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Court Review

Volume 53, Issue 3

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

Volume 53, Issue 3

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EDITOR'S NOTE

The lead article in this issue is Professor Todd Pettys's annual review of the civil cases decided in the past Term of the United States Supreme Court. For those of you who don't check the AJA website (amjudges.org) from time to time, you missed out when we posted Professor Pettys's article back in August! He covers both the decided cases most likely to come up in our courts and some of the early cases on the docket for the present Term.

In our second article, Professors Jennifer Robbennolt and Valerie Hans draw on material from their book, *The Psychology of Tort Law*, to discuss how tort law sometimes diverges from our commonsense notions of justice. When this happens, they show that it can lead to anomalies in legal proceedings. They also suggest that a divergence between the results obtained through our legal system and commonsense notions of justice can lead some to question the justice system's legitimacy. In only six pages, Robbennolt and Hans provide an overview and important insights about our tort-law system.

Our third article provides an overview of the assessment tools now available for risk assessments. Each state tends to use a specific instrument. A group of researchers led by Professor Kirk Heilbrun reviews each of the major instruments in use, discussing the strengths and limitations of these instruments as well as the extent to which expert opinion guided by some structured judgment process might compare in usefulness to these scored instruments. They conclude with recommendations for best practices in risk assessments in court.

Of course, the issue also includes our regular features: the Resource Page, our column on Canadian law from Judge Wayne Gorman, and a law-related crossword from Judge Vic Fleming. The Gorman column in this issue provides an overview of Canadian law on setting bail. That subject—along with proceedings to collect fines and fees—has become a hot topic in the United States. The Conference of Chief Justices and several other national organizations in the United States recently published a benchcard on best practices for the lawful collection of fines and fees. We've reprinted that benchcard at pages 127-128. We also have announcements from the American Judges Association throughout the issue, including the regular list of future AJA conferences and the announcement of the AJA's national awards for 2017.—SL



Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing 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 134 of this issue. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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

The cover photo is of the main hall of the historic Cuyahoga County Courthouse in Cleveland, Ohio. The courthouse has been home to several important cases, including the Sam Sheppard murder trial and the trial court proceedings in *Terry v. Ohio* and *Mapp v. Ohio*. The turtles under each of the lamps on the second floor of the courthouse are said to be symbolic of the slow march of the light toward justice. Cover photo by Steve Leben.

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President's Column

Catherine Shaffer

I am honored to join our distinguished line of American Judges Association presidents, and I congratulate you on getting and reading another wonderful edition of *Court Review*, one of the crown jewels of AJA. This journal has changed my own practice, always for the better. For example, I now offer “high-touch” management to lawyers in my complex civil cases, based on an article in a past issue. (See David Prince, *A New Model for Case Management: Efficiency Through Intrinsic Engagement*, 50 CT. REV. 174 (2014).) The lawyers love this approach, and it streamlines case handling even in the most difficult cases. Although the Board of Editors’ membership is changing, with a smooth transition managed by Judge Steve Leben, we know the quality of this journal will continue.

I just returned from our annual conference in Cleveland, Ohio. We were honored to hear inspiring addresses by Ohio Chief Justice Maureen O’Connor, Ohio Congresswoman Marcia Fudge, and, at our American Judges Foundation luncheon, featured speaker U.S. Senator Sherrod Brown. Highlights of the educational program, ably planned by Judge Eugene Lucci and Judge Gayle Williams-Byers, included Dean Erwin Chemerinsky’s fabulous constitutional-law update, wonderful plenaries on cutting-edge issues (including judicial independence and addressing unfair fines and fees), as well as a law-and-literature presentation by outstanding author Joe Starita. We also had a huge variety of top-notch choice sessions, on topics like how self-help centers can improve court litigation, new approaches to court technology, dealing with jury bias, an elder law and guardianship update, approaches to wrongful-death lawsuits in police-shooting cases, ways to provide procedural and pretrial justice in adult and juvenile court, tips on high-profile cases, and ways to handle life beyond the bench. Our family members joined us at Mr. Starita’s plenary, and also attended an excellent presentation on the Judicial Family Network program.

As usual, AJA gave awards to an outstanding group of recipients. I want to highlight the judicial courage award, named after our own brave Harold Froehlich. This year’s recipient was Gonzalo P. Curiel, the federal judge who persevered with dignity in presiding over the Trump University lawsuit despite then-candidate Donald Trump’s attacks based on the judge’s Latino heritage. Do read his eloquent letter of thanks in this edition of *Court Review*. AJA will continue to honor judicial courage and independence, stand up for the rule of law in our role as the Voice of the Judiciary[®], support equal justice, and work to advance diversity in our national judicial community.

The social events in Cleveland were marvelous, due to an enormous amount of work by our own Judge Mike Cicconetti, who received a well-deserved standing ovation at our banquet, and our education cochairs. Conference attendees attended a sold out baseball game—the 19th win in the Cleveland Indians’ historic 22-game win streak!—between Cleveland and the

Detroit Tigers, toured local landmarks like the Terminal Tower and the Cleveland Trust Building, enjoyed the AJF reception at the historic Cuyahoga County Courthouse, visited Little Italy, went to the Cleveland Art Museum and dined at the top-rated restaurant there, and made group visits on successive days to the Rock and Roll Hall of Fame. We all enjoyed Cleveland’s other fine restaurants too.

There is plenty planned for the coming year. Our midyear conference will be in Memphis, Tennessee, famous as a birthplace of rock ‘n’ roll and home of the blues, renowned for its barbecue, and the site of the National Civil Rights Museum, Beale Street, the Memphis Rock and Soul Museum, and Graceland. Our venue is on the grounds of Graceland, and Judge

Betty Moore and Justice Robert Torres are planning a fantastic education program, as well as events that let you taste the BBQ, hear the music, and learn about the civil-rights history. Sign up soon!

We have a great program set for Kauai in September 2018 already. Judge Catherine Carlson and Justice Torres have practically the entire education program planned already, and what could be a more wonderful venue than this beautiful Hawaiian garden island?

We do face challenges. We need to plan smart for our conferences, to make sure our attendance is strong and that we can continue

to afford to go to worthwhile locations and offer top-quality education. We have succeeded when we have partnered with other organizations, as in Seattle when our conference was held jointly with the National Association of State Judicial Educators and the Washington state courts. We are following that formula for September 2019, when we will be at the beautiful downtown Drake Hotel in Chicago, partnering with the Illinois state courts. Mark your calendars now! And think about how we can join with the courts in your area, because the earlier we plan joint events, the better and more successful they are, and the more new blood flows into our membership.

We also need rededication to our committees and, through those, to serving our members who do not come to conference. You are one of our incredibly talented members, and we need you to find the AJA committee that matters to you, so that AJA can take your input and turn it into outstanding articles in *Court Review*, premier resources on our website, superb presentations at conference, and, in general, great guidance to the rest of us on being better judges. If you haven’t filled out your committee-preference form already, do it now and ship it to Shelley Rockwell (srockwell@ncsc.org)! We need you and your knowledge, passion, and engagement.

You probably know that AJA has strong ties to many other national court organizations. My executive committee is already at work trying to build further ties to national minority associations. I have a busy year ahead tending these links on AJA’s behalf, and I plan to keep you updated electronically on a regular basis. Until then, thank you again for this honor.



