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EDITOR’S NOTE

Our issue begins with the annual review of the past Term’s criminal cases from the United States Supreme Court. Professor Charles Weis- selberg of Berkeley Law presents this engaging review, this time joined by two of his students, Daniel Chen and Sameera Mangena. This is now the eighth straight year that Professor Weis- selberg has provided this service to us. His reviews of the cases emphasize aspects most likely to affect judges in state courts, note emerging caselaw responses to the new decisions, and highlight issues that the Court will address in the Term now in progress.

Our second article provides the views of two noted psychologists on issues associated with Miranda warnings. I was surprised at the start to learn of the great variation in the way warnings are given—one study identified more than 1,000 unique variations. Richard Rogers and Eric Drogin then review ways in which a person’s understanding of these warnings could be improved. Judges regularly decide motions to suppress evidence based on a claim that Miranda warnings weren’t appropriately made or understood. This article will help place those discussions in a broader context.

Our third article presents a research study testing the reaction of judges to different types of evidence suggesting that a criminal defendant may have been wrongly convicted. They surveyed 308 judges to determine the different weight judges might place on forensic-science evidence of a wrongful conviction as compared to social-science evidence. The researchers did find that judges generally prefer forensic science over social science. They recommend greater judicial education, noting that judges tend to underestimate the prevalence of some of the errors that lead to wrongful convictions. The article also includes a quick overview of the leading causes of wrongful convictions: eyewitness misidentification, errors in forensic-science testing, police misconduct, undue weight given to expert testimony, and false confessions.

We also have two new features that first appeared in our last issue. Canadian judge Wayne Gorman, a judge of the Provincial Court of Newfoundland and Labrador, is now providing a regular column on aspects of Canadian law or practice that would be of general interest. In this issue, he talks about the expectations for the announcement of a decision by a Canadian judge in terms of providing reasons for the decision and how Canadian judges assess witness credibility. Arkansas judge Vic Fleming, who has written crossword puzzles and legal humor columns for many years, is providing a law-related crossword puzzle for your enjoyment.

Please let us know what you think of these new features—along with any other suggestions you may have for articles or authors or subjects you’d like to see. You can contact me (sleben56@gmail.com) or my coeditor, Eve Brank (ebrank2@unl.edu). As always, thanks for reading Court Review.—SL

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 back- ground 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 157 of this issue. Court Review reserves the right to edit, condense, or reject material submitted for publication.

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Cover photo, Mary S. Watkins (maryswatkins@mac.com). The cover photo is of the Huerfano County Courthouse in Waldenburg, Colorado; it was built in 1904.

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I am humbled and thankful that our fellow AJA members have elected me to be your “Man in the Arena” this year. In a sense, the minute we take our oath of office as judges, all of us are immediately “in the arena” of public scrutiny. Our motto at AJA is “Making Better Judges®,” and we hope that this year we can help you better withstand that public scrutiny as we help each other shine and sparkle while toiling in the “arena” of our courtrooms and chambers. Many times our decisions require great courage, other times we are required to exercise great patience; sometimes compassion is called for, and at other times, we must stand firm. But at all times, we must treat all who appear in the judicial “arena” with fairness and dignity to better serve the ends of justice.

To that end, former AJA presidents Kevin Burke and Steve Leben have been working for years to promote the concept of “Procedural Fairness.” Both have written great articles in this and other publications, and have presented at many judicial conferences in the United States and Canada, explaining those concepts to all in attendance. This year Kevin and Steve were joined by my immediate predecessor as AJA president, Brian MacKenzie, as together they presented a unique perspective on “Procedural Fairness and Drug Treatment Courts” at our Seattle conference.

We were especially fortunate to have partnered with the Washington State Judiciary and the National Association of State Judicial Educators (NASJE) in Seattle. Special thanks to our Washington judges and AJA officers, Catherine Shaffer and Richard Kayne, who worked closely with colleagues from the Washington judiciary and NASJE to present one of our best education programs ever! Special thanks to the State Justice Institute for a grant used to help defray our costs.

We cannot all attend our national conferences, where we can receive inspiring instruction from colleagues like Kevin, Steve, and Brian, hear dynamic speakers such as Nicole Austin-Hillery, or sit in awe as Dean Erwin Chemerinsky presents his superb annual review of recent developments from the United States Supreme Court. For those who cannot attend our conferences, membership in AJA still comes with special advantages. We have the ability through our AJA website to access the many wonderful articles and materials presented at our conferences. We all have the ability to network through our electronic offerings. We can still reap the benefits of the knowledge of our colleagues’ “Best Practices” and learn more about the issues of concern to all of us through Court Review, our quarterly publication sent to all AJA members.

Periodically, you will also receive an e-mail publication we call “The Rundown.” As your president, I hope to keep you informed of all of our activities conducted on your behalf throughout the year. We at AJA want to be there for you as together we work at Making Better Judges®.

Please make a special effort to join us at our midyear conference scheduled in Santa Fe, New Mexico, from April 19-22, 2016. Come with us to Toronto September 25-30, 2016, as we join our Canadian counterparts at what promises to be another great annual conference! Our president-elect, Judge Russell Otter from Toronto, promises that you will not leave disappointed.

Join us in the worthy cause of Making Better Judges® as we toil together in the judicial arena! Together, let us help each other achieve the triumph of high achievement by becoming better judges.
An Evolution in Canadian Judging

Wayne K. Gorman

In my first column I chose a very specific topic (recusal on the basis of reasonable apprehension of bias) that easily flowed over our shared border. In this column, I intend to significantly broaden the analysis.

Here I will examine what I describe as an evolution (or revolution) that is occurring in the manner in which Canadian trial judges render judgment and how they are reviewed on appeal. Interestingly, this evolution is entirely free of any statutory basis. I hope it will provide American judges some insight into what is expected of their Canadian counterparts and cause them to consider how the Canadian experience relates to their own work and standards.

THE SCOPE OF THE ANALYSIS

A column does not provide space for a review of an entire judicial system. So I intend to look at two changes that highlight how Canadian judging is evolving, under the following headings:

1. the requirement for reasons; and
2. the potential death of demeanour as a basis for the assessment of the credibility of witnesses.

Let us start with the requirement for reasons.

REASONS FOR JUDGMENT

The provision of reasons by Canadian trial judges had traditionally been a source of little appellate court comment because there was no such requirement at common law. For instance, in 1994, the Supreme Court of Canada indicated in R. v. Burns that a judge is “not required” to give reasons:

Failure to indicate expressly that all relevant considerations have been taken into account in arriving at a verdict is not a basis for allowing an appeal . . . . This accords with the general rule that a trial judge does not err merely because he or she does not give reasons for deciding one way or the other on problematic points. The judge is not required to demonstrate that he or she knows the law and has considered all aspects of the evidence. Nor is the judge required to explain why he or she does not entertain a reasonable doubt as to the accused’s guilt. Failure to do any of these things does not, in itself, permit a court of appeal to set aside the verdict.

Eight years later in R. v. Sheppard, a dramatic change occurred. The Supreme Court of Canada would subsequently say that its “approach to [the] question has evolved.”

In Sheppard, the Supreme Court of Canada set aside a conviction on the basis that the trial judge’s reasons were insufficient. In doing so, the Court created what has been described as a “freestanding error of law” justifying the setting aside of a verdict solely on the basis of “inadequacy of reasons.” The Supreme Court of Canada held in Sheppard that trial judges are required “to state more than the result.” The Supreme Court created the following common-law test for appellate determination as to whether a trial judge’s reasons are sufficient:

The trial judge’s duty is satisfied by reasons which are sufficient to serve the purpose for which the duty is imposed, i.e., a decision which, having regard to the particular circumstances of the case, is reasonably intelligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge’s decision.

This appears both simple and revolutionary in comparison to Burns. Accordingly, after Sheppard, the issue of the adequacy of trial judges’ reasons became a matter of significant appellate consideration in Canada. Such questions as when will a judge’s reasons be sufficient; what must reasons contain; and how much or how little is required, were subjects of appellate debate. The overturning of convictions on the basis of insufficient reasons was no longer uncommon.

The issue became such a common basis for appellate intervention in Canada that the Supreme Court granted leave to appeal in a number of cases involving the adequacy of the trial judges’ reasons. The results of these appeals have helped to clarify the governing standards, but they also appear to constitute a series of significant steps back from the bold initiative the Supreme Court of Canada set out in Sheppard. Let me explain.

Footnotes
7. Id. ¶ 55. The entirety of the trial judge’s reasons consisted of the following statement (at paragraph 2): “Having considered all the testimony in this case, and reminding myself of the burden on the Crown and the credibility of witnesses, and how this is to be assessed, I find the defendant guilty as charged.”
The next appeal to reach the Supreme Court of Canada on the issue of sufficiency of reasons was R. v. Gagnon. In Gagnon, the Quebec Court of Appeal, relying on Sheppard, had set aside a conviction on the basis that the trial judge’s reasons insufficiently dealt with credibility issues. The Supreme Court of Canada, in reinstating the conviction, indicated that appellate review of a trial judge’s reasons for assessing credibility must be undertaken with the understanding that it can be “very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events.” Thus, reasons for credibility determinations are not necessary, and appellate review should concentrate on whether there was a basis for the trial judge’s conclusion.

Similarly, in R. v. R.E.M., the Supreme Court of Canada reversed the British Columbia Court of Appeal’s decision to overturn a number of sexual-assault convictions on the grounds of inadequate reasons, in particular as regards the trial judge’s failure to sufficiently refer to the accused’s evidence. The Supreme Court did so despite noting that the trial judge in convicting the accused “did not clearly explain which of the offences were proved by . . . [the] evidence [that] had been led.”

Interestingly, the Supreme Court of Canada commenced its analysis in R.E.M. by declaring “that it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. A criminal trial, where the accused’s innocence is at stake, is one such circumstance.”

The Court then stated:

In summary, the law has progressed to the point where it may now be said with confidence that a trial judge on a criminal trial where the accused’s innocence is at stake has a duty to give reasons.

However, the Court upheld the convictions, despite the failure of the trial judge to explain why he disbelieved the accused’s evidence, on the basis that such an explanation was not required:

[The trial judge’s failure] to explain why he rejected the accused’s plausible denial of the charges provides no ground for finding the reasons deficient. The trial judge’s reasons made it clear that in general, where the complainant’s evidence and the accused’s evidence conflicted, he accepted the evidence of the complainant. This explains why he rejected the accused’s denial. He gave reasons for accepting the complainant’s evidence, finding her generally truthful and “a very credible witness”, and concluding that her testimony on specific events was “not seriously challenged” (para. 68). It followed of necessity that he rejected the accused’s evidence where it conflicted with evidence of the complainant that he accepted. No further explanation for rejecting the accused’s evidence was required.

In R. v. Dinardo, the Supreme Court of Canada indicated that in “a case that turns on credibility, such as this one, the trial judge must direct his or her mind to the decisive question of whether the accused’s evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt.” However, in R.E.M. (decided after Dinardo), the Court said that trial judges may wish to “spare” an accused person they are convicting from “unflattering” comments concerning his or her credibility:

While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness’s evidence is rejected may involve the judge saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence and convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.

WHAT IS REQUIRED OF CANADIAN JUDGES?

In R.E.M., the Supreme Court answered this question by stating that “what is required is that the reasons, read in the context of the record and the submissions on the live issues in the case, show that the judge has seized the substance of the matter. Provided this is done, detailed recitations of evidence or the law are not required.”

Despite these comments, Canadian appellate courts continued to set aside convictions because of insufficient reasons. In R. v. Clouthier, for instance, the Ontario Court of Appeal set aside a conviction for robbery because the trial judge failed to deal with certain portions of the evidence in convicting the accused. The Court indicated that while trial judges are not required to make reference to every piece of evidence, there is a duty to consider the evidence in its entirety, not simply the evidence that inculpates the accused. In my view, the failure to deal with two items that tended to exculpate the appellant—the balaclava and the evidence as to the height of the robber—amounts to an error of law sufficient to justify setting aside these convictions.

10. Id. ¶ 20.
11. [2008] 3 S.C.R. 3 (Can.).
12. Id. ¶ 6.
13. Id. ¶ 10 (emphasis added).
15. Id. ¶ 66.
16. [2008] 1 S.C.R. 788, ¶ 23 (Can.).
18. Id. ¶ 43. In a somewhat amusing context, the Court of Appeal chastised the trial judge in the case of M. v. M. for rendering judgment through the use of a “post-it note.” 2011 NLCA 57 (Can. Nfld.).
20. Id. ¶ 16.
Similarly, in R. v. M.J.E.B.,\textsuperscript{21} the Alberta Court of Appeal held that “where there is conflicting evidence on a key issue, and the contradiction must be resolved by an assessment of credibility, there is an obligation on a trial judge to explain how he has resolved those contradictions in assessing reasonable doubt.”\textsuperscript{22} As we will see, the Supreme Court of Canada would reject this proposition a year later.

Eleven years after Sheppard, the Supreme Court of Canada returned to the sufficiency of reasons yet again, this time in the case of R. v. Vuradin.\textsuperscript{23}

In Vuradin, the accused was convicted of a number of sexual offenses. The Supreme Court of Canada described the trial judge’s reasons as “sparse” and “not directly” addressing the accused’s evidence.\textsuperscript{24} However, the convictions were affirmed.

The Supreme Court of Canada indicated that it found the trial judge’s “sparse” reasons sufficient because a trial judge’s failure to explain why he rejected an accused’s plausible denial of the charges does not mean the reasons are deficient as long as the reasons generally demonstrate that, where the complainant’s evidence and the accused’s evidence conflicted, the trial judge accepted the complainant’s evidence. No further explanation for rejecting the accused’s evidence is required as the convictions themselves raise a reasonable inference that the accused’s denial failed to raise a reasonable doubt.\textsuperscript{25}

Thus, it appears that when the evidence of a complainant and the accused conflict, a Canadian trial judge is not required to explain why he or she rejected the testimony provided by the accused if the judge’s reasons demonstrate that where the complainant’s evidence and the accused’s evidence conflicted, the trial judge accepted the complainant’s evidence. In R. v. R.J.C.,\textsuperscript{26} the British Columbia Court of Appeal stated that the accused was “entitled to know why his evidence was rejected.” However, this comment simply cannot be reconciled with the Supreme Court of Canada’s decision in Vuradin.

Finally, though not a decision concerning the sufficiency of reasons, the Supreme Court of Canada’s decision in Cojocaru v. British Columbia Women’s Hospital and Health Centre\textsuperscript{27} is a further illustration of how the Court has diminished what it had described as a “duty to give reasons.”

In Cojocaru, the trial judge, in rendering judgment, reproduced in his reasons large portions of the written submission of the plaintiffs’ counsel—321 paragraphs of the 368 were copied from the plaintiffs’ written submission.

The Supreme Court of Canada said:

[W]hile it is desirable that judges express their conclusions in their own words, incorporating substantial amounts of material from submissions or other legal sources into reasons for judgment does not without more permit the decision to be set aside. Only if the incorporation is such that a reasonable person would conclude that the judge did not put her mind to the issues and decide them independently and impartially as she was sworn to do, can the judgment be set aside.\textsuperscript{28}

As to the judicial role and judgment writing, the Supreme Court declared that the “scope for judicial creativity is narrow, but not non-existent.”\textsuperscript{29} The Court also indicated, somewhat unkindly in my view, that “lack of originality alone [is not] a flaw in judgment-writing; on the contrary, it is part and parcel of the judicial process.”\textsuperscript{30}

WHERE ARE WE NOW IN CANADA?

The debate over sufficiency of reasons has not ended. For instance, in R. v. Labelle,\textsuperscript{31} the Ontario Court of Appeal set aside a conviction because the trial judge failed to give “an explanation of why” he did not have a reasonable doubt on the basis of contradictions in the complainant’s evidence. Similarly, in R. v. Kennedy, the Saskatchewan Court of Appeal, in setting aside a conviction, referred to the trial judge having failed to comment upon the “credibility” of the Crown’s main witness, though the trial judge had made several comments upon the “weight” of this witness’ evidence.\textsuperscript{32} This seems a rather weak distinction.

Shortly after Sheppard, one appellate court judge suggested that the decision represented “a significant change in the law with respect to a trial judge’s duty to give reasons.”\textsuperscript{33} However, as we have seen, this did not turn out to be true. This is illustrated by the decision of the New Brunswick Court of Appeal in R. v. Crowley, in which the court held that a “successful appeal from a verdict in a judge alone trial on the grounds there were insufficient reasons, or the trial judge did not apply the burden of proof, should be ‘rare.’”\textsuperscript{34}

CONCLUSION (REASONS)

So, what can Canadian judges conclude from all of this? What lessons should American judges take from the Canadian experience?

It is clear that reasons are required in a wide range of situations and that in providing reasons Canadian judges must illustrate that they have seized the substance of the matter before them; their reasons must be intelligible, allowing for
appellate review of the reasoning process utilized. Having said this, the standard required for reasons to be deemed sufficient has been set at a very low level in Canada despite what appeared to be a dramatic change after Sheppard. It is also clear, despite the brief reference in R.E.M., that written reasons are not required. This does not mean that written reasons do not play an invaluable role in the administration of justice or that judges should not be encouraged to write often, but that is different from a requirement to write.

It appears that when the evidence of a complainant and the accused conflict, a Canadian judge is not required to explain why he or she rejected the testimony provided by the accused (even if “plausible”) if the judge’s reasons demonstrate that where the complainant’s evidence and the accused’s evidence conflicted, the trial judge accepted the complainant’s evidence.

This, of course, does not mean that a Canadian trial judge is prohibited from explaining his or her reasons for rejecting a “plausible” explanation provided by an accused person, and there is great benefit to the administration of justice in judges doing so, particularly in writing. A written judgment can add significantly to a litigant’s perception of fairness. The importance of procedural fairness should not be underestimated. In Laing v. R., the Judicial Committee of the Privy Council noted (in the context of what reasons are required by appellate courts) that the “guiding principle is one of fairness. The appellant is entitled to be assured that his case has been properly considered and to know why his appeal did not succeed.”

I think a trial judge should have great difficulty, where an accused person testifies at a trial and denies having committed the offence, in rejecting his or her testimony without explaining why.

Having considered the evolution of reasons for judgment in Canada, let us now consider some recent Canadian developments in the use of a witness’ demeanour to assess credibility.

