Federal Immigration Definition of “Crimes Involving Moral Turpitude”

There is no definition of a “crime involving moral turpitude” (CIMT) in the Immigration and Nationality Act or other federal laws. Therefore, the definition of such a crime must be assessed through judicial interpretation by the Board of Immigration Appeals. A CIMT, defined generally, is one “that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between persons, either to individuals or society in general.”

Such a crime “must involve evil or malicious intent or inherent depravity.” “Neither the seriousness of the crime nor the severity of the sentence is determinative of whether a crime is a crime of moral turpitude.” Determining whether a crime involves moral turpitude requires an examination of the elements of the crime under a categorical or modified categorical approach as described in subsection C, below. The determination of construction is driven “by the statutory definition or by the nature of the crime not by the specific conduct that resulted in the conviction.”

Some common examples of crimes involving moral turpitude include: “crime[s] involving intent or reckless behavior to commit great bodily harm . . . crimes involving an intent to defraud [theft, fraud, perjury] . . . prostitution . . . [and] money laundering.” A simple case of driving under the influence (DUI) is not a CIMT, but committing a DUI while knowingly driving on a license previously revoked for a different DUI is a CIMT. Assault may be a CIMT but only if there is an aggravating factor that is charged.

C. RULES OF STATUTORY CONSTRUCTION IN IMMIGRATION LAW

Following a criminal conviction by a trial court judge, an immigration judge must determine whether a noncitizen is removable by comparing her conviction under state law with the applicable federal law described in the INA. This process of statutory construction only involves the immigration courts, but understanding the process may benefit trial judges by demonstrating the full consequences of a conviction that is imposed in criminal court. To determine whether a conviction renders an immigrant removable, the immigration judge uses either a categorical or modified categorical approach. A categorical approach requires that “the judge must determine if there is a realistic probability, not a theoretical possibility that the criminal statute would be applied to reach [removable] conduct.”

This categorical approach requires that the full range of the criminal statute under which an immigrant is convicted yields a removable offense under federal law. Therefore, vague or overbroad statutes that include conduct that does not result in removability under relevant federal law does not yield immigration consequences. A modified categorical approach allows the reviewing immigration judge to conduct a limited examination of the record to determine whether the elements

86. INA § 237(a)(2)(E)(i).
87. INA § 237(a)(2)(E)(ii).
88. INA § 237(a)(2)(F).
89. INA § 237(a)(1)(B).
90. INA § 237(a)(1)(G).
91. INA § 237(a)(3)(C).
93. INA § 101(a)(43).
94. Id.
95. Id.
96. INA § 237(a)(2)(A)(i).
97. BENCH GUIDE, supra note 73, at 37–40.
99. Id.
101. See Matter of Torres-Varela, 23 I. & N. at 84–85.
102. McNaughton v. INS, 612 F.2d 457, 459 (9th Cir. 1980).
103. BENCH GUIDE, supra note 75, at 38.
104. Id.
105. Id.
of the state crime demonstrate removability. The limited examination of the record of conviction may include “documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript.”

A series of decisions by the United States Supreme Court in summer 2013 clarified the approach to rules of construction regarding criminal convictions that carry immigration consequences. Descamps v. United States involved a criminal case where the defendant, Descamps, was convicted in 1978 for the burglary of a grocery store. The 1978 conviction was under a state statute that did not include unlawful entry as an element of the crime. This charge was the defendant’s third violent felony in violation of the federal Armed Career Criminal Act (ACCA), which imposes an enhanced conviction on the defendant; however, the language of the ACCA includes “unlawful entry” as an element of the crime. This presented the question of whether the 1978 conviction could qualify under the ACCA, which would require a modified categorical approach to examine the facts of the 1978 conviction. The Ninth Circuit found this element of the 1978 conviction satisfied by Descamp’s plea bargain; however, the United States Supreme Court disagreed and reversed Descamp’s enhanced conviction under ACCA. In her opinion, Justice Kagan stated that the modified categorical approach is inapplicable to a statute such as the ACCA, which contains a single, indivisible set of elements.

The United States Supreme Court held in Moncrieffe v. Holder that the traditional categorical approach to statutory construction applies under a Georgia statute for marijuana possession with intent to distribute. This result was due to the mismatch of the Georgia statute to federal law under a categorical approach: the Georgia statute covers some criminal conduct that falls outside the aggravated felony definition at federal law, which carries immigration consequences. This case reaffirms the court’s traditional reliance on the categorical approach when comparing convictions under state criminal statutes to applicable federal law.