The Impact of the Supreme Court of Canada on the Law of Bail

Wayne K. Gorman

The Supreme Court of Canada, through a series of judgments, has had a significant impact on the law of judicial interim release (or “bail”) in Canada. As will be seen, this impact has occurred in relation to the law of bail at both the trial and appellate level and includes two decisions rendered this year. In this column I intend to examine this impact by briefly reviewing the law of bail in Canada and then illustrating the significant impact of the Supreme Court of Canada’s decisions in this area.

The starting point is that in Canada, bail is entirely a creature of statute. It is solely governed by the provisions of Canada’s Criminal Code, R.S.C 1985, c C-46 (Can.) at both the trial and appellate level. It also has constitutional status.

THE CRIMINAL CODE OF CANADA’S BAIL PROVISIONS-TRIAL LEVEL

Section 515(10) of the Criminal Code sets out the only grounds upon which a trial judge can deny judicial interim release to an accused person in Canada. For bail to be denied it must be established that (1) the accused will fail to appear in court; (2) it is necessary to protect the public; or (3) it is necessary to maintain the public’s confidence in the administration of justice. These grounds are described in sections 515(10)(a) to (c), and they indicate that:

[T]he detention of an accused in custody is justified only on one or more of the following grounds:

- (a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;
- (b) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interference with the administration of justice; and
- (c) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including

- (i) the apparent strength of the prosecution’s case,
- (ii) the gravity of the offence,
- (iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and
- (iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.¹

There is no inherent or incidental judicial authority in Canada in relation to the granting or denying of bail. The onus to establish that bail should be denied is generally on the Crown², but there are situations where the accused person must establish that their release is warranted.³ The same provisions apply to both.

Bail hearings are heard in the Provincial Court (or by a justice of the peace in some provinces) unless the accused is charged with an offence listed in section 469 of the Criminal Code.⁴ If so, the bail hearing is held in the Superior Court. The list of offences set out in section 469 includes the offences of murder, treason, piracy, and “alarming Her Majesty.”

BAIL REVIEW

If bail is denied in the Provincial Court, an accused person can seek to have this decision reviewed by the Superior Court of the province.

In *R. v. St-Cloud*, 2015 SCC 27, the Supreme Court of Canada considered the role of a superior court judge in reviewing a bail decision made by a provincial court judge. In *St-Cloud* the accused was denied release by a justice of the peace. The accused applied for review by a Superior Court Judge pursuant to section 520 of the Criminal Code.⁵ The reviewing judge concluded that the accused should be released on the basis that his detention was not necessary under section 515(10)(c). The Crown appealed to the

Footnotes

1. If the accused is a “young person” (i.e., 12 to 17 years of age) bail is governed by the Youth Criminal Justice Act, S.C. 2002, c C-1 (Can.). This Act contains its own bail provisions, which are similar but not identical to the Canadian Criminal Code (see sections 28 and 29). In addition, a bail judge who decides that a young person should otherwise be detained can release the accused into the “care of a responsible person” (see section 31).
2. Criminal Code, R.S.C. 1985, c C-46, s 515(2) (Can.).

3. Code, R.S.C. 1985, c C-46, s 515(6) (Can.).
4. Criminal Code, R.S.C. 1985, c C-46, s 522 (Can.).
5. Section 520 of the Criminal Code states as follows:

If a justice, or a judge of the Nunavut Court of Justice, makes an order under subsection 515(2), (5), (6), (7), (8) or (12) or makes or vacates any order under paragraph 523(2)(b), the accused may, at any time before the trial of the charge, apply to a judge for a review of the order.

Supreme Court of Canada. The appeal was allowed and the detention order restored.

On the issue of bail review the Supreme Court held that the exercise of the review power contained within section 520 of the Criminal Code is prescribed and “will be appropriate in only three situations” (at paragraph 6):

(1) where there is admissible new evidence; (2) where the impugned decision contains an error of law; or (3) where the decision is clearly inappropriate. In the last of these situations, a reviewing judge cannot simply substitute his or her assessment of the evidence for that of the justice who rendered the impugned decision. It is only if the justice gave excessive weight to one relevant factor or insufficient weight to another that the reviewing judge can intervene.

The Supreme Court noted, at paragraph 92 of *St-Cloud*, that section 520 of the Criminal Code does “not confer an open ended discretion on the reviewing judge to vary the initial decision concerning the detention or release of the accused. Nonetheless, they establish a hybrid remedy and therefore provide greater scope than an appeal for varying the initial order.” The Court indicated that section 520 does “not provide for a *de novo* hearing” (at paragraph 94). The Supreme Court concluded that the reviewing judge “does not have the power to interfere with the initial decision simply because he or she would have weighed the relevant factors differently,” but a reviewing judge “may vary the initial decision if that evidence shows a material and relevant change in the circumstances of the case” (at paragraph 121).

BAIL ON APPEAL

If an accused person is convicted of an offence he or she can seek bail in the Provincial Court of Appeal if they have appealed against conviction or sentence. Section 679(3) of the Criminal Code allows a Court of Appeal to grant bail when an appeal against conviction has been filed in the following circumstances:

In the case of an appeal referred to in paragraph (1)(a) or (c), the judge of the court of appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes that

- (a) the appeal or application for leave to appeal is not frivolous;
- (b) he will surrender himself into custody in accordance with the terms of the order; and
- (c) his detention is not necessary in the public interest.

6. In *R. v. Adem*, [2017] 2017 ABCA 242, [2017] CarswellAlta 1310, para. 27 (Can. Alta.), *Oland* was considered and the Alberta Court of Appeal held that *Oland* suggests that “unless there are other considerations that call for continued incarceration, including the

On March 23, 2017, the Supreme Court of Canada released its decision in *R. v. Oland*, 2017 SCC 17. In *Oland* the accused was convicted of second-degree murder. He appealed and applied to the Court of Appeal for judicial interim release. His application was denied.

Reasonable bail in Canada is protected by the Canadian Constitution.

On appeal to the Supreme Court of Canada it was held that the accused should have been released by the Court of Appeal. The Supreme Court considered section 679(3) and concluded that the appeal court judge (at paragraph 69):

[D]id not apply the correct test in assessing the strength of Mr. Oland’s appeal and the implications flowing from it. Much as he was satisfied that Mr. Oland had raised “clearly arguable” grounds of appeal, this was not enough. . . . [H]is reasons show[], he required more, something in the nature of unique circumstances that would have virtually assured a new trial or an acquittal.⁶

THE CONSTITUTIONAL CONTEXT

Reasonable bail in Canada is protected by the Canadian Constitution. Section 11(e) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, indicates as follows: “Any person charged with an offence has the right . . . (e) not to be denied reasonable bail without just cause.”

In *R. v. Morales*, [1992] 3 S.C.R. 711, the Supreme Court of Canada considered this constitutional requirement and stated that bail “is not denied for all individuals who pose a risk of committing an offence or interfering with the administration of justice while on bail. Bail is denied only for those who pose a ‘substantial risk’ of committing an offence or interfering with the administration of justice, and only where this ‘substantial likelihood’ endangers ‘the protection or safety of the public’” (at paragraph 39).

On June 1st, 2017, the Supreme Court of Canada rendered its judgment in *R. v. Antic*, 2017 SCC 27, in which it once again considered section 11(e) of the Charter. The Supreme Court indicated that the words “just cause” in section 11(e) of the Charter is used in “two contexts” (at paragraphs 33 and 34):

First, as used in s. 11(e) of the *Charter*, “just cause” relates to the circumstances in which denying bail is constitutional: an accused has a constitutional entitlement to be granted bail unless there is “just cause” to deny it.

Second, the expression “just cause” is also commonly used to describe the statutory grounds that justify the pre-trial detention of an accused. These

seriousness of the offence, residual public safety concerns or flight risk, the law appears to favour release once an applicant has established that his appeal clearly surpasses the ‘not frivolous’ hurdle.”