34. In R. v. Williamson, for instance, the Manitoba Court of Appeal held that though the “trial judge’s oral reasons are, at times, difficult to follow and are not well organized…. when they are read in conjunction with the record of the evidence and the submissions of counsel, the foundations of the trial judge’s decision are clearly discernible.” 2015 MBCA 16, 2015 CarswellMan 41, ¶ 10 (Can. Man.).

35. One author has noted that only a written judgment exposes “the court’s decision to public scrutiny…. In no other way can it be known whether the law needs revision; whether the court is doing its job, whether a particular judge is competent.” George Smith, A Primer of Opinion Writing, For Four New Judges, 21 Ark. L. Rev. 197, 200-01 (1967). See also Judge Richard A. Posner, Judges Writing Styles (and Do They Matter?), 62 U. Chi. L. Rev. 1421, 1448 (1995) (suggesting that “the judge, by not writing, will be spared a painful confrontation with the inadequacy of the reasoning that supports his decision”). Nothing “better exposes any fallacies in your ideas than reading them in cold type.” J.O. Wilson, A Book for Judges 80 (1980).

36. The Ontario Court of Appeal has noted that “the Supreme Court of Canada has repeatedly said, a reasoned acceptance of a complainant’s evidence is a basis by itself for rejecting an accused’s evidence.” R. v. J.C., 2013 ONCA 495, 2013 CarswellOnt 10029, ¶ 7 (Can. Ont.). Similarly, the Alberta Court of Appeal, in R. v. C.E., noted that a trial judge’s “failure to specifically advert to, or explain why an accused’s plausible denial did not raise a reasonable doubt is not fatal to a conviction.” 2014 ABCA 321, 2014 CarswellAlta 1756, ¶ 10 (Can. Alta.).

37. In R. v. Zinck, the Supreme Court of Canada stated: “Deficiencies in reasons may sometimes require quashing an order for the sake of the perceived fairness and the transparency of the criminal process.” [2003] 1 S.C.R. 41, ¶ 37 (Can.).

38. [2013] UKPC 14, ¶ 15 (appeal taken from Berm.).


42. [2012] 3 S.C.R. 726, ¶ 25 (Can.) (concerning a witness who wished to wear a niqab that covered her face except for her eyes while testifying).

43. 2013 ONCA 377, 2013 CarswellOnt 7586 (Can.).

44. Id. ¶ 64.

45. Id. ¶ 85 (citations omitted).
The Court of Appeal indicated that “it is important for trial judges to bear in mind that, to the extent possible, they should try to decide cases that require assessing credibility without undue reliance on such fallible considerations as demeanour evidence.”46

The Court of Appeal concluded:

[The trial judge] took an overly confident view of his ability to assess the complainant’s credibility by reference to her demeanour. This reliance is particularly troubling in the circumstances of this case because the demeanour assessment was based on evidence that was not subjected to contemporaneous cross-examination, further weakening any possible value it had in assisting the trial judge evaluate the complainant’s credibility.

In many cases, this error may not be of great moment. But here, it mattered. Combined with the error of admitting the videotaped statement for the truth of its contents, this error provided the backdrop against which the trial judge gauged the complainant’s and the appellant’s account of what transpired when they engaged in sexual activity in the car.47

Similar comments were made in a recent decision of the New Zealand Court of Appeal. In R. v. Taniwha,48 the accused was convicted of rape after a trial by judge and jury. On appeal, he argued that the trial judge erred in failing “to give a tailored direction relating to the evidential significance” of the complainant’s “demeanour in the witness box.” The accused suggested that there exists a “developed consensus as to the importance of juries not placing undue significance on the demeanour of a witness when assessing their reliability and credibility.”49

The New Zealand Court of Appeal dismissed the appeal. The Court of Appeal explained that “the risk is not so much placing reliance on demeanour evidence per se. Rather, the real risk arises through considering demeanour evidence in isolation from other evidence and relevant factors.”50 However, the Court of Appeal also agreed “that in light of the known potential for misinterpretation of visual or oral cues given by a witness, some modification is appropriate to the more traditional jury directions on demeanour.”51 It recommended that juries should be directed to consider the demeanour of a witness as a “valuable aid” in assessing whether a witness is credible. Interestingly, the court suggested that in a “she said/he said” type of case, demeanour “may assume greater importance in the absence of other factors such as inconsistency or any inherent implausibility.”52

However, despite the strong language used in Rhayel, reliance on demeanour in assessing credibility of witnesses is far from dead in Canada. For instance, in the recent decision of R. v. Crowley, the New Brunswick Court of Appeal indicated that “deference is owed to a trial judge’s assessment of the evidence, as they are in a ‘unique’ position to see and hear witnesses.”53 Interestingly, two of the reasons provided by the trial judge in Crowley for rejecting the accused’s evidence was that he appeared “stressed” during his testimony and kept his replies to a “bare minimum.”54 This hardly seems a basis for disbelieving a person’s evidence.55

In R. v. B.G.G.,56 the Manitoba Court of Appeal made similar comments on the role of demeanour in assessing the credibility of a witness. Their comments may be considered by some as a reflection of an outdated approach:

This case is one wherein, as the judge correctly noted, credibility is the core issue. In dealing with cases of this kind, the trial judge is required to closely consider and review the testimony given by the witnesses. That exercise includes not only the evidence given, but his/her observation of the conduct and demeanor of the witnesses as they testify. Thus, the trial judge is in a much preferred position to that of appellate judges in making credibility findings. For this reason, demeanor conclusions are virtually unassailable on appellate review, and deference is owed to trial judges in respect of findings of fact, even more so findings of credibility, and the drawing of inferences based thereon.57

Interestingly, the Canadian Judicial Council in its model

46. Id. ¶ 89.
47. Id. ¶¶ 93-94.
49. Id. at [13].
50. Id. at [16].
51. Id. at [18].
52. Id.
54. Id. ¶ 13. In a rather strange case, a conviction was overturned on the basis that the trial judge, in assessing the accused’s credibility, relied on “the reactions of his trial counsel to the evidence adduced.” R. v. Ohenhen, 2015 ONCA 506, 2015 CarswellOnt 10128, ¶ 4 (Can. Ont.).
55. In Pinard-Byrne v. Linton (Dominica), a defamation case, the trial judge, in deciding in favor of the plaintiff, described the defendant’s evidence as follows: “[L]s demeanour in the witness box was more consistent with personal animosity towards the claimant rather than an unbiased search for truth.” [2015] UKPC 41, [23] (appeal taken from Dominica). On appeal, Lord Clarke stated, “The judge was in a unique position to reach that conclusion because LL had given evidence before him.” Id. ¶ 33.
56. 2015 MBCA 76, 2015 CarswellMan 457 (Can. Man.).
57. Id. ¶ 16. The decision of the Queensland Court of Appeal in Bulsey & Anor v. Queensland illustrates a quite different approach to appellate review of credibility findings. [2015] QCA 187 (Austl.). In Bulsey, the Court of Appeal held that if a trial judge’s finding of credibility is “contrary to compelling inferences,” it can be reversed even “giving full weight to the advantage of the trial judge in seeing and hearing the evidence unfold at the trial.” Id. ¶ 71. Interestingly, this decision also involved the following ground of appeal: “Appeal ground 1 contends that the trial judge’s delay in giving judgment with reasons prejudiced the appellants’ case in that the delay was detrimental to the quality of recall by His Honour of the actual testimony of witnesses and the attendant assessment of reliability and credibility of witnesses including that of the [a]ppellants.” Id. ¶ 56.
jury instructions (which are referred to in Taniwha) recommends an approach that combines the nebulous reference to “the witness’s manner” with a caution not to make it the “most important factor” in assessing credibility:

What was the witness’s manner when he or she testified? Do not jump to conclusions, however, based entirely on how a witness has testified. Looks can be deceiving. Giving evidence in a trial is not a common experience for many witnesses. People react and appear differently. Witnesses come from different backgrounds. They have different abilities, values and life experiences. There are simply too many variables to make the manner in which a witness testifies the only or most important factor in your decision.58

CONCLUSION (DEMEANOUR)

So, what can Canadian trial judges learn from these decisions, and what lessons can American judges take from them? Foremost, in my view, is that the days of Canadian trial judges placing significant reliance on the demeanour of a witness in determining credibility may be over. A compelling argument can be made that findings of credibility should be made based on logic, rationality, and most importantly, the quality of the evidence presented. Trial judges have experience, but we do not have any magical powers or crystal balls to look into the hearts of witnesses to determine if they are being truthful. Thus, reliance on evidence, confirmation, and corroboration may encapsulate a new approach to judging. The dangers of relying on our impressions of witnesses’ demeanour in the witness box to determine their truthfulness may (and some would argue should) be coming to an end.

CONCLUSION

Obviously, judging is a role subject to significant changes as the law unfolds. The Canadian experience in reasons and demeanour suggest that what is expected of a judge is always evolving. Canadian judges will have to grapple with these two issues for some time to come.

Though presented separately, the issues of reasons for judgment and the role demeanour plays in assessing credibility are subtly intertwined. If reasons for conviction do not require an explanation for the rejection of an accused person’s “plausible” denial of wrongdoing, then no one will know if the trial judge placed too much reliance on demeanour. As pointed out by the Ontario Court of Appeal in R. v. T.M., reliance on demeanour can lead to a trial judge drawing “inferences about a witness’s credibility from the witness’s demeanour while that witness is testifying . . . . even though the witness is not given an opportunity to explain any particular mannerisms while testifying.” This would appear contrary to the essential nature of procedural fairness.

Hopefully for American judges, this column will be useful in not only explaining the Canadian context, but in considering your own role as judges.

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Despite its relatively modest size, last Term’s Supreme Court criminal docket packed a punch. The Court decided search-and-seizure issues important to day-to-day policing, it returned to the Crawford v. Washington line of cases, and several justices opined on the constitutionality of solitary confinement and the death penalty. This article reviews these and other criminal decisions with an eye toward issues most relevant to state courts. It closes with a brief glance toward the 2015 Term.

**FOURTH AMENDMENT**

Traffic stops and administrative searches were the focus of this Term’s Fourth Amendment cases. The Court issued important rulings on “add-ons” to legitimate police stops, the reasonableness of searches and seizures made pursuant to an officer’s mistake of law, and the constitutionality of city ordinances permitting the police to inspect hotel registries without prior permission from a judge.

**TRAFFIC STOPS**

Rodriguez v. United States is a simple but important case, with significant implications for day-to-day policing. Rejecting a “de minimis” add-on to a traffic stop to search for drugs, the justices held that “a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution’s shield against unreasonable seizures.”

An officer stopped Rodriguez for a traffic infraction. After checking his license and registration and conducting a brief conversation, the officer issued a warning ticket. The officer then asked for permission to walk his narcotics-detection dog around the vehicle, but Rodriguez refused. The defendant was held for another seven or eight minutes until another officer arrived and the dog alerted to the presence of drugs in the vehicle. A search turned up methamphetamine. The court of appeals upheld the search, ruling that the delay was a de minimis intrusion on the defendant’s liberty. The Court reversed.

Writing for six justices, Justice Ginsburg stated the basic principle that “[l]ike a Terry stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure’s ‘mission’—to address the traffic violation that warranted the stop . . . and to attend to related safety concerns.” The Fourth Amendment may permit “certain unrelated checks during an otherwise lawful traffic stop,” but these may not prolong the stop “absent the reasonable suspicion ordinarily demanded to justify detaining an individual.” A dog sniff is “aimed at ‘detect[ing] evidence of ordinary criminal wrongdoing.’” Since it is not ordinarily part of a traffic stop, even a de minimis increase in the length of detention to facilitate a dog sniff is unlawful. The permissible duration of a traffic stop has come to an end “when tasks tied to the traffic infraction are—or reasonably should have been—completed.” The majority remanded for the court of appeals to determine if the officer had reasonable suspicion to detain Rodriguez beyond the traffic-stop investigation.

Justice Thomas, joined by Justices Alito and Kennedy, dissented, finding that the overall length of the stop was reasonable. They also argued that the majority’s test will produce arbitrary results, as a rookie officer might reasonably take longer to complete a traffic-stop investigation than a seasoned officer and that it will be difficult to determine which activities are permissibly related to the objectives of a traffic stop. Two of the dissenters also would have ruled that the detention pending the dog sniff was justified by reasonable suspicion.

A few points are important to note, and it will be interesting to see their treatment in the state courts and the lower federal courts. First, just as in Riley v. California (the recent cell-phone-search blockbuster), the Court has again tightly “tethered” the scope of a warrantless search or seizure to the purposes for it. Here, even a de minimis prolongation of detention is not reasonable since it does not serve the purpose for the stop. Second, the justices determined that the permissible length of a stop may vary depending on the circumstances and the purpose of the stop. The Court rejected a bright-line rule proposed by Rodriguez, who had suggested that it was unreasonable to hold him beyond the point where the officer actually issued the ticket warning. A large part of the petitioner’s

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**Footnotes**

2. Id. at 1612.
3. Id. at 1612-14.
4. Id. at 1614 (citing Illinois v. Caballes, 543 U.S. 405, 407 (2005)).
5. Id. at 1615.
6. Id. at 1615 (quoting Indianapolis v. Edmond, 531 U.S. 32, 40-41 (2000)).
7. Id. at 1614.
8. Id. at 1617, 1618-20 (Thomas, J., dissenting).
9. Id. at 1622; see also id. at 1623 (Alito, J., dissenting).
oral argument was consumed with whether such a bright line would be workable or whether officers would simply delay issuing a warning until after a dog sniff. The majority made clear that “[t]he critical question . . . is not whether the dog sniff occurs before or after the officer issues a ticket . . . but whether conducting the sniff ‘prolongs’—i.e., adds time to—‘the stop’ . . . .”12 Third, there will be still sorting out of the activities that are permissibly related to a traffic stop. Dog sniffs are not included; they “[l]ack[] the same close connection to roadway safety as the ordinary inquiries,” such as checking the driver’s license, determining if there are outstanding warrants, and inspecting the registration and proof of insurance.13 But surely the law on this will develop over time.

In another traffic-stop case, Heien v. North Carolina,14 the Court found that a search or seizure made pursuant to a reasonable mistake of law does not violate the Fourth Amendment. In Heien, a sheriff’s officer pulled over a car for a broken left brake light. After the driver and passenger gave consent to search the vehicle, the deputy found a bag of cocaine. The North Carolina Court of Appeals found that the initial traffic stop was invalid because, according to the state’s vehicle code, driving with “a [single] stop lamp” was not a violation of law.15 The North Carolina Supreme Court reversed, finding the misunderstanding of the law to be reasonable, and the Supreme Court affirmed.

Chief Justice Roberts authored the majority opinion, making clear that even if a police officer is mistaken about the law justifying a search or seizure, that search or seizure does not violate the Constitution if the mistake is reasonable. After all, the “ultimate touchstone of the Fourth Amendment is reasonableness.”16 The Court had already held that searches and seizures based on mistakes of fact can provide reasonable suspicion or probable cause, and “[t]here is no reason . . . why this same result” should not be acceptable “when reached by way of a similarly reasonable mistake of law.”17 The Court had “little difficulty” concluding that the officer’s error of law was reasonable based on a perceived ambiguity in the pertinent statute.18 Justice Kagan, joined by Justice Ginsburg, concurred to emphasize that only “genuinely ambiguous” statutes, those requiring “hard interpretive work”—as this one did—can support a claim of a reasonable mistake of law.19 The mistake must be objectively reasonable; an officer’s subjective understanding of the law is not relevant.20 Justice Sotomayor disagreed, arguing that a “fixed legal yardstick”—the actual state of the law, not just a reasonable understanding of it—should govern.21

The decision is significant in a number of respects. In addition to the substantive holding itself, the majority employed the mistake framework to determine that the seizure did not violate the Fourth Amendment but that the exclusionary rule should not apply.22 This distinction proved important to the Illinois Supreme Court. Illinois has sometimes interpreted the scope of its exclusionary rule more broadly than the federal exclusionary rule, but it generally construes the state constitution’s “search and seizure” phrase consistent with that of the federal constitution. Following Heien, the Illinois Supreme Court found that a mistaken belief about the legality of a trailer hitch did not make a stop unreasonable under either the state or federal constitutions.23 A number of state courts have already applied Heien to uphold seizures based upon reasonable mistakes of law in a variety of settings.24 However, not every mistake will do. At least one court has found that an officer’s mistake of law was unreasonable where the state courts had already clearly construed the meaning of the relevant statute.25

**ADMINISTRATIVE SEARCHES**

City of Los Angeles v. Patel26 provided a significant victory for hotel operators and their guests, but it may have repercussions for more than 100 municipalities across the country. A provision of the Los Angeles Municipal Code compels hotel operators to obtain and record specified information about

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11. See Transcript of Oral Argument at 8, Rodriguez v. United States, 135 S. Ct. 1609 (2013) (No. 13-9972) (Justice Sotomayor: “[B]ut you’ve tied it to . . . just writing the ticket, which is crazy”); id. at 11 (Justice Alito: “If we hold that it’s okay to have a dog sniff so long as it’s before the ticket is issued, then every police officer other than those who are uninformed or incompetent will delay the handing over of the ticket until the dog sniff is completed”); id. at 12 (Justice Ginsburg: “[T]he easiest thing to get around . . . would be the sequence in which . . . I won’t think of issuing the ticket until I’ve had the dog sniff . . . .”).
13. Id. at 1615.
15. Id. at 534-35.
16. Id. at 536 (quoting Riley v. California, 134 S. Ct. 2473, 2482 (2014)).
17. Id. at 536.
18. Id. at 540.
19. Id. at 540, 541 (Kagan, J., concurring).
20. Id.
21. Id. at 542, 542 (Sotomayor, J., dissenting).
22. The exclusionary-rule approach was taken in Herring v. United States, 555 U.S. 135, 144-46 (2009), and Davis v. United States, 131 S. Ct. 2419, 2428-29 (2011).
23. People v. Gaytan, 32 N.E.3d 641, 653-54 (Ill. 2015). See also State v. Houghton, 868 N.W.2d 143, at ¶ 49-52 (Wis. 2015) (interpreting state and federal constitutions consistently and applying Heien to overturn a recently decided case).
their guests. It also requires hotels to make guest records available to officers for inspection upon request. A group of motel operators sued, alleging the provision was facially unconstitutional. The Supreme Court agreed in an opinion by Justice Sotomayor.