Descamps and Moncrieffe assert a specific framework for immigration judges in constructing statutes to determine whether they match the general federal definition of a particular crime and can result in removal from the United States. The initial step is always to use the categorical approach, sometimes known as the “minimum conduct” test: “does the minimum conduct necessary to violate the statute match the generic immigration definition at issue?” If the answer is no, the modified categorical approach may be used but is restricted to divisible statutes: it “is reserved only for statutes which set forth multiple, separately defined offenses, one of which would trigger the generic immigration definition.” Taken together, the court’s holdings in Descamps and Moncrieffe can be conceptualized as a three-part test. The following graphic represents the test that immigration judges engage in to determine removability, which is further explained in subsections 1–3.

### 1. Step 1: Apply the Categorical Approach
Under both Descamps and Moncrieffe, the traditional categorical approach is the first step of analysis. There must be a definitive categorical match—the state criminal offense the immigrant was convicted under must necessarily involve all the facts required by the generic definition at federal law—for a statute to qualify under the generic federal immigration definition.

### 2. Step 2: Determine Whether the Statute Is Divisible
If there is no definitive categorical match, the next step in the analysis is to determine whether the statute of conviction is divisible; that is, whether the statute contains one or more offenses in the alternative that a defendant may be charged under. A keyword to identify such a statute is language such as “or” (as in, “consuming alcohol or drugs”). An indivisible statute is one that includes different elements an immigrant could be convicted under but which cannot be separated under the statute. Indivisible statutes often have general terms (e.g., “weapon”) instead of specific terms to differentiate offenses (e.g., “knife or gun”).

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107. Id.
108. Id.
110. Id. at 1–2.
111. Id. at 22–23.
112. Id.
116. Id. at 3.
III. CURRENT STATUTORY APPROACHES FOR ADVISING NONCITIZEN CRIMINAL DEFENDANTS IN A TRIAL COURT

Section I demonstrated the ambiguity of judges’ affirmative duties with respect to noncitizen criminal defendants following Padilla. Section II outlined the black letter federal law regarding removal of noncitizens in criminal-conviction contexts. In this section, we discuss current statutory obligations on trial court judges regarding informing noncitizen defendants of potential removal consequences of convictions. Although such advisements may not be explicitly required by Padilla, the U.S. Constitution, or state constitutions, certain jurisdictions have chosen to affirmatively require various types of advisements to noncitizen criminal defendants.

A. CONSIDERATIONS FOR APPROACHING STATUTORY ADVISEMENTS

There is currently some form of statutory judicial advisement for immigrant criminal defendants in at least 28 jurisdictions. These statutory obligations impose different models of compliance with Padilla and subsequent decisions, along with ethical obligations imposed on judges. This section discusses a sampling of five statutory obligations imposed on judges—from California, the District of Columbia, Massachusetts, Minnesota, and Connecticut—representing a variety of alternatives that courts have adopted to address the complicated issue of ensuring a criminal immigrant defendant understands her rights regarding the intersection of criminal and immigration law.

When evaluating potential approaches to statutory obligations on a trial court, it is important to consider certain factors that impact how effective an advisement is. First, the immigrant criminal defendant’s Fifth Amendment right against self-incrimination and Sixth Amendment due-process rights should be protected under Padilla. There are also various positive and negative consequences to different models of advisement. Boilerplate language is easily administered and broad, but it is also vague and potentially misunderstood by a defendant. Allowing a defendant additional time to consider her plea in light of the advisement ensures that she understands potential immigration consequences, but it is potentially inefficient for the trial court by opening it up to delay tactics by defense counsel. Placing the burden on the defendant to move to vacate a judgment if her advisement is insufficient allows for efficiency in the court and allows a defendant a typical defense through criminal proceedings, but immigrant defendants unfamiliar with English or the American judicial system may be unaware of these rights. The trial court should always balance efficiency for the judicial system against stronger protections for defendants and should consider unique issues facing immigrant defendants (such as language barriers, unfamiliarity with the legal system, disparate education levels, and fear of removal). In evaluating the proper approach, a trial court should employ the strongest practical protections from noncitizen defendants to ensure they fully understand the potential consequences in immigration court.

