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We start our current issue with the inaugural presidential address by Judge Russell Otter, the American Judges Association’s first president who is a Canadian judge. Please join us in thanking him for his service to AJA.

Our regular “Thoughts from Canada” column and the first article both provide summaries of criminal cases heard before the Supreme Court of Canada and the U.S. Supreme Court, respectively. We are fortunate to have Judge Wayne Gorman, judge of the Provincial Court of Newfoundland and Labrador, providing this regular column on the Canadian Court. Our annual contributor, Professor Charles D. Weis selberg, the Shannon C. Turner Professor of Law at the University of California, Berkeley, is joined by Juliana DeVries, a 2017 J.D. candidate at Berkeley Law, for the review of the past Term’s U.S. Supreme Court criminal cases. The article begins with a remembrance for Justice Antonin Scalia and Justice Scalia’s transformative effect on U.S. criminal law.

The current issue also includes a three-part article series addressing child-custody evaluations. The point, counterpoint, and response address conflicting views of the appropriateness of child-custody evaluations. Dr. Ira Turkat is a licensed clinical psychologist who provides results from a survey of divorced parents who had previously participated in a child-custody evaluation by a psychologist. He highlights his concerns about the potential for negative effects on the children involved. We invited Drs. Jonathan Gould and Allan Posthuma to provide a counterpoint, and in it they raise concerns with Dr. Turkat’s survey methodology and note the importance of using custody evaluations to move parties toward out-of-court settlements. Dr. Turkat’s response reemphasizes his concerns and urges the judiciary to carefully consider before ordering a custody evaluation. We hope you enjoy the authors’ spirited debate and consider both sides of the topic.

Before you set this issue aside, be sure to check out the Resource Page, the last page of this—and every—issue. This time we’re announcing a new product from the American Judges Association: video interviews with leading figures in the movement to improve procedural fairness in court. Each video is approximately 15 minutes or less and well worth your time to watch. – EB

Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. Court Review seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for Court Review are set forth on page 131 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 historic Pima County Courthouse in Tucson, Arizona, which opened in 1929.

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The American Judges Association recently completed its annual conference in Toronto, Canada, from September 26 to 29, 2016. The theme of the conference was comparative law in Canada and the United States. It focused on issues of common interest to judges on both sides of the border. These included such contemporary topics as “Judicial Ethics and Social Media,” “Wrongful Convictions Across Borders,” “Cannabis and the Greening of North America,” and “Judge’s Role in Ensuring Constitutional Right to Counsel.” All sessions featured leading academics and judges from Canada and the United States. On one panel we were pleased to have the Chief Justice of the Supreme Court of Guam, Robert Torres. A memorable highlight was the eloquent address by Justice Rosalie Abella of the Supreme Court of Canada. She emphasized the critical role of the judiciary in ensuring the protection of basic human rights in a democracy.

In an earlier address, when she was a member of the Court of Appeal of Ontario in 2000, she articulated the difference between the legislative and judicial branches of government as follows:

The judiciary has a different relationship with the public. It is accountable less to the public’s opinion and more to the public interest. It discharges that accountability by being principled, independent, and impartial. Of all the public institutions responsible for delivering justice, the judiciary is the only one for whom justice is the exclusive mandate. This means while legislatures respond of necessity of the urgings of the public, however we define it, judges, on the other hand, serve only justice.

(Justice Abella’s full remarks from that 2000 address can be found at https://goo.gl/sRXF4n.)

To discharge this critically important responsibility in our rapidly changing world, it is imperative that the judges benefit from continuing to attend and participate in excellent educational programs. For almost 57 years, the American Judges Association, the largest judges association in North America, has provided outstanding educational programming at its spring and fall conferences, by the publication of superb white papers including the highly acclaimed paper, “Procedural Fairness: A Key Ingredient in Public Satisfaction,” and by the publication of its quarterly journal, Court Review. AJA will continue to fulfill its mandate of Making Better Judges® with its upcoming midyear conference in Arlington, Virginia, from April 27 to 30, 2017.

Our next annual conference will be held in Cleveland, Ohio, from September 11 to 15, 2017, under the very capable leadership of our president-elect, Judge Catherine Shaffer. I urge judges in Canada and the United States to avail themselves of these golden educational opportunities.

At the conclusion of the Toronto conference, I had the distinct and historic honour of becoming the first Canadian to be president of the American Judges Association—a firm broadening of its judicial horizon. This reflects the international nature of AJA, as well as the many common goals of all state, provincial, and territorial judges and their role in democracies to uphold the rule of law.

At the meetings of the new Executive Committee and Board of Governors, I was thrilled to witness energetic participation and eagerness of all members—new and old. This was amply evident in the lively debates on ways to increase membership and to strengthen AJA in fulfilling its mandate. This renewed momentum augurs well for the future growth and sustainability of AJA.

Currently, we are exploring innovative ways to deliver our message and educate our members in our rapidly changing electronic age by such means as the enhancement of our webpage and its links, as well as the development of an AJA app that would put AJA in the forefront of judicial education.

To continue and strengthen AJA, we need to attract new members and retain existing ones to become an even stronger Voice of the Judiciary®. We need the help of all of you reading this column and your colleagues to assist in the recruitment of newly elected or appointed judges in your jurisdiction. Our commitment is reinforced by the continuation of our very successful program of offering a one-year free membership to newly elected or appointed judges and the use of a gift membership from the Executive Committee and the Board of Governors members to bring back former members.

I am eager to toil hard and long on behalf of the American Judges Association in Canada and the United States to discharge our goals and objectives throughout the coming year. I ask you to join me in this laudable adventure.
It is not every year that the Supreme Court of Canada reverses itself. However, as will be seen, this year it did.\(^1\)

In this column I am going to review the decisions rendered by the Supreme Court of Canada in 2016 that involve criminal matters. The decisions are reviewed based on categories.

In 2016, the Supreme Court of Canada considered a multitude of issues involving criminal law, including defences, evidence, and sentencing. The Court also considered the application of the *Canadian Charter of Rights and Freedoms, Constitution Act, 1982*, to various criminal-law provisions and procedures. Interestingly, the Supreme Court reversed itself and set new guidelines for the right to be “tried within a reasonable time,” as guaranteed by section 11(b) of the *Charter*.\(^2\)

Let us start with the Supreme Court’s consideration in 2016 of criminal offences.

### OFFENCES

#### BESTIALITY

Section 160 of the *Criminal Code of Canada*, R.S.C. 1985, sets out the offence of bestiality. However, it does not define the elements of the offence.

In *R. v. D.L.W.*\(^3\) the Supreme Court concluded that the offence of bestiality requires proof of penetration. The Court held that the offence requires proof of “sexual intercourse between a human and an animal”:

> The term “bestiality” has a well-established legal meaning and refers to sexual intercourse between a human and an animal. Penetration has always been understood to be an essential element of bestiality. Parliament adopted that term without adding a definition of it and the legislative history and evolution of the relevant provisions show no intention to depart from the well-understood legal meaning of the term. Moreover, the courts should not, by development of the common law, broaden the scope of liability for this offence, as the trial judge did. Any expansion of criminal liability for this offence is within Parliament’s exclusive domain. In short, this case falls within *Stephen’s* first category: our *Code* assumes the continuing existence of the common law definition of this crime.\(^4\)

#### INFANTICIDE

Section 233 of the *Criminal Code* defines the offence of infanticide. The section refers to a requirement that the mind of a mother who kills her newly born child be “disturbed.”

In *R. v. Borowiec,*\(^5\) the Supreme Court held that the word “disturbed” in section 233 means “mentally agitated,” “mentally unstable,” or “mental discomposure.”\(^6\) The Court described the nature of the offence in the following manner:

Infanticide, which is defined in s. 233 of the *Criminal Code*, is a form of culpable homicide and applies in the narrow set of circumstances where (1) a mother, by a wilful act or omission, kills her newborn child (under one year of age, as defined by the *Criminal Code*, s. 2) and, (2) at the time of the act or omission, the mother’s mind is “disturbed” either because she is not fully recovered from the effects of giving birth or by reason of the effect of lactation: *B. (L.),* [2011 ONCA 153,] at para. 58.\(^7\)

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**Footnotes**

1. In addition, in another 2016 decision, *R. v. K.R.J.*, 2016 SCC 31, 2016 CarswellBC 1999 (Can.), the Supreme Court decided to “restate” the constitutional formulation it had developed in *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 354 (Can.), in relation to section 11(i) of the *Canadian Charter of Rights and Freedoms, Constitution Act, 1982* (“Any person charged with an offence has the right . . . if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.”).


4. Id. ¶ 19.


6. Id. ¶ 35.

7. Id. ¶ 13.
The Supreme Court concluded that the disturbance “must be present at the time of the act or omission causing the ‘newly-born’ child’s death and the act or omission must occur at a time when the accused is not fully recovered from the effects of giving birth or of lactation.”

PARTIES TO AN OFFENCE: AIDING AND ABETTING

Section 21(1) of the Criminal Code makes a person a party to an offence if they aid or abet another person in committing an offence.

In R. v. Knappczyk, the Supreme Court adopted as correct the following comments made by the Alberta Court of Appeal:

On the correct application of the legal principles to the facts found by the trial judge, it is an inescapable conclusion that the respondents aided and abetted the offence of trafficking through distribution. Their acts prevented or hindered interference with the accomplishment of a criminal act. In this way, the respondents provided assistance and encouragement to Mr. Caines in the commission of the offence of trafficking. There is a clear link between the respondents’ acts and the commission of the offence.

PROCEDURE

COMPETENCY OF COUNSEL

In R. v. Meer, the Supreme Court reiterated the test it had set out in R. v. G.D.B. for the setting aside of a conviction based upon alleged incompetence of defence counsel: “To succeed in setting aside a trial verdict on the basis of the ineffective assistance of counsel, the appellant must show ‘first, that counsel’s acts or omissions constituted incompetence and second, that a miscarriage of justice resulted.’”

SENTENCING

PRE-SENTENCE CUSTODY

Section 719(3) of the Criminal Code allows a sentencing judge to “take in account” (or “credit”) an offender for any time spent by the offender in pre-sentence custody. However, section 719(3.1) prohibits a sentencing judge from providing a credit for pre-sentence custody greater than one day for each day in pre-sentence custody if the offender was in custody because bail was denied “primarily because of a previous conviction of the accused.”

In R. v. Safarzadeh-Markhali, the Supreme Court held that this provision violated section 7 of the Charter [the “right to life, liberty and security . . . in accordance with the principles of fundamental justice”] because it was overbroad:

I conclude that the portion of the Truth in Sentencing Act challenged in this appeal—the denial of any enhanced credit for pre-sentence custody to persons to whom bail is denied primarily because of a prior conviction—violates s. 7 of the Charter for another reason: it is overbroad. Laws that curtail liberty in a way that is arbitrary, overbroad or grossly disproportionate do not conform to the principles of fundamental justice: Bedford v. Canada (Attorney General), 2013 SCC 72, [2013] 3 S.C.R. 1101 (S.C.C.), at para. 105. Mr. Safarzadeh-Markhali contends that the challenged provision violates all three of these principles. For the reasons that follow, I conclude that the challenged law is unconstitutionally overbroad, because its effect is to deprive some persons of liberty for reasons unrelated to its purpose. This conclusion makes it unnecessary to address whether the law is arbitrary or grossly disproportionate.

JOINT SUBMISSIONS

In R. v. Anthony-Cook, the Supreme Court of Canada considered joint submissions. In this case the accused pleaded guilty to the offence of manslaughter. Counsel presented a joint submission seeking the imposition of a period of 18 months’ imprisonment. The trial judge rejected the submission and imposed a period of two years, less a day, imprisonment, followed by three years of probation.

The accused appealed. His appeal was dismissed by the British Columbia Court of Appeal. He appealed to the Supreme Court of Canada.

The Supreme Court allowed the appeal and imposed a period of 18 months’ imprisonment. It set aside the probation order. The Supreme Court concluded that the sentence jointly submitted should have been imposed.

The Court held that, in assessing a joint submission, a Canadian sentencing judge must adopt a “public interest test.” The Court described the test in the following manner:

Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest. But, what does this threshold mean? Two decisions from the Newfoundland and Labrador Court of Appeal are helpful in this regard.

In Druken, at para. 29, the court held that a joint sub-

8. Id. ¶ 35.
10. Id. ¶ 1 [quoting the Court of Appeal’s decision, R. v. Alcantara, 2015 ABCA 258, 2015 CarswellAlta 1475, ¶ 13 (Can. Alta.).]
15. Id. ¶ 22.
17. In Canada, a sentence of less than two years’ imprisonment can be served in a provincial institution rather than a federal institution.
mission will bring the administration of justice into disrepute or be contrary to the public interest if, despite the public interest considerations that support imposing it, it is so “markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system”. And, as stated by the same court in R. v. B.O.2, 2010 NLCA 19 (CanLII), at para. 56, when assessing a joint submission, trial judges should “avoid rendering a decision that causes an informed and reasonable public to lose confidence in the institution of the courts”.

In my view, these powerful statements capture the essence of the public interest test developed by the Martin Committee. They emphasize that a joint submission should not be rejected lightly, a conclusion with which I agree. Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down.

THE CHARTER OF RIGHTS AND FREEDOMS

SECTION 7

Section 7 of the Charter states: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

In R. v. Cawthorne, a member of the Canadian Armed Forces was charged with an offence. He was acquitted, and the Minister of National Defence, as authorized by the National Defence Act, launched an appeal to the Supreme Court of Canada. The accused applied to quash the appeal, arguing that the principles of fundamental justice were breached on the basis that the Minister being a member of the Cabinet was not independent from political influence in making prosecutorial decisions.

The Supreme Court held that “a prosecutor—whether it be an Attorney General, a Crown prosecutor, or some other public official exercising a prosecutorial function—has a constitutional obligation to act independently of partisan concerns and other improper motives.” However, the Court stated that “partisan” is not “broadly synonymous with ‘political.’”

The Court concluded that Parliament’s “conferral of authority over appeals in the military justice system on the Minister does not violate s. 7 of the Charter.” The Supreme Court indicated that the Minister of Defence, “like the Attorney General or other public officials with a prosecutorial function, is entitled to a strong presumption that he exercises prosecutorial discretion independently of partisan concerns. The mere fact of the Minister’s membership in Cabinet does not displace that presumption.”

SECTION 8

Section 8 of the Charter prohibits “unreasonable” searches or seizures.

In R. v. Saeed, the Supreme Court held that the taking of a penile swab from a suspect did not violate section 8 of the Charter because it constituted a valid search incidental to arrest, and, thus, any DNA evidence obtained from the swabbing was admissible:

[W]hile a penile swab constitutes a significant intrusion on the privacy interests of the accused, the police may nonetheless take a swab incident to arrest if they have reasonable grounds to believe that the search will reveal and preserve evidence of the offence for which the accused was arrested, and the swab is conducted in a reasonable manner.

However, the Supreme Court set out “a number of factors to guide police in conducting penile swabs incident to arrest reasonably”:

1. The penile swab should, as a general rule, be conducted at the police station;
2. The swab should be conducted in a manner that ensures the health and safety of all involved;
3. The swab should be authorized by a police officer acting in a supervisory capacity;
4. The accused should be informed shortly before the swab of the nature of the procedure for taking the swab, the purpose of taking the swab, and the authority of the police to require the swab;
5. The accused should be given the option of removing his clothing and taking the swab himself, and if he does not choose this option, the swab should be taken or directed by a trained officer or medical professional, with the minimum of force necessary;
6. The police officer(s) carrying out the penile swab should be of the same gender as the individual being swabbed, unless the circumstances compel otherwise;
7. There should be no more police officers involved in the swab than are reasonably necessary in the circumstances;
8. The swab should be carried out in a private area such that no one other than the individuals engaged in the swab can observe it;
9. The swab should be conducted as quickly as possible and in a way that ensures that the person is not com-

18. 2016 SCC 43, ¶¶ 32-34.
20. Id. ¶ 24.
21. Id. ¶ 27.
22. Id. ¶ 33.
23. Id. ¶ 32.
25. Id. ¶ 6.
the accused was charged with an offence

In R. v. Jordan, the accused was charged with an offence in December 2008. His trial ended in February 2013. He applied for a stay of proceedings to be entered pursuant to section 11(b) of the Charter due to the delay.

The Supreme Court entered a stay of proceedings. In doing so, the Court indicated that it was rejecting the framework for section 11(b) that it had set out in R. v. Morin (a balancing of factors). In its place, the Supreme Court created a new framework, which involves “a presumptive ceiling” beyond which delay from the date of the laying of the charge to the actual or anticipated end of the trial will be “presumed to be unreasonable,” unless “exceptional circumstances” justify the time period involved. The Court held that the presumptive ceiling is 18 months for cases tried in the provincial court and 30 months for cases tried in the superior court (or cases tried in the provincial court after a preliminary inquiry). Delay attributable to or waived by the accused will not count towards the presumptive ceiling.

In R. v. Williamson, the accused was charged with a sexual offence in January 2009. His trial ended in December 2011. Applying the new framework it set out in Jordan, the Supreme Court entered a stay of proceedings. It held that “although this is a close case, the transitional exceptional circumstance does not apply and, therefore, the delay is unreasonable.”