The case involved a facial challenge to the code provision. The municipal ordinance violated the Fourth Amendment because it failed to provide hotel operators with an opportunity for preclearance review before a neutral decision maker. Admittedly, because the searches at issue served a special need beyond conducting criminal investigations, namely, ensuring compliance with the recordkeeping requirement (which in turn deterred criminal enterprises on hotel premises), they fell beyond the ambit of the warrant requirement. Nonetheless, such administrative searches still require the opportunity for preclearance review. The ability to search without preclearance review was not necessary to the regulatory scheme, and the inspection scheme at issue did not provide an adequate substitute for a warrant. The Court suggested that searches utilizing administrative subpoenas would be constitutional since an objecting hotel operator could move to quash the subpoena before any search takes place. Justice Scalia authored the main dissent, joined by Chief Justice Roberts and Justice Thomas. He argued that the searches were necessary to deter criminal activity in motels, "obvious havens for those who trade in human misery." Because hotels are closely regulated industries subject to stricter government regulation, warrantless searches are not unreasonable.

The Term also included a per curiam reversal involving a civil search. The petitioner in *Grady v. North Carolina* was a recidivist sex offender whom the State sought to subject to satellite-based monitoring under a civil statute. Grady claimed that ordering him to wear a monitoring device and continuously tracking his movements would be an unreasonable search. The North Carolina courts rejected his challenge on the theory that civil monitoring is distinguishable from searches in criminal cases such as *United States v. Jones*. The justices granted Grady's petition for a writ of certiorari and summarily reversed. In light of *Jones* and *Florida v. Jardines*, a state "conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements." The civil-criminal distinction was immaterial, since the Fourth Amendment extends beyond criminal investigations. "[T]he government's purpose in collecting information does not control whether the method of collection constitutes a search." The Justices remanded for the state courts to determine whether the monitoring program is reasonable when it is properly viewed as a search.

**SIXTH AMENDMENT**

The Court's sole Sixth Amendment decision, *Ohio v. Clark*, is the latest in the *Crawford v. Washington* line of cases. While the holding may appear uncontroversial, the decision further revealed the rift among the justices regarding their fealty to *Crawford*.

*Crawford*, of course, rejected the approach to the Confrontation Clause marked by *Ohio v. Roberts*, under which hearsay statements against a criminal defendant were admissible if the statements bore "adequate indicia of reliability." *Crawford* instead "prohibits the introduction of testimonial statements by a nontestifying witness, unless the witness is 'unavailable to testify, and the defendant had a prior opportunity for cross-examination.'" Statements "are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency" and that "the primary purpose" is "to establish or prove past events potentially relevant to later criminal prosecution." Applying the "primary purpose" test, the Supreme Court has found the following to be non-testimonial: calls to a 911 operator, a dying victim's identification of his shooter (who was still on the loose), and a lab report arguably not offered for its truth. Statements deemed testimonial include descriptions of spousal abuse provided to police and reports from forensic analysts. In *Clark*, the Supreme Court applied the "primary purpose" test to statements made by three-year-old "L.P." to preschool teachers. L.P. appeared at school with injuries that suggested child abuse. He told teachers that his mother's boyfriend had caused the injuries. At trial, the state introduced L.P.'s statements to his teachers; L.P. did not testify. Though the justices split on their reasoning and language, the Court unanimously

27. This includes the guest's name and address, the size of each guest's party, any guest vehicles, date and time of arrival and departure, assigned room number, rate charged, and method of payment. *Id.* at 2447-48. There are more than 100 similar laws in cities and counties across the nation. *Id.* at 2457, 2460 (Scalia, J., dissenting).

28. *Id.* at 2452.

29. *Id.* at 2453, 2456.

30. *Id.* at 2453.

31. Justice Alito, joined by Justice Thomas, authored a separate dissent arguing that the ordinance was not facially unconstitutional. *Id.* at 2464 (Alito, J., dissenting).

32. *Id.* at 2457, 2461 (Scalia, J., dissenting).


34. 132 S. Ct. 945 (2012).

35. 133 S. Ct. 1409 (2013).


37. *Id.* at 1371.


41. *Clark*, 135 S. Ct. at 2179 (quoting *Crawford*, 541 U.S. at 54).

42. *Id.* at 2179-80 (quoting *Davis* v. Washington, 547 U.S. 813, 822 (2006)).

43. *Davis*, supra note 42.


46. *Davis*, supra note 42.

ruled that admitting the statements did not violate the Confrontation Clause.

Justice Alito wrote for the Court. Applying Crawford and its progeny, the justices found that L.P.'s statements occurred in the context of an ongoing emergency. Because there was no indication that the primary purpose of the conversation between L.P. and his teachers was to gather evidence for Clark's prosecution, the admission of testimony about L.P.'s out-of-court statements did not violate the Confrontation Clause even though the teachers were subject to mandatory reporting requirements.46 Justice Scalia, joined by Justice Ginsburg, concurred, emphasizing that the statements were non-testimonial under the precedent applicable to informal police interrogation.49 Justice Thomas was of the view that the child's statements did not "bear sufficient indicia of solemnity to qualify as testimonial."50

While at first blush this case appears uncontroversial, Justice Scalia had harsh words for the majority. He wrote separately to "protest the Court's shoveling of fresh dirt upon the Sixth Amendment right of confrontation so recently rescued from the grave in Crawford v. Washington."51 Justice Scalia took with the majority's characterization of Crawford as merely a "different approach" from Ohio v. Roberts, and he assailed Justice Alito for his "hostility to Crawford and its progeny."52 More substantively, Justice Scalia criticized the majority for what he took as dictum suggesting that defendants must show that the evidence would have been excluded in criminal cases at the time of the founding. If true, that would signal a significant retreat from Crawford,53 though subsequent courts do not appear to read the case that way.54

EIGHTH AMENDMENT

In Glossip v. Gross,55 the only Eighth Amendment case decided last Term, the Court held that midazolam—a controversial drug used to render prisoners unconscious as part of Oklahoma's lethal-injection protocol—worked adequately enough to survive Eighth Amendment scrutiny. In doing so, the Court affirmed a test used by a plurality of the Court in a previous method-of-execution case, Baze v. Rees.56

When Oklahoma adopted lethal injection as its chosen form of capital punishment, the state settled on a three-drug protocol that included sodium thiopental, a chemical that produces unconsciousness during an execution. In Baze, the Court upheld Kentucky's use of this same three-drug protocol, rejecting a challenge by inmates who claimed that the risk of a botched execution was so great that it effectively amounted to the infliction of cruel and unusual punishment.57 After Baze, Oklahoma was unable to secure this and another barbiturate, so it turned to midazolam, a sedative it had not used before, to render prisoners unconscious during lethal injection. The plaintiffs in Glossip brought a federal civil-rights action challenging the constitutionality of Oklahoma's midazolam execution protocol following the state's botched execution of another inmate, Clayton Lockett.58

Justice Alito, writing for a five-justice majority, determined that Oklahoma's new drug protocol did not amount to an unconstitutional infliction of cruel and unusual punishment. Drawing upon the test from the Baze plurality opinion, the Court concluded that to obtain a preliminary injunction, prisoners must show "a likelihood that they can establish both that Oklahoma's lethal injection protocol creates a demonstrated risk of severe pain and that the risk is substantial when compared to the known and available alternatives."59 Here, their claims failed both requirements—petitioners did not establish that the district court committed clear error in finding midazolam would not inflict severe pain and suffering, nor could they suggest an alternative method of execution.60

Justice Sotomayor penned the principal dissent, arguing that Oklahoma's use of midazolam violated the Eighth Amendment's prohibition against cruel and unusual punishment because the drug could not be trusted to render and keep an inmate insensate, leaving him vulnerable to pain at the later stages of the execution.61 She was particularly critical of the majority's requirement that the inmates identify an alternative method of execution; she would have held that the State should not be allowed to use an objectively intolerable method simply because an alternative cannot be identified.62

Justice Breyer authored another dissent, joined by Justice Ginsburg, suggesting that the death penalty was per se unconsti-

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48. Clark, 135 S. Ct. at 2181-83. 49. Id. at 2183, 2184 (Scalia, J., concurring). 50. Id. at 2185, 2186 (Thomas, J., concurring). 51. Id. at 2184 (Scalia, J., concurring). 52. Id. 53. Id. at 2185. Justice Scalia argues that "[t]his dictum gets the burden precisely backwards . . . . The burden is on the prosecutor who seeks to introduce evidence over this [Confrontation Clause] bar to prove a long-established practice of introducing specific kinds of evidence . . . ." Id. 54. Decisions appear simply to cite Clark as the latest Crawford case. See, e.g., United States v. Clifford, 791 F.3d 884, 888 (8th Cir. 2015) (admission of a young child's spontaneous statements to her mother's boyfriend was not testimonial); People v. Hinton, 2015 Cal. App. Unpub. LEXIS 6097, at *23 (Cal. Ct. App. Aug. 24, 2015) (in-custody defendant's inculpatory statements during a recorded phone call were nontestimonial); and Holloman v. Commonwealth, 775 S.E.2d 434, 446 (Va. Ct. App. 2015) (a gang notebook was not created for the purposes of an investigation or prosecution). 55. 135 S. Ct. 2726 (2015). 56. 553 U.S. 35 (2008) (plurality opinion). 57. Id. at 61-62. 58. Glossip, 135 S. Ct. at 2734-35. 59. Id. at 2737. 60. Id. at 2738-39, 2741-42. 61. Id. at 2780, 2785-86 (Sotomayor, J., dissenting, joined by Justices Ginsburg, Breyer, and Kagan). 62. Id. at 2795.
[T]hey threw in the towel, finding that this “residual clause” of the ACCA violates the Fifth Amendment’s Due Process Clause because it is unconstitutionally vague.

Due Process Clause and the Vagueness Doctrine

The ACCA defines “violent felony” in several ways. It could be a crime that involves the “use, attempted use, or threatened use of physical force” against another; it could be burglary, arson, extortion, or an offense involving use of explosives; or it could be an offense that “otherwise involves conduct that presents a serious potential risk of physical injury to another.” The italicized phrase has come to be known as the “residual clause,” and the prosecution sought to qualify Johnson's prior conviction under this provision. In four cases decided since 2007, the justices have interpreted the residual clause of the ACCA without striking it down. In those decisions, the Court applied Taylor v. United States, which explained that whether a crime is a violent felony under the ACCA requires a categorical approach; that is, assessing “how the law defines the offense” and “not . . . how an individual offender might have committed it on a particular occasion.”

The opinion of the Court in Johnson, written by Justice Scalia and joined by five other justices, concludes that there is too much uncertainty in categorically determining what kind of conduct “the ordinary case” involves, as well as how much risk it takes for a crime to qualify as a violent felony. In one prior case, the Court had assessed risk by comparison to the closest analog among the enumerated crimes in the ACCA; two of the prior cases sought to rely upon statistics; and a fourth took an entirely different approach. This “failure of ‘persistent efforts . . . to establish a standard’” confirms that the statute is vague. Stare decisis, the majority says, “does not matter for its own sake” but only to promote the consistency and predictability of the law. Because application of the residual clause has proved to be unworkable, standing by precedent would “undermine . . . the goals that stare decisis is meant to serve.” The residual clause “denies fair notice to defendants and invites arbitrary enforcement by judges.”

Justice Kennedy and Thomas concurred; they would have found that the offense was not a violent felony under the prior court rulings, and they would not have struck down the residual clause.

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Justices Kennedy and Thomas concurred; they would have found that the offense was not a violent felony under the prior court rulings, and they would not have struck down the residual clause.

Due Process Clause and the Vagueness Doctrine.

DUE PROCESS CLAUSE—VAGUENESS

The Court granted certiorari in Johnson v. United States to decide whether unlawful possession of a short-barreled shotgun is a “violent felony” under the federal Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(c), which makes a defendant previously convicted of violent felonies eligible for an increased sentence. Johnson was the Court’s fifth go since 2007 at the “residual clause” of the act that purports to define certain violent felonies. After oral argument in November 2014, the justices called for supplemental briefing and heard re-argument in April 2015. Then they threw in the towel, finding that this “residual clause” of the ACCA violates the Fifth Amendment’s Due Process Clause because it is unconstitutionally vague.

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The opinion of the Court in Johnson, written by Justice Scalia and joined by five other justices, concludes that there is too much uncertainty in categorically determining what kind of conduct “the ordinary case” involves, as well as how much risk it takes for a crime to qualify as a violent felony. In one prior case, the Court had assessed risk by comparison to the closest analog among the enumerated crimes in the ACCA; two of the prior cases sought to rely upon statistics; and a fourth took an entirely different approach. This “failure of ‘persistent efforts . . . to establish a standard’” confirms that the statute is vague. Stare decisis, the majority says, “does not matter for its own sake” but only to promote the consistency and predictability of the law. Because application of the residual clause has proved to be unworkable, standing by precedent would “undermine . . . the goals that stare decisis is meant to serve.” The residual clause “denies fair notice to defendants and invites arbitrary enforcement by judges.”

Justices Kennedy and Thomas concurred; they would have found that the offense was not a violent felony under the prior court rulings, and they would not have struck down the residual clause.

Justice Alito dissented, finding no good reason for
overruling precedent “except the Court’s weariness with ACCA cases.”

Justice Alito also would have upheld the residual clause, primarily on the theory that the ACCA does not refer to “the ordinary case” and whether the clause applies or not can be determined by looking at the specific circumstances of each crime.

A few points to note. First, the Court struck down only the residual clause, not the other parts of the ACCA (including the provision with enumerated offenses). Thus, the holding need not relate to similar statutes with enumerated offenses. Second, the Court itself emphasized that its holding does not automatically apply to the “dozens of federal and state criminal laws” that include terminology such as “substantial risk,” “grave risk,” and “unreasonable risk,” since almost none of these other laws link the phrase to a confusing list of examples, as opposed to conduct on a particular occasion. The impact of Johnson remains to be seen. This decision may open, or at least push slightly ajar, a door to constitutional challenges to state laws that contain at least some language similar to that of the residual clause.

**EQUAL PROTECTION CLAUSE—BATSON**

The Term also delivered a Batson case, Davis v. Ayala, though it was presented in a complicated federal habeas corpus framework. In Davis, the Court considered whether a federal habeas petitioner with Batson claims was entitled to relief when the state court determined that even though there was probably error in his case, it was harmless. A closely divided Court concluded that because the state court was statutorily entitled to deference, and because its findings were reasonable, the federal habeas petition should be denied.

During jury selection in Ayala’s case, the prosecution used its peremptory challenges to exclude 18 prospective jurors, including all 7 African-Americans and Hispanics in the venire. The defense raised Batson objections three times. While the trial court required the prosecution each time to provide its justifications ex parte so as not to be forced to reveal trial strategy. Each time the trial court found that the prosecution had sufficient race-neutral reasons to exclude those jurors. Ayala was subsequently convicted and sentenced to death. On appeal, the California Supreme Court held that excluding defense counsel was error under state and possibly federal law but that the error was harmless beyond a reasonable doubt. Ayala sought federal habeas corpus relief, which the court of appeals determined should be granted. The Supreme Court reversed, 5-4.

In an opinion authored by Justice Alito, the Court first discussed the habeas framework. Under Brecht v. Abrahamson, a petitioner must show that a trial error resulted in actual prejudice, and this test subsumes the demanding standards of 28 U.S.C. § 2254(d), the Antiterrorism and Effective Death Penalty Act of 1996, when the state court has found an error to be harmless. Applying this deferential framework, the majority reviewed the prosecution’s explanations for its peremptory challenges. There was sufficient information in the record for the trial court to rule on the Batson objections without the defense present. “Ayala cannot establish actual prejudice or that no fair-minded jurist could agree with the state court’s application” of the test for harmless error.

The dissent, written by Justice Sotomayor and joined by Justices Ginsburg, Kagan, and Breyer, expressed no disagreement with the standard of review described by the majority but contended that its analysis misidentified the issue: the majority focused on whether the trial court was wrong to reject Ayala’s Batson objections based on the record rather than on the exclusion of his attorneys from the Batson hearings. Ayala’s lawyers could have played two critical roles had they been present at the Batson hearings. First, they would have been able to question the credibility of the offered race-neutral explanations. Second, they could have made a record and ensured that the trial judge actually considered the defense arguments against the offered reasons. Counsel’s presence was all the more important given the length of the jury-selection process (3 months) and the apparent loss of the majority of the jurors’ questionnaires. And, with respect to one of the challenged jurors, the dissenters concluded that “had Ayala’s lawyers been present at the Batson hearing” to point out similarities between that juror and a white juror who was not struck, it is probable that “his strong Batson claim would have turned out to be a winning one.” There were also two interesting concurrences. Justice Kennedy joined the majority but expressed his grave concern that Ayala has apparently been in solitary confinement for more than 25 years. Justice Thomas retorted that “the accommodations in which Ayala is housed are a far sight more spacious than those in which his victims . . . now rest.”

78. Id. at 2573, 2575 (Alito, J., dissenting).
79. Id. at 2578-80.
80. Id. at 2561.
82. 135 S. Ct. 2187 (2015).
83. Id. at 2208.
84. Id. at 2193-95.
85. Id. at 2195-97.
88. For example, counsel’s presence was not necessary for the trial judge to compare answers of white and African-American jurors (id. at 2201), to assess the prosecutor’s concern about a juror’s limited English proficiency (id. at 2204), or to evaluate the sincerity of a prosecutor’s concern about a juror’s willingness to impose the death penalty (id. at 2205).
89. Id. at 2203.
90. Id. at 2210, 2211-12 (Sotomayor, J., dissenting).
91. Id. at 2212-13.
92. Id. at 2215-16.
93. Id. at 2208 (Kennedy, J., concurring).
94. Id. at 2210 (Thomas, J., concurring).
The Court read a scienter requirement into a federal criminal statute but did not specify the particular state of mind required for conviction or reach the lurking constitutional question.

FEDERAL CRIMINAL LAW AND EVIDENCE

The federal criminal-law cases of this Term involved interpreting a wide array of criminal statutes. We will review two decisions in which the Court assessed scienter requirements, two others with ambiguous statutory terms, and an opinion addressing whether a felon whose firearms are seized can transfer those firearms to another. Additionally, we venture perhaps slightly outside of our charter to summarize an important civil decision interpreting Federal Rule of Evidence 606(b) and the use of evidence to impeach a jury’s verdict.