The Supreme Court cautioned against setting the amount of a surety or cash deposit “so high as to effectively constitute a detention order.”

grounds, which are enumerated in s. 515(10) of the *Code*, are flight risk, public safety and public confidence in the administration of justice. In most cases, it is presumed that the accused should be released, and he or she will not be detained unless the Crown can show on the basis of these statutory criteria that detention is warranted.

The Court stated, at paragraph 40 of *Antic*, that:

A provision may not deny bail without “just cause[.]” The right not to be denied bail without just cause imposes a constitutional standard that must be met for the denial of bail to be valid. . . . [T]here is just cause to deny bail only if the denial (1) occurs in a “narrow set of circumstances” and (2) the denial of bail “is necessary to promote the proper functioning of the bail system and is not undertaken for any purpose extraneous to the bail system.”

The Court also indicated that (at paragraph 41):⁷

[The] right not to be denied reasonable bail without just cause protects accused persons from conditions and forms of release that are unreasonable. The French version of s. 11(e) bears this out: a person charged with an offence has the right to a release “assortie d’un cautionnement raisonnable” (“in conjunction with reasonable bail[.]”)

REASONABLE BAIL AND CASH DEPOSITS

In *Antic*, the Supreme Court made a number of comments concerning the problems caused by requiring an accused person to make a cash deposit to secure their release. The Court noted that the “central purpose of the *Bail Reform Act* was to avoid the harsh effects on accused persons of requiring cash deposits where other avenues of release are available” (at paragraph 48). The Supreme Court cautioned against setting the amount of a surety or cash deposit “so high as to effectively constitute a detention order” (at paragraph 56). It held that a bail judge has a “positive obligation ‘to make inquiries into

the ability of the accused to pay” (at paragraph 56). The Supreme Court indicated that the requirement for cash can result in “increased incarceration of accused persons” (at paragraph 59):

[R]equiring cash as a condition of release has the potential to result in increased incarceration of accused persons. Cash bail does not give impecunious persons greater access to bail. Rather, requiring a cash deposit will often prevent an accused person from being released, as it did for many months in Mr. Antic’s case. Professor Friedland observed in his study that a majority of accused persons who were required to deposit security as a condition of release were unable to raise the necessary funds: *Detention before Trial*, at pp. 130 and 176. An accused person’s release should not be contingent on his or her ability “to marshal[] funds or property in advance.”

SECTION 515(10)(C)

As we have seen, section 515(10)(c) of the Criminal Code allows bail to be denied if it “is necessary to maintain confidence in the administration of justice.” In *R. v. Hall*, 2002 SCC 64, the Supreme Court considered section 515(10)(c) of the Criminal Code. As we saw earlier the present wording of section 515(10)(c) is very specific as regards the four factors to be considered. An earlier version of this section was drafted in much broader terms. The wording at the time *Hall* was decided was as follows (at paragraph 64):

For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:

. . . .
(c) on any other just cause being shown and without limiting the generality of the foregoing, where the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the prosecution’s case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.

The Court’s decision in *Hall* forced Parliament to enact the present wording found in section 515(10)(c) because the Supreme Court of Canada concluded in *Hall* that the

7. In *United States v. Salerno*, 481 U.S. 739, 755 (1987), the Supreme Court of the United States upheld the constitutionality of the *Bail Reform Act* concluding:

In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception. We hold that the provisions for pretrial detention in the *Bail Reform Act* of 1984 fall within that carefully limited exception. The Act authorizes the detention prior to trial of arrestees charged with serious felonies who are found after

an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel. The numerous procedural safeguards detailed above must attend this adversary hearing. We are unwilling to say that this congressional determination, based as it is upon that primary concern of every government—a concern for the safety and indeed the lives of its citizens—on its face violates either the Due Process Clause of the Fifth Amendment or the Excessive Bail Clause of the Eighth Amendment.

words “on any other just cause being shown” in the former section 515(10)(c) of the Criminal Code violated section 11(e) of the Charter were, “void” and therefore “severed” from the section (see paragraphs 44 and 45).

“ANY OTHER JUST CAUSE”

In *Hall* the Court quickly concluded that these words violated section 11(e) of the Charter and could not be “saved” by section one.⁸ The Court summarized its conclusion in the following manner (at paragraph 22):

The first phrase of s. 515(10)(c) which permits denial of bail “on any other just cause being shown” is unconstitutional. Parliament cannot confer a broad discretion on judges to grant bail, but must lay out narrow and precise circumstances in which bail can be denied: *Pearson* and *Morales*, *supra*. This phrase does not specify any particular basis upon which bail could be denied. The denial of bail “on any other just cause” violates the requirements enunciated in *Morales*, *supra*, and therefore is inconsistent with the presumption of innocence and s. 11(e) of the *Charter*.

“NECESSARY TO MAINTAIN CONFIDENCE IN THE ADMINISTRATION OF JUSTICE”

However, the Supreme Court reached the opposite conclusion in *Hall* as regards the effect of the words “confidence in the administration of justice” in section 515(10)(c). The Court concluded that it is appropriate in particular circumstances to deny bail on this basis alone (at paragraph 31):

[A] provision that allows bail to be denied on the basis that the accused’s detention is required to maintain confidence in the administration of justice is neither superfluous nor unjustified. It serves a very real need to permit a bail judge to detain an accused pending trial for the purpose of maintaining the public’s confidence if the circumstances of the case so warrant. Without public confidence, the bail system and the justice system generally stand compromised. While the circumstances in which recourse to this ground for bail denial may not arise frequently, when they do it is essential that a means of denying bail be available.

VOID FOR VAGUENESS

The accused in *Hall* had also argued that the words “confidence in the administration of justice” were unconstitutionally vague. The Court concluded that this portion of subsection 515(10)(c) provided “an intelligible standard for debate” and was therefore not void for vagueness (at paragraph 38). Similarly, these words were held by the Court not to be overly broad. The Court expressed the basis for this conclusion in the following manner (at paragraph 41):

The judge cannot conjure up his own reasons for denying bail; while the judge must look at all the circumstances, he must focus particularly on the factors Parliament has specified. At the end of the day, the judge can only deny bail if satisfied that in view of these factors and related circumstances, a reasonable member of the community would be satisfied that denial is necessary to maintain confidence in the administration of justice. . . .

For these reasons, the provision does not authorize a “standardless sweep” nor confer open-ended judicial discretion. Rather, it strikes an appropriate balance between the rights of the accused and the need to maintain justice in the community. In sum, it is not overbroad.

The Supreme Court . . . indicated that a judge . . . must before denying release . . . “be satisfied that detention is not only advisable but necessary.”

THE TEST TO BE APPLIED PURSUANT TO SECTION 515(10)(C)

In addition to considering the constitutional status of section 515(10)(c), the Supreme Court also considered in *Hall* how the provision was to be applied by bail judges. The Supreme Court of Canada indicated, at paragraph 41, that a judge conducting a bail hearing must before denying release pursuant to this provision “be satisfied that detention is not only advisable but *necessary*.” The Court also indicated in *Hall* that the specific factors set out in section 515(10)(c) “delineate a narrow set of circumstances under which bail can be denied on the basis of maintaining confidence in the administration of justice” (at paragraph 40).