Concerns regarding whether trial court judges are able to consider immigration consequences in convictions and sentencing have been clarified in part by the Board of Immigration Appeals (BIA). “[I]mmigration courts must determine immigration consequences to an [immigrant] based on the crime as charged and convicted and the sentence as determined by the state court judge, even if the criminal charge or sentence was shaped by the prosecutor or judge in part to mitigate or maximize adverse immigration consequences on the defendant.” The immigration judge will consider the sentence and conviction, without regard to a trial court judge’s consideration of immigration consequences, even when a conviction is retroactively modified to alter immigration consequences. These decisions by the BIA make it clear that a trial court judge has the discretion to consider federal immigration consequences of a conviction, and a judge should accordingly be aware of and prevent unduly adverse consequences that might arise from conviction.

B. STATUTORY OBLIGATIONS: FIVE EXAMPLES

This subsection will illustrate five of the current approaches taken by legislatures in various jurisdictions to impose some obligation on the court to inform noncitizen defendants of potential immigration consequences from a criminal conviction. Each model trial-court advisement serves as an exemplar for a specific category of statutes. The statutes are quoted in part to highlight their differences; some provisions have similar language and impact in their full text, but the purpose of this illustration is to demonstrate the various individual provisions used by trial courts. Following this chart is a substantive discussion of the model advisements.

117. Judicial Obligations, supra note 19, at 22 (Jurisdictions that have a statutory obligation for advising immigrant criminal defendants include: Alaska, Arizona, California, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Montana, Nebraska, New Mexico, New York, North Carolina, Ohio, Oregon, Puerto Rico, Rhode Island, Texas, Vermont, Washington, and Wisconsin.)
118. See generally supra Section I.
119. See supra Section I.B.3.a.
It is important to note that these statutory duties create mandatory minimums for courts. Individual courts or jurisdictions may be permitted—depending on statutory language—to provide additional protections for criminal defendants by internal rules and procedures. For example, the Superior Court of California, County of San Diego, provides more detailed explanations of potential immigration consequences on its plea form than is required by the California statute, including a list of aggravated felonies under federal immigration law.122

1. Sample Policy #1: Broad Language (California)123

The court shall administer the following advisement on the record to the defendant: If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

<table>
<thead>
<tr>
<th>MODEL ADVISEMENTS</th>
<th>RELEVANT STATUTORY LANGUAGE</th>
<th>EFFECT OF THE LANGUAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>BROAD LANGUAGE (CALIFORNIA)</td>
<td>The court shall administer the following advisement on the record to the defendant: If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.</td>
<td>This boilerplate language informs a defendant in the most general manner that there may be potential immigration consequences if she is convicted.</td>
</tr>
<tr>
<td>ADDITIONAL TIME IN PLEA COLLOQUIES (DISTRICT OF COLUMBIA)</td>
<td>Upon request, the court shall allow the defendant a reasonable amount of additional time to consider the appropriateness of the plea in light of advisement.</td>
<td>This statutory language allows the defendant to consult with her attorney if she has not already, to determine what immigration effects may result from a conviction.</td>
</tr>
<tr>
<td>STATUTORY CONSEQUENCES FROM A TRIAL COURT’S FAILURE TO INFORM (MASSACHUSETTS)</td>
<td>If the court fails so to advise the defendant, and he later at any time shows that his plea and conviction may have or has had one of the enumerated consequences, even if the defendant has already been deported from the United States, the court, on the defendant’s motion, shall vacate the judgment, and permit the defendant to withdraw the plea of guilty, plea of nolo contendere, or admission of sufficient facts, and enter a plea of not guilty . . . .</td>
<td>If a trial court does not inform a criminal defendant of potential immigration consequences, the court is mandated to vacate the conviction and allow a new plea to be entered if the defendant so moves.</td>
</tr>
<tr>
<td>ENGAGING WITH THE DEFENDANT AND HER COUNSEL (MINNESOTA)</td>
<td>The judge must also ensure defense counsel has told the defendant and the defendant understands: That if the defendant is not a citizen of the United States, a plea of guilty to the crime charged may result in deportation, exclusion from admission to the United States, or denial of naturalization as a United States citizen.</td>
<td>This statutory provision mandates that courts verify that defense counsel has done her duty under Padilla to inform her client of potential immigration consequences.</td>
</tr>
<tr>
<td>IMPOSING A BURDEN ON THE COURT (CONNECTICUT)</td>
<td>The court shall not accept a plea of guilty or nolo contendere from any defendant in any criminal proceeding unless the court first addresses the defendant personally and determines that the defendant fully understands that if the defendant is not a citizen of the United States, conviction of the offense for which the defendant has been charged may have the consequences of deportation or removal from the United States, exclusion from readmission to the United States or denial of naturalization . . . .</td>
<td>This provision mandates that a court must ensure a defendant knows about potential immigration consequences that may arise from a conviction. The burden is on the court to ensure that this has been done.</td>
</tr>
</tbody>
</table>