FEDERAL CRIMINAL LAW—MENTAL STATE

In Elonis v. United States,95 sometimes called the “Facebook threats” case, the Court read a scienter requirement into a federal criminal statute but did not specify the particular state of mind required for conviction or reach the lurking constitutional question. Anthony Elonis posted violent, graphic, and self-made rap lyrics on Facebook that referenced his estranged wife, co-workers, an unspecified kindergarten class, and an FBI agent. While Elonis often posted the material with disclaimers that his lyrics were fictitious, others viewed them differently. Elonis was charged with violating 18 U.S.C. § 875(c), which prohibits transmitting in interstate commerce “any communication containing any threat . . . to injure the person of another.” The district court denied Elonis’s request for a jury instruction that the government must prove that he intended to communicate a true threat, and it instead instructed the jury that it was enough if he intentionally made a statement that a reasonable person would view as a threat.96 Elonis was convicted, and the court of appeals affirmed. The Supreme Court reversed.

As Chief Justice John Roberts wrote for the Court, the text of § 875(c) did not specify any particular mental-state requirement.97 The majority turned to Morissette v. United States98 and other precedents for the general rule that a defendant must be “blameworthy in mind” and that criminal statutes will be interpreted to include “broadly applicable scienter requirements” even if the statute does not contain them.99 When the statute is silent on the required mental state, the Court will “read into the statute ‘only that mens rea which is necessary to separate wrongful conduct from otherwise innocent conduct.’”100 Because the “crucial element separating legal innocence from wrongful conduct” was the threatening nature of the communication, the lower courts erred in ruling that criminal liability depended on how Elonis’s posts were understood by a reasonable person, as opposed to what Elonis thought. Negligence, the Court held, was not enough.101 However, the justices declined to decide whether recklessness would suffice and remanded to the lower courts to decide the issue.102

This refusal to decide the requisite mental state led Justice Alito to write separately. While Justice Alito concurred that scienter was required, he would have found that recklessness in making threatening statements was enough.103 Because he also would have upheld the conviction on a standard of recklessness, Justice Alito also reached the First Amendment issue, finding that the Free Speech Clause did not protect Elonis’s Facebook posts.104 Justice Thomas was the lone dissenter and, unlike Justice Alito, castigat ed the Court for “throw[ing] everyone from appellate judges to everyday Facebook users into a state of uncertainty.”105 He would have upheld a general-intent approach and found no First Amendment violation.106

In the other scienter case of the Term, McFadden v. United States,107 the Court unanimously held that the government can establish that a defendant “knowingly” distributed a controlled substance “analogue” in two ways: (1) proving that a defendant knew that he was dealing with a controlled substance or something treated as a controlled substance under the Analogue Act, 21 U.S.C. § 813; or (2) proving that a defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue.108 McFadden sold hallucinogenic bath salts. Because the lower court found that the statute only required that the government prove he meant for the substance to be consumed by humans, the Court vacated and remanded for further proceedings. McFadden and Elonis together afford some guidance in assessing mens rea requirements in statutes that either have no explicit scienter requirement (Elonis) or have a requirement that must be distributed to the statute’s other elements (McFadden).

FEDERAL CRIMINAL LAW—AMBIGUOUS STATUTES

Yates v. United States,109 one of the decisions construing ambiguous statutes, was not the most important case of the Term, but it is tough to beat for amusement value. The question was whether a fisherman who threw undersized fish from his boat destroyed “tangible object[s]” in violation of 18 U.S.C. § 1519, the “anti-shredding” provision of the Sarbanes-Oxley Act of 2002. Sarbanes-Oxley was passed in the wake of Enron’s

96. 135 S. Ct. at 2007.
97. Id. at 2008.
98. 342 U.S. 246 (1952).
100. Id. at 2010 (quotations omitted).
101. Id. at 2011-12.
102. Id. at 2013.
103. Id. at 2013, 2014-16 (Alito, J., concurring in part and dissenting in part).
104. Id. at 2016-17.
105. Id. at 2018 (Thomas, J., dissenting).
106. Id. at 2021, 2028.
108. Id. at 2305.
accounting fraud and revelations that Arthur Andersen had destroyed potentially incriminating documents.

The facts of this case seem made to amuse first-year law students. A fish-and-game officer boarded the Miss Katie, a commercial fishing vessel captained by defendant John Yates. Federal regulations at the time required immediate release of grouper less than 20 inches long, and the officer found 72 fish that fell short of that mark. He separated the undersized fish from the rest of the catch and ordered Yates to leave them undisturbed until the Miss Katie returned to port. But when the officer visited the boat several days later, he discovered that Yates had ordered a crew member to throw the undersized fish over the side and replace them with slightly larger denizens of the deep. Yates was subsequently charged with the federal crime of destroying “any record, document or tangible object with the intent to impede, obstruct, or influence” a federal investigation. He was convicted following a jury trial, and the court of appeals affirmed his conviction. A bare majority of the Supreme Court reversed.

Justice Ginsburg wrote a plurality opinion in which three other justices joined, finding that the lower courts applied too broad a definition of “tangible object.” Justice Alito concurred, providing the fifth vote for reversal. The plurality looked to the context of Sarbanes-Oxley, which was enacted specifically to “prohibit . . . corporate document-shredding to hide evidence of financial wrongdoing.” While the justices acknowledged that the ordinary meaning of “tangible object” could encompass anything with discrete form, the plurality found that the specific context for the disputed language, the broader context of the statute, and principles of statutory construction (such as avoiding a reading that would render parts of the statute superfluous) counseled a narrower construction. “It is highly improbable that Congress would have buried a general spoliation statute covering objects of any and every kind in a provision targeting fraud in financial record-keeping.” Thus, “tangible object” should be read “to cover only objects one can use to record or preserve information, not all objects in the physical world.” Concurring, Justice Alito offered a similar but not identical definition of “tangible object,” concluding that the term “should refer to something similar to records or documents.”

The dissent, penned by Justice Kagan, took issue with how both the Ginsburg plurality and the Alito concurrence interpreted section 1519. While the dissenting justices agreed “that context matters in interpreting statutes,” they argued that the plain text of the statute and the context surrounding its enactment both pointed to a broad reading of “tangible object.” The dissent suggested that the majority reached its decision because of “overcriminalization and excessive punishments in the U.S. Code.” Although Justice Kagan agreed that section 1519 grants “prosecutors too much leverage and sentencers too much discretion” and reflects “a deeper pathology in the federal criminal code,” it is not up to the Court to reconstruct laws written by Congress.

The other case with ambiguous statutory terms is Whitfield v. United States. There a unanimous Court ruled that the statute enhancing penalties for bank robberies that involve forced “accompaniment” does not require movement over a substantial distance; the forced-accompaniment provision of 18 U.S.C. § 2113(e) applies even if the movement occurs entirely within a single building or over a short distance. The Court looked to the dictionary definition of “accompany” and noted that the danger involved in forced accompaniment does not depend on the distance traveled.

FEDERAL CRIMINAL LAW—TRANSFER OF SEIZED FIREARMS

Another interesting federal criminal case is Henderson v. United States. There a unanimous Court held that a convicted felon whose firearms are seized by the government before his conviction can transfer those firearms to a seller or other third party unless doing so would allow him to later retake control over those firearms and either use them or direct their use. The decision interprets the federal statute, 18 U.S.C. § 922(g), that bars felons from possessing firearms. While the Court did not decide any constitutional claims, the opinion may be worth a read given the prevalence of felon-in-possession statutes among the states.

The opinion begins by describing “the proverbial sticks from the bundle of property rights” that Henderson retained over his firearms despite his conviction. The Court explained that upon conviction, Henderson had lost the stick of possession, which encompasses both actual and constructive possession, and that he would still constructively possess the firearms if they were transferred to anyone who would return them to Henderson or follow his instructions for their use. But the Court separated that from the right to sell or otherwise dispose of his firearms, which Henderson retained.

110. And Supreme Court justices as well. See id. at 1091 (Kagan, J., dissenting) (referencing Dr. Seuss, One Fish Two Fish Red Fish Blue Fish (1960)); id. at 1094 (arguing that the plurality’s “fishing expedition comes up empty”).
111. Id. at 1081 (Ginsburg, J., joined by Chief Justice Roberts and Justices Breyer and Sotomayor).
112. Id. at 1087.
113. Id. at 1081.
114. Id. at 1089 (Alito, J., concurring). He concluded that the combination of “the statute’s list of nouns, list of verbs, and its title” suggested that Congress intended the statute to apply to a specific category of items, asking—for example—“[h]ow does one make a false entry in a fish?” Id. at 1089-90.
115. Id. at 1090, 1092 (Kagan, J., joined by Justices Scalia, Kennedy, and Thomas).
116. Id. at 1100.
117. Id. at 1101.
119. Id. at 789.
120. 135 S. Ct. 1780 (2015).
121. Id. at 783.
122. Id. at 784.
The Court held that the Federal Rules of Evidence precluded the district court from considering the [juror’s] affidavit; the opinion articulates a strong version of the common-law anti-impeachment rule.

The decision construes Federal Rule of Evidence 606(b) and may be of particular interest in jurisdictions with evidence codes similar to the Federal Rules.

In Warger v. Shauers, the plaintiff moved for a new trial after one juror gave an affidavit about statements made by another juror that suggested she had lied during voir dire. The Court held that the Federal Rules of Evidence precluded the district court from considering the affidavit; the opinion articulates a strong version of the common-law anti-impeachment rule.

The decision construes Federal Rule of Evidence 606(b), which provides that a juror may not testify about any statement made in deliberations as part of “an inquiry into the validity of a verdict.” A claim about misconduct during voir dire plainly entails an inquiry into the validity of a verdict regardless of whether the misconduct had a direct effect on the verdict. The Court acknowledged that some jurisdictions have a weak anti-impeachment rule. For example, under what is sometimes known as the “Iowa” approach, jury testimony is only excluded when it relates to matters that “inhered in the verdict,” and that approach has been used to allow juror testimony challenging conduct during voir dire. However, as Justice Sotomayor wrote for a unanimous Court, the U.S. Supreme Court rejected the “Iowa” approach early on, and the plain language of Rule 606(b) is consistent with these early cases. The Court also turned aside the plaintiff’s contentions that the exceptions in Rule 606(b) applied here and that the narrow interpretation of the rule unconstitutionally infringed the right to an impartial jury.

**EVIDENCE—IMPEACHING A VERDICT**

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**CIVIL RIGHTS**

There were several substantial civil-rights cases in the last Term. One decided the standard to apply in excessive-force lawsuits; others addressed the doctrine of qualified immunity.

In the most significant of the cases, Kingsley v. Henderson, the Court held that to prove an excessive-force claim under 42 U.S.C. § 1983, a pretrial detainee only has to show that officers purposefully or knowingly used force that was objectively excessive, not that the officers were subjectively aware that their use of force was unreasonable. Justice Breyer, writing for the majority, explained that the objective standard was consistent with precedent, primarily Bell v. Wolfish, where the Court held that pretrial detainees cannot constitutionally be subjected to excessive force that amounts to punishment. According to the majority, under Bell, a pretrial detainee can prevail on an excessive-force claim under 42 U.S.C. § 1983 even when there is no evidence of the officers’ intent to punish. He only has to show that the officers’ actions are not “rationally related to a legitimate nonpunitive governmental purpose” or that those actions exceed what is necessary for that purpose. Second, the objective standard is “workable”; that is, there are pattern jury instructions in several circuits that incorporate that standard, and many officers are trained “to interact with all detainees as if [their] conduct is subject to an objective reasonableness standard.” Finally, the objective standard “adequately protects an officer who acts in good faith,” because the reasonableness of force is determined “from the perspective and with the knowledge of the defendant officer.” The majority expressly declined to reach the question of whether reckless use of force might suffice as a standard for imposing liability.

Justice Scalia dissented along with Chief Justice Roberts and Justice Thomas, arguing that the majority fundamentally misread Bell because that case “makes intent to punish the focus of its due process analysis.” Also, according to the dissenters, Kingsley did not need to use the Constitution to bring claims against the officers since state statutory law and common law allowed him to bring a tort claim, and “the majority overlook[ed] this in its tender-hearted desire to fortify the Fourteenth Amendment.”

The Court also decided qualified-immunity questions in a handful of Section 1983 civil-rights cases. The justices were poised to decide whether the Americans with Disabilities Act (ADA) required police officers to provide accommodations to an armed, violent, and mentally ill suspect when attempting to bring her into custody. Instead, the Court resolved City and County of San Francisco v. Sheehan on more narrow grounds,

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123. Id. at 1785.
124. Id. at 1786.
125. 135 S. Ct. 521.
126. Id. at 525, 528.
127. Id. at 526 (citations omitted).
128. Id. at 526-27.
129. Id. at 528-30.
131. Id. at 2470.
133. Kingsley, 135 S. Ct. at 2473 (quoting Bell, 441 U.S. at 561).
134. Id. at 2474.
135. Id.
136. Id. at 2472.
137. Id. at 2477, 2478 (Scalia, J., dissenting).
138. Id. at 2479.
granting qualified immunity to officers who confronted, shot, and injured a mentally ill woman wielding a knife in her private room.\textsuperscript{140} No precedent clearly established that there was not an objective need for the officers to enter Sheehan's room.\textsuperscript{141} In two per curiam decisions, \textit{Carroll v. Carman}\textsuperscript{142} and \textit{Taylor v. Barkes},\textsuperscript{143} the Court granted certiorari and summarily reversed, finding that officials were entitled to qualified immunity because they did not violate rights that were clearly established by Supreme Court or circuit precedent. \textit{Carroll} holds that officers who approach property owners (for a “knock and talk”) at their backyard door instead of their front door do not violate clearly established Fourth Amendment rights. \textit{Taylor} finds that as of 2004, there was no clearly established principle in Supreme Court or Third Circuit precedent assuring an incarcerated person’s right to proper implementation of adequate suicide-prevention protocols.

HABEAS CORPUS

Last Term gave us several decisions addressing the standards to be applied in federal habeas proceedings. The most significant of the decisions was in a case brought by a capital defendant with intellectual deficits who claimed that he could not be constitutionally executed under \textit{Atkins v. Virginia}\textsuperscript{144} and whose claim was summarily dismissed in state court.

In \textit{Brumfield v. Cain},\textsuperscript{145} the petitioner had based his \textit{Atkins} argument on mitigation evidence from the sentencing phase of his trial, including his IQ score of 75, his fourth-grade reading level, the identification of his learning disability, and his treatment at psychiatric hospitals as a child. The state trial court dismissed the \textit{Atkins} claim without an evidentiary hearing and without providing funds for further investigation, and the Louisiana Supreme Court affirmed.\textsuperscript{146} On federal habeas corpus, the district court ruled that Brumfield could overcome the deferential habeas standards established under 28 U.S.C. § 2254(d): the state courts’ rejection of the claim did not comport with clearly established federal law and was based on an unreasonable determination of facts. Following a federal evidentiary hearing, the court went on to find that Brumfield was intellectually disabled and therefore could not be executed.\textsuperscript{147} The Fifth Circuit reversed on the grounds that Brumfield could not pass through the deferential habeas standards.\textsuperscript{148}

The five-justice majority determined that the state court’s ruling was based on an “unreasonable determination of the facts” under § 2254(d)(2) without answering the question of whether the state court unreasonably applied “clearly established Federal law” under § 2254(d)(1). The opinion, authored by Justice Sotomayor, focused on two factual determinations made by the state trial court—that Brumfield’s IQ indicated he did not have an intellectual disability and that there was no evidence of adaptive impairment.\textsuperscript{149} The majority gave substantial deference to the trial court, noting that “[w]e may not characterize these state-court factual determinations as unreasonable ‘merely because [we] would have reached a different conclusion . . . .’”\textsuperscript{150} Even so, Brumfield’s IQ was “squarely in the range of potential intellectual disability,” and there was “sufficient evidence to raise a question” as to whether Brumfield met the criteria for adaptive impairment, so the factual findings of the state court were unreasonable.\textsuperscript{151} The majority emphasized that the threshold that needed to be overcome by Brumfield for an evidentiary hearing was low; all he needed to do was raise a “reasonable doubt” that he had an intellectual disability.\textsuperscript{152} The Court remanded for further proceedings, which presumably would permit the Court of Appeals to review the finding that Brumfield was in fact intellectually disabled.

Justice Thomas dissented. The dissenting and majority opinions provide “a study in contrasts,” much like the stories around which the dissent was framed.\textsuperscript{153} The dissent accuses the majority of “recasting legal determinations as factual ones” and would find that the state court’s factual determinations were reasonable under § 2254(d)(1) and that the decision was not an unreasonable application of clearly established law relating to funding to develop an \textit{Atkins} claim.\textsuperscript{154} \textit{Atkins} itself left it to state courts to determine how to implement its constitutional rule. \textit{Brumfield} may offer a bit more guidance, particularly with respect to whether an \textit{Atkins} claim may be summarily denied or may deserve further development. But moving forward, state courts should remain cautious when looking to that guidance because it is specific to the “reasonable doubt” standard for a defendant to get an \textit{Atkins} claim.

\textsuperscript{140.} The Court granted certiorari to decide whether the ADA applies to an officer’s on-the-street encounter. However, in its merits brief, San Francisco shifted its legal strategy and instead argued that the ADA applies but that Sheehan was not due an accommodation. As this was not briefed below, the Court dismissed the question as improvidently granted. \textit{Id.} at 1773-74. Justices Scalia and Kagan would have dismissed the entire case to “not reward such bait-and-switch tactics.” \textit{Id.} at 1778, 1779 (Scalia, J., concurring in part, dissenting in part).

\textsuperscript{141.} \textit{Id.} at 1777.

\textsuperscript{142.} 135 S. Ct. 348 (2014) (per curiam).

\textsuperscript{143.} 135 S. Ct. 2042 (2015) (per curiam).

\textsuperscript{144.} 536 U.S. 304 (2002).

\textsuperscript{145.} 135 S. Ct. 2269, 2273 (2015).

\textsuperscript{146.} \textit{Id.} at 2275.

\textsuperscript{147.} \textit{Id.} at 2275-76.

\textsuperscript{148.} \textit{Id.} at 2276.

\textsuperscript{149.} \textit{Id.} at 2276-77.