After *Hall*, there were decisions suggesting that *Hall* had interpreted 515(10)(c) of the Criminal Code in such a manner that it should be applied sparingly. In *R. v. LaFramboise*, [2005] O.J. No. 5785, 2005 CarswellOnt 8335 (Can. Ont.), for instance, the Ontario Court of Appeal interpreted *Hall* as standing for the proposition that section 515(10)(c) should be used to deny bail “sparingly” and its use “will be justified only in rare cases” (at paragraph 30).

However, in *St-Cloud*, the Supreme Court indicated, at paragraph 5, that section 515(10)(c) has been “unduly restricted by the courts in some cases.” It rejected the proposition that the denial of bail pursuant to section 515(10)(c) of the Criminal Code is “limited to exceptional circumstances” (at paragraph 54):

In conclusion, the application of s. 515(10)(c) is not limited to exceptional circumstances, to “unexplainable” crimes or to certain types of crimes such as murder. The Crown can rely on s. 515(10)(c) for any type of crime, but it must prove — except in the cases provided for in

8. Section one of the Charter states: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as

can be demonstrably justified in a free and democratic society.” Canadian Charter of Rights and freedoms, Part I of the Constitution Act, 1982.

“The ladder principle . . . prohibits a justice or a judge from imposing a more onerous form of release unless the Crown shows why a less onerous form is inappropriate”

s. 515(6) — that the detention of the accused is justified to maintain confidence in the administration of justice.

This constituted a monumental shift in the law of bail in Canada. In *R. v. A.A.C.*, [2015] 2015 ONCA 483 (Can. Ont.) for instance, the Ontario Court of Appeal indicated that in *St-Cloud*, the Supreme Court rejected “an unduly restrictive interpretation of the section’s scope and holds that the tertiary ground for detention is not to be interpreted narrowly or applied sparingly” (at para-

graph 47).

The Supreme Court also indicated in *St-Cloud*, at paragraph 69, that:

The four listed circumstances are simply the main factors to be balanced by the justice, together with any other relevant factors, in determining whether, in the case before him or her, detention is necessary in order to achieve the purpose of maintaining confidence in the administration of justice in the country. This is the provision’s purpose. Although the justice must consider all the circumstances of the case and engage in a balancing exercise, this is the ultimate question the justice must answer, and it must therefore guide him or her in making a determination.

Subsequently in *Oland*, the Supreme Court indicated that in assessing public confidence concerns pursuant to section 515(10)(c), “the seriousness of the crime plays an important role. The more serious the crime, the greater the risk that public confidence in the administration of justice will be undermined if the accused is released on bail pending trial” (at paragraph 37). Similarly in *St-Cloud* the Supreme Court concluded (at paragraph 88): “In conclusion, if the crime is serious or very violent, if there is overwhelming evidence against the accused and if the victim or victims were vulnerable, [pretrial] detention will usually be ordered.”

THE LADDER PRINCIPLE

Sections 515(2)(a) to (e) of the Criminal Code set out the forms of release available to a judge conducting a bail hearing. It is often referred to as the “ladder principle” because it begins with release on “such conditions as the justice directs” and ends with section 515(2)(e), which allows a bail judge to order, if the accused is from out of the province or does not ordinarily reside within two hundred kilometers of the place in

which he or she is in custody, that the accused be released with sureties and/or a cash deposit.

In *Antic*, the Supreme Court of Canada considered this provision. In *Antic*, the accused was charged with several offences. He was denied judicial interim release at the trial level. On review, the reviewing judge indicated that he would have released the accused if he could have imposed both a surety and a cash deposit as release conditions but section 515(2)(e) of the Criminal Code did not apply. On a second application for review, the bail review judge held that the geographical limitation in section 515(2)(e) of the Criminal Code violated the right not to be denied reasonable bail without just cause under section 11(e) of the Charter.

The Supreme Court reversed the declaration that section 515(2)(e) of the Criminal Code was unconstitutional. The Supreme Court noted that “[s]ection 515(2)(e) did not have the effect of denying Mr. Antic bail — it was the bail review judge’s misapplication of the bail provisions that did so” because “Mr. Antic had offered to provide sureties with a monetary pledge. . . . He could have been released without a cash deposit” (at paragraphs 3-5).

As regards the “ladder principle,” the Supreme Court indicated in *Antic* that:

The ladder principle is codified in s. 515(3), which prohibits a justice or a judge from imposing a more onerous form of release unless the Crown shows why a less onerous form is inappropriate: “The justice shall not make an order under any of paragraphs (2)(b) to (e) unless the prosecution shows cause why an order under the immediately preceding paragraph should not be made” (at paragraph 47).⁹

The Supreme Court concluded in *Antic* that the application judge made two errors (at paragraphs 52 to 54):

First, the bail review judge failed to apply the ladder principle properly. Although he purported to apply it, he erred by insisting on cash despite the existence of other forms of release. The bail review judge was fixated on a cash deposit because he believed the erroneous assumption that cash is more coercive than a pledge. But, as I explained above, a recognizance is functionally equivalent to cash bail and has the same coercive effect. The bail review judge should not have insisted on a cash deposit where the accused could have entered into a recognizance with a surety (the effect of which is that the surety joins in acknowledging the debt to the Crown).

The bail review judge’s second error may in fact have influenced the first. He expressed concern that the “pull of bail” would not be strong enough without a cash deposit. Because the proposed surety was an elderly

9. In *R. v. Beirsto*, 2017 ABCA 254, para. 9 (Can. Alta.), it was held that the “direction in *R. v. Antic*” that “the bail provisions must be applied consistently and fairly throughout Canada relates to the

conditions of release, and does not invite comparing the factual backgrounds of individual cases in determining whether release should be granted. Every case depends on its own facts.”

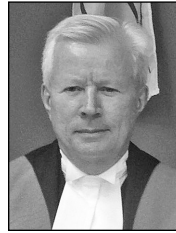
woman, the bail review judge was concerned that Mr. Antic might believe that a forfeiture proceeding would not be taken against her if he breached his bail terms.

The bail review judge erred in making his decision on the basis of such conjecture. A justice or a judge cannot impose a more onerous form of release solely because he or she speculates that the accused will not believe in the enforceability of a surety or a pledge. The bail system is based on the promises to attend court made by accused persons and on their belief in the consequences that will follow if such promises are broken. As Rosenberg J.A. rightly observed, “if accused came to believe that they could fail to attend court without their sureties suffering any penalty, the surety system would be ineffective. (Citation omitted.)”

CONCLUSION

As illustrated the Supreme Court of Canada has considered numerous aspects of the law of bail in Canada. The Court has assessed and explained the constitutional context of bail in

Canada, and it has conclusively set out the manner in which bail is to be considered by bail judges. In the long term, the most significant impact of the Supreme Court of Canada’s decisions on bail may be the importance it has placed upon avoiding pretrial detention based solely on financial means.



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From Playgrounds to Plavix: Civil Cases in the Supreme Court's October 2016 Term

Todd E. Pettys

During the Supreme Court's October 2016 Term, news relating to Donald Trump's rise to the presidency—including his successful nomination of Neil Gorsuch to fill the vacancy created by Justice Antonin Scalia's death more than one politically eventful year earlier—frequently overshadowed news of the Court's rulings. The Court itself contributed to that redirection of the nation's attention: it decided more than 30 fewer cases than its recent average, and it achieved unanimity at an unusually high rate.¹ With 68% of the Court's rulings falling on the civil side of the ledger,² however, we have much here to discuss, with significant new rulings in the areas of arbitration, debt collection, disabilities and education, discovery sanctions, equal protection, fair housing, false claims, family law and veterans benefits, jurisdiction, patents, religion, sovereign immunity, speech, takings, and the Trump Administration's "travel ban."