In R. v. Vassel, the accused was jointly charged with six other individuals. It took over three years to proceed to trial. The accused applied for a stay of proceedings, arguing that his right to be tried within a reasonable period of time as protected by section 11(b) of the Charter was breached. The Supreme Court entered a stay of proceedings. It held that “a more proactive stance on the Crown’s part was required”:

In fulfilling its obligation to bring all accused to trial within a reasonable time, the Crown cannot close its eyes to the circumstances of an accused who has done everything possible to move the matter along, only to be held hostage by his or her co-accused and the inability of the system to provide earlier dates. That, unfortunately, is what occurred here.

SECTION 12

Section 12 of the Canadian Charter of Rights and Freedoms prohibits “cruel and unusual treatment or punishment.”

26. Id. ¶ 78; see Don Stuart, Saeed: A Pragmatic, Limited Police Power to Take Penile Swabs Without a Warrant, 29 CRIM. REP. (7th) 51 (2016).
29. K.R.J., 2016 SCC 31, ¶ 41. It is interesting to compare this decision with Welch v United States, 136 S. Ct. 2476 (2016). In Welch, the Supreme Court of the United States, in considering whether constitutional decisions applied on a retroactive basis, adopted an approach based on procedural versus substantive decisions.
31. Section one of the Charter indicates that it “guarantees the rights and freedoms set out” subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”
34. See Jordan, 2016 SCC 27, ¶ 105.
36. See id. ¶ 25-30.
38. Id. ¶ 7.
In R. v. Lloyd, the accused was convicted of the offence of possession of a controlled substance for the purpose of trafficking. Because of a prior conviction for a similar offence, he was subject to a mandatory minimum sentence of one year of imprisonment, pursuant to section 5(3)(a)(i)(D) of the Controlled Drugs and Substances Act.

The Supreme Court of Canada concluded the mandatory minimum sentence of one year of imprisonment violated section 12 of the Charter on the basis that it “casts its net over a wide range of potential conduct’. As a result, it catches not only the serious drug trafficking that is its proper aim, but conduct that is much less blameworthy. This renders it constitutionally vulnerable.”

DEFENCES

ALIBI

In R. v. Laliberté, the Supreme Court held that when the defence of alibi is raised, a trial judge “must specify” in her or his instruction to the jury that “the fabrication of an alibi supports an inference of consciousness of guilt, but no more than that.” The Court also held that there must be other evidence “independent of the finding that the alibi is false on the basis of which a reasonable jury could conclude that the alibi was deliberately fabricated and that the accused was involved in that attempt to mislead the jury.”

EVIDENCE

ACCESS TO DOCUMENTS IN THE POSSESSION OF A THIRD PARTY

In World Bank Group v. Wallace, the accused were charged with the offence of bribing foreign public officials. The accused sought access to records in the possession of investigators of the World Bank. The Supreme Court dismissed the application, holding that “[t]he World Bank Group’s immunities cover the records sought and its personnel, and they have not been waived. Moreover, the records [of an independent unit within the World Bank Group] were not disclosable under Canadian law.”

CIRCUMSTANTIAL EVIDENCE

In R. v. Villaroman, the Supreme Court considered the law in relation to circumstantial evidence.

The Supreme Court held that in “assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts . . . . Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown’s evidence does not meet the standard of proof beyond a reasonable doubt.”

The Court held when a trial judge assesses circumstantial evidence, she or he must consider “other plausible theor[ies] . . . . inconsistent with guilt”.

When assessing circumstantial evidence, the trier of fact should consider “other plausible theor[ies]” and “other reasonable possibilities” which are inconsistent with guilt . . . . I agree with the appellant that the Crown thus may need to negative these reasonable possibilities, but certainly does not need to “negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused”: R. v. Bagshaw (1971), S.C.R. 2 (S.C.C.), at p. 8. “Other plausible theories” or “other reasonable possibilities” must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.

CONCLUSION

As we have seen, the Supreme Court of Canada considered a number of issues in 2016 related to criminal law and procedure. This included the defence of alibi (R. v. Laliberté) and parties to an offence (R. v. Knapczyk).

In the realm of offences, the Supreme Court considered the offences of bestiality (R. v. D.L.W.) and infanticide (R. v. Borowiec).
In the constitutional context, the Court declared a minimum mandatory sentence unconstitutional (R. v. Lloyd) and considered the role of the prosecutor (R. v. Cawthorne).

Finally, it is difficult to predict over the course of a year which decision rendered by a Supreme Court will have the most significant long-term effect. For the Supreme Court of Canada in 2016, I would choose the Court’s decision in Jordan. Not only did the Supreme Court take the exceptional step of reversing itself, it set out a framework that might lead to many criminal charges being stayed.49

Wayne Gorman is a judge of the Provincial Court of Newfoundland and Labrador. His blog (Keeping Up is Hard to Do: A Trial Judge’s Reading Blog) can be found on the web page of the Canadian Association of Provincial Court Judges. He also writes a regular column (Of Particular Interest to Provincial Court Judges) for the Canadian Provincial Judges’ Journal. Judge Gorman’s work has been widely published. Comments or suggestions to Judge Gorman may be sent to wgorman@provincial.court.nl.ca.

In a way, we had not one but two Supreme Courts last Term.¹ The first Court sat from October 5, 2015, to February 12, 2016. The Term of the successor Court began on February 13, 2016, when Associate Justice Antonin Scalia unexpectedly passed away on a Texas ranch. We will review important criminal-law decisions from both 2015-2016 Courts. But for those who adjudicate, study, prosecute, or defend criminal cases, the death of Justice Scalia was the most significant aspect of the year. Whether one was a fan of his jurisprudence or not, it is impossible to deny his outsized impact upon the Court for almost three decades. We will begin by noting some of his most influential criminal-law and procedure opinions before turning to the rulings of the 2015-2016 Term.

JUSTICE ANTONIN SCALIA AND CONSTITUTIONAL CRIMINAL LAW—A REMEMBRANCE

During his decades on the bench, Justice Antonin Scalia authored transformative opinions in criminal law and procedure.

Justice Scalia shaped Fourth Amendment jurisprudence with decisions such as United States v. Jones,² the GPS-tracking-device case, which reintroduced property-law principles in determining what amounts to a search. He also wrote the dog-sniff sequel of Florida v. Jardines.³ In Jardines, as well as in the thermal-imaging-device case of Kyllo v. United States,⁴ Justice Scalia established himself as the Court’s fiercest protector of the home. Justice Scalia was less fond, however, of the Fourth Amendment exclusionary rule, as demonstrated in Hudson v. Michigan,⁵ which removed “knock and announce” violations from the scope of the rule.

Justice Scalia authored the foundational opinion in Whren v. United States,⁶ upholding the pretext use of traffic infractions, and in Ashcroft v. al-Kidd,⁷ which did the same with material-witness warrants. In United States v. Gonzalez-Lopez,⁸ he vigorously supported a defendant’s right to choose retained counsel, and he dissented in Indiana v. Edwards⁹ to support the right of a defendant with a severe mental illness to represent himself. His dissent in Edwards was characteristically fiery, just like his disagreements with the majorities in Mistretta v. United States,¹⁰ Maryland v. Craig,¹¹ Dickerson v. United States,¹² Maryland v. King,¹³ and Navarette v. California.¹⁴ Justice Scalia’s concurrence in Thornton v. United States¹⁵ directly led to the Court’s change of position in Arizona v. Gant, which restricted searches of automobiles incident to the driver’s arrest, though the jurist would have gone even further.¹⁶ He also wrote for the majority in District of Columbia v. Heller,¹⁷ finding that the District of Columbia’s ban on handgun possession in the home violates the Second Amendment.

It is difficult to select which of his opinions will have the most lasting importance, but surely a leading contender is Crawford v. Washington,¹⁸ which invoked the Confrontation Clause to overturn the longstanding rule that an unavailable witness’s out-of-court statement could be admitted if it bore adequate indicia of reliability. He wrote for the Court in the later Confrontation Clause cases of Davis v. Washington¹⁹ and Melendez-Diaz v. Massachusetts²⁰ and then fought to prevent the Constitution permits Miranda v. Arizona to be replaced by statute; “[t]he Constitution is not, unlike the Miranda majority, offended by a criminal’s commendable qualm of conscience or fortunate fit of stupidity”).

Footnotes
1. We are grateful to Professor Tejas Narechania for suggesting this characterization of the Court’s Term.
9. 554 U.S. 164, 179 (2008) (Scalia, J., dissenting) (quipping that “the Court’s opinion does not even have the questionable virtue of being politically correct”).
11. 497 U.S. 836, 860 (1990) (Scalia, J., dissenting) (arguing that the use of closed-circuit television for child witnesses violates the Confrontation Clause; “[i]f good or bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it”).
12. 530 U.S. 428, 444 (2000) (Scalia, J., dissenting) (arguing that the
the Court from retreating from Crawford in a series of

dents.21

Perhaps we may soon know whom President-elect Trump
will select to replace Justice Antonin Scalia. But whomever the
nominee may be, it is difficult to imagine a justice who will
have a greater or more lasting impact on constitutional crim-
nal law and procedure.

Now on to the opinions from 2015-2016.

FOURTH AMENDMENT

The year provided two significant Fourth Amendment deci-
sions that matter for the day-to-day functioning of the criminal
law. The most noteworthy (and, for us, most puzzling) opinion
was Utah v. Strieff,22 which applied the attenuation doctrine to
uphold admission of evidence following an unconstitutional
investigatory stop. Strieff may narrow the exclusionary rule
going forward. Another important case this Term, Birchfield v.
North Dakota,23 addressed whether officers may obtain breath
or blood evidence of intoxication without a warrant as part of a
search incident to arrest.

In Strieff, a detective received an anonymous tip of narcotics
activity at a home. He conducted intermittent surveillance and
stopped one visitor leaving the home. When the visitor,
Edward Strieff, produced his identification, the detective called
it in and learned that Strieff had an outstanding arrest warrant
for a traffic violation. The detective then arrested and searched
Strieff, finding methamphetamine and drug paraphernalia. The
State conceded that the stop was without reasonable suspicion,
and the State only learned of the outstanding warrant and the
contraband as a result of the stop. The Utah Supreme Court
found that the evidence was inadmissible, but the U.S.
Supreme Court reversed.24

Writing for a five-justice majority, Justice Thomas noted
that under the attenuation doctrine, evidence is admissible
“when the connection between unconstitutional police con-
duct and the evidence is remote or has been interrupted by
some intervening circumstance” such that suppressing the evi-
dence would not serve the interest protected by the Fourth
Amendment.25 Analyzing the case under the factors articulated
in Brown v. Illinois,26 the Court found that while the temporal
proximity of the unlawful stop and the search favored exclu-
sion, two other factors counseled in favor of admission. The
warrant was an “intervening circumstance” because its exis-
tence predated the stop and was independent of it. Further, the
officer’s conduct was not purposeful or flagrant; it was, at
most, negligent.27

Three justices dissented. Justice Kagan, joined by Justice
Ginsburg, disputed the majority’s application of the attenuation
d doctrine, characterizing the detective’s conduct as purposeful
and not an innocent mistake. Nor were they willing to con-
sider the discovery of the warrant to be an intervening circum-
stance; it was a foreseeable consequence of the stop, and the
detective testified that checking for outstanding warrants was a normal practice. They con-
cluded that the majority’s opinion creates incentives for police
to make suspicionless stops.28

Justice Sotomayor also dissented in a forceful opinion
joined in part by Justice Ginsburg. In a section written only
for herself, Justice Sotomayor described the impact of unlaw-
ful stops upon ordinary Americans, and especially people of
color:

For generations, black and brown parents have given
their children “the talk”—instructing them never to run
down the street; always keep your hands where they can
be seen; do not even think of talking back to a
stranger—all out of fear of how an officer with a gun
will react to them. . . . Until their voices matter too, our
justice system will continue to be anything but.29

It will be interesting to see the impact of Strieff in the years
ahead. One astute observer, Professor Orin Kerr, remains
unsurprised by the majority’s analysis of the Brown factors. He
thinks of an “intervening circumstance” as “an outside event
that changes what is expected to happen,” and the stop here
“unfolded exactly as the officer expected it would.”30 We agree
and find it difficult to foresee how future courts will interpret
“intervening circumstances.” Further, a capacious definition of
“intervening circumstances” can substantially narrow the
exclusionary rule and create incentives for officers to conduct
suspicionless stops. In addition, along with Kerr, we note that
the majority inferred that the officer’s conduct was at most neg-
ligent, even though the record did not contain much evidence
either way. We will see whether this case leads courts to con-
sider officers’ subjective intent in assessing either attenuation
or the overall application of the exclusionary rule.31

senting) (arguing that a gunshot victim’s statements were testi-
monial); Williams v. Illinois, 132 S. Ct. 2221, 2264 (2012) (Kagan, J., dissenting, joined by Justices Scalia, Ginsburg, and
Sotomayor) (contending that a defendant has the right to cross-
examine the analyst who generated a DNA profile).
24. Id. at 2059-60.
25. Id. at 2061.
27. Strieff, 136 S. Ct. at 2061-63.
28. Id. at 2071, 2072-74 (Kagan, J., dissenting).
29. Id. at 2064, 2069-71 (Sotomayor, J., dissenting).
But It Still Lives, SCOTUSBLOG (June 20, 2016, 9:35 PM),
http://www.scotusblog.com/2016/06/opinion-analysis-the
exclusionary-rule-is-weakened-but-it-still-lives/.
ger the exclusionary rule, police conduct must be sufficiently
deliberate . . . . As laid out in our cases, the exclusionary rule
serves to deter deliberate, reckless, or grossly negligent conduct
. . . .”).
Birchfield is a sequel to Missouri v. McNeely, where the Court found that the natural dissipation of alcohol from the bloodstream does not always amount to exigent circumstances that justify taking a blood sample without a warrant. All 50 states have enacted “implied consent” laws, requiring motorists to consent to tests for blood alcohol concentration (BAC) as a condition of driving. Some states have also criminalized the refusal to undergo testing. Birchfield addresses three different defendants’ appeals, all related to whether an arrested person may refuse to consent to a blood or breath test and whether that refusal may be criminalized. In all of the cases, the defendants were first placed under arrest, and the officers later sought to obtain BAC evidence.

Justice Alito’s majority opinion begins with a primer on laws relating to driving under the influence, including informed consent. The opinion then reviews the principles of searches incident to arrest, culminating in the ruling two Terms ago in Riley v. California. The Riley Court reaffirmed the “categorical” approach to searches incident to arrest. The authority to search depends on the fact of arrest and is permitted to further officer safety and preserve evidence. In determining “whether to exempt a given type of search from the warrant requirement,” courts assess “on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.” Applying these principles, subjecting motorists to a breath test does not implicate significant privacy concerns, furthers legitimate governmental interests, and may be performed incident to arrest, without a warrant. “Blood tests are a different matter.” They require piercing the skin, and give law enforcement a sample that can be preserved and used for other purposes. They may not be obtained without a warrant, incident to arrest. The majority also found that, while implied-consent laws may impose civil penalties and evidentiary consequences on those who refuse consent, motorists “cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense.” The Court affirmed one defendant’s conviction for refusing a warrantless breath test, reversed a conviction for refusing a warrantless blood draw, and remanded where a defendant submitted to a blood test after being told he had no right to refuse.

Five justices were in the majority. Justices Sotomayor and Ginsburg dissented from the majority’s conclusion with respect to breath tests. They disagreed with the application to breath tests of the search-incident-to-arrest framework. They would find that officers should obtain a warrant for BAC evidence unless exigent circumstances exist in a particular case. Justice Thomas wrote separately to state his disagreement with McNeely. He would instead hold that both blood and breath tests may be performed without a warrant due to exigent circumstances.

Strieff and Birchfield were both decided by the Court without Justice Scalia. Would they have been decided differently before his passing? Justice Scalia had strong views about the scope of the exclusionary rule and the attenuation doctrine, as Hudson shows. In McNeely, he joined the majority in finding no exigent circumstances, as a categorical matter, to support warrantless blood draws. His vote was not necessary to obtain numerical majorities—each opinion commanded five votes—yet his voice was loud on Fourth Amendment issues. We may never know how these two opinions would read had he lived to see them written—or, perhaps, had he authored them himself.

**SIXTH AMENDMENT**

Last Term the Court issued a number of substantial Sixth Amendment rulings, plus a per curiam reversal. Betterton v. Montana answered whether the speedy-trial guarantee applies to sentencing; it does not. In Hurst v. Florida, the justices overturned Florida’s capital-punishment system, reinforcing the principle that the jury must find the facts necessary to a capital judgment. Luis v. United States is an important ruling about seizing assets that deprive a defendant of counsel of choice. United States v. Bryant addressed the use of unexplained tribal-court convictions as predicate offenses for prosecutions under a federal statute. And in Maryland v. Kulbicki, the justices summarily reversed a state court that faulted defense counsel for not uncovering a report about the validity of a certain type of forensic evidence.