\textsuperscript{150.} \textit{Id.} at 2277 (citation omitted).

\textsuperscript{151.} \textit{Id.} at 2278-79.

\textsuperscript{152.} \textit{Id.} at 2281.

\textsuperscript{153.} \textit{Id.} at 2283, 2283 (Thomas, J., joined by Chief Justice Roberts and Justices Scalia and Alito). In a part of the dissent joined only by Justice Scalia, Justice Thomas compares the horrific facts of Brumfield’s crimes with the exemplary life of Warrick Dunn, the son of Brumfield’s victim, who overcame the murder of his mother to become a professional football player and philanthropist. \textit{Id.} at 2286-87.

\textsuperscript{154.} \textit{Id.} at 2290, 2296-97.
hearing in Louisiana, and the Court did not discuss differences among the states in standards relating to Atkins claims.

As in other recent terms, the justices also summarily reversed several lower federal courts in habeas corpus cases. Most of these decisions were issued to reinforce the highly deferential standards applied under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).155 Thus, in Lopez v. Smith,156 the very first ruling of the Term, the Court emphasized that federal courts of appeals cannot rely on their own precedent to determine whether a constitutional principle is "clearly established" under AEDPA; only Supreme Court precedent may do so.157 Drawing on Smith, Glebe v. Frost158 holds that a trial court's restriction on defense counsel's closing argument was not "clearly established" as structural error; the Washington Supreme Court had found the error to be harmless beyond a reasonable doubt. And in Woods v. Donald,159 the justices determined that the law was not "clearly established" by United States v. Cronic160 that defense counsel's absence from a short portion of trial relating to a co-defendant amounted to ineffective assistance for which prejudice would be presumed.

A LOOK AHEAD

The 2015 Term has just begun, but it already has a significant criminal docket, including a substantial number of capital cases. Three cases argued in October raise questions about how capital juries are instructed with respect to mitigating circumstances and whether conducting joint penalty-phase trials of co-defendants violates the Eighth Amendment by creating a substantial risk that the death penalty will be imposed arbitrarily.161 October also saw a broad challenge to Florida's death-penalty scheme, based on a claim that Florida's advisory jury fails to require a jury finding on all facts necessary to impose the death penalty.162 The Court is taking on a Batson claim in a capital case.163 And it will decide another death-penalty case where it is alleged that the presiding chief justice of the state supreme court had personally approved the capital charges during his prior service as district attorney, had—during his election campaign—expressed support for the death penalty in this and other cases, and had then declined to recuse himself from sitting in the petitioner's case.164 On the non-capital side, the justices are considering whether the ban on mandatory imposition of life-without-parole sentences for juveniles, set out in Miller v. Alabama,165 applies retroactively,166 and if restraining a defendant's untainted assets needed to retain counsel violates the right to counsel and the Due Process Clause.167 It is shaping up to be an interesting term.

155. One outlier: Christeson v. Roper, 135 S. Ct. 891 (2015), was a summary reversal to allow an inmate to show that he may be entitled to equitable tolling of AEDPA's statute of limitations.
156. 135 S. Ct. 1 (2014) (per curiam).
157. See 28 U.S.C. § 2254(d)(1) (habeas corpus relief may be granted if a state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States").
158. 135 S. Ct. 429 (2014) (per curiam).
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Miranda Rights and Wrongs: Matters of Justice

Richard Rogers & Eric Y. Drogin

Judges are likely to respond with outright skepticism when the validity of a Miranda waiver is questioned because the defendant claimed to be merely “depressed” or “anxious” at the time of arrest. They may be reassured that extensive research on Miranda abilities has largely borne out this perspective.

Symptoms of depression and anxiety, by themselves, do not increase the chances of impaired Miranda comprehension or reasoning. For instance, defendants with even moderate to severe depression have roughly the same odds of impaired functioning as those with negligible depression. Only at the extreme levels of depression does a pattern of deficits emerge for Miranda comprehension but not for Miranda reasoning.1

Likewise, a similar pattern is observed even for certain psychotic symptoms, such as delusions and paranoid distrust.2 On reflection, both legal and mental-health professionals alike can discern a plausible explanation for this occurring. Since most delusions and persecutory thoughts do not involve the police or the criminal-justice system, these symptoms are likely to have only a peripheral influence on Miranda-relevant abilities. Only when psychotic symptoms become truly pervasive (i.e., extremely severe) are they likely to impair Miranda comprehension and reasoning.

This introduction underscores several related points. First, judges would be correct in not equating even serious mental disorders with invalid Miranda waivers. Second, Miranda issues—as we consider the totality of the circumstances—must be viewed as much more complex and nuanced than any simple association of symptoms with functional legal abilities.

Judges, prosecutors, and defense counsel alike may share similar misconceptions regarding the general public’s knowledge and understanding of Miranda. For instance, faulty perceptions abound with respect to both the content and the meaning of Miranda warnings. The next two sections address fundamental misunderstandings as they apply to Miranda comprehension and reasoning. We begin with comprehension, focusing first on fundamental myths about Miranda advisements.

THREE FUNDAMENTAL MYTHS ABOUT MIRANDA WARNINGS

Rogers, Shuman, and Drogin3 first articulated major fundamental myths that threaten the integrity of Miranda warnings and subsequent waivers. For instance, judges are sometimes led to assume that there exists only one, simply written Miranda warning that is applied uniformly across the United States. This uniformity myth is shattered by research data that have identified more than 1,000 unique variations, varying in length by more than 500 words, with reading levels that range from grade three to postcollege.4

In 2011, Rogers5 proposed the “general neglect hypothesis” in an effort to explain why Miranda issues were routinely overlooked by the criminal courts—and in particular by the defense bar. Based on very conservative estimates, thousands of arrestees with severely impaired Miranda abilities6 are overlooked or disregarded by defense attorneys each year. This section examines three fundamental Miranda myths that are strongly linked to the general neglect hypothesis. For example, legal professionals are likely to overlook Miranda issues if they believe they are irrelevant (i.e., “just a formality” because everyone already knows them).

1. JUST A FORMALITY

One general misassumption is rooted in the notion that nearly all Americans have a working knowledge of the Miranda warnings. If this were true, then the communication of Miranda rights would aptly be captured by the phrase, “just a formality.” Although Leo7 was critical of police practices in downplaying the importance of Miranda warnings in what he has characterized as a “confidence game,” arresting officers may genuinely see these advisements as nothing more than a necessary bureaucratic exercise—mandated by the Supreme Court—for defendants who are already fully apprised of their rights. Simply put, if suspects already know their Miranda rights, then anything more than the most cursory advisement will be recognized instantly why the commonsensical view that Miranda warnings seems incontestable: Residents of the United States are constantly bombarded with snatches of stereotyped Miranda recitations via countless police dramas and various outlets of the public media. The litany almost inevitably begins with “you have the right to remain silent.” Based on this compelling yet false premise, many attor-

Footnotes
2. Id. at 213-14.
4. See generally Rogers & Drogin, supra note 1.
6. An example of severely impaired abilities is the failure to recall even 50% of the Miranda warning immediately following its oral or written administration.
neys from both the prosecution and defense unhesitatingly assume that criminal defendants are fully cognizant of their Miranda rights as expressed in Miranda warnings. This basic myth, “everyone knows their Miranda warnings,” appears to be strikingly pervasive across our communities. However, this view is simply unwarranted. When a cross-section of the community (e.g., juror pools) was surveyed anonymously, roughly one-third (35%) conceded they had little or no Miranda knowledge. Indeed, they were largely accurate in estimating their ignorance of Miranda warnings. While performing moderately well on the first component, right to silence, they faltered on the other three basic components, averaging only 45% correct: risks of talking, right to counsel, and free legal services. The fifth component of most Miranda warnings, addressing the assertion of rights at any time, or continuing rights, is almost universally missed.

Intuitively, it might be argued that investigating officers could easily screen which arrestees were knowledgeable about Miranda—simply by asking them. In this regard, more than 80% of Miranda advisements directly ask arrestees to affirm their understanding of the Miranda warning. Most defendants provide assents, however, through unelaborated responses (e.g., “yes”). Shouldn’t the criminal courts view such terse yet ubiquitous assents with slack-jawed skepticism?

Self-appraisals. High confidence does not necessarily translate into high accuracy. For instance, about 30% of those professing a high level of Miranda knowledge lacked any substantive memory concerning the Miranda component of free legal services.

Adversarial context. Many arrestees justifiably view their investigating officers as adversaries, who are responsible for their arrests and current detentions. In this context, it is entirely understandable why some detainees would be reluctant to acknowledge any serious limitations, such as a limited cognitive ability to understand Miranda, which might further weaken—at least in their eyes—their adversarial position.

Irrelevance. Many arrestees may perceive Miranda warnings as inconsequential formalities and pay very little attention to their content. Investigating officers may also communicate this message—either directly or indirectly. As an example of the latter, advisements may be delivered in a “mechanical, bureaucratic manner so as to trivialize their potential significance and minimize their effectiveness.” Alternatively, warnings may be presented with rapid-fire delivery, precluding any meaningful comprehension. Canadian research on audio-recorded warnings administered to actual arrestees has clocked average speeds exceeding 200 words per minute. Besides the virtual incomprehensibility of such breakneck speeds, the warnings were frequently marred by omissions and inaccuracies.

Acquiescence. The response style of “acquiescence” refers to an almost reflexive agreement (i.e., yea-saying) that is especially prominent when certain vulnerable defendants are confronted by authority figures. For persons with intellectual disabilities, yes-no-type questions—pervasive in Miranda waivers—are particularly vulnerable to acquiescence. This pattern of acquiescent responding is captured in the title of a classic study: When in Doubt, Say Yes. However, this problem can easily be averted by asking open-ended questions, such as “What do you remember about your Miranda rights?” As a note of caution, the courts should be skeptical if acquiescence is raised for adult arrestees without major intellectual deficits. While genuine cases of acquiescence can occur, they tend to be relatively infrequent for those with adequate cognitive abilities who lack other relevant conditions, such as a dependent-personality disorder.

2. CONVEYING KNOWLEDGE VIA WARNINGS

The Supreme Court of the United States consistently exhibits an unshakeable belief that Miranda warnings represent a highly effective method of conveying information. In Berghuis v. Thompkins, for example, it was unquestioningly assumed that the defendant was fully aware of his rights once properly advised before questioning. Even after nearly three hours, the Court concluded: “As questioning commences and then continues, the suspect has the opportunity to consider the choices he or she faces and to make a more informed decision, either to insist on silence or to cooperate.” In other words, the Court appears to presume that all properly cau-

8. See Rogers et al., supra note 3.
12. The difference lies between “meta-ignorance” (awareness of what is not known) and “meta-knowledge” (awareness of what is known); see Rogers, supra note 5.
13. See Rogers et al., supra note 9.
16. The overall average was 233 words per minute. See Brent Snoonk, Joseph Eastwood & Sarah MacDonald, A Descriptive Analysis of How Canadian Police Officers Administer the Right-to-Silence and Right-to-Legal Counsel Cautions, 52 CAN. J. CRIMINOLOGY & CRIM. JUST. 545 (2010).
19. See generally ROGERS & DROGIN, supra note 1.
tioned defendants remain fully apprised of their Miranda rights and can even accumulate additional information via the questioning to further inform their decision making.

As noted by Blackwood and her colleagues, the Court appears to have fallen victim to the long-disproved supposition that the mind operates like an audio recorder that accurately records and correctly accesses relevant information.22 The “recorder fallacy” of memory has been described as “one of the five great myths of popular psychology.”23 As observed by Rogers and Drogin, however, the Court was not provided with “any information to the contrary” (i.e., evidence of impaired Miranda comprehension, either immediately after the warning or following the several-hour delay). Given the presumption of competency, the Court was left with no choice but to assume that the defendant was fully functioning at the time of his incriminating statement.

A mere notification of rights cannot be equated with the education of one’s rights. Simply because something is stated or written does not mean that it was adequately heard or read. Even if it were heard or read, that does not necessarily mean that it was adequately comprehended. Obviously, judges cannot be expected to take into account every instance of willful inattention in determining the validity of Miranda waivers. Nonetheless, Miranda warnings can include easily identifiable elements that essentially preclude the real comprehension of Miranda material. Such a direct statement likely provokes healthy skepticism. Consider for the moment reading-comprehension levels. It makes no sense—legal or otherwise—to expect a typical arrestee with a sixth- or seventh-grade reading level to comprehend a Miranda advisement written at a college-graduate reading level. Furthermore, research has convincingly demonstrated that lengthy oral warnings cannot be comprehended.25 When given relatively short passages (less than 90 words), well-educated adults are considered to have superior memories if they can immediately recall as much as 72% of the material.26 With typical Miranda warnings—ranging from 125 to 175 words—oral comprehension typically fails to reach 50%, even when administered to college undergraduates.27 At an even more basic level of analysis, research on hundreds of pretrial defendants28 has clearly identified problematic words that foil comprehension. Beyond difficult vocabulary (e.g., “indigent”), other words are legalistic (e.g., “admissible”) or have more commonly used definitions (e.g., “execute” as meaning “to kill”). These issues are addressed more fully in the section “Blueprint for Improving Miranda Warnings.”

3. OVERCOMING MIRANDA MISCONCEPTIONS

A third and final fundamental misconception is that Miranda warnings go beyond conveying knowledge to help in rectifying Miranda misconceptions. As a concrete example, not just judges, prosecutors, and defense counsel, but rather nearly everyone—arrestees, undergraduates, and members of the community—can dutifully recite “you have the right to remain silent.” Nevertheless, a substantial minority continue to embrace the opposite belief. For instance, 20% of prospective jurors,29 26% of undergraduates, and 31% of defendants30 wrongly believe that silence will be used as incriminating evidence. This crucial fallacy can play a determinative role in the waiving of rights.

Rogers and Drogin identified approximately 20 misassumptions that could have direct bearing on Miranda-waiver decisions. For example, arrestees in about one-fourth of American jurisdictions are advised that they have the right to silence until they have legal counsel.32 Assuming arrestees believe what they are told, then the frame of reference changes from if they should waive to when they should waive their rights and talk. Given that offenders are susceptible to forfeiting long-term considerations for immediate gains (e.g., “getting it over”), they may decide to talk now without the benefit of counsel. As a second example, many defendants believe their statements to the police cannot be used as evidence without a signed Miranda waiver. As a consequence of this gross misbelief,34 arrestees may not recognize how almost any form of admission can jeopardize their defenses.

Miranda warnings constitute an ineffective method for rectifying fundamental Miranda misconceptions. This finding is hardly surprising, inasmuch as the Supreme Court justices in Miranda and subsequent cases could hardly have envisioned the rampant nature of Miranda misconceptions that would emerge in subsequent decades. Even if they did, the possible solutions might further confound rather than enlighten detainees.

Take, for example, the New Hampshire Supreme Court in State v. Benoist35 that sought to remedy juvenile suspects’ core misconceptions. Its model Miranda warning reassured juveniles

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24. See ROGERS & DROGIN, supra note 1, at 16.
28. Rogers et al., supra note 9.
29. Id.
31. See generally ROGERS & DROGIN, supra note 1.
32. See Rogers et al., supra note 10.
33. This process is referred to as "temporal discounting."
34. Arrestees do not even need to be asked or provide any verbal indication of their waiver. See Rogers et al., supra note 10.
that invoking their rights carried no penalty: “You will not be punished for deciding to use these rights.” 36 In their well-meaning and concerted attempt to correct fundamental Miranda misconceptions, the justices unwittingly created an exhaustive Miranda advisement that is likely to overwhelm even the most educated adult by its extraordinary length: 425 words for the “misdemeanor” version and ballooning to 498 words for the “felony” version. Juvenile suspects are then presented sequentially with two forms of Miranda waivers totaling an additional 175 words for a grand total of 600 or more words. A common-sensical question that begs for a response: “At what point do juveniles simply stop listening or reading?” 5

For the purposes of this article, we performed an additional analysis on whether “frequent flyers” in the criminal-justice system at either the “gold” (20-39 arrests) or “platinum” (40+ arrests) levels realized any substantive reductions in their Miranda misconceptions when compared to defendants with fewer than five arrests. 38 Contrary to expectations, we found virtually no improvements in average misconceptions: 7.6 for inexperienced defendants versus 7.5 for gold-level and 7.0 for platinum-level defendants. These data expose a fundamental fallacy that repeated exposures to Miranda warnings serve an educative function. 39

Rogers and his colleagues 40 directly tested whether repeated exposure to Miranda advisements had any curative effect on Miranda misconceptions. To provide greater opportunities for learning, they exposed defendants to five differently worded Miranda warnings, which were interspersed with other tasks to avoid fatigue. To keep these participants actively involved, they were tested on their immediate recall after each warning. Despite this intense exposure, no overall reduction in Miranda misconceptions was observed, irrespective of whether the warnings were provided orally or in writing. As the only bright note, a small number of defendants with substantial difficulties showed modest improvement, but they were clearly outnumbered by those with no improvement or even worse performance. 41

**MIRANDA-WAIVER DECISIONS**

Beyond police coercion impairing their voluntariness, 42 Miranda waivers typically rely on knowing and intelligent decisions to relinquish Miranda rights. As two distinct yet related components, 43 the “knowing” prong provides the necessary foundation for an “intelligent” waiver. As an analogy from chess, Rogers and Drogin observed that simply knowing how the pieces move is, by itself, insufficient for rational decision making. 44

Grisso 45 described five important components of rational decision making as it applies to legal competence. 46 The five levels are outlined below with illustrative questions that judges will presumably want defense counsel to have asked to investigate the level of rational decision making:

1. **Awareness of the alternatives.** Counsel may wish to inquire: “What did you see as your choices after you were given the Miranda warning?”

2. **Potential consequences of each alternative.** For each choice, counsel may wish to simply inquire: “What did you think would happen?”

3. **Likelihood of these consequences.** As a follow-up to #2, counsel may wish to ask the following for each alternative: “How certain were you that this would happen?”

4. **Weighing the desirability of each consequence.** As a follow-up to #2, counsel may wish to query for each alternative: “How much did you want this to happen?”

5. **Comparative deliberation of alternatives and consequences.** As the final question, counsel may wish to ask: “How did you make the decision?”