ARBITRATION

The Supreme Court's long-running campaign to bring state courts into compliance with the Federal Arbitration Act continued this past Term with its ruling in *Kindred Nursing Centers Limited Partnership v. Clark*.³ Exercising their respective powers of attorney, Janis Clark and Beverly Wellner had completed the paperwork necessary to move family members into a Kentucky nursing home. The contracts with the nursing home stated that all controversies concerning the family members' stay at the facility would be resolved through binding arbitration, rather than through litigation. When the family members died not long thereafter, Clark and Wellner brought suits against the nursing home on behalf of the decedents' estates. Were those suits contractually barred? The Kentucky Supreme Court held they were not. A power of attorney does not empower a representative to enter into an arbitration agreement, Kentucky's high court reasoned, unless it contains a statement explicitly conferring that authority. Otherwise, the Kentucky justices said, agents could waive their principals' core constitutional rights of access to the courts and trial by jury.

Led by Justice Kagan, the Court unanimously reversed. In a prior ruling concerning the FAA's requirements, the Court had explained that "courts must place arbitration agreements on an equal footing with other contracts" and that arbitration agreements thus cannot be invalidated "by defenses that apply only to arbitration or that derive their meaning from the fact that an

agreement to arbitrate is at issue."⁴ Justice Kagan explained that the Kentucky Supreme Court had violated these principles when it held that, absent a clear statement to the contrary, a power-of-attorney contract cannot confer the power to waive a principal's right to sue or to invoke his or her right to a jury trial. "Such a rule is too tailor-made to arbitration agreements—subjecting them, by virtue of their defining trait, to uncommon barriers—" Justice Kagan wrote, "to survive the FAA's edict against singling out those contracts for disfavored treatment."⁵

DEBT COLLECTION

The Court handed down two significant rulings this Term on the Fair Debt Collection Practices Act. In his first opinion for the Court, Justice Neil Gorsuch led his colleagues in unanimously rejecting a claim brought by debtors who believed that their rights under the Act had been violated. The case, *Henson v. Santander Consumer USA, Inc.*,⁶ featured a debt collector—Santander—that had purchased defaulted auto loans from Citi-Financial Auto and then deployed collection methods that the debtors found legally objectionable. The Act places methodological restraints upon (among others) anyone "who regularly collects or attempts to collect . . . debts owed or due . . . another."⁷ The parties agreed that the statute applies to agents who attempt to collect debts on behalf of creditors, and they also agreed that the statute does not ordinarily apply to those who attempt to collect debts that they themselves originated. But what about someone who—like Santander—purchases debts originated by others and then seeks to recover on those debts for its own financial benefit?

"[B]y its plain terms," Justice Gorsuch wrote, the statutory language at issue brings within the Act's scope "third party collection agents working for a debt owner—not . . . a debt owner seeking to collect debts for itself."⁸ This is true, Justice Gorsuch said, regardless of whether the debt owner "originated the debt or came by it only through a later purchase." As for the debtors' argument that Congress would have wished to bring the Act to bear on debt purchasers if it had known that this "new industry would blossom," Justice Gorsuch stressed that "it is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced."⁹

Suppose a debt collector asserts a right to be paid on a credit-card debt and that, on the face of the claim, it is clear

Footnotes

1. Kedar S. Bhatia, *Stat Pack for October Term 2016*, SCOTUSBLOG, 8, 16 (June 28, 2017), http://scotusblog.com/wp-content/uploads/2017/06/SB_Stat_Pack_2017.06.28.pdf.
2. See *id.* at 6.
3. 137 S. Ct. 1421 (2017).

4. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).
5. *Kindred Nursing Centers*, 137 S. Ct. at 1427.
6. 137 S. Ct. 1718 (2017).
7. 15 U.S.C. § 1692a(6).
8. *Henson*, 137 S. Ct. at 1721.
9. *Id.* at 1725.

that the statute of limitations for collecting the debt has expired. Does the assertion of the claim amount to a “false, deceptive, or misleading representation” or an “unfair or unconscionable means” of attempting to collect a debt, in violation of the Act?¹⁰ In *Midland Funding, LLC v. Johnson*,¹¹ the Court held that such a claim does not violate the federal statute when the claim is asserted in Chapter 13 bankruptcy proceedings. In that context, Justice Breyer reasoned for the majority, there are a variety of protections that help to ensure that the patently stale claim will be rejected. The Court reserved judgment, however, on whether the Act bars “a debt collector’s assertion in a civil suit of a claim known to be stale”—a setting in which a consumer might easily be duped into paying a time-barred debt in order to avoid litigation.¹² Joined by Justices Ginsburg and Kagan, Justice Sotomayor dissented, arguing that a debt collector violates the Act when it attempts to collect a debt that it knows is time-barred. Faced with a contrary ruling by a majority of their colleagues, the dissenting justices urged Congress to amend the legislation.

DISABILITIES AND EDUCATION

Through a variety of federal statutes, Congress has aimed to protect the interests of children with disabilities. Prominent among those statutes are the Individuals with Disabilities Education Act, Title II of the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act. A provision of the IDEA—20 U.S.C. § 1415(l)—states that, even if suing under a statute other than the IDEA, a disabled child must first exhaust the IDEA’s administrative procedures if he or she is “seeking relief that is also available under [the IDEA].” The Court was asked to interpret the meaning of that exhaustion provision in *Fry v. Napoleon Community Schools*.¹³ A child with cerebral palsy had sued a school after it refused to allow her to bring her service dog on the premises. The child sued under Title II of the ADA and Section 504 of the Rehabilitation Act, but did not first exhaust the IDEA’s administrative procedures. Was the failure to exhaust a problem?

Pointing out that the IDEA’s “principal command” is that disabled children be provided with what the statute describes as “a free appropriate public education” (commonly called a FAPE),¹⁴ Justice Kagan explained in her opinion for the Court that the IDEA’s exhaustion requirements only apply when “the gravamen” of the plaintiff’s complaint concerns a school’s alleged failure to provide a FAPE.¹⁵ To help lower courts determine whether a given complaint fits that description, Justice Kagan offered a couple of diagnostic questions:

First, could the plaintiff have brought essentially the

same claim if the alleged conduct had occurred at a public facility that was *not* a school—say, a public theater or library? And second, could an *adult* at the school—say, an employee or visitor—have pressed essentially the same grievance? When the answer to those questions is yes, a complaint that does not expressly allege the denial of a FAPE is also unlikely to be truly about that subject [and so the IDEA’s exhaustion requirements will not apply].¹⁶

The Court was asked to interpret the meaning of [the IDEA] exhaustion provision in *Fry v. Napoleon Community Schools*.

The Court remanded for an application of those principles. Joined by Justice Thomas in a short opinion concurring in part and concurring in the judgment, Justice Alito worried that the majority’s two diagnostic questions would confuse the lower courts. Those questions, Justice Alito wrote, evidently presume that “there is no overlap between the relief available under” the IDEA, on the one hand, and the relief available under the ADA, the Rehabilitation Act, or some other federal law, on the other.¹⁷

During his Senate confirmation hearings for a seat on the Court, then-Judge Gorsuch took some heat from critics¹⁸ for authoring a Tenth Circuit opinion stating that, to satisfy the FAPE requirements of the IDEA, the educational benefits being provided to a disabled student by a school “must merely be ‘more than *de minimis*.’”¹⁹ That criticism was not altogether fair; as the internal quotation marks in the prior sentence indicate, Gorsuch was invoking the standard previously adopted by the Tenth Circuit, although it also is true that he added the word “merely” to the formulation. With or without that adverbial modifier, the Tenth Circuit’s standard is no longer good law.