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32. 133 S. Ct. 1552 (2013).
33. See Birchfield, 136 S. Ct. at 2167-70.
34. 134 S. Ct. 2473 (2014).
36. Id. at 2176-80, 2184.
37. Id. at 2178.
38. Id. at 2184.
39. Id. at 2186.
40. Id.
41. See id. at 2187 (Sotomayor, J., joined by Ginsburg, J., concurring in part and dissenting in part).
42. See id. at 2196 (Thomas, J., concurring in judgment in part and dissenting in part).
43. Assuming he voted with the majority in Strieff, there is a significant chance that Justice Scalia would have been assigned to write the opinion. Strieff was argued in the February 2016 sitting. We note that Justice Thomas, who wrote for the Court in Strieff, was also assigned the opinion in another case from the February sitting, Kingdomware Technologies, Inc. v. United States, 136 S. Ct. 1969 (2016). Assigning Strieff to Justice Scalia would have more evenly spread the Court’s workload and perhaps made sense, given his prior opinion in Hudson.
44. 136 S. Ct. 1609 (2016).
45. 136 S. Ct. 616 (2016).
46. 136 S. Ct. 1083 (2016).
SPEEDY TRIAL

Betterman is the Sixth Amendment decision with the broadest applicability. Brandon Betterman failed to show up in court for a domestic-violence assault charge. He was charged with bail-jumping and pleaded guilty to that offense. Betterman was then held for 14 months before sentencing, and he argued that the sentencing delay violated the Sixth Amendment’s Speedy Trial Clause. The Court found, unanimously, that the Clause does not apply to delayed sentencing.

Writing for the Court, Justice Ginsburg divided criminal proceedings into three phases. The first phase, before arrest or indictment, may be governed by the Due Process Clause, which protects against fundamentally unfair prosecutorial conduct.49 The Sixth Amendment’s Speedy Trial Clause applies in the second period; it attaches upon arrest or indictment and lasts through conviction. But this Sixth Amendment right then detaches upon conviction, which triggers the third stage that lasts until sentencing.50

The Court found that this division of the criminal proceeding into three stages, with the Speedy Trial Clause only applying during the second stage, is consistent with the purposes and historical understanding of the speedy-trial right. The three-stage model “reflect[s] the concern that a presumptively innocent person should not languish under an unresolved charge.”51 Moreover, the language of the Sixth Amendment references the “accused,” not someone already convicted.52 While guilty pleas may be prevalent in our system, making sentencing the main event for most defendants, factual disputes at sentencing do not relate to the question of guilt.53 To the extent that sentencing proceedings are unduly delayed, rules of court and the Due Process Clause may still be relevant. Justice Thomas (joined by Justice Alito) and Justice Sotomayor concurred to address possible applications of the Due Process Clause.54

RIGHT TO A DECISION BY A JURY

In Hurst, an 8-1 decision with Justice Scalia in the majority, the Court overturned Florida’s capital-punishment scheme because it does not require a jury to find the facts necessary to sentence a defendant to death. Timothy Hurst received the death penalty from a judge, who found sufficient aggravating circumstances to impose a sentence of death following an advisory verdict by a jury.

In the foundational case of Ring v. Arizona,55 the Court found that Arizona’s capital-sentencing scheme violated the Sixth Amendment (and the Apprendi v. New Jersey56 line of cases) because Arizona permitted a judge rather than a jury to find the facts required to sentence a defendant to death. In several cases, such as Spaziano v. Florida57 and Hildwin v. Florida,58 the Court had expressed support for Florida’s capital-sentencing scheme, holding in both cases that the jury need not make the specific findings authorizing the sentence of death. Hurst overturned Spaziano and Hildwin as irreconcilable with Apprendi and Ring.59 The Court did not reach the question of whether the error was harmless but overruled Spaziano and Hildwin “to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury’s factfinding, that is necessary for imposition of the death penalty.”60 Justice Breyer concurred in the judgment.61 Justice Alito was the lone dissenter, arguing that a Florida judge essentially fills a reviewing function and that any error was harmless.62

Apart from its importance for the state of Florida, Hurst makes clear that Ring stands strong. A jury must make the factual findings necessary to sentence a defendant to death.

RIGHT TO COUNSEL

In the forfeiture ruling, Luis, Justice Breyer, joined by Chief Justice Roberts and Justices Ginsburg and Sotomayor, concluded that “the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment.”63 Justice Thomas concurred, providing the fifth vote.64

The federal government charged Sila Luis in 2012 with healthcare fraud in the amount of $45 million, almost all of which she had already spent by the time she was indicted. When the government caught up with her, Luis had $2 million in her possession, which the district court ordered frozen for potential future payment of restitution and other criminal penalties, but which Luis wished to spend on her defense. The government and Luis agreed that the frozen $2 million were legitimate, untainted funds not connected to the alleged crime.65

The plurality recognized that past Supreme Court cases allowed the government to freeze a criminal defendant’s assets...
pretrial and prevent her from using those assets to hire her counsel of choice. They distinguished these precedents, however, as limited to restraint of a criminal defendant’s tainted assets, that is, those traceable to the crime charged. In contrast, the court order here prevented Luis from using her own money to hire the private defense counsel of her choice.

Justice Breyer’s plurality opinion reasons that the government has a substantial property interest in tainted assets that it does not have in untainted property. It also balances the interest in the fundamental right to assistance of counsel against the government’s contingent interest in securing criminal forfeiture and the victim’s interest in restitution and finds that the Sixth Amendment right trumps. It notes the impact that an opposite decision would have on the public defense system: “accepting the Government’s views would—by increasing the government-paid-defender workload—render less effective the basic right the Sixth Amendment seeks to protect.” The plurality additionally surmised that “the constitutional line we have drawn should prove workable” because “the law has tracing rules that help courts implement the kind of distinction we require in this case.”

Concurring, Justice Thomas agreed that freezing untainted assets pretrial violates the Sixth Amendment, reasoning that “constitutional rights necessarily protect the prerequisites for their exercise.” He disagreed, however, with the plurality’s “balancing approach,” arguing that such balancing “do[es] violence to the constitutional design.”

Justice Kennedy wrote a dissenting opinion joined by Justice Alito. His main criticism of the plurality was that the distinction between tainted and untainted assets makes little sense because money is fungible. “There is no difference,” he asserts, “between a defendant who has preserved his or her own assets by spending stolen money and a defendant who has spent his or her own assets and preserved stolen cash instead.”

Justice Kagan wrote a separate and short but intriguing dissent. She would have revisited the “troubling” decision in Monsanto, which held that the government is allowed to freeze tainted assets pretrial that the defendant needs to hire an attorney. However, given that Luis did not ask the Court to overturn Monsanto, Justice Kagan agreed with the principal dissent that there is no difference between tainted and untainted assets, since that money is fungible.

This case will likely have the largest impact on white-collar defendants, who might have legitimate assets in addition to and separate from those linked to their alleged crimes, and on the private criminal-defense bar, which may lose fewer clients to public-defender offices. It will also be interesting to see if counsel latch on to Justice Kagan’s dissent and try to challenge the constitutionality of the Monsanto decision. Courts will also have to hold traceability hearings or find another way to separate tainted from untainted assets, which may prove more difficult than Justice Breyer predicts.

The Term’s other right-to-counsel case was Bryant, which concerned a conviction under a federal statute that makes it a crime for any person to commit a domestic assault in Indian country if the person has at least two prior convictions for domestic violence. Bryant had multiple prior tribal-court convictions, which were uncounseled and included jail time. Had Bryant been convicted in state or federal courts, those prior convictions would have been obtained in violation of the Sixth Amendment right to counsel. But it is well settled that the Sixth Amendment does not apply to tribal-court proceedings. Writing for a unanimous Court, Justice Ginsburg noted that the tribal-court convictions “did not violate the Sixth Amendment when obtained, and they retain their validity” when invoked as predicate offenses in a federal prosecution. The Court’s opinion also points to the high rates of domestic violence among Native American women, the complex patchwork of law that makes it difficult to address this violence, and the inability or unwillingness of states to fill the enforcement gap.

INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, in Kulbicki, the justices summarily reversed a state court that had found that counsel’s performance was deficient for failing to uncover a report about the reliability of bullet-fragment forensic evidence. Kulbicki was convicted of murder in 1995 in a trial where the State’s expert purportedly matched the composition of lead in a bullet fragment in the victim’s brain with a bullet fragment in the defendant’s truck. A 1991 report undermined the legitimacy of “Comparative Bullet Lead Analysis,” although courts widely accepted this analytical technique until 2003. The Supreme Court ruled that a diligent search would not necessarily have discovered the early report undermining the bullet expert’s analysis, so counsel’s performance was not deficient.

EIGHTH AMENDMENT

The Court decided three notable Eighth Amendment cases...
this Term. Justice Scalia provided the majority opinion in one and a dissent in another, and the third was issued after his death. In Kansas v. Carr, the Court opined on whether the Eighth Amendment requires courts to instruct capital-sentencing juries regarding the burden of proof for mitigating circumstances. Montgomery v. Louisiana raised the question of whether the rule announced in Miller v. Alabama applies retroactively on state collateral review. And in Lynch v. Arizona, the Court summarily reversed the Arizona Supreme Court, which had upheld the death penalty where the trial court did not allow the defendant to inform the sentencing jury that he was parole ineligible.

In his last majority opinion for the Court, Justice Scalia delivered the ruling in Carr, where eight justices agreed that the Kansas Supreme Court improperly vacated the death sentences of Sidney Gleason, Reginald Carr, and Jonathan Carr. Gleason had participated in a conspiracy to rob an elderly man and then murder Gleason’s co-conspirator and her boyfriend. The Carr brothers committed a series of heinous crimes, set out in excruciating detail in Justice Scalia’s majority opinion, which culminated in the rape and shooting of five people, one of whom survived to recount the horrific tale.

The Kansas Supreme Court vacated the sentences after finding that the Eighth Amendment requires sentencing courts to instruct juries that mitigating circumstances need not be proved beyond a reasonable doubt. Justice Scalia, however, wrote that the Constitution requires no such thing. He concluded that whether mitigating circumstances exist “is largely a judgment call (or perhaps a value call),” rather than a factual determination amenable to a burden-of-proof determination, so a reasonable-doubt instruction would only confuse the jury.

The Kansas Supreme Court also found that the Carrs’ joint capital-sentencing proceeding violated their constitutional right to an individualized sentencing determination. Again, the majority disagreed. Reginald argued that he was prejudiced by Jonathan’s portrayal of him as the corrupting older brother and Jonathan’s presentation of testimony from their sister that tended to show that Reginald, not Jonathan, was the shooter. Jonathan contended that the joint sentencing proceeding caused the jury to unfairly associate him with his dangerous older brother. Analyzing the issue under the Due Process Clause, the Court found that any evidentiary unfairness during the joint sentencing phase did not rise to the level of a constitutional violation.

Justice Sotomayor wrote a lone dissent, in which she argued that the Court never should have taken these cases, where Kansas merely overprotected the constitutional rights of its citizens, something states are permitted to do with state law, if they so choose. She criticized the majority for unnecessarily cutting off state experimentation by opining on the best way for states to provide individual rights, “without any empirical foundation or any basis in experience.” Leaving the states alone to experiment, she noted, “is particularly important in the criminal arena because state courts preside over many millions more criminal cases than their federal counterparts.” We would like to point out that Justice Sotomayor is the only sitting justice with experience in a state criminal-justice system.

In the second Eighth Amendment case, Montgomery v. Louisiana, the Court found that the rule announced in Miller v. Alabama applies retroactively on state collateral review. In 1963, when Henry Montgomery was 17 years old, he killed a deputy sheriff and received a mandatory life sentence without parole. This would not lawfully happen today, since the Court in 2012 announced in Miller v. Alabama that the Eighth Amendment prohibits states from imposing mandatory life without parole on juveniles. Miller required sentencing courts to consider the diminished culpability and high capacity for change of youth offenders before imposing a life sentence. It also noted that life sentences for juveniles should be “uncommon.” In Montgomery, the Court clarified that the Constitution requires this rule to apply even to cold cases like Montgomery’s.

The Court in Montgomery announced that “when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.” Substantive, as opposed to procedural, rules are those that “set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State’s power to impose.” The majority reasoned that the Miller rule is substantive in that it “rendered life without parole an unconstitutional penalty for a class of defendants because of their [juvenile] overwhelming: She spent four and a half years as an assistant district attorney in Manhattan, thirty years ago.”.

82. Id. at 642.
83. Id. at 645.
84. 136 S. Ct. 718 (2016).
85. Id. at 725-26.
87. Id. at 2469.
88. Montgomery, 136 S. Ct. at 729. The Montgomery case also involves a thorny federal-question jurisdictional issue that is beyond the scope of this project. See Jason M. Zarrow & William H. Milliken, Retroactivity, the Due Process Clause, and the Federal Question in Montgomery v. Louisiana, 68 STAN. L. REV. ONLINE 42 (2015) (unpacking the jurisdictional issue in Montgomery).
The Court decided the year's most significant Due Process and Equal Protection Clause decisions without Justice Scalia.

nile] status.” The rule therefore applies retroactively.90 The Court, however, assured states that they “may remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.”91 In his last dissent in a criminal case, Justice Scalia argued that the decision of whether to revisit an already-finalized conviction is entirely within the State's control—the Constitution, he said, does not have an opinion either way.92 Justice Thomas wrote separately to emphasize that the Court lacked jurisdiction to hear the case in the first place because it did not implicate any federal right.93

The third Eighth Amendment case, *Lynch*,94 was a per curiam decision reversing the Arizona Supreme Court, which had upheld the death penalty for Shawn Patrick Lynch. At Lynch's penalty-phase hearing, the State suggested that the jury should impose death because Lynch could be dangerous in the future. To rebut this argument, defense counsel asked the trial court to inform the jury that Lynch was ineligible for parole under Arizona law, but the court refused. The Supreme Court found that this violated *Simmons v. South Carolina*, which held that:

Where the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury—by either argument or instruction—that he is parole ineligible.95

The high court in Arizona mistakenly thought that *Simmons* did not apply because, under state law, Lynch could have received a life sentence with eligibility for “release” after 25 years. The per curiam opinion notes, however, that because Lynch only would have been eligible for executive clemency, not parole, Lynch was entitled to the instruction on parole ineligibility.

In dissent, Justices Thomas and Alito criticized the majority for “such micromanage[ment of] state sentencing proceedings.”96 They were skeptical that knowing the current state of the law on parole would impact a jury's decision to impose a death sentence. They also found the per curiam decision “a remarkably aggressive use of [the Court's] power to review the States' highest courts,” particularly given that *Simmons* was “a fractured decision of this Court that did not produce a majority opinion.”97 Justice Scalia, who passed away before the *Lynch* opinion came down, had dissented in *Simmons*.98 We might assume that, had he been alive when *Lynch* came down, he would have joined Justices Thomas and Alito or authored his own dissent.

**DUE PROCESS & EQUAL PROTECTION**

The Court decided the year's most significant Due Process and Equal Protection Clause decisions without Justice Scalia. In *Williams v. Pennsylvania*,99 the Court clarified and expanded its standard for when the Due Process Clause requires a judge to recuse herself from a case. And in *Foster v. Chatman*,100 the Court found that Georgia prosecutors were motivated by discriminatory purpose in striking black jurors from a death-penalty case. The Court also delivered a summary reversal.

In *Williams*, Justice Kennedy, writing for a five-justice majority, stated that where a judge has had “significant, personal involvement in a critical trial decision” regarding the defendant's case, the Due Process Clause requires the judge's recusal.101 Terrance Williams murdered Amos Norwood in Philadelphia in 1984. At that time, Ronald Castille was the district attorney, and he gave his approval for the line prosecutor to seek the death penalty against Williams. Williams was convicted and sentenced to death.

In 2012, Williams challenged his sentence in a post-conviction petition, claiming that the line prosecutor at his murder trial had violated Brady. That court stayed Williams's execution and granted him a new sentencing hearing. The Commonwealth appealed. By this time, former District Attorney Castille was the Chief Justice of the Pennsylvania Supreme Court. Over defense counsel's objection, he joined the rest of the court in overturning the lower court's decision and reinstating the death penalty in Williams's case.

A majority of the U.S. Supreme Court concluded that Williams's due-process rights were violated when Chief Justice Castille refused to recuse himself from the Commonwealth's appeal. Justice Kennedy reasoned that “[w]hen a judge has served as an advocate for the State in the very case the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome.”102 According to the Court, Chief Justice Castille made a critical decision in Williams's case by authorizing the prosecutor to pursue the death penalty, and that choice was significant in that, without his express authorization, the prosecutor would not have been able to seek the death penalty. Thus, Chief Justice Castille's previous involvement in the case created an “unacceptable risk

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90. Id. at 734.
91. Id. at 736.
92. Id. at 737, 741 (Scalia, J., dissenting) (“Once a conviction has become final, whether new rules or old ones will be applied to revisit the conviction is a matter entirely within the State's control; the Constitution has nothing to say about that choice.”)
93. Id. at 744, 745 (Thomas, J., dissenting).
94. 136 S. Ct. at 1818.
97. Id.
98. Simmons, 512 U.S. at 185 (Scalia, J., dissenting).
100. 136 S. Ct. 1737 (2016).
101. Id. at 1907.
102. Id. at 1906.
of actual bias” that “so endangered the appearance of neutrality that his participation in the case must be forbidden if the guarantee of due process is to be adequately implemented.”103

Chief Justice Roberts, joined by Justice Alito, dissented, as he did in the Court’s last major due-process recusal case, Caperton v. Massey (there joined by Justices Scalia, Thomas, and Alito).104 They would rather leave it “up to state authorities—not this Court—to determine whether recusal should be required.”105 Justice Thomas also wrote a separate dissent in Williams106 arguing that the majority opinion should have distinguished the due-process rights of criminal defendants from those of parties in post-conviction proceedings.107

A few points are particularly worth noting. First, the majority held that “an unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote.”108 Thus, there is a due-process issue even if the offending judge served on a unanimous panel and even, seemingly, if the judge voted in the complaining party’s favor.