Judges are likely to be taken aback by the low level of rational thinking exhibited by many defendants when faced with these potentially life-altering decisions. Considering this notion within a legal framework, the Supreme Court of the United States held in Iowa v. Tovar 47 that a waiver is intelligent “when the defendant knows what he is doing and his choice is made with eyes open.” A rhetorical but very real question is, “How open?” To be fully open, levels #2, #3, and #4 must be considered. To avoid being fully closed, #2 seems essential. For the remaining levels, the necessary appreciation may have less to do with accuracy than the underlying reasons for this belief. Using #3 as an illustration, a female mentally disordered suspect may correctly believe that her confession may result in an “earthly” conviction but reason delusionally that she is exempt from “earthly” powers. Miranda reasoning should not be viewed as an all-or-nothing process. Indeed, Blackwood and her colleagues 48 found that the large majority of defendants with markedly impaired reasoning

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36. Id. at 22.
37. Id. Both modalities should be used: “The following is to be read and explained by the officer, and the child shall read it before signing.”
41. Id. Overall, 33 evidenced at least two fewer misconceptions, whereas 35 showed no improvement at all, or even a worse performance.
43. Interestingly, in Edwards v. Arizona, 451 U.S. 477 (1981), the Supreme Court of the United States appeared to de-emphasize the intelligent prong in holding that a basic awareness was sufficient for a valid Miranda waiver.
44. See Rogers & Drogin, supra note 1, at 93.
on some aspect of the Miranda waiver could still rationally consider some short- and long-term consequences regarding other aspects. For instance, they found most irrational thinking involved the benefits of exercising rather than waiving Miranda rights. For this article, we performed an additional analysis on our extensive database of more than 600 pretrial defendants. As summarized in Table 1, relatively few defendants evidenced substantially impaired reasoning for waiving or exercising rights. The notable exception (14.4%) involved grossly misperceived risks of requesting counsel. Examples include fundamental fallacies about affordability (e.g., no attorney without the capacity to pay) or allegiance (e.g., court-appointed attorney will divulge your admissions to the judge). Counsel may wish to inquire, for example, “Why didn’t you ask for an attorney immediately after being detained? Why didn’t you ask for an attorney immediately after hearing your Miranda warnings?” Such questions may help to illuminate the defendant’s thinking before the Miranda waiver.

The picture becomes much more complex when irrational and questionable reasoning are considered together. As a benchmark, roughly 20% meet this combined category. When this combined category is examined for defendants who have been found incompetent to stand trial, the number nearly doubles. Depending on other evidence, counsel may wish to routinely consider Miranda issues when competency to stand trial is raised. In general, a major challenge facing defense counsel and their retained experts is that many defendants are confused about their memories around the time of the arrest due to intoxication and severe situational stressors.

Issues of impaired Miranda reasoning are almost invariably raised by defense counsel. Nonetheless, prosecutors as well as judges have a strongly vested interest that only genuine cases go forward. In addition to research on possibly feigned Miranda vocabulary, Rogers and his colleagues are beginning to examine whether defendants are evidencing a believable pattern of Miranda misconceptions. These approaches can be used to evaluate whether some defendants are falsely claiming gross misconceptions in an intentional effort to suppress a completely valid Miranda waiver. For example, a “Discrimination Index” was established based on which misconceptions show remarkable deficits or moderate improvements when defendants try to feign impaired Miranda reasoning.

### A BLUEPRINT FOR IMPROVING MIRANDA WARNINGS

Citing earlier Miranda research, the American Bar Association issued a policy statement to legislative bodies and governmental agencies, asking for their constructive efforts toward “the development of simplified Miranda language for use with juvenile arrestees.” In our estimation, the need for comprehensible warnings should have no age barri-

<p>| TABLE 1: DEFENDANTS’ ABILITIES TO REASON ABOUT WAIVING AND EXERCISING THEIR MIRANDA RIGHTS |
|-----------------------------------------------|-----------------------------------------------|-----------------------------------------------|-----------------------------------------------|-----------------------------------------------|</p>
<table>
<thead>
<tr>
<th>WEIGHING OPTIONS</th>
<th>SUBSTANTIALLY IMPAIRED REASONING</th>
<th>QUESTIONABLE REASONING</th>
<th>RATIONAL: SHORT-TERM</th>
<th>RATIONAL: LONG-TERM</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefit of waiving</td>
<td>Silence</td>
<td>2.6</td>
<td>20.2</td>
<td>20.2</td>
</tr>
<tr>
<td></td>
<td>Counsel</td>
<td>4.7</td>
<td>13.1</td>
<td>13.1</td>
</tr>
<tr>
<td>Risk of waiving</td>
<td>Silence</td>
<td>5.1</td>
<td>14.3</td>
<td>14.3</td>
</tr>
<tr>
<td></td>
<td>Counsel</td>
<td>3.2</td>
<td>20.2</td>
<td>20.2</td>
</tr>
<tr>
<td>Benefit of exercising</td>
<td>Silence</td>
<td>2.9</td>
<td>20.2</td>
<td>20.2</td>
</tr>
<tr>
<td></td>
<td>Counsel</td>
<td>0.8</td>
<td>11.0</td>
<td>11.0</td>
</tr>
<tr>
<td>Risk of exercising</td>
<td>Silence</td>
<td>5.5</td>
<td>14.6</td>
<td>14.6</td>
</tr>
<tr>
<td></td>
<td>Counsel</td>
<td>14.6</td>
<td>10.6</td>
<td>10.6</td>
</tr>
</tbody>
</table>

a Considers immediate circumstances only.

b Considers future consequences.

49. ROGERS ET AL., supra note 38.

50. Id. The greatest concerns involved the benefits of waiving (45%) or exercising (45%) the right to silence, plus the risk of waiving the right to counsel (48%).

51. Id. Using a detection strategy known as the “performance curve,” the SAMA Miranda Vocabulary Scale expects to find that defendants will have much greater success at easier items than more difficult ones. Feigners often do not pay attention to item difficulty when faking.


ers. In 2008, Rogers called for the elimination of incomprehensible warnings, particularly those which he categorized as the “worst offenders.” In their recent book, Mirandized Statements, Rogers and Drogin present tools on selecting simple language for building effective Miranda warnings that can be used with both juvenile and adult arrestees. They recommend grassroots efforts to promote procedural justice involving the key stakeholders, such as law enforcement, prosecutors, defense attorneys—and, of course, judges.

Table 2 outlines the simple steps toward improving Miranda warnings. For vocabulary, five simple steps could effectively

| TABLE 2: BLUEPRINT FOR IMPROVING MIRANDA WARNINGS |
|-----------------|-----------------|-----------------|
| STEPS | ISSUES | DETAILS/EXAMPLES |
| **REMOVE DIFFICULT VOCABULARY**^a |
| 1 | Remove legalese | Examples: admissible, alleged, appearance, deposes, detain, duress, entitled, executed, inadmissible, incriminate, knowingly, privilege, retain, revocation, statutory, stipulate, waive, waiver |
| 2 | Remove formalized words | Examples: aforementioned, hereinafter, hereby, pursuant, whatsoever, whomsoever |
| 3 | Avoid homonyms (particularly problematic for oral advisements) | Examples: admission, aggravated, charge, commitment, counsel, execute, immunity, petition, terminate, waive |
| 4 | Avoid difficult words (10+ grade reading level) | Examples: appointed, certify, coercion, compelled, compulsion, counsel, discretionary, indigent, incompetent, intimidation, invoke, leniency, pending, perjury, proceedings, render, renounce, signify |
| 5 | Avoid infrequent words (less than one word per million in writing) | Examples: certify, cross-examine, detain, discontinue, induce, ment, initialed, interrogation |

| **SHORTEN MIRANDA WARNINGS**^b |
| 1 | Component: Silence | Less than 14 words |
| 2 | Component: Evidence against you | Less than 16 words |
| 3 | Component: Attorney | Less than 20 words |
| 4 | Component: Free legal services | Less than 25 words |
| 5 | Component: Continuing rights | Less than 23 words |
| 6 | Total warning | Less than 56 words^c |

| **DECREASE READING-COMPREHENSION DEMANDS**^d |
| 1 | Component: Silence | Flesch-Kincaid less than 4.2 grade level |
| 2 | Component: Evidence against you | Flesch-Kincaid less than 6.9 grade level |
| 3 | Component: Attorney | Flesch-Kincaid less than 4.5 grade level |
| 4 | Component: Free legal services | Flesch-Kincaid less than 7.3 grade level |
| 5 | Component: Continuing rights | Flesch-Kincaid less than 6.4 grade level |
| 6 | Total warning | Flesch-Kincaid less than 6.4 grade level |

^a Some words qualify for multiple categories. For simplicity, they are listed under the first applicable category. Vocabulary issues were distilled from Appendixes A and B of Rogers & Drogin, supra note 1.

^b With warnings from 945 jurisdictions, these lengths represent the first quartile, with more than 200 variations found in general warnings.

^c This number is based on the total words and does not equal the sum of each component.

^d With warnings from 945 jurisdictions, these reading grade levels represent the first quartile, with more than 200 variations found in general warnings.

Judges play a highly influential role in the American criminal-justice system. While they may not wish to become deeply involved in the development of model Miranda warnings, they can still help to shape and improve current practices. Toward this end, we offer a simplified blueprint that should enable judges and their staff to facilitate simple yet effective changes in the existing Miranda advisements.

55. See Rogers, supra note 11, at 782.
56. See Rogers & Drogin, supra note 1.
57. Depending on the jurisdiction, judges may wish to avoid potentially polarizing issues between defense and prosecution.
remove abstruse words that often confuse even the educated public.

Remove legalese: Simple words can easily be substituted for words with specialized legal meanings, such as “admissible,” “appearance,” “inadmissible,” “stipulate,” and “waiver.”

Remove formalized words: Some centuries-old formal words are no longer used in common discourse. Examples include “aforementioned” and “whomsoever.”

Remove homonyms: These words are particularly confusing with oral Miranda warnings. Most defendants have heard “execute” and “terminate,” but many ascribe a very different meaning to them than what is needed to accurately convey the legally relevant information.

Remove difficult words. Some words clearly require close to a high-school education or more before adults can even recognize their correct meanings. Examples particularly relevant to Miranda warnings include “indigent” and “proceedings.”

Remove infrequent words. Some words very rarely appear in print, even if known, they can be barriers to a full understanding of the sentence. Examples are “certify” and “interrogation.”

The second two components can be achieved easily, using Microsoft Word or other major word-processing programs. Word provides readability statistics—including word counts and reading grade levels—almost instantly. The Flesch-Kincaid reading-level estimate that the program generates is widely accepted and used by many governmental agencies, including the Department of Defense. As an important caution, its reading levels are set for at least 75% comprehension; often several more grades of reading ability are needed to ensure complete comprehension.

The take-home message is very simple. With less than an hour of unhurried work, the language of Miranda warnings could be easily simplified. Equally simple would be the shortening of the Miranda warning and the marked reducing of its reading demands to grade six or even lower. Remember, the reading levels reported in Table 2 were found with several hundred variations (i.e., the lowest quartile). With a more concerted effort, even lower grade levels are easily achievable.

The blueprint for improving Miranda warnings could be extended beyond local jurisdictions and considered at the national level starting with Table 2 and supplemented by the extensive guidelines in Rogers and Drogin. Building on the ABA policy, the American Judges Association (AJA) could adopt a more encompassing national policy with the attainable goal of eliminating most incomprehensible warnings, irrespective of age or language. This policy would be consistent with Miranda’s language calling for “clear and unequivocal” communication of constitutional rights. Moreover, this policy embraces the AJA’s overriding objective of being “dedicated to improving the systems of justice in North America.” Substantiated with an AJA White Paper, a movement toward national reform of Miranda warnings could be galvanized.

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60. See ROGERS & DROGIN, supra note 1, at 21-45 (“An Ounce of Prevention”).
63. This quote is from the current AJA president, Judge Brian MacKenzie, in the “President’s Message” on the home page of the American Judges Association, http://aja.ncsc.dni.us/index.html.
64. An excellent example is PAMELA CASEY, KEVIN BURKE & STEVE LEBEN, MINDING THE COURT: ENHANCING THE DECISION-MAKING PROCESS (2012), http://aja.ncsc.dni.us/pdfs/Minding-the-Court.pdf. As a possible parallel to informed-waiver decisions, it provides examples of how benchcards and other decisional tools can facilitate judicial decision making.
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 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.

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

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Wrongful conviction is a serious dilemma for the criminal-justice system. A joint investigation by the Better Government Association and the Center on Wrongful Convictions tracked exonerations from 1989 through 2010 and identified 85 people who were wrongfully incarcerated. Not only were those 85 lives unfairly affected in serious ways due to the incarceration, but the actual perpetrators continued on crime sprees that went on to include 14 murders, 11 sexual assaults, 10 kidnappings, and at least 62 other felonies.

The reversal of false convictions is becoming more frequent. However, scholars have asserted that the exonerations that do occur are probably a small fraction of actual wrongful convictions. Gross and colleagues pointed out that “[o]ur legal system places great weight on the finality of criminal convictions. Courts and prosecutors are exceedingly reluctant to reverse judgments or reconsider closed cases; when they do—and it’s rare—it’s usually because of a compelling showing of error.” Therefore, in order for a wrongful conviction to be overturned, these cases must undergo a lengthy appeals process.

WRONGFUL CONVICTION CAUSAL FACTORS

To prevent wrongful convictions, it is important to understand the factors that lead to them. In one study of 86 DNA-exoneration cases, the leading factors contributing to wrongful conviction were eyewitness misidentification (71% of the cases), errors in forensic-science testing (63% of the cases), police misconduct (44% of the cases), prosecutor misconduct (28% of the cases), false and misleading expert testimony by forensic experts (27% of the cases), dishonest informants and incompetent defense representation (both 19% of the cases), and false confessions (17% of the cases). According to a more recent analysis by The Innocence Project (2015), which examined 325 post-conviction DNA exonerations in the United States, the following errors were identified: eyewitness-misidentification testimony (72% of cases), unvalidated or improper forensic science (47% of cases), false confessions/incriminating statements (27% of cases), and informants or snitches (15% of cases). Based on these data, it is apparent that there is an array of causal factors related to wrongful convictions.

Eyewitness misidentification. Wrongful-conviction research has established that eyewitness identifications are widely considered to be one of the least reliable forms of evidence admitted in the courtroom. In one study of 500 cases of erroneous convictions, the leading cause of mistaken conviction was faulty eyewitness identification of defendants. Since DNA testing became available in criminal cases in the 1990s, hundreds of defendants who were convicted by United States juries have been exonerated by exculpatory DNA evidence. Out of these people, 235 were cases of mistaken eyewitness identification. Despite clear limitations, many legal decision makers view eyewitness testimony as very persuasive. As eyewitness testimony is the leading cause of wrongful convictions, decision makers should consider the existing scientific knowledge pertaining to the shortcomings of eyewitness testimony when considering facts of criminal cases that involve eyewitnesses.

Error in forensic-science testing. Forensic science (e.g., latent fingerprints and hair analysis) is often portrayed as a gold standard of evidence since it is widely thought of as unquestionable physical proof of one’s innocence or guilt.
DNA evidence specifically has been referred to as a “truth machine.” However, forensic-science error has led to wrongful convictions in several cases. Whether it is laboratory fraud or fabricated evidence, these erroneous methods are especially troubling since scientific evidence is often the primary method prosecutors use to prove a defendant’s guilt. In a study of the trial transcripts of 137 exonerations, 13 cases involved either a failure to disclose exculpatory data or analysis or fabrication of forensic evidence.13

**Police misconduct.** In a study of 62 exonerations, police misconduct was found in 50% of the cases.14 Common forms of misconduct by police included employing suggestion when conducting identification procedures, coercing false confessions, lying or intentionally misleading jurors about their observations, failing to turn over exculpatory evidence to prosecutors, losing or destroying evidence, and providing incentives to secure unreliable evidence from informants.15 Because there is pressure on police officers to obtain incriminating evidence against a suspect in the absence of alternate inculpatory evidence, police may be “tempted to cut corners... perhaps to manufacture evidence to clinch the case.”16

**Expert Testimony.** Experts may be held in a generally high regard based on the witness’s credential or some other relevant factor.17 In fact, because juries may give special weight to forensic-science expert testimony,18 the U.S. Supreme Court cautioned, “[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it.”19 A study by Garrett and Neufeld found that in 60% of their sample of wrongful-conviction cases, forensic analysts called by the prosecution provided invalid testimony.20 Additionally, experts sometimes testify regarding forensic-science practices (e.g., hair microscopy, bite-mark comparison) that, while practiced for years, have not been subjected to adequate scientific research.21 While forensic science often provides exonerating information, the misuse of this evidence can have deleterious implications as well.

**False confessions.** Despite being implicated in 20% to 25% of wrongful convictions in DNA-exoneration cases in the United States, confession evidence has been historically regarded as a “gold standard” of evidence in court.22 However, of the 340 exonerations between 1989 and 2004, 51 defendants, or 15%, confessed to crimes they did not commit.23 Most of these confessions were coerced by the police. False confessions are heavily concentrated among the most vulnerable populations—people with mental disabilities and people under the age of 18. Of the false confessions in Gross et al.’s study, 55% of them were either under 18, intellectually disabled, or both.24 Research conducted by Kassin, Bogart, and Kerner25 suggested that confessions may exert influence in addition to the actual admission of guilt in trial. Specifically, incriminating confessions can mislead the perceptions of lay witnesses, expert witnesses, and jurors. For example, research has found that confessions influence verdicts even when the confessor is reportedly mentally ill or when the confessor was noted to be under duress when confessing.26 Furthermore, Kassin et al. found that multiple errors were more likely to exist in wrongful-conviction cases containing a confession.27 In such cases containing multiple errors, confessions were more likely to have been obtained first rather than later in the investigation. This temporal-order finding is important because it suggests confessions taint other forms of evidence.

**JUDICIAL DECISION MAKING**

While judicial decision making is ostensibly guided by legal factors, public policy and other influences often converge to shape judicial decisions.28 Ideological factors as well as policy preferences increasingly influence decision making as one moves higher up the judicial “pyramid.”29 Although a growing body of research has investigated the use of expert testimony in jury decisions, little is known about how judges evaluate scientific or psychological evidence in the decision-making process.30 It has been indicated that some judges may be more likely to disregard social-science evidence because it may repu-

21. Id. at 20, 47-51.
23. Gross et al., supra note 3, at 544.
24. Id. at 545.
27. Kassin et al., supra note 25, at 43.
29. Id. at 1213.
diate their (more conservative) sociopolitical beliefs. Furthermore, research suggests that without additional training, some judges may be less able to assess the validity of scientific and psychological evidence accurately. This has several implications for judges’ ability to interpret expert and eyewitness testimony and be effective gatekeepers of forensic-science and social-science evidence.