In *Andrew F. v. Douglas County School District RE-120*—a case concerning a Tenth Circuit ruling in which Gorsuch did not participate, but in which his framing of the Tenth Circuit’s standard had been deployed—the Court unanimously held that the Tenth Circuit had failed to interpret the IDEA and the Court’s own precedent appropriately. Writing for the Court, Chief Justice Roberts explained that, to satisfy the IDEA’s mandate, “a school must offer an [individualized education program, or ‘IEP’] reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”²¹ Although an IEP need not be “ideal,” Chief Justice Roberts wrote, it “must aim to enable the child to make progress” and thus must be “constructed only after careful consideration of

10. 15 U.S.C. §§ 1692e, 1692f.

11. 137 S. Ct. 1407 (2017).

12. *Id.* at 1413.

13. 137 S. Ct. 743 (2017).

14. 20 U.S.C. §§ 1400(d)(1)(A), 1415(a).

15. *Fry*, 137 S. Ct. at 752-57.

16. *Id.* at 756.

17. *Id.* at 759 (Alito, J., concurring in part and concurring in the judgment).

18. See Mark Walsh, *Debate on Gorsuch and Special Education Rulings Continues on Last Day of Hearing*, EDUCATION WEEK (Mar. 23, 2017, 6:05 PM), http://blogs.edweek.org/edweek/school_law/2017/03/debate_on_gorsuch_and_idea_rul.html.

19. *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008) (quoting *Urban ex rel. Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 727 (10th Cir. 1996)).

20. 137 S. Ct. 988 (2017).

21. *Id.* at 999.

Justice Kagan explained that . . . [discovery] sanctions “must be compensatory rather than punitive in nature.”

the child’s present levels of achievement, disability, and potential for growth.”²² By requiring that a disabled child’s educational program be “appropriately ambitious in light of his circumstances,” the IDEA imposes a requirement that “is markedly more demanding than the ‘merely more than *de minimis*’ test applied by the Tenth Circuit.”²³

DISCOVERY SANCTIONS

Imagine you are a federal judge presiding over a tort lawsuit in which the plaintiffs allege that a defective tire manufactured by the defendant caused their motorhome to crash. After several years of discovery, the parties settle. Months later, the plaintiffs learn that—despite discovery requests that were squarely on point—the defendant had concealed internal test results indicating that the tire grew unusually hot at highway speeds. The plaintiffs return to your courtroom, urging you to order the defendant to pay all of the attorney’s fees and other litigation costs that the plaintiffs incurred after the defendant’s first refusal to disclose the test results. Does your inherent power to impose sanctions for litigation misconduct extend that far?

That was the question before the Court in *Goodyear Tire & Rubber Co. v. Haeger*.²⁴ The district court in that case had awarded the plaintiffs \$2.7 million, covering all of the fees and costs that the plaintiffs had paid after Goodyear’s first dishonest response to a discovery request concerning Goodyear’s internal tests on the G159 tire model. The Ninth Circuit affirmed, but the Supreme Court unanimously reversed. Drawing heavily from the Court’s 1994 ruling in *Mine Workers v. Bagwell*,²⁵ Justice Kagan explained that—regardless of whether a court is imposing sanctions pursuant to a rule of civil procedure, 28 U.S.C. § 1927, or the court’s inherent sanctioning authority—sanctions “must be compensatory rather than punitive in nature.”²⁶ “[P]retty much by definition,” Justice Kagan wrote, that means that a “court can shift only those attorney’s fees incurred *because of* the misconduct at issue.”²⁷ When making that causal assessment, a district court has considerable discretion. If presented with an “exceptional” case, for example, the but-for standard “permits a trial court to shift *all* of a party’s fees, from either the start or some midpoint of a suit, in one fell swoop.”²⁸ In this particular case, however, the record did not support a finding “that disclosure of the heat-test results would have led straightaway to a settlement.”²⁹ Notwithstanding the internal test results, Goodyear still could

have argued that the plaintiff’s tire failed for reasons attributable to the plaintiffs themselves (such as failing to replace it after it had worn down), and, in a separate lawsuit concerning a G159 tire, Goodyear had disclosed the test results and nevertheless proceeded to trial. The court thus remanded for application of the proper analysis.

EQUAL PROTECTION

Immigration

For more than half a century, the nation’s immigration laws treated unwed U.S. citizen mothers significantly more favorably than it treated (and still treats today) unwed U.S. citizen fathers in determining the citizenship of children born abroad. For such a father to transfer American citizenship to his child, he must have resided in the United States for five or more years before the child’s birth, and at least two of those years must come after the father reaches the age of fourteen. For a child born abroad to a U.S. citizen father before November 14, 1986, the requirement is even more demanding: the father must have resided in the United States for ten or more years prior to the child’s birth, with at least five of those years coming after the father reached the age of fourteen. If a child was born abroad to an unwed U.S. citizen *mother*, however—whether before or after 1986—the statutory requirement was far more lenient: the child became an American citizen so long as the mother had resided in the United States for at least one year prior to the child’s birth.

The Court declared that arrangement unconstitutional in *Sessions v. Morales-Santana*,³⁰ though the news for the claimant in that case was nevertheless ultimately unfavorable. Luis Ramón Morales-Santana was born in the Dominican Republic in 1962 to unwed parents. Morales-Santana’s father—but not his mother—was an American citizen. Yet Morales-Santana’s father had fallen twenty days short of meeting the lengthy, statutorily imposed residence requirement for obtaining American citizenship for his son. Later facing deportation as a result of criminal convictions, Morales-Santana challenged the statute’s differing treatment of unwed mothers and fathers, contending that it violated the Fifth Amendment’s equal protection principles.

Led by Justice Ginsburg, a majority of the Court agreed.³¹ Applying intermediate scrutiny, the Court found that the statute’s distinction between mothers and fathers lacked the necessary “exceedingly persuasive justification.”³² The Court concluded that the distinction—first drawn in the mid-twentieth century—was the result of an anachronistic assumption that mothers are children’s primary guardians and that fathers commonly play little or no role in shaping children’s values and civic attachments:

22. *Id.*

23. *Id.* at 1000.

24. 137 S. Ct. 1178 (2017).

25. 512 U.S. 821 (1994).

26. *Goodyear Tire & Rubber*, 137 S. Ct. at 1186.

27. *Id.* (emphasis added).

28. *Id.* at 1187 (emphasis added).

29. *Id.* at 1189.

30. 137 S. Ct. 1678 (2017).

31. Before reaching the merits of the equal-protection claim, the Court found that Morales-Santana was entitled to assert the equal-protection rights of his deceased father.

32. *Id.* at 1690 (internal quotation omitted).

The Court handed down several important rulings this Term concerning the Equal Protection Clause and legislative redistricting.