122. SDSC CRM-012 7d (Sept. 2011).

123. CALIFORNIA PENAL CODE ANN. § 1016.5 (West 1985).
<table>
<thead>
<tr>
<th>SAMPLE POLICIES</th>
<th>BENEFITS TO THE DEFENDANT</th>
<th>BENEFITS TO THE COURT</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>BROAD LANGUAGE (CALIFORNIA)</strong></td>
<td>The defendant will be aware of the possibility of immigration consequences of a conviction.</td>
<td>This is efficient for a court: the trial court judge reads the statement for each defendant, regardless of immigration status. There is no duty to do anything more than read the mandated language.</td>
</tr>
<tr>
<td><strong>ADDITIONAL TIME IN PLEA COLLOQUIES (DISTRICT OF COLUMBIA)</strong></td>
<td>This allows a defendant and her counsel to have the necessary time to make an informed plea decision to avoid adverse immigration consequences.</td>
<td>While there exists a potential for delay tactics, this may be efficient for the court over time by reducing potential claims of ineffective assistance of counsel under Padilla.</td>
</tr>
<tr>
<td><strong>STATUTORY CONSEQUENCES FROM A TRIAL COURT’S FAILURE TO INFORM (MASSACHUSETTS)</strong></td>
<td>This protects a defendant by creating statutory consequences for the failure by a trial court to inform a defendant of her potential immigration consequences.</td>
<td>This language provides a clear statutory result of a failure to inform a defendant. This encourages compliance with the statute, and a statutory basis for vacating a judgment upon failure to inform.</td>
</tr>
<tr>
<td><strong>ENGAGING WITH THE DEFENDANT AND HER COUNSEL (MINNESOTA)</strong></td>
<td>This requires that the defendant is not only informed of, but also understands, the potential immigration consequences of a conviction.</td>
<td>By engaging with defense counsel and the defendant, personally, the trial court judge creates a clear record that the defendant knows and understands immigration consequences of a criminal conviction.</td>
</tr>
<tr>
<td><strong>IMPOSING A BURDEN ON THE COURT (CONNECTICUT)</strong></td>
<td>A guilty plea or plea of nolo contendere will not be accepted by the trial court without an affirmative showing that the defendant knows about potential immigration consequences.</td>
<td>This protects against uninformed pleas. This places a burden on the court to show that it has verified a defendant’s understanding of potential immigration consequences, further encouraging judicial compliance with the statutory obligation to inform a defendant.</td>
</tr>
</tbody>
</table>

2. **Sample Policy #2: Additional Time in Plea Colloquies (District of Columbia)**

Upon request, the court shall allow the defendant a reasonable amount of additional time to consider the appropriateness of the plea in light of advisement.

The District of Columbia has adopted California’s statutory language in subsection (a) of its judicial obligation. Additionally, D.C. courts allow a “reasonable amount of additional time to consider the appropriateness of the plea in light of advisement.” This statutory language provides additional protection for the immigrant criminal defendant by allowing sufficient time to make an informed plea. The additional time for the defendant to consider her plea after the advisement may open the court to delay tactics and the potential for lengthy continuances in some cases. However, limiting this to “reasonable” additional time prevents improper delays. This type of advisement should be used by courts to safeguard against ineffective counsel: allowing additional time to consider a plea, if needed, further encourages defense counsel to fully inform her client of immigration consequences.

3. **Sample Policy #3: Statutory Consequences from a Trial Court’s Failure to Inform (Massachusetts)**

If the court fails to advise the defendant, and he later at any time shows that his plea and conviction may have or has had one of the enumerated consequences, even if the defendant has already been deported from the United States, the court, on the defendant’s motion, shall vacate the judgment, and permit the defendant to withdraw the plea of guilty, plea of nolo contendere, or admission of sufficient facts, and enter a plea of not guilty . . . .