For the most part, it is relatively unknown how judges perceive the errors that commonly lead to convictions of innocent defendants. In a survey conducted by Ramsey and Frank investigating criminal-justice professionals’ perceptions of the frequency of wrongful convictions and system errors, judges indicated beliefs that each system error occurred less frequently than defense attorneys believed it occurred. Judge perceptions were more in line with police chiefs and prosecutors than defense attorneys. In addition, survey responses indicated criminal-justice professionals (i.e., defense counsel, police, prosecutors, and judges) were least likely to acknowledge error concerning corrupt actions, specifically using false evidence and prosecutors knowing using false evidence. This may reflect the fact that respondents are more likely to recognize issues concerning negligence and poor training than issues involving corruption within the system. While studies such as this do ultimately shed some light on judges’ perceptions of factors leading to wrongful convictions, there is still much to be learned regarding judicial decision making in wrongful-conviction cases.

THE PRESENT STUDY
Judicial decision making may be subject to the influence of many different factors, including the judge’s attitudes, past experiences, policy preferences, and opinion of scientific evidence. The present study contributes to courtroom research by examining demographics and perceptions of trial errors and scientific evidence associated with the propensity to grant a writ of habeas corpus.

We expected that judges would be more likely to grant the writ of habeas corpus when confronted with errors in forensic-science evidence contributing to a wrongful conviction over errors in social-science evidence. This hypothesis is consistent with past research documenting judicial and law-student participants’ generally negative or dismissive attitudes about social-science evidence. In an exploratory manner, we investigated which trial errors judges would place greatest importance on in their decision making. Finally, it was hypothesized that judges’ attitudes toward different types of scientific evidence (i.e., social science and forensic science) in the courtroom would influence granting of a new trial.

METHOD
PARTICIPANTS
Participants were 308 judges with an average of approximately 13 years of experience each. The sample included 70 females (22.7% of the sample) and 238 males (77.3% of the sample). Most judges reported being between the ages of 45 and 64 (75.4%), with others between 35 and 44 (7.1%), 65 and 74 (16.6%), and over 75 (1%). Most reported being Caucasian (94.0%), while others reported being black or African-American (1.7%), Asian or Asian-American (1.7%), Hispanic or Latin American (1.3%), or from another racial or ethnic background (3.3%). There was at least one participant from each U.S. state, the District of Columbia, the Northern Mariana Islands, and the Virgin Islands. The judicial sample comprised judges from the following regions of jurisdiction: 32.1% of judges presided in the West, 27.6% presided in the Midwest, 6.5% presided in the Northeast, 33.1% presided in the South, and 0.6% presided in island territories.

In the sample, 69.4% of judges served general jurisdictions, while 5.5% served appellate, 22.8% served special, and 2.3% served military jurisdictions. As a whole, judges estimated they had presided over between 17 and 18 cases that had been involved in the appeals process over the duration of their careers thus far. The judges reported a range of experience with cases over which they had presided that had been overturned on appeal, with an average of approximately five overturned cases.

MEASURES
Vignette. Judges were presented with one of two vignettes; one included social-science evidence and the other, forensic-science evidence. The vignettes contained three different evidentiary issues related to the causal factors of wrongful convictions. All vignettes first presented system-corruption evidence (i.e., held constant across conditions as a rationale to raise the appeal process). There were then two variables from one of the scientific-evidence categories (i.e., forensic or social science). The vignettes’ presentation order of scientific evidentiary issues were counterbalanced, with the system-corruption issue always presented first and a counterbalanced variation of the two scientific-evidence variables presented second and third. Because post-conviction review is often focused on the correction of legal and procedural errors, as opposed to factual errors, judges were presented with the system-corruption evidentiary issue (i.e., police misconduct) first, as it was potentially more likely to be considered a legal error worthy of investigation that might then lead to judges’ further consideration of additional factual errors (e.g., false confession, inaccurate
expert testimony). The system-error evidence pertained to causal factors of false convictions involving corrupt action by form of police misconduct. The police-misconduct vignette was as follows:

Mr. Adam's co-worker told the police that she was with him on the night of the murder during the time that the crime allegedly took place. However, law enforcement officials never added this evidence to their police report and it was never mentioned during trial, as it was never turned over to the prosecutors.

The evidentiary issues relating to social-science evidence included evidence of a false confession and of an eyewitness misidentification. These types of evidence fall under the defined domain of social-science evidence in line with social-psychological research on mechanisms and impacts involved in false confessions and eyewitness misidentification. The eyewitness-testimony vignette was as follows:

Mr. Williams testified at the original trial that he witnessed what he believed to be Mr. Adams fleeing the scene of the crime on the night of the murder. The eyewitness stated that as he was leaving his friend's house, he heard a commotion in an alleyway and saw who appeared to be Mr. Adams running and jumping over a fence. When he heard about the murder on the news a few days later, he went into the police station and told them what he believes he saw. The underlying facts regarding the identification procedure at the station were never presented to the jury. First, at the time Mr. Williams witnessed the perpetrator flee, it was late, dark, and he had been drinking. He told the officers this and they asked him to try his hardest to pick the perpetrator from a lineup to the best of his ability, as they knew how compelling an eyewitness would be to the jury during the trial. When he stated he was unsure who the perpetrator was upon viewing the lineup, an officer asked if he would take a few more minutes to consider who they suspected committed the crime (Mr. Adams). The officers reminded him a few more times how important his testimony would be to the case and reassured him that they were already quite sure who had committed the crime. Eventually, Mr. Williams picked out the suspect from the lineup after recognizing that he had a similar facial structure and facial hair to the man he witnessed fleeing the scene of the crime.

The false-confession vignette was as follows:

The prosecuting attorney presented evidence to the court at the original trial that Mr. Adams confessed to raping and murdering Mrs. Jones. The circumstances behind the coerced confession included the following. Mr. Adams was interrogated by police detectives for several hours, after which they deployed deception to elicit his confession. Specifically, they told him they had solid incriminating evidence that he committed the crime in the form of fingerprints on the murder weapon. However, this was untrue. At the arrival of his lawyer and upon learning that there was no such fingerprint evidence, Mr. Adams recanted the confession. The confession evidence played a large role in the prosecutor's case against Mr. Adams, and he was eventually convicted and sentenced to 50 years to life in prison.

The evidentiary issues presented in the forensic-science vignette were derived from real cases described by Garret and Neufeld in their study examining trial transcripts for invalid forensic-science testimony. The inaccurate-expert-testimony vignette was as follows:

An expert from the local crime lab testified during the trial regarding a serology analysis his lab conducted. In this case, the victim, Mrs. Jones, and the suspect, Mr. Adams, are both B secretors. B substances were found on the victim's underwear, which could have been entirely from the victim. However, the analyst testified stating that the donor would have had to have been a B secretor. In addition, A antigens were found on another stain in the victim's underwear that were foreign to both the suspect and the victim, but the analyst failed to exclude Mr. Adams as the source stating to the court that the foreign substance could be a mixture of blood, sweat, wood, leather, and detergents or other substances, indicating that the suspect should not be ruled out based on this evidence.

The faulty-laboratory-procedure vignette was as follows:

A private forensic laboratory's analyst reportedly failed to detect semen on the victim's underwear so that no testing could be done to either include or exclude Mr. Adams. However, a post-conviction on-the-spot DNA test later showed a positive result for the presence of semen on that exact spot that should not have been missed previously. Subsequent DNA testing on the spot will provide evidence lending to the innocence of the suspect.

Vignette-related factors and outcomes. Judges answered questions after each evidentiary issue was presented. After the first piece of evidence (i.e., system error/police misconduct) was presented, the judges were asked to consider the piece of evidence and rate how likely they would be to grant a new trial on a scale of 1 to 10. Following the presentation of the entire vignette (i.e., either all forensic or all social-science evidence), judges made final decisions as to the likelihood of granting a new trial (using the scalar item), as well as whether or not they would grant a writ of habeas corpus in dichotomous format. Therefore, the items included a dichotomous “yes”/“no” question addressing this decision (used for ecological-validity purposes) and a continuous version of the question asking, “How likely are you to grant the writ on a scale of 1 to 10?”

An opinion portion of the questionnaire followed the deci-
sion, where the judges were asked to rate how important each evidence variable was in their decision-making process. They rated the importance of each trial error on a scalar rating, with 1 being “Not at all” and 10 being “Very much so.” Participating judges also indicated which evidentiary issue presented in the vignette was most influential in their decision regarding whether to grant a new trial, as well as which evidentiary issue was least influential.

**Scientific Evidence in Court Attitudes Questionnaire.** After the decision-making portion of the survey was complete, judges responded to 36 items related to beliefs and attitudes about scientific evidence. Eighteen items pertained to social science in a courtroom context, and the remaining 18 items concerned forensic science in the courtroom. For example, a social-science item stated, “The subjectivity of social science causes me to question its value in the courtroom.” A forensic-science item stated, “Forensic science expert witnesses have been known to exaggerate their findings to benefit the side for whom they are testifying.” The items were derived from issues discussed in a variety of sources, including amicus briefs, research articles, court cases, and The Innocence Project. Judges were asked to rate the extent to which they agreed with the 36 items. They responded on a 10-point scale, with 1 being “Not at all” and 10 being “Very much so.”

**PROCEDURE** Questionnaires were distributed to judges through SurveyMonkey, a survey-hosting website. Participating judges were contacted through a National Judicial College electronic mailing list. Before answering items on the questionnaire, a brief consent form explained the rights and risks of the participants that are involved in the research study. If consenting, the participants were directed to the remainder of the questionnaire. The versions of the vignettes (i.e., social science or forensic science) presented to the participants were randomly assigned through a logic function in SurveyMonkey. Of the participating judges, 48.7% received the social-science vignette, and 51.3% received the forensic-science vignette.

**FINDINGS**

**PRELIMINARY ANALYSES**

A total of 279 out of 308 judges (90.5%) ultimately granted the writ of habeas corpus. Of the judges in the forensic-science condition, 92.4% ultimately granted the writ of habeas corpus. In the social-science condition, 88.7% of the judges ultimately granted the writ of habeas corpus. Other than gender, no demographic variables showed significant effects on ultimate decisions regarding granting a writ of habeas corpus. Results indicated that gender of the judge was fairly influential on judges’ decisions regarding how likely they were to grant the writ. Specifically, females reported a somewhat higher likelihood of granting the writ than males. Similarly, the ultimate dichotomous decision regarding whether to grant the writ differed by gender, where females more often indicated they would grant the writ of habeas corpus (97.1%) in comparison to males (88.7%).

**DOES THE TYPE OF SCIENTIFIC EVIDENCE PRESENTED IN THE VIGNETTE CONTRIBUTE TO THE JUDGES’ DECISIONS REGARDING GRANTING A WRIT OF HABEAS CORPUS?**

We conducted a logistic regression to evaluate what type of evidence would most influence the decision to grant the writ of habeas corpus. A logistic regression allows the prediction of categorical outcomes (i.e., yes or no) with two or more categories. Therefore, a logistic regression was utilized to determine the influence of the different types of evidence presented to judges on their ultimate decision to grant the writ (i.e., yes or no). This model also included gender to evaluate its role on decisions to grant a writ. While the overall group of predictors was significant, only gender influenced the decision to grant the writ in this instance.

Results of the current study collectively suggest that female judges were consistently more likely to grant the writ than male judges, even when couched in the context of restricted ranges of overall sample responses. Of note, existing research on judges and gender found sentencing disparities involving the gender of the defendant. Specifically, it was found that female offenders receive more lenient sentences by male judges and that male offenders are punished more harshly regardless of the gender of the judge. Adding to the literature on gender-difference theories in a judicial context, gender differences in judicial decision making have been found in sex-discrimination cases. Specifically, it was found that male and female judges utilize distinct approaches in these types of cases, with the probability of female judges ruling in favor of the plaintiff 10% more often than when the judge is male. Additionally, research findings indicated that the presence of a female judge...


46. Only significant findings are reported. Full statistical results available upon request.

47. F(1, 306) = 2.98, p = .08.

48. (M = 9.08, SD = 1.54).

49. (M = 8.65, SD = 1.95; Cohen’s d = .24).

50. χ² (1, N = 308) = 4.57, p = .03, OR = 4.35, 95% CI (1.01, 18.77).

51. χ² (2) = 6.99, p = .03, Cox & Snell R² = .02.

52. β = 1.47 (SE β = .75), Wald χ² (1) = 3.90, p = .05, OR = 4.37 (95% CI = 1.01, 18.86).


54. Id. at 188.

on a panel of judges increases the likelihood of a male judge ruling in favor of the plaintiff by 12% to 14%. 56 In other words, “the presence of a female on a panel actually causes male judges to vote in a way they otherwise would not.” 57 A plausible explanation for gender differences in granting the writ may be found in research on the construct of authoritarianism. Some studies have found that males tend to be higher in authoritarianism than women. 58 Research has suggested that individuals higher in authoritarianism may assign harsh punishment, be tougher on offenders, and be more likely to recommend conviction. 59 Therefore, perhaps male judges, who may be more likely to be high in authoritarianism, are less likely to consider the possibility of potentially releasing a previously convicted offender, even when confronted with persuasive proof of error. This finding demonstrates an area for further research to better understand potential gender differences among judges.

We conducted an analysis of covariance (ANCOVA) to examine the relationship between the likelihood of granting a writ of habeas corpus depending on vignette condition, controlling for gender. The overall model displayed a significant effect on likelihood of granting the writ. 60 Both type of evidence 61 and gender 62 contributed to judges’ decisions regarding how likely they were to grant the writ. Results indicated participants in the forensic-science condition 63 were more likely to grant the writ (i.e., assign higher likelihood ratings) than those in the social-science condition. 64

When asked what evidence presented in court is generally more influential on their decision-making process, 0.6% of judges indicated psychological evidence such as eyewitness misidentifications and false confessions; 61.4% indicated forensic-science evidence such as serology, fingerprints, and DNA evidence; and 38% reported that they do not think one type of evidence is more influential than the other. Further, when asked which type of expert testimony they generally found more credible, 0.6% of judges indicated social-science testimony, 76% indicated forensic-science testimony, and 23.4% reported that they do not find one generally more credible than the other. Figure 1 demonstrates these preferences.

JUDGES’ OPINIONS REGARDING CREDIBILITY OF EXPERT TESTIMONY AND INFLUENCE OF TYPES OF EVIDENCE

Judges indicated which evidentiary issues were most and least influential to their decision regarding granting the writ of habeas corpus. Table 1 provides a breakdown of their responses for both the forensic-science- and social-science-vignette conditions.

Judicial consideration of police misconduct (i.e., the first piece of evidence presented to the judges) is of particular importance to the wrongful-conviction literature. 65 Of all evidentiary issues presented, police misconduct accounted for the greatest amount of variance in granting the writ across vignette conditions, suggesting judges place considerably high emphasis on criminal-justice-system errors.

Among the judges in the forensic-science condition, the likelihood of granting the writ of habeas corpus depended on the importance ratings that judges associated with the three different evidentiary issues: police misconduct, faulty laboratory procedure, and inaccurate expert testimony. With regard to a mistake made in a forensic laboratory, the results suggested that once the judges were presented with evidence of faulty laboratory procedure, the more they valued that evidence, the more likely they were to grant the writ of habeas corpus. This finding indicates that the importance associated with this type of error played a significant role in the judicial decision-making process. Seeing an error made in a forensic-science laboratory may have served as an eye-opening reminder to judges that forensic science is not always unquestionable physical proof of guilt or innocence. Therefore, many judges seemed to consider a mistake made with this generally accepted and trustworthy evidence to be an important factor in the appeals process.

TABLE 1

<table>
<thead>
<tr>
<th>EVIDENTIARY ISSUES FOR FORENSIC-SCIENCE AND SOCIAL-SCIENCE CONDITIONS</th>
<th>Police Misconduct</th>
<th>Faulty Laboratory Procedure</th>
<th>Inaccurate Expert Testimony</th>
</tr>
</thead>
<tbody>
<tr>
<td>Most Influential</td>
<td>49.4%</td>
<td>37.3%</td>
<td>13.3%</td>
</tr>
<tr>
<td>Least Influential</td>
<td>28.5%</td>
<td>18.4%</td>
<td>53.2%</td>
</tr>
<tr>
<td>SOCIAL-SCIENCE CONDITION</td>
<td>Police Misconduct</td>
<td>Faulty Laboratory Procedure</td>
<td>Inaccurate Expert Testimony</td>
</tr>
<tr>
<td>Most Influential</td>
<td>69.3%</td>
<td>25.3%</td>
<td>5.3%</td>
</tr>
<tr>
<td>Least Influential</td>
<td>11.3%</td>
<td>26.7%</td>
<td>62.0%</td>
</tr>
</tbody>
</table>

56. Id. at 406.
57. Id.
58. E.g., Deborah L. Browning, Developmental Aspects of Authoritarian Attitudes and Gender Role Conceptions in Men and Women, 68 HIGH SCH. J. 177, 181 (1983).
60. (2, 305) = 3.30, p = .04
61. F(1, 305) = 3.60, p = .06, ηp² = .01
62. F(1, 305) = 2.99, p = .08, ηp² = .01
63. (M = 8.94, SD = 1.74)
64. (M = 8.54, SD = 1.99; Cohen’s d = .21)
65. See Ramsey & Frank, supra note 33.
In the social-science condition, the judges’ likelihood of granting the writ depended on the importance ratings of two different trial errors: eyewitness misidentification and police misconduct. The perceived importance of a false confession did not impact judges’ likelihood to grant the writ of habeas corpus. In fact, 62% of the judges named the false-confession evidence as the least influential evidentiary error presented to them. This finding is consistent with mock-jury research that has found that even when people decide that a confession was coerced or involuntary, or when they say the confession evidence does not influence their decisions, individuals do not appropriately discount confession evidence. Therefore, perhaps some judges simply are less likely to acknowledge that false confessions occur or are problematic in the first place.