Second, the majority did not limit itself to death-penalty cases or invoke the Eighth Amendment. The holding therefore appears to apply to any significant personal involvement a judge has had in any critical trial decision, not just in decisions in capital cases.

Third, this case could have an interesting impact on how former prosecutors make decisions about whether to recuse. While “[m]ost questions of recusal are addressed by more stringent and detailed ethical rules, which in many jurisdictions already require disqualification under the circumstances of this case,”109 Williams makes clear that these rules have constitutional dimensions.

The eight-justice Court decided Chatman110 in May 2016 in an opinion Chief Justice Roberts assigned to himself. The Court first determined that the Georgia habeas court’s application of res judicata principles to Timothy Foster’s Batson claim was not independent of the merits of that claim; the justices could therefore review the Batson issue.111 The Court then found that state prosecutors were motivated by discriminatory intent when they used their peremptory strikes to remove all the prospective black jurors from Foster’s death-penalty case, which violates the Equal Protection Clause.112

Foster supported his Batson case with an array of documents he obtained pursuant to a state open-records request, including the jury-venire list, which showed that each black prospective juror’s name was highlighted and noted with a “B.” On each of the juror questionnaires, the juror’s response indicating his or her race was circled. Foster also received a draft affidavit prepared by the state’s investigator at the prosecutor’s request, in which the investigator wrote: “If it comes down to having to pick one of the black jurors, [this one] might be okay” under one of the black prospective juror’s names. Foster received handwritten notes on three black prospective jurors, which referred to those jurors as “B#1,” “B#2,” and “B#3,” and a handwritten list titled “definite NO’s” that included all of the black prospective jurors’ names. Another handwritten document titled “Church of Christ” included a notation that read: “NO. No Black Church.”113

Although the prosecutors presented alternative reasons for why they struck each of the black prospective jurors, the Court rejected these justifications, noting the State’s “shifting explanations, the misrepresentation of the record, and the persistent focus on race.”114 “[T]he focus on race in the prosecution’s file plainly demonstrates a concerted effort to keep black prospective jurors off the jury.”

Justice Alito wrote separately to assert that the state court on remand could still reject Foster’s claim on state habeas grounds.115 Dissenting, Justice Thomas accused the majority of “[i]nadequately grappling with the possibility that we lack jurisdiction,” as it was unclear from the Supreme Court of Georgia’s summary order whether it based its opinion on state or federal law.116 “The Court today imposes an opinion-writing requirement on the States’ highest courts.”117

In its per curiam decision in Wearry v. Cain,118 the Court summarily reversed a Louisiana post-conviction court due to a Brady violation. Michael Wearry had been convicted and sentenced to death for murder in rural Louisiana in 1998. No physical evidence connected Wearry to the murder, and the prosecution built its case on inmate witnesses. But it later became clear that the prosecution failed to disclose material evidence that would have undercut the witnesses’ credibility.

The Court found that under settled constitutional principles, this undermined confidence in the jury verdict and therefore violated Wearry’s due-process rights. The state court erred by evaluating the materiality of each piece of evidence individually, rather than cumulatively.119 Justices Alito and Thomas dis-

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103. Id. at 1908-09 (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).
106. Id. at 1917 (Thomas, J., dissenting).
107. Id. at 1909.
108. Id. at 1908.
109. 136 S. Ct. at 1737.
110. Id. at 1746-47.
111. See Batson v. Kentucky, 476 U.S. 79 (1986) (finding that purposeful racial discrimination in jury selection violates the defendant’s equal-protection rights under the Fourteenth Amendment).
112. Foster, 136 S. Ct. at 1743-44.
113. Id. at 1754.
114. Id. at 1755.
115. Id. at 1755, 1760 (Alito, J., concurring).
116. Id. at 1761 (Thomas, J., dissenting).
117. Id. at 1765.
118. 136 S. Ct. 1002.
119. Id. at 1006-07.
The justices decided one Second Amendment case, . . . summarily reversing the Supreme Judicial Court of Massachusetts.

SECOND AMENDMENT
The justices decided one Second Amendment case, Caetano v. Massachusetts, summarily reversing the Supreme Judicial Court of Massachusetts. The Massachusetts court had found that the Second Amendment does not protect stun guns for several reasons, including that stun guns were not in common use at the time of the Second Amendment’s enactment and are not readily adaptable to military use. The U.S. Supreme Court rejected these reasons as inconsistent with the holding in District of Columbia v. Heller and remanded for further proceedings.

TIDBITS
The Court also decided a series of federal criminal cases and issued a summary reversal in a habeas case, that, for our purposes, are worth a brief mention.

In a closely watched case, McDonnell v. United States, the Court unanimously reversed the federal criminal conviction of the former Governor of Virginia, Bob McDonnell. The key part of the decision is the Court’s interpretation of what amounts to a proscribed “official act” within the meaning of the federal bribery statute, 18 U.S.C. § 201. The justices rejected an expansive construction, ruling that that merely hosting an event or meeting with others is not enough. Rather, the public official must make a decision or take an action on the matter by doing something specific and focused, such as deciding an issue or exerting pressure on another official to do so.

Another case of interest is Voisine v. United States, where the Court ruled 6-2 that a federal law barring a person convicted of a “misdemeanor crime of domestic violence” from possessing a firearm includes convictions for reckless conduct.

The majority found no indication in the text, background, or history of the statute that the firearms ban should be limited to knowing or intentional conduct. “And the state-law backdrop” to the federal statute, “which included misdemeanor assault statutes covering reckless conduct in a significant majority of jurisdictions, indicates that Congress meant just what it said.”

Welch v. United States is a sequel to last Term’s decision in Johnson v. United States, where the justices ruled that the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(e)(B)(ii), was unconstitutionally vague. In Welch, the Court determined that the rule announced in Johnson is substantive and thus applies retroactively to cases on collateral review under the framework set forth in Teague v. Lane.

The summary reversal came in White v. Wheeler, where the Court reversed the Sixth Circuit, as it has often done as of late. The Sixth Circuit had granted habeas relief on Due Process and Sixth Amendment grounds in a death-penalty case where the Kentucky trial court had dismissed a juror for giving equivocal and inconsistent answers as to whether he could impose the death penalty. The Court found that the lower court misapplied the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which requires deference to the state courts. The Court communicated its apparent exasperation with the Sixth Circuit: “this Court again advises the Court of Appeals that the provisions of AEDPA apply with full force even when reviewing a conviction and sentence imposing the death penalty.”

TWO COURTS, AND A LOOK AHEAD
We have suggested that the 2015-2016 Term had two Courts, one with Justice Antonin Scalia and one without. With such a private governmental entity, it is difficult to assess how his passing affected the remaining justices’ decision making. His death would not likely have changed the outcomes of any criminal cases decided in the second half of the Term. Yet his was such a strong voice that it is difficult to imagine the opinions not being shaped by him in some way. And there is always the possibility, nay, probability, that the justices decided the cases as they did to avoid a 4-4 tie.

The 2016-2017 Term is now underway, with a number of
important criminal-law cases on the docket. For starters, *Pena-Rodriguez v. Colorado* \(^{135}\) will examine whether evidence of racial bias may be used to impeach a jury’s verdict. And *Moore v. Texas* \(^{136}\) will explore whether it violates the Eighth Amendment to prohibit the use of current medical standards on intellectual disability in determining whether a person may be executed. But the most important question for the coming Term is whom President-elect Trump will nominate to fill the seat of the late Justice Antonin Scalia.

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Harmful Effects of Child-Custody Evaluations on Children

Ira Daniel Turkat

Child-custody evaluations have become commonplace in family-law disputes over living arrangements, parental decision making, and time-sharing with offspring. A quarter century ago, I raised the issue that child-custody evaluations had no scientific validity.\(^1\) When I reviewed the literature again a decade ago, the lack of scientific validity remained unchanged, prompting me to bring the issue directly to the readership of this journal.\(^2\) Unfortunately, even today’s prominent proponents of child-custody evaluations admit that at the present time there is still no scientific evidence whatsoever that a child-custody evaluation results in beneficial outcomes for the children involved.\(^3\)

In light of the above, it is reasonable to ask: Why are child-custody evaluations ordered with regularity when there is no scientific evidence to support them? There are a variety of reasons.

First, it is rational and fair to expect mental-health experts to be more capable at rearranging families than judges; after all, the latter are not trained as psychologists or psychiatrists, and in the quest to make these critical decisions correctly, it is prudent to look to experts for advice. However, this assumption comes into question because there is no scientific evidence proving that mental-health professionals are better at making child-custody decisions than judges. In fact, there is no scientific evidence that mental-health professionals are better at making child-custody decisions than anyone, be they professionals, laypersons, or otherwise.

Second, while mental-health experts are duty-bound to provide their best advice when called upon, they do not seem to be emphasizing to the judiciary that there is no scientific evidence for their custody-evaluation recommendations. After all, if that were emphasized, their testimony might well be precluded based on the Federal Rules of Evidence and pertinent Supreme Court decisions (e.g., *Daubert v. Merrell Dow Pharmaceuticals, Inc.*).\(^4\) Further, the lack of scientific validity has not deterred professional organizations such as the American Psychological Association (APA) from issuing guidelines for how to conduct these evaluations\(^5\) or smaller groups offering “certification” (e.g., Professional Academy of Custody Evaluators) based on less-than-stellar credentials.\(^6\) Such offerings by professional organizations encourage the use of child-custody evaluations despite the absence of proper scientific substantiation for them. Guidelines and certification are no substitute for scientific evidence.

Third, while custody evaluators undoubtedly perform these examinations with a sense of professional duty, they also have a significant financial interest in conducting them. Some studies report custody-evaluation fees to be in the thousands of dollars,\(^7\) and in highly contested matters it is not uncommon to see tens of thousands of dollars spent on these evaluations.\(^8\) As will be shown below, when parents are ordered into these costly evaluations in the absence of scientific evidence to determine if, when, and how they should be conducted, it creates a context in which custody evaluators have considerable discretion, leading some to implement extensive psychological assessments of family members and thereby spend the family’s money in a way the court likely never imagined. Since there is no scientific evidence whatsoever that a more thorough evaluation leads to a better outcome for children, these families are forced to pay for a costly evaluation and opinion that may very well be incorrect. Those benefiting financially from these evaluations may not wish to see courts discontinue ordering them.

Financial interests aside, there is no doubt that what underlies the promotion of child-custody evaluations is the assumption held by the judiciary, custody evaluators, and pertinent professional organizations that performance of these examinations is in the best interest of children. Unfortunately, this assumption has no body of scientific evidence to prove it and appears more consistent with wishful thinking. Clearly, an overburdened judiciary would benefit greatly by having highly skilled professionals ready to perform child-custody evaluations that are strongly supported by a comprehensive body of scientific findings.

Since there is no direct scientific evidence proving that custody evaluations benefit children, is it possible that custody

**Footnotes**

6. The Professional Academy of Custody Evaluators of Furlong, Pa., does not require a doctorate nor more than two years of experience to apply for certification. In contrast, the American Academy of Matrimonial Lawyers requires at least 10 years of practice following bar admission as one of 10 criteria that must be met to apply for certification.
8. Author's experience as a work-product consultant in highly contested cases.
evaluations might not benefit children? Taken a step further: might child-custody evaluations cause detrimental effects for the children involved?

At first glance, the idea that child-custody evaluations could potentially be harmful to children would seem inconsistent with the Zeitgeist. However, upon further consideration, there are several facts supporting the viability of the hypothesis that child-custody evaluations may indeed prove detrimental.

**WHY CHILD-CUSTODY EVALUATIONS MAY BE DETRIMENTAL**

The first consideration as to why child-custody evaluations may be detrimental is that there is no scarcity of past participants claiming them to be. Not only are such claims made regularly in pleadings and attorneys' offices, a perusal of the Internet reveals no shortage of individuals opposed to these evaluations. It is easy to dismiss such complaints as the consequence of “sour grapes,” but without proper scientific investigation, it is unknown what percentage of these custody-evaluation grievances have legitimacy.

Second, there is no doubt that these financially burdensome evaluations deplete a certain percentage of a family’s financial resources, especially at a time when funds are being drained by the formal reorganization of the family. One of the more disturbing examples of such a financial assault was noted by the Second District Court of Appeal of Florida in 2003 where it was reported that one psychologist charged an amount equal to the parties' entire net worth ($20,000), leading the appellate court to question how it could be in a child's best interest for the family's resources to be depleted by such fees.9 This is especially concerning given that scientific research has shown that an important predictor of how well children adjust to divorce is economic stability, a key variable in light of the drain caused by dividing a family into two households.10 Clearly, if a mental-health professional wipes out a family's entire net worth for an opinion that has no demonstrated beneficial value of major significance, this certainly would appear harmful to the children involved. In fact, any substantial dent in a family's resources due to a custody evaluation that produces little if any proven benefit for the family would certainly not be in the best interest of the children.

A third reason supporting the hypothesis that child-custody evaluations may be detrimental can be seen in the aftermath of the custody evaluator's declared opinion. Since there is no scientific evidence to support the opinion as correct or not, costly decisions may be made by the family on what may be erroneous professional recommendations. Some may feel no choice but to commit more family funds to attack or defend a report that may be incorrect and perhaps detrimental. Others may succumb to the custody evaluator's recommendations to avoid further expense, even though these may be wrong and ultimately prove harmful to their children. Even correct recommendations might prove to be a detriment if the court feels it must dismiss them on grounds of inadequate scientific validity, thereby resulting only in another costly expenditure for the family. Thus, in the absence of strong scientific evidence, a correct set of recommendations and incorrect set may both produce detrimental effects for families.

A fourth reason to suggest that child-custody evaluations may prove deleterious can be found in the scientific literature on the effects of psychotherapy.11 Over the decades, substantial scientific evidence has accumulated showing that a significant percentage of patients are actually harmed by psychotherapy.12 Put another way, it is a well-established scientific fact that in their efforts to be helpful, mental-health professionals actually harm a subset of their patients. While not widely publicized, the interested reader will find a substantial body of scientific research available documenting iatrogenic effects of psychotherapy. Accordingly, it is not unreasonable to assume that such efforts “to help”—in the form of providing child-custody evaluations—may prove harmful to some as well.

Fifth, there is substantial scientific evidence that diagnostic errors in healthcare are common, creating serious negative consequences and costing billions of dollars.13 In medicine, objective assessment tools are readily available (e.g., blood test, MRI, etc.), yet diagnostic errors occur with regularity, producing serious consequences. In contrast, the assessment tools of mental-health professionals (including those used by child-custody evaluators) are certainly less objective. The determination of whether a blood-sugar level is too low or high is far more straightforward than determining how to optimally rearrange a family’s time together, how decision making should occur on items like school choice and extracurricular activities, how to structure two-household living arrangements, and how to address other multi-factorial issues that are part and parcel of child-custody evaluators’ recommendations. Armed with less objective assessment tools to examine the considerably more complex issues found in mental-health practice, it is not surprising that the rate of misdiagnosing psychiatric disorders is alarming.14 In fact, diagnostic error is so problematic that the Chairperson of the Fourth Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), psychia-

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12. Scott O. Lilienfeld, Psychological Treatments That Cause Harm, 2
The present study was designed to be exploratory and... is preliminary in nature.

As emphasized by Allen Frances of Duke University School of Medicine, declared that the current version of the diagnostic manual (DSM-5)—the most widely used compendium of criteria for psychiatric disorders—includes scientifically unfounded, inadequately tested, and potentially dangerous diagnoses, resulting in millions of patients labeled incorrectly as suffering from mental disorders. The problem of diagnostic error is well illustrated in DSM-5 research field trials, which revealed a significant failure in evaluators' ability to reliably agree on numerous psychiatric diagnoses, prompting DSM-IV Chairperson Frances to declare, "The results of the DSM-5 field trials are a disgrace to the field." Chairperson Frances' scathing criticism of the scientifically problematic psychiatric diagnoses contained in DSM-5 was echoed by no less than the Director of the National Institute of Mental Health, Thomas Insel, who confirmed that the DSM-5's "weakness is its lack of validity."

Given the problem mental-health practitioners have in making reliable and valid diagnoses combined with the documented history of harming therapy patients they set out to help, it would seem likely that scientifically unsupported custody evaluations are not immune from these very same serious deficiencies. Clearly, assigning a psychiatric diagnosis is a far less complex task than figuring out an entire family's best interests, it is not uncommon for highly sensitive and deeply personal information obtained from a minor by a custody evaluator to be revealed to parents. On occasion, such content may stimulate damaging interactions among family members. The negative impact upon the individuals so affected has not been studied scientifically, but recent scientific studies show that privacy invasion in families can negatively affect the child-parent relationship. In light of the significant privacy intrusion and forced disclosure that children and parents may endure as participants in custody evaluations, it is reasonable to expect potential detrimental effects.

In sum, when one considers the lack of scientific evidence to support custody evaluations, the diagnostic-error rate among mental-health professionals, the harmful effects psychotherapists unintentionally cause patients, the impact of financial burden caused by custody evaluations, and the psychological damage that privacy invasion may generate, the hypothesis that child-custody evaluations may produce detrimental effects seems viable.

In light of the above, I recently searched the literature in this regard and did not find even one research study aimed at investigating the potential negative impact of child-custody evaluations on the children these examinations aim to help. The present article reports the first known quantitative data on detrimental effects of child-custody evaluations.

**RESEARCH DESIGN**

Scientific investigation can be expensive. As such, initial studies in an area typically are designed to be limited, straightforward, and cost-effective, operating under the assumption that if useful results emerge, future studies will be more sophisticated and produce reliable findings of greater clarity with increased applicability. The present study was designed to be exploratory and, as an initial investigation, is preliminary in nature.