Massachusetts statutory language creates specific consequences if a court fails to inform a noncitizen criminal defendant of the potential for immigration consequences upon conviction: the court will vacate the judgment upon defendant’s motion and allow her to withdraw a plea of guilty or nolo contendere. This sample advisement really conveys a consequence and demonstrates the process a court will take in the absence of a full advisement. The language provides a clear path for the court to take if it fails to inform a noncitizen defendant. However, this consequence is only available upon the defendant’s motion: noncitizen defendants, especially ones unfamiliar with the American legal system, who may not speak English as a first language, or who have deficient counsel, may go unaware of this potential to vacate their judgment and enter a new plea.

The extended language of this statute also offers additional protection to an immigrant criminal defendant by protecting her Fifth Amendment right against self-incrimination: she “shall not be required . . . . to disclose to the court [her] legal status in the United States” at any time. This statutory protection is essential protection for a noncitizen defendant against revealing her immigration status.

125. Id.
126. Id.
128. Id.
The full statute provides many of the pro-claim if done advisement goes claims and, because the state's judicial advisement decision generally?

132. We contacted the offices of the state courts in six jurisdictions

133. We contacted the administrative offices and asked the following advisements above (California, District of Columbia, Massachusetts, Minnesota, and Connecticut) and Iowa. Our research plan was to contact the administrative offices and ask the following five questions:

1. How has Padilla v. Kentucky affected or influenced how your state's guidelines about noncitizen defendants have been implemented?
2. Has your court seen very many Padilla claims on appeal (anecdotally)?

3. Do you think your state's statutory language about advisements is adequate following Padilla? If not, what changes should be made to it?
4. Do you keep any data on the number of Padilla claims?
5. How do you think judges feel about the statutory advisement and the Padilla decision generally?

Each of the offices of our model advisements communicated a lack of understanding that there was a statutory obligation imposed on trial court judges, and nobody was clear who would be able to answer our questions. Ultimately, most were unable or unwilling to answer any of our questions. We received one reply from the Communications Office of the Iowa Judicial Branch, who informed us that the state keeps no data on Padilla claims and, because the state's judicial advisement (Iowa Rule of Crim. Procedure 2.8(2)(b)(3) (2002)) predates Padilla, Iowa courts have not seen any significant changes since the Supreme Court decision.
tions; and court administrators, to verify that each court is fulfilling its statutory obligations.

IV. PROPOSED MODEL ADVISEMENT

It is our recommendation that a trial court should use the following model advisement for every criminal defendant each time she appears before the court, including before accepting a plea of guilty or nolo contendere:

This court will not inquire into your citizenship status during this criminal proceeding. You should know, however, that if you are not a citizen of the United States, a criminal conviction may have adverse immigration consequences, such as removal from the United States or ineligibility for certain forms of immigration benefits or relief. A conviction in this court may also affect your immigration status and the ability for you to travel to other countries, depending on their respective immigration laws and policies.

If you do not understand or have had insufficient time to consult with your attorney regarding your immigration status and the potential consequences of a conviction, the court shall grant you reasonable additional time to consult privately and confidentially with your attorney. Have you had sufficient time to consult with your attorney regarding your immigration status and the potential consequences of a conviction? Do you fully understand the potential immigration consequences of a conviction, if applicable? Counsel, can you verify that you have discussed the potential immigration consequences of a guilty plea with your client?

This court will not accept a plea of guilty or nolo contendere without first confirming that you have had the opportunity to consult with your attorney regarding your immigration status and the potential consequences of a criminal conviction. If the court fails to verify that you are aware and understand the potential consequences of your conviction, the court shall, on the defendant's motion, vacate the judgment and permit you to withdraw your plea and enter a plea of not guilty.

A. PROVISIONS OF THE MODEL ADVISEMENT

Our proposed model advisement for trial court judges should apply to all criminal defendants, regardless of whether they are noncitizens. A judge should not inquire into a defendant's citizenship status, nor should a defendant ever feel pressured to reveal her status to the trial court. This initial statement of the proposed advisement will protect the defendant's Fifth Amendment right against self-incrimination and make it clear there should be no pressure to divulge immigration status to the trial court. To effectively ensure against self-incrimination, this advisement should be given to all criminal defendants at every hearing.