The importance of eyewitness identification was the only social-science evidentiary issue that affected judges’ likelihood of granting a new trial. It appears judges place a value on such evidence that is in line with the high frequency with which eyewitness misidentifications have occurred in actual exonerations cases. Judges may be more likely to perceive eyewitness misidentification as an important and influential trial error due to judges’ responsibility for preventing and minimizing effects of eyewitness errors in the United States court system. Specifically, the quintessential responsibility judges hold in facilitating the prevention and identification of erroneous eyewitness testimony may lend itself to explain why judges’ perceived importance regarding eyewitness error successfully predicted the likelihood to grant a writ of habeas corpus.

**DO ATTITUDES PERTAINING TO SCIENTIFIC EVIDENCE, SPECIFICALLY EITHER SOCIAL SCIENCE OR FORENSIC SCIENCE, INFLUENCE JUDICIAL DECISION MAKING REGARDING GRANTING A WRIT OF HABEAS CORPUS?**

To develop items for the forensic-science-attitudes scales, an exploratory-factor-analysis (EFA) procedure was performed to retain only factors that are maximally representative of judges' attitudes pertaining to scientific evidence. After several analyses were run, which produced suboptimal results due to issues with some of the items and the model, a forced two-factor EFA model utilizing all but two of the items from the Attitudes Regarding Forensic Scientific Evidence Scale (due to a general lack of fit with the other items) was run, which suggested meaningful and correlated relationships among factors. Nine of the 16 remaining items were related to factor 1, and six items were related to a second factor. Item 3 was dropped due to lack of conceptual fit on either factor.

From these results, it can be concluded that two underlying sub-components exist, namely, Negative Attitudes Regarding Forensic-Science Evidence (factor 1) and Positive Attitudes Regarding Forensic-Science Evidence (factor 2). Factor 1 comprises items suggesting beliefs that forensic-science evidence is flawed, biased, or lacks validity and reliability. Sample items include “Forensic science can produce errors that contribute to wrongful convictions” and “Forensic science techniques lack adequate reliability and validity.” Conversely, factor 2 includes items that refer to beliefs about the infallibility of forensic-science evidence. Items correspond with beliefs that forensic-science evidence is objective, not likely to be biased by experts, and rarely inadmissible in court. Sample items include “Forensic science is the most important evidence presented during a criminal court proceeding” and “Opposing experts are less likely to disagree about forensic science evidence in court.”

An EFA procedure was performed including the scores of the items in the Attitudes Regarding Social Scientific Evidence Scale. The EFA results, including all 18 items of the Attitudes Regarding Social Scientific Evidence Scale, suggested meaningful and correlated relationships among factors. Results of the EFA suggested one factor. Four items (7, 9, 10, and 14) were removed due to insufficient factor loading, yielding a 14-item, single-factor model.

From these results, it was concluded that one underlying sub-component exists, namely, Negative Attitudes Regarding Social Science Evidence (factor 1). This scale comprises items suggesting that social-science evidence is biased, is not applicable to the real world, and should be inadmissible in court. Sample items include “Social science evidence is easily manipulated to favor either side in a trial” and “Most fact finders have difficulties assessing the quality of social science evidence.”

Repeated-measures General Linear Modeling was used to test the combined effects of judges’ ratings before and after being presented with all pieces of evidence, judges’ gender, and their attitudes regarding scientific evidence. This type of analysis allowed the investigators in the study to compare variables’ impacts on the outcome (i.e., likelihood to grant the writ) both before and after certain evidentiary issues were introduced.
while comparing results by different group variables, such as gender and vignette condition (i.e., social science vs. forensic science). Within the forensic-science-vignette subsample, no significant effects were observed. Within the social-science-vignette subsample, the main effect of the pre-post writ rating remained significant. Participants were significantly more likely to grant the writ after considering all scientific errors than after viewing police corruption only. No additional significant effects were observed.

Data from several analyses suggest a pattern of judges preferring forensic science over social science. Therefore, it seems possible that judges value forensic-science evidence (even errors pertaining to forensic-science evidence) more than they value social-science evidence. These findings are consistent with previous literature that has explored why courts seem to ignore relevant social-science research or reject social-science evidence. The current study builds upon Redding and Reppucci's findings where many judges indicated a distrust of social science, particularly experts who testify in court regarding social science.

**EXPLORATORY ANALYSES**

The Attitudes Regarding Scientific Evidence scales were tested for their direct impact on the dichotomous judicial decision regarding granting a writ of habeas corpus. Logistic regression was employed for examination of both Attitudes Regarding Forensic and Social Scientific Evidence, predicting the ultimate dichotomous writ decision when controlling for participant gender and vignette condition.

The set of predictors displayed a significant effect on the dichotomous writ decision, the model also displayed adequate fit. Of the Attitudes Regarding Scientific Evidence subscales, only Positive Attitudes Regarding Forensic-Science Evidence and Negative Attitudes Regarding Social-Science Evidence showed significant effects. The odds ratio suggests that as positive attitudes regarding forensic-science evidence increase, the odds of the judges granting the writ of habeas corpus increase as well. In addition, as negative attitudes regarding social-science evidence increase, the odds of the judges granting the writ of habeas corpus decrease.

Supplemental logistic-regression analyses were conducted to evaluate whether the effects of Attitudes Regarding Scientific Evidence scores on the dichotomous writ decision varied by vignette subsample. Identical regression parameters were retained from the previous analysis. For judges in the forensic-science-vignette condition, the set of predictors displayed a significant effect on whether or not they ultimately granted the writ of habeas corpus; the model also displayed adequate fit. Similar to the findings from the larger overall sample, only Positive Attitudes Regarding Forensic Science and Negative Attitudes Regarding Social Science displayed significant effects. Odds ratios indicated that as positive attitudes regarding forensic-science evidence increase, so do odds of judges granting the writ of habeas corpus. Further, as negative attitudes regarding social science increase, judges' odds of granting the writ decrease. For judges in the social-science-vignette condition, the set of predictors did not display a significant effect on whether or not they ultimately granted the writ of habeas corpus; the model also displayed adequate fit.

Consistent with Redding and Reppucci's finding that judges' general attitudes about the use of social science in law correlate with specific judgments, results of the current study suggest that judges' attitudes toward scientific evidence predicted whether judges would ultimately grant the writ of habeas corpus using the dichotomous-outcome variable (i.e., yes or no). This finding is particularly relevant to judicial decision making, as the judges' dichotomous decision is externally valid and more applicable to the kinds of decisions judges typically make in court. The results indicate that the more positive attitudes regarding forensic science and the less negative attitudes regarding social science, the more likely judges were to grant the writ. This could point to potential biasing factors regarding how judicial decision makers feel about science. Furthermore, when broken down by subsample, only judges who received the forensic-science vignette were significantly affected by their attitudes when making the dichotomous decision.

Because these results suggest judges are less likely to change their attitudes, it seems system reform is a viable option to rectify errors involving scientific evidence. According to Haney, little widespread and lasting legal change results from psychological testimony regarding these errors. Instead, Haney advises working toward concrete changes within the legal system by seeking improvements to mandatory jury instruction or changes to the rules of evidence. The Innocence Project, in conjunction with the National Academy of Sciences, recommends the creation of an independent federal entity that would seek to conduct comprehensive research and evaluation within the forensic sciences to establish validated standards and consistent applica-

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82. F(1, 147) = 4.06, p < .05, \( \eta_p^2 = .03 \)
83. (M = 8.54, SD = 1.99)
84. (M = 7.77, SD = 2.41)
88. \( \chi^2 (5) = 15.20, p = .01 \), Cox & Snell R\(^2\) = .05
89. Hosmer and Lemeshow: \( \chi^2 (8) = 9.62, p = .29 \)
90. (\( \beta = .07, p = .01 \), Wald \( \chi^2 (1) = 5.98, OR = 1.07, 95\% CI = 1.01-1.13 \))
91. (\( \beta = .03, p = .02 \), Wald \( \chi^2 (1) = 5.21, OR = 0.97, 95\% CI = 0.95-1.00 \))
92. \( \chi^2 (4) = 15.39, p < .01 \), Cox & Snell R\(^2\) = .09
93. Hosmer and Lemeshow: \( \chi^2 (8) = 1.71, p = .99 \)
94. (\( \beta = .12, p = .01 \), Wald \( \chi^2 (1) = 6.23, OR = 1.13, 95\% CI = 1.03-1.24 \))
95. (\( \beta = .03, p = .05 \), Wald \( \chi^2 (1) = 3.91, OR = 0.96, 95\% CI = 0.93-1.00 \))
96. \( \chi^2 (4) = 3.25, p = .52 \), Cox & Snell R\(^2\) = .02
97. Hosmer and Lemeshow: \( \chi^2 (8) = 7.86, p = .45 \)
100. Id. at 174.
tions of forensic techniques nationwide.\textsuperscript{103} Widely enforced scientific standards, in combination with judicial training regarding complex scientific evidence, could significantly assist judges in making important legal decisions within the justice system. Ultimately, if the frequency of these errors is reduced, not only would the number of wrongful convictions eventually decrease, but the justice system’s time and financial resources would be saved as well, as fewer efforts would be wasted in rectifying these errors in the first place.

**CONCLUSION AND IMPLICATIONS**

Overall, results indicated the following factors played a part in judges’ decisions regarding granting a writ of habeas corpus: gender of the judge, forensic- versus social-science-vignette condition, and the perceived importance of certain evidentiary issues (i.e., faulty laboratory procedure, police misconduct, inaccurate expert testimony, and eyewitness misidentification). Additionally, attitudes regarding social and forensic scientific evidence differentially predicted the decision of whether judges would ultimately grant the writ of habeas corpus.

**IMPLICATIONS FOR POLICY AND TRAINING**

Present findings point to the need for greater awareness among criminal-justice professionals regarding the many different types of procedural or evidentiary errors existent in wrongful-conviction cases. In light of present findings and previous research, training for judges may include information regarding frequency and potential consequences of common procedural and evidentiary errors, the scientific method and how it relates to the types of evidence potentially presented in court, validity and reliability of scientific analyses and techniques often presented in the courtroom, and management of threats to objectivity.

The particular importance of judge education is highlighted, specifically regarding how often some of these trial errors occur in actuality, because it may be the case that some judges are underestimating the prevalence of such errors and, as a result, are overlooking their possible contribution to wrongful convictions. For example, many judges seemed to disregard evidence of a false confession in the current study, and yet in 27\% of actual DNA exonerations, innocent defendants made incriminating statements, pled guilty, or falsely confessed.\textsuperscript{102} Furthermore, to reduce the prevalence of wrongful convictions in the first place, the results of the current study support the continuation of scientific-evidence training among judges. Fong, Krantz, and Nisbett found that individuals who underwent brief training in methodological reasoning provided more scientifically sophisticated solutions to a series of real-world problems.\textsuperscript{103} Therefore, judges may be able to reason in an increasingly methodologically sophisticated manner after brief training, and as a result, they may also be better “able to scrutinize the quality of expert evidence more systematically and thus make better informed decisions.”\textsuperscript{104}

For several decades, judges have been receiving training on scientific methods through judicial-education conferences and seminars, as well as through entities like the National Judicial College, the Federal Judicial Center, and the Agency for Science, Technology, and Research. Nevertheless, although education has been available, it generally has not been treated as a core component of judges’ curricula. Future training, available to judges in all levels of courts and jurisdictions through workshops and webinars, should focus on how social and forensic scientific evidence can inform judicial decisions.

Due to the often-complicated nature of scientific evidence in the courtroom, it is of vital importance that judges understand the complexities of the evidence to perform the gatekeeping aspect of their jobs responsibly.\textsuperscript{105} Regrettably, judges might sometimes find themselves in a position to evaluate rather convoluted materials without specialized training or expertise on the subject. Therefore, in addition to scientific-methodology training, judges should be informed as to the reliability, validity, and conformance to Daubert principles of different social-science measures as well as forensic-science techniques.\textsuperscript{106} They should be aware of which techniques have not been subjected to rigorous scientific evaluation (i.e., hair microscopy, bite-mark comparisons, tool-mark analysis), so that they can make well-informed gatekeeping decisions. Accordingly, a National Institute of Justice research report produced by representatives from practice, academia, and other relevant areas suggested the following potentially needed areas of judicial education: “the basics of a given science . . . regulations for expert presentations, and resources for determining when science is conclusive.”\textsuperscript{107}

While understanding the science presented in court is of utmost importance, it is possible that judges would benefit from objectivity training as well. As pointed out by Smith and Blumberg, “The judge . . . can only strive to minimize the emotional, the idiosyncratic elements in his intellectual processes, but cannot eliminate them altogether.”\textsuperscript{108} Therefore, considering our results suggesting that judicial decision making could potentially be compromised by preferences and opinions regarding scientific evidence, training should also address plausible techniques in detecting and managing threats to objectivity. While biases and opinions cannot be removed entirely, they can be adjusted for as long as they are identified


104. Kovera & McAuliff, supra note 30, at 575.


106. Id. at 9, 12-15.

107. Id. at 4.

and acknowledged. Future training opportunities should address ways judges can practice such self-scrutiny.

Previous research on minimizing the influence of biases among expert witnesses has suggested employing a set of introspective tasks as an approach to proactively detect and prevent unconscious biases. Drawing on those suggestions, similar tasks could be presented to judges as a method of recognizing threats to objectivity that may have previously been difficult to recognize. Some of these tasks would include a list of questions judges should ask themselves when evaluating scientific evidence in court. For example, they could ask themselves if they are having difficulty assessing the quality of the evidence, if the evidence presented resonates with preexisting ideas or attitudes regarding a particular type of science, or if their personal training and experience is adequate for the case.

Limitations. There are a few limitations associated with the current study. As with most studies that employ vignettes, the ecological validity associated with this particular method of data collection is limited. A short vignette is likely vague in comparison to actual in-court testimony or more detailed discoverable evidence. In regard to sample limitations, the Northeast region of the United States was underrepresented in comparison to other regions. Further, some judges with more unique demographic information (e.g., jurisdiction, years served, region) may have been reluctant to participate in the study for fear of identifying information that could be somehow connected to opinions and attitudes collected in the survey. All findings must be viewed cautiously in light of the restricted range of ultimate decisional outcomes.

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CONSIDER CLOSELY by Victor Fleming

ACROSS
1 Partially open
5 Reduce the value of
11 Status ___
14 Disney chipmunk
15 Certain vacuum cleaners
16 It might be bookmarked
17 1999 Billy Crystal/Robert De Niro film
19 Supermarket chain, initially
20 Sal of "Exodus"
21 That woman
22 ___-deucey
23 Humorist David
26 Pancake order
28 ___ up (secured, as a win)
30 "Yes ___ Bob!"
33 Irascibility
36 Gillette's ___ Plus
38 Rods' companions
39 "___ pro nobis"
40 Synonym for words in four other answers
42 Part of a PC command
43 Tools
46 Reed of note
47 Comic lightbulb
48 Sentence ending
50 Lefty Warren in Cooperstown
51 Prefix meaning 44-Down
54 Support frame
58 Low court score
60 Wall St. action
62 Repeated, an English pop band
63 Follow a Vail trail

DOWN
1 Brewer Samuel
2 Fricke of country music
3 "___ flowing with milk and honey"
4 Press ___
5 No. of eggs or jurors
6 Prior to, to poets
7 Sibling of Amy and Meg
8 Soreness symptoms
9 Avoids
10 Slalom shape
11 It's easily perused
12 Push vigorously
13 Big name in cosmetics
18 Olden times
22 About 44,000 square feet
24 "___ just kidding!"
25 Altercation
27 Basketball filler
29 Thrashes
31 Reese, in "Legally Blonde"
32 This, in Tampa
33 Hale-___ comet
34 "Dies ___"
35 Journal published by future counselors
37 Become a parent of
41 Part of a century
44 Supreme Court seat count
45 "___ of a gun!"
47 It may provide a defense
49 Part of a PC command
51 Movie star Lamarr
53 Diminish, as a nuisance
55 Cache, as of treasure
56 Approach bedtime
57 Diciembre follower
58 Future atty.'s exam

37 Become a parent of
41 Part of a century
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51 Movie star Lamarr
53 Diminish, as a nuisance
55 Cache, as of treasure
56 Approach bedtime
57 Diciembre follower
58 Future atty.'s exam

59 Tex. neighbor
61 Bonanzas' yields
64 "Viva ___ Vegas!"
65 Spy org.
66 "Incidentally," in a text

Answers are found on page 137.

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A new report from the National Center for State Courts shows how 10 different jurisdictions are using risk-and-needs-assessment information when sentencing defendants in criminal cases. This 2015 report specifically follows up on one published in 2011 that provided "guiding principles" for the use of risk-and-needs assessments in sentencing decisions.

The new report looks to see how these 10 jurisdictions are applying the guiding principles. For example, the first guiding principle suggests a limited purpose for the use of the assessment information: "Risk and needs assessment information should be used in the sentencing decision to inform public safety considerations related to offender risk reduction and management. It should not be used as an aggravating or mitigating factor in determining the severity of an offender's sanction."

The researchers report that several jurisdictions have formally adopted limitations on the use of this information, including some that only allow it for recommending the conditions of supervision if a defendant is granted probation and the programming that would be most appropriate to reduce the defendant’s chance of recidivism. They also note an Indiana Supreme Court decision, Malenchik v. Indiana, 928 N.E.2d 564 (Ind. 2010), in which the court said the information could not be used as an aggravating or mitigating factor or to establish the length of a sentence but could be used as a consideration in crafting sentences modified for each individual defendant.

The full report provides a wealth of information about how risk-and-needs-assessment information is presently being used in courts in 10 different states. An appendix details the practices of each of the individual jurisdictions.


For another view of the use of risk-based needs assessments in sentencing, take a look at this article prepared by journalists with the website FiveThirtyEight.com and The Marshall Project. The authors provide arguments for and against the use of risk-based needs assessments—all with a backdrop of recent developments in Pennsylvania. They include comments from Mark Bergstrom, who has run the Sentencing Commission in Pennsylvania for two decades, Sonja Starr, a law professor who argues that the use of risk assessments in sentencing is unconstitutional, as well as a public defender, a probation officer, a psychologist, and a statistician.

Early in the article, the authors provide an overview of the questions critics have raised about the use of risk-assessment scores in sentencing:

The risk assessment trend is controversial. Critics have raised numerous questions: Is it fair to make decisions in an individual case based on what similar offend-