To preserve objectivity and subject anonymity, a nationally recognized private research firm utilized by Harvard University, Stanford University, and other institutions was hired to solicit and screen subjects, administer research questions, collect data, and tally results.

**SUBJECTS**

One hundred one individuals representing 66 metropolitan areas across 35 states who met the following selection criteria participated in the present study: (1) they indicated they were divorced; (2) they reported they had participated in a child-custody evaluation by a psychologist; (3) they presented details requested about the custody evaluation; (4) they indi-

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cated the evaluation was paid for by family funds; and (3) they were not related to any other study participant. No children participated in the present investigation.

The subjects were equally divided in gender (49% female; 51% male). Age was distributed as follows: 34 years or younger (28.7%); 35-44 (35.6%); 45-54 (20.8%); 55-64 (13.9%), and 65 or older (1%). In regard to subjects’ participation in a child-custody evaluation, 94% reported doing so between 2000 and 2015; the remaining few did so before 2000. The highest custody-evaluation fee reported by subjects was $23,000.

METHOD
Following an online identification and screening process, potential subjects were exposed to and answered only one question at a time regarding aspects of their divorce history, including experience participating in a child-custody evaluation, until they either met all of the screening criteria or failed to meet one of the criteria. Those failing to meet any one of the screening criteria were removed immediately from the study, and those meeting all of the screening criteria were then administered the survey online. Subjects were chosen consecutively until the target number of participants was reached with equal gender representation. No one who met all screening criteria was excluded from the study. Any subject who failed to answer all of the required questions of the study was excluded from the final subject pool.

Following successful completion of the custody-evaluation-history screening process, each of the participants were asked three yes/no questions as to whether the recommendations of the child-custody evaluator did or did not: (1) “have any negative effect on any of your children”; (2) “have any harmful effect on the life of any of your children”; and (3) “make life worse for any of your children.”

Participants were next asked, “Given what you know now, if you could go back in time and take all the money that was spent on the child custody evaluation and choose today how best to spend that money for your children’s benefit, which statement below do you agree with?” and were asked to choose one of the following: (1) “My children would be better off if the money was spent on the child custody evaluation” or (2) “My children would be better off if the money was spent in other ways and not on the child custody evaluation.”

Finally, participants were then invited (but not required) to respond to the following open-ended statement: “Please tell us anything else you would like us to know about the effects of the child custody evaluation on any of your children.”

RESULTS
The results of the present study indicate that a remarkable number of children experienced negative effects and that lives were made worse by the recommendations of the custody evaluator, as reported by their parents. As can be seen in in Figure 1, nearly one in four children reportedly experienced negative effects, and one in five were reportedly harmed or lives were made worse by the custody evaluators’ recommendations. These findings are disturbing. However, they appear especially problematic given that a stunning 65% of all parents in the present study reported that their children would have been better off if the money spent on the child-custody evaluation had not been spent on it. Within that 65% were many parents not reporting negative effects who still concluded that their children would have been better served by the family not having spent money on the child-custody evaluation. Thus, in addition to an alarming percentage of children reportedly being harmed by child-custody evaluators’ recommendations, a unique negative effect was found: approximately two-thirds of all parents report that child-custody evaluations are not in the financial best interest of their children.

Although not required, subjects were invited to respond to an open request to present anything else about the effects of the evaluation on their offspring they would like to, and 66% of parents chose to volunteer their thoughts—suggesting a population intrinsically motivated to share their child-custody-evaluation experiences. Of those who reported that the custody evaluator’s recommendations produced negative effects on their children, they related predictable complaints, such as that the evaluator made a poor placement decision (e.g., “Because of the evaluation my child resides with his maternal grandparents and is miserable”); “[the evaluator] made my daughter live with her mother, who is unfit and absentencing”), created a negative economic impact on the children (e.g., “The

TABLE

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FIGURE 1: PERCENTAGE OF PARENTS REPLYING AFFIRMATIVELY

21. The subject-recruitment-and-screening process utilized by the independent research company is summarized as follows. Subjects were invited to participate in a short survey as an entry to desired premium content (e.g., e-book, movie, etc.) from a select group of pre-screened online publishers with an established history of producing attentive, quality respondents. Participation was purely voluntary; no other reward (e.g., airline miles, money, etc.) was offered to subjects for participation. Any subject who failed the research company’s trademarked technology to identify dishonest answers (e.g., response-pattern analysis, including elimination of excessive-speed responders, “trap” questions with known answers such as “what time zone are you in?,” etc.) was eliminated. Study participants were each assigned a unique alphanumeric label; at no time did the present author interact with any of the subjects that participated in the study or receive any personally identifying information about them. For additional information about the research firm utilized, please contact the author.
Two-thirds of parents did not feel child-custody examinations are in their children’s best financial interest. . . .

Cost of the evaluation was so high . . . it set back my ability to afford the right things for my child. Instead of doing traveling sports and band it is no longer feasible and I must work extra as well as his mother so neither one of us see our child much”), and demonstrated unacceptable professional performance (e.g., “the evaluator spent little time with the child[,] spent no alone time with the child[,] and made life altering decisions based on her feelings and not the facts”). In addition, other subjects who reported that the custody evaluator’s recommendations produced negative effects on their children also reported how the evaluation process stressed their offspring. Examples:

It created tension in my children, them getting confused on whom to support, me or her. Long and the short of it, nothing good came out of it.

My kids knew what was going on, the purpose and reason of the eval. It put them in the middle of the battle between my ex-wife and I. It was emotionally draining for them. They wanted it to be over.

It was an unnecessary trauma on my daughter, which the court mandated.

Perhaps even more illuminating are the complaints volunteered by those who reported that the custody evaluator’s recommendations did not have negative effects on their children. Consistent with the data reported above, the evaluators were criticized over the cost of the child-custody evaluation (e.g., “It really didn’t do anything one way or another other than a loss of funds used to pay for it” and “waste of money/could of taken the kids shopping for clothes shoes/spent on a vacation/bought the children food/hygiene products anything they may have needed”). In addition, a subset of parents who did not report negative effects on the children did attack the usefulness and value of the custody evaluation. For example:

It didn’t really have an effect. It pretty much told us what we already knew so the money would have been better spent on my daughter.

It is just a big hassle for the child involved and stirs up more emotions.

It took too much time, and effort, and had to explain questions, that my child did not need to know at the time.

The evaluation did not have much merit in court because the judge said it sounded “biased” even though it was based off scientific metrics.

Taken as a whole, the results of the present study reveal child-custody evaluations are rejected by the majority of parents as not in their children’s financial best interest, and a worrisome number report negative and harmful effects of these evaluations on their children. Clearly, the parents in the present study provide disturbing appraisals of the child-custody evaluations they participated in around the country.

ADVICE FOR THE JUDICIARY

The results of the present study question the assumption that child-custody evaluations are in the best interest of children. The data herein demonstrate that almost one in four children experienced negative effects from these evaluations, including parental reports of harm and children’s lives made worse in one in five cases. Further, two-thirds of parents did not feel child-custody examinations are in their children’s best financial interest; looking back, they oppose spending money on these evaluations. The results of the present study should trigger alarms when a motion for a child-custody evaluation is heard.

For the first time, the judiciary now has some quantitative information about the effects of child-custody evaluations. Unfortunately, these initial data suggest custody evaluations may harm children. Most parents reject these evaluations as financially unworthy. The data raise serious concerns.

In regard to the individual case before the bench, the results of the present study suggest the court should appreciate that any order for a child-custody evaluation may potentially lead to damaging the children the court is trying to protect. Ironically, the present data imply the court may need to protect children in custody battles from the custody evaluators.

The notion that children in custody battles may need protection from custody evaluators comes not just from the present study demonstrating a worrisome percentage of children reportedly being harmed and parents reporting these evaluations as not in the children’s financial best interest, but by a consideration of common courtroom practices. Before the present study, given the absence of any scientific evidence whatsoever to support the utilization of child-custody evaluations, the decision to order such an evaluation was based on two key assumptions: (1) the evaluation would be helpful for the children; and (2) the bench would rely primarily on the credentials of the evaluator as a guarantor of an accurate and cost-effective custody evaluation. Unfortunately, the present results show that children can be hurt by these evaluations and that parents view these evaluations as cost-ineffective, with children better off without them. Further, reliance on the evaluator’s credentials is flawed as well.22 One can have outstanding credentials, but that does not guarantee accurate or cost-effective child-custody-evaluation recommendations.

Indeed, most family courts these days would welcome as a custody evaluator someone who had served as a psychology

22. See Turkat, supra note 1.
professor at a major university and as the elected President of the American Board of Forensic Psychology (the longstanding certification authority in its area recognized by the APA), authored numerous peer-reviewed articles pertinent to custody evaluations (including joint publication with a law professor), evaluated over 2,000 cases, and served as a court-appointed guardian ad litem and special master. These are in fact the credentials of University of Washington Clinical Associate Professor Stuart Greenberg:

[H]e evaluated more than 2,000 children, teenagers and adults. His word could determine which parent received custody of a child . . . . But his formidable career was built upon a foundation of hypocrisy and lies. In the years since Greenberg's death . . . The Seattle Times worked to unearth Greenberg's secrets, getting court records unsealed and disciplinary records opened. Those records are a testament to Greenberg's cunning. They show how he played the courts for a fool. He played state regulators for a fool. He played his fellow psychologists for a fool. And were it not for a hidden camera, he might have gotten away with it . . .

As a custody investigator, expert evaluator, arbiter, mediator, guardian ad litem, special master[, he] became enmeshed in the court system, buddyng up to lawyers, judges, fellow experts. On the stand, he radiated confidence. "He was just kind of a notch above the rest of us," says Nick Wiltz, a fellow forensic psychologist. "He was able to present reports and information in a very powerful way." . . . He published in peer-reviewed journals and spoke all over the country. . . . His peers elected him president of the American Board of Forensic Psychology. . . . His fees in individual cases were known to climb from $8,000 to $12,000 to $20,000 or more.25

Empowered by top-notch credentials and reputation in an area lacking scientific validity, Greenberg engaged in highly unethical behavior, abused his clients and employees, duped the courts about cases (e.g., misused and misrepresented test and interview data, including manipulating a custody recommendation to favor a convicted domestic-violence offender represented by legal counsel who was Greenberg's undisclosed business partner, while falsely presenting the assault victim as significantly disturbed mentally and posing a danger to her offspring), secretly videotaped individuals in his office bathroom for his own private gratification, and despite having been found guilty of violating his license to practice earlier in his career, Greenberg was so cunning he was able to force his disciplinary records to be sealed so as not to interfere in his future practices as a forensic psychologist.24 In 2007, Greenberg was caught gratifying himself in front of the very camera he used to spy on others in his office bathroom and shortly thereafter committed suicide.25

Had it not been for the discovery of that camera, Greenberg might still be operating today as a prominent, highly desired custody evaluator.

Greenberg's case undoubtedly would not apply to most custody evaluators, but it illustrates the serious flaws in how these evaluations are assigned, implemented, and utilized. Relying primarily on credentials is risky when there is no scientific evidence to guide the court.

In light of this dilemma and considering the results of the present study, the bench would do well to stay focused on the need for strong scientific support before authorizing well-intentioned professionals to perform potentially harmful child-custody evaluations or unwittingly empowering potentially harmful evaluators. At present, ordering a child-custody evaluation is a gamble, in terms of the evaluator, the evaluation, and the potential for harm to children. As Greenberg illustrated in today's poor level of science that forces the bench to be dependent on its faith in the evaluation in performing a child-custody evaluation, it comes with a heavy wager: an evaluator you place your faith in may take a family down a terrible path you might not even know about until after the damage is done. Put another way: if the highly observed President of the American Board of Forensic Psychology can "play the courts for a fool,"26 what prevents the less-scrutinized custody evaluator before you from doing so? Today's poor level of science on child-custody evaluations offers the judiciary no protection.

Considering the results herein more globally, the judiciary may wish to take a very hard look at the practice of ordering child-custody evaluations to determine how they serve the needs of families. More specifically, a greater push should be made by the judiciary to encourage local psychologists and the APA to begin systematic scientific research on child-custody evaluations27 to develop a set of proven tools that properly serves families. Over the last quarter century, psychology has failed to do so. If the judiciary halted child-custody evaluations

24. Id.
25. Id.
26. Id.
27. From a scientific perspective, the results of the present study call for the development of clearly delineated facts on the positive and negative outcomes of child-custody evaluations utilizing well-designed research investigations of far greater sophistication than the initial survey herein, which naturally comes with limitations. Scientifically useful retrospective and cross-sectional studies would certainly be helpful, but, ultimately, prospective investigations are required to demonstrate the long-term effects of child-custody-evaluation recommendations, using well-chosen representative populations of ample size. With a comprehensive body of scientific facts on custody evaluation and outcome, including direct assessment of the functioning of children in addition to other measures such as parental report (the sole dependent variable in the present study), evaluators would then have a legitimate scientific foundation to properly advise the courts, which is lacking at the present time.
until there is strong scientific evidence for how to perform them in ways that achieve better outcomes for children, psychologists would likely rise to the challenge. Without such a halt, the experience of the last quarter century as noted above is at risk to continue as is. Maintaining the status quo is certainly not in the best interest of families litigating over custody of their children.

As child-custody evaluations have been performed for decades under the assumption that it is in the best interest of children—an assumption seriously challenged by the results of the present investigation and the factors reviewed herein, it is hoped that future research will help create evaluations that serve children well and outweigh any negative effects, including the crippling cost some families have experienced. Given the design of the present study, one should look to the results of future, more sophisticated scientific investigations to better identify the types of negative effects that child-custody evaluations may produce, their prevalence, and how they can be prevented.

Since at the present time there is no scientific evidence whatsoever that child-custody evaluations benefit children while the quantitative information presented in the present article indicates these evaluations may harm them, at minimum, it is advisable for the judiciary to become far more cautious when a motion for a child-custody evaluation is heard. At maximum, one could well argue that, at the present time, families may be better off without child-custody evaluations.

Dr. Turkat advises family-law attorneys on child-custody disputes. A licensed psychologist, he has served on the faculty at Vanderbilt University School of Medicine and University of Florida College of Medicine. In 2011, the 50,000-member British Psychological Society named him alongside three of the world’s most outstanding clinical psychologists in history for their influential work on case formulation; Dr. Turkat is the only American named among the four. Address all correspondence to: Ira Daniel Turkat, Ph.D., 2015 South Tuttle Avenue, Sarasota, Florida 34239; Telephone (941) 488-8093.
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The Unsubstantiated Claims of Turkat’s Harmful Effects of Child-Custody Evaluations on Children

Jonathan W. Gould & Allan Posthuma

We welcome the opportunity to respond to Dr. Turkat’s article, Harmful Effects of Child-Custody Evaluations on Children. We believe that there are many flaws and unsubstantiated claims made by Dr. Turkat, and we challenge his primary thesis that child-custody evaluations are, by definition, harmful.

Dr. Turkat sets the tone in his first paragraph with his sweeping statements that “child-custody evaluations [have] no scientific validity” and “there is still no scientific evidence whatsoever that a child-custody evaluation results in beneficial outcomes for the children involved.” His article includes too many generalized, unsupported charges to allow it to pass without challenge. We hope that our comments will contribute to more informed discussion clarifying misunderstandings about the role and value of custody evaluations and how they should properly be introduced into court proceedings.

OUTRAGEOUS ALLEGATIONS WITH NO SUPPORT

Our first concern with these opening statements of Dr. Turkat, and his paper in general, is his assumption that forensic psychologists and the courts have not responded to Daubert and its progeny and that psychologists continue to pontificate in the absence of sound research support, charging outrageous sums of money for their services. This is not the case. Even in the non-Daubert states and in Canada, expert evidence has come increasingly under the microscope to ensure opinions have scientific support. The National Academy of Sciences provides an excellent treatise for forensic, psychological, and other professional examiners.

In addition, professional organizations (federal, state, and provincial) have made explicitly clear to psychologists, as well as other forensic experts, the need to adhere to scientifically supported evidence. Furthermore, forensic psychologists must ensure the “scientific support” they are offering in support of their opinions is, in fact, robust, replicated, and well-recognized research.

Footnotes
6. See Faigman et al., supra note 5.
7. See Haack, supra note 5.
Writing from both a legal and forensic-psychological perspective, psychologist Robert Kelly and attorney Sarah Ramsey have written about the importance in the age of Daubert and its progeny of judges and attorneys developing a better understanding of social-science research and the scientific processes that comprise a well-done empirical study. They argue that judges need to understand better the methodological strengths and deficiencies of studies cited in an expert witness’ oral or written testimony. They proposed a set of guidelines for judges and attorneys to follow to determine the forensic usefulness of a study drawn from behavioral-science literature.

Several mental-health professionals have provided direction for forensic psychologists in ensuring the proffered evidence needs to conform with various indicia of scientific validity to satisfy the gatekeeping role performed by the judge. This healthy cross-fertilization of legal and forensic-psychological research has contributed to many jurisdictions in Canada and the United States incorporating, in family-law legislation, requirements not only for the need of expert evidence having proof in scientific literature, but also for the examiner to answer specific questions put forth, either by counsel or the court, which must be addressed by the expert. In many cases, this enables the expert to focus on specific issues before the court, thus increasing the likelihood of being able to provide strong scientific evidence. Forensic psychologists are thus more likely to be able to find scientific support addressing specific issues than broad statements on best interests of children in parenting plans or custody evaluations.