Fearing that a foreign-born child could turn out more alien than American in character, the [Franklin Delano Roosevelt] administration believed that a citizen parent with lengthy ties to the United States would counteract the influence of the alien parent. Concern about the attachment of foreign-born children to the United States explains the treatment of unwed citizen fathers, who, according to the familiar stereotype, would care little about, and have scant contact with, their nonmarital children. For unwed citizen mothers, however, there was no need for a prolonged residency prophylactic: The alien father, who might transmit foreign ways, was presumptively out of the picture.³³

The Court's ruling on the merits of Morales-Santana's claim left the justices with a choice: should they extend the benefits of the one-year residence requirement to children born abroad to unwed U.S. citizen fathers (as Morales-Santana desired), or should they instead declare that children born abroad to unwed U.S. citizen mothers become American citizens only if their mothers meet the lengthier residence requirement previously imposed only on fathers? The Court chose the latter option. The decision hinged, Justice Ginsburg explained, on what Congress would have desired if it had known that its mother-father distinction would be struck down as unconstitutional. The Court found that "all indicators" suggest Congress would have wished to retain the lengthier residence requirement.³⁴ Morales-Santana himself thus failed to benefit from the Court's ruling.³⁵

Legislative Redistricting

The Court handed down several important rulings this Term concerning the Equal Protection Clause and legislative redistricting. First up was *Bethune-Hill v. Virginia Board of Elections*,³⁶ in which the Court clarified a portion of the analysis that applies when determining whether a state permissibly took race into account when drawing the boundaries of its legislative districts. Virginia conceded that, when setting the boundaries of eleven of its districts in the wake of the 2010 census, one of its goals was to ensure that each of those districts would have a black voting-age population of at least 55%. Such action will draw strict scrutiny if race was the predominant factor that the state used when placing voters inside or outside the challenged districts. Was it? The lower court held that race was *not* the predominant factor because the eleven districts' boundaries could have been drawn in precisely the same way using traditional, constitutionally permissible criteria.

Led by Justice Kennedy, the 6-2 Court reversed and remanded. "The racial predominance inquiry concerns the

actual considerations that provided the essential basis for the lines drawn," Justice Kennedy explained, "not *post hoc* justifications the legislature in theory could have used but in reality did not."³⁷ Of course, when the placement of districts' lines *does* conflict with traditional criteria, it might be quite easy for a challenger to establish an equal-protection claim. But "a conflict or inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement or a mandatory precondition in order for a challenger to establish a claim of racial gerrymandering."³⁸ Rather than find that race did predominate here and that strict scrutiny was thus appropriate, the Court remanded for an application of the proper legal analysis. Given the state's admission that it tried to ensure a black voting-age population of at least 55%, Justices Alito and Thomas would have held that race did indeed predominate and that strict scrutiny should apply.³⁹

The second of the Court's redistricting cases this Term was *Cooper v. Harris*,⁴⁰ a case concerning North Carolina's District 1 and District 12. Neither of those districts had a majority black voting-age population before redistricting, but both of them routinely elected candidates favored by a majority of black voters. The state added a substantial number of African-American voters to both districts, pushing their black voting-age populations beyond 50%. In an effort to rebut allegations of unconstitutional racial gerrymandering, North Carolina officials argued that the changes to District 1 were necessary to comply with the Voting Rights Act of 1965 and that race had not played a predominant role in the selection of voters for District 12. A three-judge district court rejected both of those defenses. Led by Justice Kagan, the Supreme Court affirmed.

With respect to District 1, the evidence made it clear that those leading the redistricting effort wished to create a majority-minority district, and so the Court quickly turned its attention to whether there was a compelling justification for taking race predominantly into account. North Carolina argued that there was—namely, avoiding vote dilution in violation of the Voting Rights Act of 1965. In election after election in District 1, however, numerous white voters had helped elect candidates favored by most blacks, and so the state did not have "good reasons" to fear that blacks' voting strength in that district was at risk of dilution.⁴¹ With respect to District 12—a storied district making its fifth appearance before the Court—

33. *Id.* at 1692 (internal quotation and citation omitted).

34. *Id.* at 1700-01.

35. Joined by Justice Alito, Justice Thomas concurred in the judgment. Because Morales-Santana could not obtain the relief he desired no matter how the Court ruled on his equal-protection claim, Justice Thomas found it unnecessary to reach the merits of that claim.

36. 137 S. Ct. 788 (2017).

37. *Id.* at 799.

38. *Id.*

39. Justice Thomas also took issue with the Court's handling of a twelfth legislative district, the details of which will be of interest to those specializing in such claims.

40. 137 S. Ct. 1455 (2017).

41. *Id.* at 1469-72.

[T]he Court issued a 6-3 *per curiam* opinion summarily reversing a ruling by the Arkansas Supreme Court concerning same-sex marriages and birth certificates.

the state argued that partisanship, rather than race, had been the basis for drawing the district's lines, and that lawmakers had simply opted to pack that district with Democrats. Reviewing the district court's contrary factual findings only for clear error, the Court rejected the state's argument. The redistricting plan's lead architects had said at various points that they were focusing on race, for example, and one expert witness concluded that

race, rather than partisanship, far better explained the state's choice of district lines.

Joined by Chief Justice Roberts and Justice Kennedy, Justice Alito concurred in the judgment in part and dissented in part. He agreed that North Carolina violated the Equal Protection Clause when redrawing District 1's boundaries, but accepted the state's party-focused explanation of its reasons for redrawing District 12. On behalf of the majority, Justice Kagan replied that Justice Alito had ignored the clear-error standard of review and that his opinion "tracks, top-to-bottom and point-for-point, the testimony of . . . the State's star witness at trial—so much so that the dissent could just have block-quoted that portion of the transcript and saved itself a fair bit of trouble."⁴²

*North Carolina v. Covington*⁴³ was another racial gerrymandering case from the Tar Heel State, this one featuring a district court's finding that state officials had unconstitutionally drawn twenty-eight legislative districts' boundaries along racial lines. In a separate order, the Court summarily affirmed the district court's ruling on the merits of the plaintiff's claims.⁴⁴ In this *per curiam* ruling handed down the same day, however, the Court unanimously vacated the district court's remedial order. In addition to setting a deadline by which new legislative boundaries needed to be drawn, the district court had ordered that the two-year terms of certain legislators be cut in half, had ordered that special elections be held for specified legislative seats, and had partially suspended the North Carolina Constitution's requirement that a legislative candidate live for one year in a district before being elected to represent it. Without taking a position on whether those remedial measures were justified, the Court held that, before imposing those remedies, the district court needed to engage in a more thorough, case-specific analysis of the equitable considerations at stake.

Same-Sex Marriage

Two years ago, in one of its most widely noted rulings of the

past half century, the Court ruled in *Obergefell v. Hodges*⁴⁵ that the Fourteenth Amendment—through a combination of equal-protection and substantive-due-process principles—grants same-sex couples the right to marry and to have their marriages recognized in all states. On the closing day of its most recent Term, the Court issued a 6-3 *per curiam* opinion summarily reversing a ruling by the Arkansas Supreme Court concerning same-sex marriages and birth certificates. When two women in separate same-sex marriages gave birth in Arkansas, the Arkansas Department of Public Health refused to list the non-birth spouses as parents on the children's birth certificates. The Court ruled in *Pavan v. Smith*⁴⁶ that this flatly violated *Obergefell's* declaration that states must provide same-sex couples with "the constellation of benefits that the States have linked to marriage."⁴⁷ Joined by Justices Thomas and Alito, Justice Gorsuch dissented, arguing that the case merited full briefing and argument, that *Obergefell* had not squarely addressed the constitutional propriety of birth-certificate regimes like Arkansas's, and that it was "very hard to see what [wa]s wrong with" the Arkansas Supreme Court's conclusion "that rational reasons exist for a biology based birth registration regime."⁴⁸

FAIR HOUSING ACT

In *Bank of America Corp. v. City of Miami*,⁴⁹ Miami officials claimed that Bank of America and Wells Fargo had discriminated against Latino and African-American home-loan borrowers in a variety of ways, and that this discrimination resulted in lower tax revenues and higher municipal expenses for the city. Could Miami bring an action against the two banks under the Fair Housing Act? The answer to that question turned on at least two things: whether the city's claims fell within the zone of interests that Congress intended to protect when enacting the FHA and whether the city's harms had been proximately caused by the banks' alleged FHA violations. The court answered the first of those two inquiries in the affirmative and remanded the second for further consideration.⁵⁰

Writing for the Court, Justice Breyer reminded readers that, when bringing a federal statutory claim, a federal plaintiff must meet the standing requirements of Article III *and* must show that it possesses a cause of action under the statute. To meet the latter requirement, a plaintiff must show that its interests at least arguably "fall within the zone of interests protected by the law invoked."⁵¹ The FHA broadly permits suit by "any person . . . who claims to have been injured by a discriminatory housing practice" or who "believes that [it] will be injured by a discriminatory housing practice that is about to occur."⁵² By using such capacious language, Justice Breyer wrote, Congress extended the pool of potential FHA plaintiffs to the full limits of what Article III allows.