The proposed advisement allows a defendant additional time to consider her plea in light of potential immigration consequences that result from a criminal conviction (including a plea of guilty or nolo contendere) if she has not consulted with her attorney or does not fully understand the potential consequences of a plea. This additional time should be reasonable under the circumstances of the case, and the length of the additional time should be discretionary. It is essential to remember when deciding the reasonable length of additional time to consider a plea that, despite the severity under criminal law, a conviction may carry more severe consequences—including removal—in immigration law.

The advisement engages with both the defendant and her defense counsel to verify that she fully understands the potential consequences of a conviction and that her counsel has adequately informed her. This places an affirmative duty on the defense counsel to fulfill its obligations under Padilla while allowing the court to safeguard against ineffective assistance. The questions directed at the defendant and her counsel encourage them both to listen to and understand the advisement in its totality and creates a record that the court attempted to ensure proper representation by the defense counsel under Padilla.

Further, this advisement places a burden on the court to ensure that it does not accept a plea until it verifies that a defendant understands the potential immigration consequences. If the record is silent regarding judicial advisement, there should be a presumption that the court has not properly informed the defendant, and the judgment should be vacated upon defendant's motion. There should be no statute of limitations on the defendant's right to move to vacate the judgment if there has been no effective judicial advisement: noncitizen defendants who do not fully understand the potential immigration consequences should be able to effectively navigate the trial court system and take full advantage of their protections under the law. This final paragraph in the advisement could alternatively be adopted as a model principle: instead of advising each criminal defendant of the process, the trial court may instead adopt the purpose of the confirmation in practice and allow the defendant additional time to confer with her lawyer if necessary.

To ensure the defendant's protection, this advisement should be given every time a defendant appears before the court. In preliminary hearings, the advisement will direct the defense counsel to consult with her client before entering a plea. During a plea colloquy, it will ensure that proper representation has occurred before entering a plea of guilty or nolo contendere. During sentencing, such a statement will remind a defendant of potential consequences and her ability to raise a claim under Padilla if she has not been effectively represented or, alternatively, to move to vacate the judgment by the court.

135. See BENCH GUIDE, supra note 73, at 4.
136. See generally supra Section II.
137. See BENCH GUIDE, supra note 73, at 6.
and enter a new plea of not guilty if the court has not previously informed her.

B. WHAT SHOULD NOT BE INCLUDED IN THE MODEL ADVISEMENT

We did not include examples of specific crimes as a provision of the model advisement. For example, an advisement could potentially inform a criminal defendant: “Some common crimes that carry immigration consequences include drug offenses, theft, assault, and battery.” Alternatively, as the Superior Court of California, County of San Diego, has done, courts could provide plea forms that include specific aggravated felonies that are removable offenses. Although including common crimes as examples of removable offenses, such as drug possession or crimes involving moral turpitude, would more effectively inform a defendant of potential immigration consequences specific to her offense, it is likely that such an advisement could have a negative—and improper—effect in immigration court. If it becomes necessary for an immigration judge to use a modified categorical approach to determine removability, the immigration judge will have access to limited records of conviction, including the judicial advisement. If the immigration judge reads the specific crime in the advisement without the context of the case, she may rule a noncitizen is removable in circumstances where a silent record would not result in removal. For example, signaling “drug offenses” as a removable offense may lead an immigration court to conclude that an immigrant is removable on a modified categorical approach for a divisible statute, even when the charge is only for simple personal possession of marijuana under 30 grams (which is not a removable offense). Additionally, where crimes involving moral turpitude are unclear under the federal definition, crime-specific advisements may lead to improper removal: if the advisement signals removability, this may lead an immigration judge to incorrectly conclude removability where the elements of the potential CIMT are unclear at federal law. Stating specific examples of removable offenses in a judicial advisement would ultimately be counterproductive and result in increased removal of convicted noncitizens in circumstances where they may otherwise be permitted to remain in the United States. It may be possible to avoid these consequences with careful consideration of what to include on a plea form or in an oral judicial advisement, but this determination should be made by individual jurisdictions; our model proposal is meant to provide adequate protections for noncitizen criminal defendants in any jurisdiction and may be modified to become more effective in specific jurisdictions.