MOST CUSTODY EVALUATIONS ARE USED TO SETTLE, NOT LITIGATE

We believe child-custody evaluations should involve more than providing the court with recommendations about residential placement (physical custody) and decision making (legal custody). There are many useful ways in which a child-custody evaluation may provide reliable information to courts about a variety of issues.

Approximately 90% of child-custody evaluations are used as settlement tools that lead to out-of-court resolution of custody disputes. The use of a custody evaluation in this manner results in families being spared the increased conflict and tensions that are part of custody litigation. We conclude, therefore, that an important role played by a well-conducted child-custody evaluation is to reduce the likelihood that families will litigate and to increase the likelihood that a negotiated settlement would lead to reasonable compromises.

Turkat fails to note this point in condemning child-custody evaluations because of the financial burden they put on families. The fact that child-custody evaluations are a financial burden reflects only one perspective, but not the whole story. Certainly, a child-custody evaluation that leads to litigation rather than settlement would become another significant cost in the litigation process. However, as described above, since most custody evaluations lead to settlement, the evaluation-as-settlement tool avoids the cost of litigation. It has been our experience that when custody evaluators claim that they often testify in court about their evaluations, it is very likely that their evaluations are either sub-par or viewed as unfair and biased. Evaluation reports that lead to settlement do not end up being the focus of litigation since the parties settle out of court.

PROFESSIONAL CONSENSUS ABOUT PROCEDURES TO BE UTILIZED IN A CHILD-CUSTODY EVALUATION

The methodological steps employed in a child-custody evaluation have changed over the past 30 years. Today, there is a general consensus in law and mental health that the methodology of a custody evaluation includes multiple interviews of the parents, interviews with the children, direct observation of parent-child interaction, interviews with third parties who have directly observed parent-child interaction, administration of psychological tests, and review of past and current records. In an effort to make custody evaluations more relevant to the unique issues presented by a particular family, attorneys and judges have been advised to provide specific questions to evaluators that define the scope of their evaluations and guide their investigative work. The legal standard of what is in the best interests of the child is intention-


9. See Ramsey & Kelly, Assessing Social Science Studies, supra note 8, at 367.


The usefulness of a custody evaluation is directly related to the nature and quality of the specific questions.

CUSTODY EVALUATIONS CAN PROVIDE MORE TO THE COURT THAN OPINIONS ABOUT CUSTODIAL PLACEMENT

A child-custody evaluation is not limited to providing the court with expert opinions about custodial placement and parental decision making. A well-conducted child-custody evaluation may provide the court with information about family functioning that would not otherwise be available to it. The evaluator brings to the evaluation process an understanding of how to employ the scientific method to achieve the most reliable set of data available. One means of obtaining reliable data is through the use of forensic methods and procedures. That is, information is gathered from multiple independent sources, enabling the evaluator to analyze the degree to which each independent data source converges on the same or similar findings. The five independent data sources used in a child-custody evaluation include multiple interviews with each parent, multiple interviews and/or observations of each child, direct observation of each parent with each child, psychological testing when appropriate, collateral record review, and collateral interviews of individuals who have direct observational knowledge of parent-child interactions. The confidence with which an evaluator is able to offer an expert opinion is directly related to the number of independent data sources supporting the opinion.

Turk's work shows that there is no scientific evidence for custody recommendations. Feinberg has voiced a similar concern, reflecting the often-heard criticism of child-custody evaluations by attorneys. Tippins and Wittman argued that there is scant empirical evidence upon which expert opinions about custodial placement are based and urged evaluators to stop short of making residential-placement recommendations.

SPECIFIC QUESTIONS GUIDE RELEVANT INQUIRY

We argue, however, that the usefulness of a custody evaluation is directly related to the nature and quality of the specific questions that guide the investigation. For example, the court may be concerned about whether a parent's mental-health condition adversely affects the children and, if so, whether it is something that might respond to mental-health treatment or medical/pharmaceutical intervention. The court may be concerned about how children have developed a dysfunctional relationship with one parent while aligning with an unhealthy way with the other parent and seek recommendations about how to help the children develop a more balanced, healthy relationship with both parents.

INTEGRATING PROFESSIONAL AND SCIENTIFIC RESEARCH ACROSS SOCIAL-SCIENCE DISCIPLINES

In the past, custody or parenting-plan evaluators often overlooked the extensive and rich developmental research published in highly regarded peer-reviewed journals, typically confined to the academic world. However, in the last decade, many of these research interests have expanded into the classroom, parenting classes, and the courtroom.

- One such area is research on executive function. Executive function refers to the development in the brain, as well as in real life, of the ability to problem solve and, in essence, meet the demands of life at school, at home, and on the work site. One fascinating insight provided by this research is that progress can be measured, not only by psychological tests designed to measure the ability to problem solve, but also in neuroimaging scans of the brain, and in particular the frontal areas of the brain. From the forensic standpoint, another encouraging development is the examination of educational and parenting strategies to improve executive function, not only...
in North America, but in many countries and cultures across the world.\textsuperscript{19}

\begin{itemize}
\item Executive-function research, in the real world of the classroom and home, is sufficiently replicated to enable forensic psychologists to answer specific questions of interaction of each parent's potential ability to provide the coping mechanisms and skills of their child, or children, in facing the demands of the world they will encounter in the future.
\item Research examining prediction of parental decision making demonstrates that pre-separation communication between parents often predicted post-divorce communication once litigation ended.\textsuperscript{20} These research findings suggest that it may be possible to predict which parents are more likely to engage in cooperative communication once the litigation is complete. The evaluator may look at factors identified in the literature as associated with a negative prediction of future cooperative communication. Evaluators who gather information about the parents’ past and present decision making about the children may be able to provide a prediction about which parents are more likely to engage in cooperative communication.
\item Research now helps courts to understand better how each family member in a divorced family system contributes to one or more of the children's attitudes and behaviors regarding resisting visitation. The child-alienation model described by Johnston and Kelly\textsuperscript{21} provides a map of how to investigate the contribution of each family member to children's resistance to visit with a parent.
\item Empirical research and scholarship in child development have provided a wealth of data that serves as the basis for age-appropriate and developmentally appropriate parenting-access-plan guidelines for the court to consider when making parenting-plan decisions. For example, there is ample research addressing the developmental limitations of children aged four and under.\textsuperscript{22}
\item Research from intact and divorcing families regarding the psychological and social effects of relocation on children's adjustment has greatly evolved over the past 15 years. An assessment model addressing empirically based risk factors has been developed to predict the risk to a child whose parent intended to relocate to a geographically distant location.\textsuperscript{23}
\end{itemize}

Research has also addressed the relationship between parental gatekeeping and parental access.\textsuperscript{24} Other useful research provides more specific examination of gatekeeping, parental access, and relocation.

\textbf{FACTS ARE IMPORTANT, AND HYPERBOLE MISLEADS}

We are most concerned, however, by the several claims made by Dr. Turkat that are not supported by research and that create a false impression about the utility of custodial evaluations. There is no research to date that addresses the type of custodial evaluations that are most often ordered by courts. In fact, many jurisdictions around the country are limiting their orders for custody evaluators to brief, focused evaluations. Other jurisdictions direct evaluators not to address the ultimate issues regarding expert opinions about custodial placement.\textsuperscript{25} Some jurisdictions have begun to rely on reports from guardians ad litem to investigate concerns in custody disputes, choosing to bypass the use of child-custody evaluators (e.g., New Hampshire).

Turkat argues that there are several ways in which a custody evaluation may be detrimental. On the other hand, since there is no empirical examination of the short- and long-term effects of expert opinions regarding custodial placement and decision making on judicial determinations, it is just as easy to argue that custody evaluations may be helpful. Neither argument has been empirically examined. In fact, scholars have not yet been able to develop a valid research study of these issues.

It is not uncommon in custody disputes for one parent to argue emotional, mental, or behavioral superiority over the other parent. When a parent in an unhealthy marriage seeks counseling to learn how to cope with the stresses of the relationship, this is often presented by the other parent as a sign of emotional weakness or parental incompetence. In rarer circumstances, a parent may have a history of admissions to psychiatric hospitals for a variety of problems. Experienced

\textbf{We are most concerned . . . Dr. Turkat . . . create[s] a false impression about the utility of custodial evaluations.}

\begin{itemize}
\item Executive Skills for Children and Adolescents: A Practical Guide to Assessment and Intervention (2nd ed. 2010); SAM GOLDSTEIN & JACK NAGLIERI, HANDBOOK OF EXECUTIVE FUNCTIONING (2014); MAUREEN HOSKYN ET AL., EXECUTIVE FUNCTIONS IN CHILDREN’S EVERYDAY LIVES: A HANDBOOK FOR PROFESSIONALS IN APPLIED PSYCHOLOGY AND EDUCATION (2015).
\item LESLIE DROZD ET AL., PARENTING PLAN EVALUATIONS (2nd ed. 2016).
\item Austin et al., Parental Gatekeeping, supra note 23.
\item SANDRA MILLER, NEW YORK STATE COURT’S MATRIMONIAL COMMISSION ON CUSTODY DISPUTES IN DIVORCE CASES (2006), http://www.nycourts.gov/tp/matrimonial%2Dcommission.
\end{itemize}
The pur-
pose of psychotherapy is to assist the client to change prob-
lems and to achieve change. Psychotherapy has been shown to be harmful to some patients. Psychotherapists typically have extensive academic and clinical expertise with such cases and know when to consult with other mental-health specialists to determine the relevance of a parent's mental health to the welfare of the children involved.

Turkat, however, makes no reference at all to such important details, nor to the diverse responses of courts. He does not draw a distinction between or among the data obtained by the evaluator, the analysis of the data by the evaluator, the discussion of the meaning of the analysis of the data in light of the issues faced by the family, and the expert opinions that are proffered to the court based upon these data and analyses. We choose not to throw the baby out with the bathwater. Courts may find useful the data in an evaluation report but not the expert opinions. They may find useful the data and analysis but not the expert opinions. They may find useful the data, the analysis, and the application of these data and analyses to the issues faced by the family but not the expert opinions. Courts may find useful the data analysis, and the application to the family and agree with some of the expert opinions. Courts may find useful the data, analysis, and application to the family and accept all of the expert opinions. Courts may also modify expert opinions by incorporating information from other parts of the case to which the evaluator had no access.

FORENSIC EVALUATION IS NOT PSYCHOTHERAPY

Turkat argues that a significant number of psychotherapy patients are harmed by psychotherapy. He then makes the unsupported argument that since mental-health professionals conduct forensic evaluations, it makes sense to consider that mental-health experts will harm those who they forensically evaluate in a manner similar to the ways in which psychotherapy has been shown to be harmful to some patients. Whether in court or in journal articles, those who make assertions such as those proffered by Turkat about forensic evaluations causing harm have, in our view, a responsibility to cite empirical research to support such a claim.

It is one thing to offer an opinion based upon clinical experience and observation rather than based upon empirical research as long as the basis of the opinion is clearly stated. Statements without attribution to experience or empirical data may mislead the reader to an unsupported conclusion.

Further, there is little parallel between the activities of a psychotherapist with a patient and the activities of a forensic evaluator and a litigant. There is a robust literature addressing differences between clinical assessment and forensic assessment and between therapeutic and forensic roles. The purpose of psychotherapy is to assist the client to change problematic aspects of her or his life. Therapists are intended to be helpful to their clients. The purpose of forensic assessment is to assist the court in understanding a particular psycho-legal issue. In the case of a child-custody evaluation, the purpose is to gather information about a family system with the goal of assisting the court in its determinations about parental access and parental decision making. Therapy is fundamentally different from forensic assessment.

DIAGNOSIS IS Seldom USEFUL IN CHILD-CUSTODY EVALUATIONS

Turkat spends time discussing the “substantial scientific evidence that diagnostic errors in healthcare are common, creating serious negative consequences and costing billions of dollars” (p. 153). The implication that Turkat appears to want the reader to draw is that because diagnostic errors in the healthcare industry cause “serious negative consequences and cost[] billions of dollars,” it follows that diagnosis in child-custody assessment creates serious negative consequences and adds significantly to the cost of the evaluation. There is no evidence to support this assertion.

Further, most custody texts addressing how to conduct child-custody evaluations emphasize the lack of usefulness of mental-health diagnoses. In the vast majority of child-custody cases, a mental-health diagnosis does not provide information to the court about parenting or parent-child interaction. A mental-health diagnosis provides no information to the evaluator or to the courts about the ways in which the behaviors associated with a mental-health diagnosis are related to parenting behaviors. Without demonstrating a nexus between the mental-health diagnosis and parenting behavior, the diagnostic label provides only another term to be used as a weapon in the parents’ custodial battle.

SCIENTIFIC PROCESS IS IMPORTANT EVEN WHEN WRITING FOR A NON-SCIENTIFIC AUDIENCE

It’s important to note that the research conducted by Dr. Turkat, as described in his paper, would not be accepted by most peer-reviewed journals. The primary reason is the lack of a control group. While he could certainly claim that the respondents to his survey were disenchanted, there is no way he could determine whether the only individuals who responded to the survey were those who were disenchanted. For most regulatory psychological boards in Canada and the United States, statistics have been interpreted to indicate that the highest rate of complaints to regulatory organizations come from parents who did not receive the custody or parenting-plan arrangements they believed they deserved.

The psychological research, conducted by an agency or an academic institution, typically must be approved by an ethics committee. It is unlikely any ethics committee or, for that matter, the judiciary, would randomly make custody arrangements or parenting plans irrespective of the merits or shortcomings of the parenting plan. When forensic evaluators con-
tact therapists, counselors, or teachers involved with either the parents or the children, they must factor in these sources of information. They probably receive only the viewpoint or perspective of the parent or student and, thus, from a forensic standpoint, have a biased view. Forensic evaluators must use the information provided by the client—but only in the context of various other sources of information, including other collateral interviews, psychological testing, and observations of various combinations of immediate and extended family interactions.

**VOICES OF CHILDREN ARE INCREASINGLY HEARD AND RESPECTED**

In the United States and Canada, an increasing number of states and provinces have legislation providing for consideration of the rights and views of the child in defining a parenting plan or custody resolution. In British Columbia, where the second author practices, the courts are increasingly likely to have a Views of the Child report, instead of the more traditional assessment of the complete family. The law in British Columbia, similar to Article 123 of the U.N. Convention on the Rights of the Child, requires the court and the examiner to assess not only the child’s wishes, but whether the recommendation is in the best interest of the child.

Too often, when parents litigate custody, the voices of their children are either ignored or are presented through each parent’s perspective. A custody evaluation should provide information to the court about the children’s perspective through their eyes, not filtered through the eyes of their parents or their parents’ attorneys. A custody evaluation will often include information about the children’s experiences within the binuclear family and information about the children’s wishes. There are emerging data about children’s desire to participate in decision making about their custodial placement. Some children want nothing to do with decision making about their custodial placement while other children are eager to share their ideas and opinions. A custody evaluation will often include relevant information about the children’s experiences with each family, each extended family, and other child-related areas of examination.

Dr. Turkat raises a valid point about the need for the court and forensic examiners to be sensitive to the vulnerabilities of children. In most situations, examiners and the court try to minimize contributing to the distress of children. However, as the court is aware, most situations in which a forensic examination is ordered typically follow the most protracted, vitriolic disputes, in which the children may have already developed emotional, behavioral, and academic problems. Legislatures, courts, and forensic examiners are deeply aware of the destructive forces operating on children in these disputes and have attempted various ways to minimize the damage done to children, unfortunately often with less-than-satisfying results.

**NO EMPIRICAL SUPPORT FOR HARMFUL EFFECTS ON CHILDREN OF CHILD-CUSTODY EVALUATIONS**

The last criticism offered by Turkat about the alleged harmful effects of child-custody assessment is focused on the intrusiveness of the evaluation process. Turkat acknowledges that there has been no empirical examination of the relationship between the alleged intrusiveness of a child-custody assessment and the negative effects on the parent-child relationship. Nonetheless, he opines that “it is reasonable to expect potential detrimental effects” resulting from the custody-evaluation process (p. 154). Turkat does not explain why it is reasonable to expect potential detrimental effects from a custody assessment. In fact, it is possible to infer the opposite effect. In more than 90% of cases in which a custody evaluation has been conducted, the evaluation reports become tools for settlement. That is, a well-done evaluation will often keep the parties out of court. The findings and recommendations often serve as a basis for out-of-court settlement.

**CHEAP SHOT AT A TERRIBLY UNFORTUNATE AND SAD EXAMPLE OF UNPROFESSIONAL BEHAVIOR**

We believe, however, that it was a mistake of Dr. Turkat to focus much of his concluding section on the highly publicized emotional and professional problems of one practitioner, the late Dr. Stuart Greenberg. This section owed more to sensationalism than scholarship; it contributed nothing of merit to the other important points raised by Dr. Turkat elsewhere in his paper.

**CUSTODY EVALUATIONS ARE OFTEN A NECESSARY INTRUSION**

We agree that the custody-evaluation process is intrusive. To be effective, it is, in our view, unavoidably so. We have described how practitioners respectfully and thoroughly follow best practices in conducting the process. Yet evaluators must investigate many aspects of how the parents and children function across a wide variety of activities and environments. Evaluator interviews with collateral informants may be experienced as intrusive by some parents while being welcomed by other parents. However, we believe that the custody-evaluation process is best regarded as an inoculation rather than a long-term illness. Individuals who are given an inoculation may suffer short-term discomfort from the needle piercing the skin and penetrating into the blood, yet the long-term advantages far outweigh the temporary discomfort. So, too, the custody-evaluation process may cause short-term discomfort that should nonetheless promote long-term advantages for the overall health of the family.

JUDGES AS GATEKEEPERS: TIPS TO IDENTIFYING A COMPETENTLY CONDUCTED CHILD-CUSTODY EVALUATION

There are several tips that can guide judges in determining the quality of a child-custody evaluation. The first step is to examine the evaluator’s training. Ask the evaluator whether he or she has obtained specialized training in each of the procedures employed in a custody evaluation. Judges are encouraged to carefully examine the expert’s continuing-education workshops and publication list (CV) to ensure that the proposed expert has developed specialized knowledge in child-custody assessment. The proposed expert should have recently attended continuing education in child-custody assessment as well as in the areas of concern specific to the matter before the court, e.g., relocation, alienation, domestic violence, LGBT parenting. The proposed expert should be educated about the current professional and scientific knowledge of the areas of concern before the court, and, when possible, the expert may demonstrate evidence of authoring or co-authoring peer-reviewed publications in those areas specific to the matter before the court.

An important area for judges to examine is whether the evaluator conducted a forensic rather than a clinical interview of the parents and children. In a forensic interview, the evaluator gathers information about particular areas of interest that are identified in the specific questions that define the scope and purpose of the evaluation. A custody-assessment interview is not a clinical interview in the sense that the forensic interviewer, not the party, is in charge of the direction of the interview. In a clinical interview, the patient leads the therapist. In a forensic interview, the interviewer is focused on obtaining information about specific areas of concern identified by the questions that guide the evaluation.

Judges need to examine the interview data to ensure that each question posed at the beginning of the evaluation was systematically investigated by the interviewer. Similarly, the judge needs to examine interview data from children and collateral informants to ensure that the evaluator obtained information that directly answered the questions that guided the evaluation.

Judges should ask evaluators to explain their choice in psychological tests. Evaluators need to explain to the court why a particular set of tests was chosen. The evaluator needs to explain how the selected tests are used to create information from parent responses that can help answer the questions posed at the beginning of the evaluation process.

Judges also need to inquire about the context of the parent-child observation. Parent-child observations that take place in the parent’s home are likely to produce information about parent-child interactions that are more representative of their daily behavior than information obtained during a parent-child observation at the evaluator’s office.

Judges also need to know whether the evaluator participated in the parent-child observation or whether the evaluator intentionally chose not to participate. Information from parent-child observations are best when the evaluator simply watches and does not interact with the parent or the child. The more the evaluator becomes engaged in the parent-child observation, the more likely the observational information is changed from a parent-child observation to a parent-child-evaluator observation.

Judges need to scrutinize the quality of information obtained from collateral informants. Too often, evaluators provide collateral interview data that is ripe with opinions and vacant of behavioral observations. We learn little from a collateral statement that the parent is loving and kind. We learn more when the collateral statement describes how the parent and child interacted. For example, a collateral informant recently reported that she observed the child run up to her parent, jump into her father’s arms, kiss him on the cheek, and say, “I missed you today!” The father responded by smiling at his daughter, getting down on one knee, and giving her a big hug. They laughed and spontaneously began to sing a song. Behavioral detail from a collateral informant—a fact witness—is far superior to an opinion (that a parent is loving) from one who should be a fact witness.

Another increasingly common aspect of quality reports is for the evaluator to tie his or her expert opinions to the professional and scientific literature. For example, when opining on a parenting-access plan for a two-year-old, it is often helpful for the evaluator to cite to the relevant research articles that support the expert opinion.

A CALL FOR INTERDISCIPLINARY CONFERENCES AND TRAINING

We are also encouraged by the high-quality workshops offered by state and national mental-health associations, including those offered at the state and regional level by the Association of Family Conciliation Courts (AFCC), the American Psychological Association (APA), and the American Academy of Forensic Psychology (AAFP). Legal associations, including the American Bar Association (ABA), the American Academy of Matrimonial Lawyers (AAML), and state bar associations around the country, are also providing high-quality workshops. We find great value in interdisciplinary conferences that focus on family law and related mental-health issues such as the recent conferences co-presented by AFCC and AAML. We view these workshops and conferences as examples of healthy developments in psychology and the law.

CUSTODY EVALUATIONS PROVIDE USEFUL INFORMATION TO THE COURTS AND, MORE OFTEN THAN NOT, LEAD TO SETTLEMENT

We come to a very different conclusion than Dr. Turkat about the usefulness of child-custody evaluations. We support their use in cases in which expert mental-health professionals can offer specialized knowledge to the court. We also believe that evaluators need to do better. There are wide variations in the quality of child-custody evaluations, and there are wide variations in the abilities of attorneys and judges to identify a competently conducted custody evaluation from a poorly conducted custody evaluation.
We believe that an important solution is for attorneys and judges to become more familiar with what constitutes a competently conducted custody evaluation. Once the bench and the bar become more familiar with knowing how to identify a competently conducted evaluation and then communicating expectations to forensic practitioners that inferior reports will no longer be accepted, the quality of evaluator reports will rise to meet the expectations of the legal system.

Science can advance only when there is vigorous examination and debate about issues of importance in the field. Scientific inquiry and scientific debate are prescriptions for humility. They are our profession's inherent forms of arrogance control. B.F. Skinner concluded that science requires a "willingness to accept facts even when they are opposed to wishes." We are, therefore, encouraged by the editors of this journal requesting a second opinion on Dr. Turkat's article. Dr. Turkat has raised many important issues worthy of debate, and we are honored to have been given the opportunity to participate in this debate.

Jonathan Gould is a board-certified forensic psychologist who specializes in psychological concerns associated with family-law matters. He has authored or co-authored five books, including Conducting Scientifically Crafted Child Custody Evaluations (2nd edition), The Art and Science of Child Custody Evaluations, and Psychological Experts in Divorce Actions (6th edition). He has authored or co-authored more than 100 peer-reviewed articles about child-custody assessment, application of psychological ethics to child-custody assessment, forensic assessment of alienation dynamics, domestic violence, and child sexual abuse. Dr. Gould has conducted more than 300 court-appointed child-custody evaluations, consulted on more than 2,500 family-law-related matters. He has lectured widely on topics about applying forensic methods and procedures to child-custody assessment, the application of Daubert principles to forensic psychological assessment, application of child-development research to crafting age-appropriate parenting plans, among other areas of importance to family-law attorneys and courts. He may be reached at jwgould53@gmail.com.

Dr. Posthuma holds diplomate status in forensic and clinical psychology from the American Board of Professional Psychology (ABPP). He has provided evidence in personal-injury, criminal, and family courts at the Supreme and Provincial Court levels in Canada over the last 40 years. He has published and presented forensic psychology research at national and international conferences.

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Consider a recent custody dispute presided over by Judge Michael Algeo in Montgomery County, Virginia. Here, a father Judge Algeo ordered previously into supervised visitation was asking the court to remove it. In weighing the request, Judge Algeo ordered the father to have a psychological evaluation. The psychologist who performed the evaluation advised the court it was safe for the child to have unsupervised visits with the father. Judge Algeo endorsed the psychologist’s recommendation. The fourth unsupervised visit resulted in the death of the child and the father charged with murder.

In this tragic example, the court had significant concern that led it to originally order supervised visitation, but it then chose to listen to the advice of a psychologist instead of sticking with its own initial judgment. If the court had not followed the psychologist’s recommendation, that child might still be alive today. The same could be said if the court had not ordered a psychological evaluation in the first place. Can there be any doubt that a psychological evaluation in a custody matter can have harmful effects? As evidenced in Virginia, endorsing a psychologist’s recommendation ended in a child’s wrongful death.

As I set out to read Drs. Gould and Posthuma’s counterpoint, I was hopeful they would present scientific evidence I was unaware of proving that child-custody evaluations benefit children. Unfortunately, they did not present even one scientific study showing that custody evaluations improve children’s lives or don’t cause harm. Thus, their entire counterpoint is one of opinion and speculation and therefore can easily be dismissed because we are way beyond needing more conjecture about child-custody evaluations; what we need is scientific data directly on point about the effects of these evaluations. While Gould and Posthuma acknowledge that there is no scientific evidence that custody evaluations benefit children, they will keep doing them anyway. Thus, direct, on-point scientific evidence of effectiveness doesn’t truly matter to Gould and Posthuma when it comes to custody evaluations.

So what are children getting from a custody evaluation? Gould admits that child-custody recommendations provided to the court are merely guesses. Some custody-evaluator guesses have cost as much as $57,000 to over $300,000. Is it right to force children to endure economic injury to their future for such a guess? Higginbotham said “no,” and 65% of parents in the harmful-effects study said “no.” On top of this, Gould revealed that “we often provide testimony to the court about custodial arrangements with the arrogance of ‘true’ science implied.” So not only is the bench getting a guess not based on scientific evidence of efficacy, it is presented with the false implication that there is “true science” behind it. Such testimony is the opposite of the scientific evidence. Thus, the judiciary must contend often with twisted custody-evaluator testimony it can’t easily unravel, complicated further when wrapped in psychological jargon, while trying to avoid endorsing a custody recommendation that might prove detrimental.

CUSTODY-EVALUATION JARGON AND POTENTIAL HARM

Gould and Posthuma reference the term “scientifically crafted child custody evaluations,” which Dr. Gould created, I am sure, with the best of intentions. The judiciary should be wary of this jargon because there is no research in the scientific literature that has crafted a child-custody-evaluation method proven to produce fine rates of beneficial custodial placement without harm. To produce such an effective custody-evaluation protocol would require sophisticated large-scale scientific investigations and take many years to develop.

So what scientific evidence is Dr. Gould referring to in regard...
to “scientifically crafted child custody evaluations”? It can only be on topics other than custodial arrangement, since there is no scientific proof of benefit for any custody evaluation or plan. Further, Gould has advised custody evaluators that one may “cautiously” provide the court with “opinions that have no basis in behavioral science literature” and does so in his book Conducting Scientifically Crafted Child Custody Evaluations.9 With the oxymoronic quality of this jargon and Gould's admission of the frequent twisted testimony of “true science falsely implied,” the court could potentially be misled inadvertently to believe that a particular custody guess has been scientifically validated when, in fact, that guess may be harmful.

To be clear, if we use the most appropriate criterion—a body of direct scientific proof that custody evaluations improve children's lives—there is no such thing as a scientifically crafted child-custody evaluation.

CUSTODY-EVALUATION HARM AND CUSTODY-EVALUATOR GREENBERG

I profoundly disagree with Gould and Posthuma about how we need to respond to the disasters that arise from harmful custody evaluators like Stuart Greenberg. In essence, Gould and Posthuma prefer to sweep under the rug the very vulnerabilities Greenberg revealed in what the judiciary faces when dealing with any custody evaluator, especially prominent ones. I argue that to do so is a disservice to the field, the judiciary, and the children of custody litigation.

When psychologists make mistakes, especially highly egregious ones, it is our duty to learn from them to prevent such mistakes from occurring again. Ultimately, if these mistakes so illustrated by Greenberg are not properly addressed and corrected, children of custody litigants remain no more protected from harm today. Gould and Posthuma unwittingly prove my point. While fully aware of Greenberg's unethical manipulations but choosing to sweep them under the rug, they proposed tips for judges to evaluate a “competent” custody evaluation, including ideas about how to evaluate a custody evaluator. If one were to use Gould and Posthuma's recommendations for identifying a “competent” custody evaluator, Greenberg would have passed their test with flying colors. Consequently, by following their advice, the bench would be in the same position it was in before Dr. Greenberg was caught.

It is important to know that Greenberg has not been the only custody evaluator who seriously violated professional rules, manipulated custody-evaluation data, or hurt families; too many custody evaluators have been found guilty of violating ethical codes and/or state licensing law when conducting child-custody evaluations.10 Permitting a scientifically unproven child-custody evaluation today may come with a degree of risk for exploitation as well.

When psychologists make mistakes . . . it is our duty to learn from them . . .

POTENTIAL HARM OF CONSTRUING CHILD-CUSTODY EVALUATIONS AS A SETTLEMENT TOOL

Gould and Posthuma justify performing a child-custody evaluation by claiming it serves as a settlement tool. It was disappointing to read their post hoc justification for many reasons.

No proof for claim. They provide no citation of any kind and no scientific data at all for their claim that approximately 90% of custody evaluations result in a settlement. While Gould and Posthuma demand substantiation from others, they don't demand it of themselves.

Misleading statistic. Gould and Posthuma fail to take into account the American Bar Association's statistic that 95% of all divorces settle, which includes contested custody cases.11 Thus, contrary to Gould and Posthuma's presentation, there is no apparent better settlement rate for having a custody evaluation done.

Failure to filter key factors. Since 95% of all divorces settle, scientifically Gould and Posthuma would have to present some sophisticated research proving that a custody evaluation by itself and independent of other factors results in a superior lawsuit-settlement percentage for their claim to be accurate. No such evidence exists. When a custody evaluation is followed by new negotiations, mediation, and/or litigation and then a settlement, it would be incorrect scientifically to claim the custody evaluation caused that agreement, as the other factors may have been responsible. Further, Georgetown University Professor of Law M. Gregg Bloche has stated that courts have typically rubber-stamped custody-evaluation recommendations;12 if true, then a settlement would be primarily due to the rubber-stamping effect and not any value of the custody recommendation. Clearly, if courts consistently endorsed custody recommendations, it wouldn't matter scientifically whether the recommendations were correct. And, of course, attorneys aware of a court's rubber-stamping history would advise their clients to make decisions accordingly.13 If broadscale rubber-stamping is in fact true, it would mean, unfortunately, that the courts are likely rubber-stamping a worrisome number of harmful custody recommendations. Without filtering cases by these kinds of factors in relation to the timing and terms of a settlement, scientifically one can easily get an incorrect picture of what truly causes a settlement and inflated claims thereof. Gould and Posthuma provided no such filtering for their claim.

9. Id. at 238.
10. Over 20 examples of mental-health professionals subjected to disciplinary actions such as forced surrender of license, monetary penalties, and probation for violating state licensing laws related to custody-evaluation activities can be found on the webpage of the Citizens Commission on Human Rights (co-founded by the late prominent psychiatrist Thomas Szasz, Professor of Psychiatry Emeritus at SUNY Upstate Medical University):

13. Id.
Not in APA Guidelines. Nowhere in the APA Guidelines on child-custody evaluations does the term “settlement tool” or even the word “settlement” appear. The purpose of a custody evaluation has never been to serve as a settlement tool but rather, as stated in the APA Guidelines, to “assist in determining the psychological best interests of the child” because “the child’s welfare is paramount.”

Guesses risk harm. Gould and Posthuma’s pivot to reframe child-custody evaluations as “settlement tools” risks psychologists contributing to outcomes that are incompatible with APA Guidelines that “the child’s welfare is paramount.” A psychologist’s incorrect guess may influence settlement negotiations to produce an agreement that may be to a child’s detriment.

No scientific proof of any benefit. Even if used as a settlement tool and even if 90% of cases settle following a custody evaluation, there is no scientific evidence that this results in beneficial outcomes for children and prevention of harm.

Higher relitigation rates. Research studies show that families participating in child-custody evaluations have a higher relitigation rate compared to those not participating in child-custody evaluations. A good “settlement tool” should not lead to higher rates of relitigation.

Confusion about settlement tools. The APA Guidelines on custody evaluations aspire to promote the best interest of children, not settlement rate. Gould and Posthuma seem confused. Settlement tools are not inherently good. For example, aggressive litigation when it is unnecessary is sometimes used as a settlement tool. Likewise, settlements are not inherently good; parents may settle on terms not truly in a child’s best interest. A settlement tool that contributes to a worse future for children is not acceptable.

Pressuring families financially. By the time a custody evaluation is completed, it is often late in the litigation sequence of that lawsuit when money is tighter. Litigants have typically spent considerable funds on legal expenses before a child-custody evaluation takes place. And if one party wishes to contest an evaluator’s recommendation, both parties are hit economically with a double whammy: they must pay for the expensive evaluation and a whole new leg of litigation expenses created specific to the custody evaluation itself in terms of case preparation, depositions, experts, hearings, and so forth, that would not have occurred otherwise. Thus, contesting a custody recommendation may be financially unwise for many and may thereby render a litigant more likely to fold, even if the evaluator’s guess about custody is wrong. The primary “tool” bringing the parties to settle at that point is depletion of funds, not any “cost-saving value” provided by the custody evaluation.

Underestimated expense inflation. Gould and Posthuma fail to specify how their “settlement tool” can inflate the parties’ expenses not just after the evaluation but before it as well. The New York case of E.V. v. R.V. demonstrated such expense inflation before a scheduled child-custody evaluation began. Here, the court-appointed custody evaluator, a psychiatrist, completed his evaluation and provided recommendations to the court without being informed that privately, a psychologist had extensively coached the plaintiff with over 50 hours of client preparation for the psychiatrist’s custody evaluation. While the psychologist’s highly prepped client lost that custody battle and thus would face even more hefty expenditures if an effort to reverse that decision is made, it is clear that the cost of over 50 hours of preparation by the psychologist and any associated legal expenses would never have occurred if a custody evaluation had not been performed.