C. ADDITIONAL CONSIDERATIONS FOR THE TRIAL COURT

We recommend that trial courts without statutory obligations adopt our proposed model advisement to effectively allow noncitizen criminal defendants to assert their rights under Padilla. To maximize the utility of the judicial advisement, the court should apply the effect retroactively by court precedent. This would allow a noncitizen previously unprotected by such an advisement to assert her rights under Padilla, vacate her judgment and enter a plea of not guilty, and maximize her rights under the law, even if she has already been removed following a conviction in a criminal proceeding.

Even if a state legislature has not created a judicial duty that requires an advisement, courts should adopt some form of this proposed advisement to ensure that all defendants are aware of potential immigration consequences from conviction. Trial courts in jurisdictions that already have statutory obligations to advise noncitizen defendants should take steps to further maximize their advisement’s utility by incorporating our model language and ensuring that all defendants’ rights are sufficiently protected.

CONCLUSION

Trial court judges have always played a crucial role in safeguarding criminal defendants’ due-process rights, such as access to effective assistance of counsel and the ability to make knowing, intelligent pleas. Through the Padilla decision, the United States Supreme Court has now expressed an interest in protecting the unique interests of noncitizens appearing in state and federal criminal proceedings. The Padilla decision applies directly to defense attorneys, but we have demonstrated the benefits when trial court judges also adopt procedures to uphold the rights of noncitizen criminal defendants. This is best illustrated by our recommended model advisement in section IV. We recommend that all trial court judges become familiar with the relevant immigration consequences that come from criminal convictions as stated in the INA, discussed in section III, and employ an advisement to inform noncitizens of their rights and the potential immigration consequences of their criminal convictions.

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138. See SDSC CRM-012 7d (Sept. 2011).
139. See INA § 237(a)(2)(B)(i).
140. See General Assault Convictions After Moncrieffe, Descamps, and Olivas-Motta, supra note 113, at 6.
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education.amjudges.org
The Maryland Access to Justice Commission has excellent resources for court staff to use in learning how they can—and cannot—help self-represented litigants. There’s a bench card and poster listing the things staff can do (such as explaining how the court works) and things it cannot do (like letting someone talk to the judge outside of court or telling someone what to say in court). Answers to questions about what staff may do often are not self-explanatory to court staff, and the Maryland Commission has offered a handy checklist.

There’s also an 18-minute training video for court staff on how to respond to inquiries from litigants. Additional materials for self-assessment and for peer training accompany the video. These materials could easily be adapted for use in other states.

Judicial Training Materials
Access Brief: http://goo.gl/nmWt6E
Curriculum: http://goo.gl/7VHLuk

The Center on Court Access to Justice for All has established a web-based Center on Court Access to Justice for All, which seeks to assist judges and courts in providing better access to justice. The Center works with a number of national organizations, including the American Judges Association, to implement realistic access-to-justice solutions.

This includes the development of a series of “Access Briefs,” short papers on key topics for access to justice. The first paper, issued in November 2012, was on self-help services (http://goo.gl/FvGvl). It’s an 11-page paper setting out various options for providing help to the self-represented litigant, with examples of courts that have set up useful websites, courthouse desks or offices, telephone-based programs, in-person clinics, and courtroom assistance.

The Center offers three webinars: (1) Self-Represented Litigation Curriculum, covering a wide variety of materials available for judicial training; (2) Procedural Fairness and Self-Represented Litigants; and (3) Forms Development. The procedural-fairness webinar, presented by Minnesota state trial judge Kevin Burke, is available on the website without registration. The other two require registration, available by contacting the Center.

The Center also offers technical assistance to state and local courts seeking help in providing better access to justice. Click the “Assistance” tab on the Center’s home page and you’ll find more information and a link to the “technical assistance request form.”


The National Center for State Courts also has an excellent online resource guide that provides links to articles, web-based resources, and organizations dealing with how to improve services to self-represented litigants.

One of the articles included on the website, by Richard Zorza, looks at the implications of the United States Supreme Court’s 2011 decision in Turner v. Rogers, 131 S. Ct. 2507 (2011). In Turner, the Court held that a child-support obligor’s due-process rights were violated when he was jailed for nonpayment without either an appointed attorney or the benefit of “substitute procedural safeguards.” The Court listed safeguards such as a notice to the obligor that his ability to pay would be a critical issue, the use of a form to elicit relevant financial information, the opportunity for him to respond to questions about his finances, and an express court finding that he had the ability to pay. Zorza argues that the Court’s conclusion that due process could be met by using such procedural safeguards with self-represented parties should be a signal to courts to improve their services to the self-represented.