Better options elsewhere. There are other less expensive tools that are designed specifically to facilitate settlement—unlike custody evaluations, which are not designed to settle cases. Examples include attorney negotiations, judicial probing, and mediation. Each of these can be “stepped up” and still be less expensive and less intrusive than custody evaluations.

FALSE, MISGUIDED, AND UNSUBSTANTIATED CLAIMS MADE BY GOULD AND POSTHUMA

Dr. Gould and Dr. Posthuma made so many false, misguided, and unsubstantiated claims in their counterpoint, I cannot properly address them all here given restrictions on journal space. Below are 10 of them, briefly corrected:

CUSTODY-EVALUATION COMPETENCY

Gould and Posthuma: “We believe that an important solution is for attorneys and judges to become more familiar with what constitutes a competently conducted custody evaluation. Once the bench and the bar become more familiar with knowing how to identify a competently conducted evaluation and then communicating expectations to forensic practitioners that inferior reports will no longer be accepted, then the quality of evaluator reports will rise to meet the expectations of the legal system.”

Turkat: Gould and Posthuma propose turning the judiciary into the custody-evaluator police. This proposal in and of itself should greatly alarm you about the second-rate nature of today’s custody evaluations. More critically, however, there is no scientific evidence whatsoever to define a “competent” child-custody evaluation. A far better solution than what Gould and Posthuma proposed is for psychologists to develop clear-cut scientific evidence directly proving that child-custody evaluations benefit children without doing harm. Psychologists are the ones who need to step up, not the judiciary. Further, by

15. Id.
18. Such preparation raises potential ethical issues I cannot address here. To be clear, I am not making any allegation in this article of unethical behavior in that case.
19. See 44 Misc.3d 1210(A).
proposing that you police custody evaluators to identify incompetent ones, Gould and Posthuma unwittingly admit child-custody evaluations can cause harm; otherwise, why would you need a “competent” evaluator? Finally, it would seem that the proper definition to aspire to for a “competent” custody evaluation might be: a correctly utilized child-custody-evaluation protocol proven directly by a body of scientific research to benefit children and not harm them. That is what families battling over custody need from custody evaluators, what the judiciary wants from custody evaluators, and what psychology should provide. Of course, if we use that definition, then every custody evaluation performed today would be considered incompetent.

DETIRMENAL-EFFECTS RATIONALE

Gould and Posthuma: “Turkat does not explain why it is reasonable to expect potential detrimental effects from a custody assessment.”

Turkat: False. I provided six specific reasons in the introduction to the harmful-effects study in the section labeled “Why Child-Custody Evaluations May Be Detrimental.”

EXPERTISE AND JUDGMENT IN CUSTODY CASES

Gould and Posthuma: “Experienced and qualified forensic psychologists typically have extensive academic and clinical expertise with such cases and know when to consult with other mental-health specialists to determine the relevance of a parent’s mental health to the welfare of the children involved.”

Turkat: Experience is not the same as a body of scientific facts, nor is it a suitable substitute. Gould and Posthuma tout the “clinical expertise” of forensic psychologists to make determinations about the welfare of children in custody evaluations. In their example, such expertise includes making clinical judgments that involve “knowing when” and “determining relevance” of “mental health” and the “welfare of children.” All four of these terms require making clinical judgments that easily give rise to different interpretations by different psychologists on the same set of case information. Even on a term as common as “mental health,” scientists don’t agree on how to define it or measure it. Nonetheless, Gould and Posthuma want to reassure you about the clinical judgments made by experienced custody evaluators like themselves. But when discussing elsewhere how custody evaluators depend greatly on clinical judgment in conducting interviews and making observations, Dr. Posthuma stated that “clinical judgment is unreliable.”

ETHICS AND RANDOMIZATION IN RESEARCH ON PARENTING PLANS

Gould and Posthuma: “The psychological research, conducted by an agency or an academic institution, typically must be approved by an ethics committee. It is unlikely any ethics committee or, for that matter, the judiciary, would randomly make custody arrangements or parenting plans irrespective of the merits or shortcomings of the parenting plan.”

Turkat: False. Having served as a professor on university ethics committees for scientific research, as well as having participated as a co-investigator in a nationwide, multi-center interdisciplinary clinical research trial funded by the National Institute of Health (NIH), I advise the reader that Gould and Posthuma’s speculation here is wrong. There is a substantial scientific literature spanning decades of research designed to evaluate a particular assessment procedure or intervention with vulnerable populations that utilized randomization and including use of well-developed NIH-required Data and Safety Monitoring Boards for clinical trials that provide oversight while the study is ongoing for issues such as patient risks, safety, and differential results emerging across research.

20. See Jose Bertolote, The Roots of the Concept of Mental Health, 7 World Psychiatry 113 (2008); Keith Tudor, Mental Health Promotion: Paradigms and Practice (2013).
groups. Since there is no scientific data proving the benefits or detriments of any parenting plan, research that randomly assigns subjects to different commonly used parenting plans can indeed be implemented in line with the well-established research protocols and ethical protections already existing in the scientific literature. While Gould and Posthuma doubt the judiciary would randomly assign custody-litigation families to different research groups that might generate different outcomes for children, court participation in randomly assigning contested-custody cases in related psychological research has already been done successfully.

**HARM BY FORENSIC EVALUATORS**

Gould and Posthuma: “Whether in court or in journal articles, those who make assertions such as that proffered by Turkat about forensic evaluations causing harm have, in our view, a responsibility to cite empirical research to support such a claim.”

**Turkat:** I did precisely that. I reported research data from the harmful-effects study. At no point, however, did Drs. Gould and Posthuma meet the exact same standard they insisted I meet—“a responsibility to cite empirical research” to prove that custody evaluations improve children’s lives. Further, Gould and Posthuma do not seem all that concerned that custody evaluations may harm children, but other forensic evaluators have raised alarm for decades that forensic evaluations can cause harm.

**DISENCHANTMENT OF RESEARCH SUBJECTS TOWARD CUSTODY EVALUATIONS**

Gould and Posthuma: “[H]e could certainly claim that the respondents to his survey were disenchanted.”

**Turkat:** False. There was no study of “disenchantment” and no specific measurement of it; Gould and Posthuma misinterpret the research methodology and data. When parents report that money spent on a child-custody evaluation was not in their children’s best interest or that the custody evaluation made their children worse, I very much doubt that “disenchantment” properly characterizes the reaction of these parents. Like many exploratory studies, a control group was not necessary for the harmful-effects study and certainly not one based on a speculation like “disenchantment.”

**HARMFUL EFFECTS “BY DEFINITION”**

Gould and Posthuma: “[W]e challenge his primary thesis that child-custody evaluations are, by definition, harmful.”

**Turkat:** False. I did not say that “by definition” child-custody evaluations are harmful. What I did assert was that, just as psychotherapy and diagnostic errors have been shown scientifically to produce harmful effects in a certain percentage of patients, it is reasonable to predict that similar tasks performed by psychologists that involve making important appraisals of individuals presenting scientifically unclear phenomena such as in child-custody evaluations, may produce harmful effects as well. And then I provided quantitative evidence of potential harm. What scientific evidence did Drs. Gould and Posthuma present to “challenge” the harmful effects of custody evaluations? None.

**BRIEF CUSTODY EVALUATIONS**

Gould and Posthuma: “[T]he movement toward brief, focused custody evaluations has been another important change in the custody field. . . . Professional practice guidelines have been promulgated to assist in the formulation and performance of brief, focused evaluations.”

**Turkat:** There is no scientific evidence that a brief child-custody evaluation benefits children and does not harm them. The same is true of practice guidelines for child-custody evaluations. Even if a brief custody evaluation costs only a nickel, without scientific proof of benefit and absence of harm, a brief evaluation still results in an evaluator’s guess that may prove detrimental to children. I suggest keeping this fact in mind: when you shop for a car and buy a lemon, saving a few dollars on the purchase doesn’t change the fact that the car is a lemon.

**POST HOC JUSTIFICATION OF A CHILD-CUSTODY EVALUATION**

Gould and Posthuma: “A child-custody evaluation is not limited to providing the court with expert opinions about custodial placement and parental decision making. A well-conducted child-custody evaluation may provide the court with information about family functioning that would not otherwise be available to it.”

**Turkat:** The same post hoc justification can be applied to the content of almost any investigation of a family, whether it be by a guardian ad litem, school counselor, or otherwise. Critically, however, one must consider a family’s financial

27. See FRIEDMAN ET AL., supra note 25.
29. See Seymour L. Halleck, The Ethical Dilemmas of Forensic Psychiatry: A Utilitarian Approach, 12 BULL. AM. ACAD. PSYCHIATRY & L.
30. An APA PsycINFO database search reveals over 8,000 entries for “exploratory study” in peer-reviewed journals in the psychological literature, which includes exploratory studies with and without control groups. See also ROBERT A. STEBBS, EXPLORATORY RESEARCH IN THE SOCIAL SCIENCES (2001).
situation before subjecting it to expensive investigations, and, in the case of psychologists, one must also consider scientific evidence about effectiveness and harm. There is no scientific evidence that a court learning some new information about family functioning from a custody evaluation benefits children.

HYPOTHE Sized CUSTODY-EVALUATION BENEFITS

Gould and Posthuma: “[T]he custody-evaluation process is best regarded as an inoculation rather than a long-term illness. Individuals who are given an inoculation may suffer short-term discomfort from the needle piercing the skin and penetrating into the blood, yet the long-term advantages far outweigh the temporary discomfort.”

Turkat: False. There is no scientific evidence in the literature supporting this speculation by Gould and Posthuma about alleged benefits of custody evaluations. Further, their “inoculation” analogy proves my point: the Centers for Disease Control reports that any vaccine can cause problems, and some may cause serious injury or death. As such, it is reasonable to expect that custody evaluations can produce harmful effects, including serious ones.

WHAT SHOULD THE JUDICIARY DO ABOUT CHILD-CUSTODY EVALUATIONS?

Is there really any advantage for children to be subjected to a child-custody evaluation? The evidence to date reveals none. It is time to override any existing belief you may have that a custody evaluator’s guess about a child’s future is going to be better than yours. Custody evaluators’ educated guesses are scientifically no more valid than your own educated guesses about custodial placement, despite psychologists having had decades to prove otherwise.

Moreover, when you allow a custody evaluation to proceed, you are placing a child at risk for potential harm. Only by participating in a custody evaluation can a child be potentially harmed by that evaluation. By preventing a child-custody evaluation, you are guaranteeing that child will not be exposed to potential harm from a custody evaluation.

When the judiciary demands psychologists to provide direct, on-point scientific proof that child-custody evaluations benefit children and do not harm them before permitting a custody evaluation, then judges will be providing children of future custody litigation a better opportunity for improved lives and protection from harm that does not exist today. The answer lies in sophisticated, direct, on-point future scientific research on the beneficial and detrimental effects of child-custody evaluations. Demand it of psychologists, and help them identify ways to fund the necessary research; listen to the scientists over the professional custody evaluators. If you do so, I am confident that psychologists will rise to the challenge. To date, psychologists have failed you and the children of custody litigation that require your rulings.

It is high time for the science of psychology to deliver its great potential for assisting the children caught in the middle of custody battles. Ironically, in order to help lift child-custody evaluations out of a fantasy of scientific respectability into a better future for the children of custody litigation, your lead in this effort is truly essential. Without it, these children remain on course for a future affected by scientifically unsupported and potentially harmful guesses.

Dr. Turkat advises family-law attorneys on child-custody disputes. A licensed psychologist, he has served on the faculty at Vanderbilt University School of Medicine and University of Florida College of Medicine. In 2011, the 50,000-member British Psychological Society named him alongside three of the world’s most outstanding clinical psychologists in history for their influential work on case formulation; Dr. Turkad is the only American named among the four. Address all correspondence to: Ira Daniel Turkad, Ph.D., 2015 South Tuttle Avenue, Sarasota, Florida 34239; Telephone (941) 488-8093.

Answers to Crossword from page 178

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**GONE A-COURTIN’** by Judge Victor Fleming

**Across**
1. Not fast
2. Butterflies’ kin
3. Gem that may be carved
4. Prefix with byte
5. Prefix in
6. Tabloid sightings, briefly
7. Short flight info?
8. Cherish
9. Let go of
10. Convent figure
11. Olden daggers
12. Oily bunch?
13. Small firecracker
14. Philatelist’s collection
15. Homophone of 1-Across
16. Hurdle for a jr.
17. Articles
18. Gem that may be carved
19. Key ratings period
20. “Oy!”
21. Sibs
22. Cabinet of
23. Grp. that'll send you a release
24. Savory
25. Portrait holders
26. Hoses down
27. Landmark
28. 1978 precedent-winning
29. Unpublished
30. 1966
31. Some sibs
32. Let go of
33. Greater quality
34. Type of lamp
35. Newspaper’s ___ page
36. “What are the ___?”
37. Drop
38. Non-speak
39. Help you get in
40. Seer’s claim
41. Drop ___
42. Mark up or down
43. It helps you get in
44. Make haunted house noises
45. Drop ___
46. Constructed from
47. Part of a bouquet
48. Constructed from
49. Licorice-flavored liqueur
50. See 41
51. Newsmagazine
52. Spelling of
53. Three-card monte, notably
54. Grp. that'll send you a release
55. Oldman's collection
56. Newsmagazine
57. Three-card monte, notably
58. Editorial
59. Specification
60. Homophone of 1-Across
61. Homophone of 1-Across
62. Homophone of 1-Across
63. Homophone of 1-Across
64. Homophone of 1-Across
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67. Homophone of 1-Across
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69. Homophone of 1-Across
70. Homophone of 1-Across

**Down**
1. Goblets’ features
2. Allow to board
3. Give a valedictory, say
4. Horses down
5. Dara ____ (Picasso’s muse)
6. “What are the ___?”
7. Drop ___
8. Nonspeaking Marx
9. Key ratings periods
10. Res ____ (lawsuit defense)
11. Woodstock hairdo
12. It helps you get in
13. For ___ (lawsuit defense)
14. Lawyer letters?
15. Mark up or down, say
16. Help you get in
17. Greater number
18. Greater quantity
19. Type of lamp
20. Newspaper’s ___ page
21. Dainty dessert
22. Corpus Juris Secundum, for one
23. How much
24. What is it?
25. How much
26. How much
27. How much
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29. How much
30. How much
31. How much
32. How much
33. How much
34. How much
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NEW FROM THE AMERICAN JUDGES ASSOCIATION

Procedural-Fairness Interviews
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The American Judges Association (AJA) conducted interviews about procedural fairness with nine national leaders on issues involving judges and the courts. The interviews, done by Kansas Court of Appeals Judge and past AJA president Steve Leben, cover the elements of procedural fairness for courts and judges, how judges can improve fairness skills, and how the public reacts to courts and judges.

In addition to the video interviews, in which you'd watch separate interviews with each of the nine leaders we talked to, there are a series of podcasts that take clips from the other interviews and combine them into audio podcasts on three topics: (1) Improving Judicial Behavior, (2) Procedural Fairness in Judicial Training and Evaluation, and (3) Procedural Fairness as a Model for Modern Authority. These audio podcasts were put together by Justine Greve, a staff member with the Kansas Court of Appeals. They run eight to ten minutes apiece. Just click on the “Podcasts” tab to find them.

The interviews that are available are:

- Professor Tom Tyler (15:48): Yale Law School Professor Tom Tyler is the leading scholar in the United States on procedural justice in both law-enforcement and court contexts. He provides an overview of all the basic concepts, along with practical advice for judges to use in the courtroom.
- Emily Gold LaGratta (12:14): Emily Gold LaGratta, the Deputy Director of Training and Technical Assistance at the Center for Court Innovation (CCI), discusses CCI projects designed to help implement these principles in specific courts, as well as specific suggestions individual judges can implement.
- Terry Maroney (18:14): Vanderbilt Law School Professor Terry Maroney suggests that all judges can get better at dealing with their own emotional reactions as well as those of others. We explore with her what emotions best enhance—or distract from—their perceptions of fair treatment.
- Dale Lefever (19:31): Now a consultant, Dale Lefever has trained judges and doctors for decades. He discusses how to build better skills, including how to use videotape to evaluate one’s own performance.
- Daniel Becker (12:08): Utah State Court Administrator Daniel Becker heads up the administrative structure of a state-court system that has, for many years, regularly surveyed court users in each local judicial district to get data evaluating the procedural fairness of its courts—and then publicized the data and used it to improve court performance. He discusses how such data can be used and how it has been used in Utah.
- Kent Wagner (9:16): Kent Wagner serves as the Executive Director of the Colorado Office of Judicial Performance Evaluation; he discusses the types of comments that are commonly made in surveys about judges, and common areas judges might focus on for improvement.
- Bert Brandenburg (9:24): Bert Brandenburg was Executive Director of Justice at Stake at the time of this interview. He discussed the extensive work Justice at Stake has done on public opinion about the courts.
- Carl Reynolds (5:00): Carl Reynolds, formerly (from 2005 to 2012) the Texas State Court Administrator, discusses the use of measurement tools to assess court performance in fairness, as well as how best to train judges about procedural-fairness concepts.

In addition to these interviews, we also have videotaped statements provided by two state supreme court chief justices about procedural fairness in the courts of their states:

- Then-Alaska Chief Justice Dana Fabe (4:09): She tells about the decision to place a poster pledging fairness at the entrance to every courthouse in Alaska.

- Utah Chief Justice Matthew B. Durand (2:40): He discusses the emphasis the state courts of Utah have placed on procedural fairness, along with specific steps taken by Utah courts and judges.

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