With respect to causation, the Court was less definitive. The

42. *Id.* at 1473 n.6.

43. 137 S. Ct. 1624 (2017).

44. *North Carolina v. Covington*, No. 16-649 (U.S. June 5, 2017).

45. 135 S. Ct. 2584 (2015).

46. 137 S. Ct. 2075 (2017).

47. *Id.* at 2076, 2078 (quoting *Obergefell*, 135 S. Ct. at 2590).

48. *Id.* at 2079 (Gorsuch, J., dissenting).

49. 137 S. Ct. 1296 (2017).

50. Joined by Justices Kennedy and Alito, Justice Thomas argued that the Court should have rejected the city's arguments on both fronts.

51. *Id.* at 1302 (quoting *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014)).

52. 42 U.S.C. § 3602(i).

Eleventh Circuit had concluded that the city met the FHA's causation requirement by pleading injuries that were the foreseeable result of FHA violations. The Supreme Court found, however, that the FHA is more demanding:

In the context of the FHA, foreseeability alone does not ensure the close connection that proximate cause requires. The housing market is interconnected with economic and social life. A violation of the FHA may, therefore, be expected to cause ripples of harm to flow far beyond the defendant's misconduct. Nothing in the statute suggests that Congress intended to provide a remedy wherever those ripples travel.⁵³

But beyond indicating that there needed to be some kind of "direct" connection between an alleged FHA violation and the plaintiff's harm, the court declined "to draw the precise boundaries of proximate cause under the FHA."⁵⁴ None of the courts of appeals had yet addressed that issue, and so the Court opted to give them the first shot at tackling it.

FALSE CLAIMS ACT

The False Claims Act's *qui tam* enforcement provision enables a private party (a "relator") to bring an FCA action on behalf of the federal government against an individual whom he or she believes has "knowingly present[ed] to the government] . . . a false or fraudulent claim for payment or approval."⁵⁵ The FCA further states that "[t]he complaint shall be filed in camera [and] shall remain under seal for at least 60 days."⁵⁶ In *State Farm Fire & Casualty Co. v. United States ex rel. Rigsby*⁵⁷—a case concerning allegations that, in the wake of Hurricane Katrina, State Farm fraudulently tried to shift some of its wind-insurance liabilities to the federal government—the Supreme Court was asked to determine whether a violation of the FCA's seal requirement mandates dismissal of a relator's complaint. In an opinion by Justice Kagan, the Court unanimously found that dismissal is not required, but rather is among the remedies that a district court may deem appropriate in its discretion.

FAMILY LAW AND VETERANS' BENEFITS

*Howell v. Howell*⁵⁸ concerned an issue that looms large when dealing with the distribution of veterans' benefits between divorcing spouses. When John and Sandra Howell divorced in 1991, the divorce decree declared that Sandra would receive half of John's Air Force retirement pay. That arrangement was permissible under the Uniformed Services Former Spouses'

Protection Act, which declares that states may treat veterans' "disposable retired pay" as community property divisible between divorcing spouses.⁵⁹ More than a decade later, the Department of Veterans Affairs determined that John suffered from a partial disability resulting from his military service, entitling him to disability benefits. Under federal law, however,

John could receive those disability benefits only if he agreed to take a corresponding reduction in the retirement pay that he and Sandra had been dividing.⁶⁰ John agreed to that arrangement, surely appreciating the fact that, unlike veterans' ordinary retirement pay, veterans' disability benefits are statutorily exempt from federal, state, and local taxation.⁶¹ Of course, by making that choice, he reduced the amount of his monthly retirement pay that Sandra received each month. Unhappy with the cut in her monthly payments, Sandra asked an Arizona family court to order John to make up the difference. The family court agreed to do so and the Arizona Supreme Court affirmed.

Led by Justice Breyer, the U.S. Supreme Court reversed. As the Court explained in 1989's *Mansell v. Mansell*,⁶² Congress has declared that states cannot treat as divisible community property any amount of retirement pay that a veteran has waived to receive disability benefits.⁶³ (Congress has thereby ensured that the financial benefits of disability payments go entirely to the veteran himself or herself.) By ordering John to make up for the reduction that his waiver had yielded in Sandra's share of the retirement pay, Justice Breyer explained, Arizona's courts tried to do what Congress has explicitly forbidden. Justice Breyer closed by "not[ing] that a family court, when it first determines the value of a family's assets, remains free to take account of the contingency that some military retirement pay might be waived, or . . . take account of reductions in value when it calculates or recalculates the need for spousal support."⁶⁴

JURISDICTION

The Court handed down several noteworthy cases this Term concerning state and federal courts' jurisdiction. In *BNSF Railway Co. v. Tyrrell*,⁶⁵ the Court held (over the lone dissent of Justice Sotomayor) that the Montana Supreme Court erred when it determined that the courts of that state could exercise personal jurisdiction over BNSF Railway Company.⁶⁶ The issue

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53. *Bank of America*, 137 S. Ct. at 1306 (citation and internal quotation omitted).

54. *Id.*

55. 31 U.S.C. § 3729 (a)(1)(A); see also 31 U.S.C. 3730(b)(1) (presenting the *qui tam* provision).

56. 31 U.S.C. § 3730(b)(2).

57. 137 S. Ct. 436 (2016).

58. 137 S. Ct. 1400 (2017).

59. 10 U.S.C. § 1408(c)(1).

60. 38 U.S.C. § 5305.

61. 38 U.S.C. § 5301(a)(1).

62. 490 U.S. 581, 588-95 (1989).

63. 10 U.S.C. § 1408(a)(4)(A)(ii).

64. *Howell*, 137 S. Ct. at 1406.

65. 137 S. Ct. 1549 (2017).

66. The Court also held that 45 U.S.C. § 56—a provision of the Federal Employers' Liability Act—does not address personal jurisdiction over railroads. Instead, that provision addresses issues of federal venue and concurrent federal-state jurisdiction.

Writing for the Court, Justice Alito explained that California’s “sliding-scale” framework was nothing more than “a loose and spurious form of general jurisdiction.”

arose when two former BNSF employees sued the company in a Montana state court for injuries they allegedly suffered while on the job. Because the employees’ claims did not flow from actions occurring in Montana, the inquiry focused on general, rather than specific, jurisdiction. Relying particularly upon its 2014 ruling in *Daimler AG v. Bauman*,⁶⁷ Justice Ginsburg explained for the Court that a state court may take general jurisdiction over a corporation without

fear of violating the Fourteenth Amendment’s Due Process Clause only when the corporation is incorporated in that state, when its principal place of business is in that state, or when “exceptional” circumstances indicate that the corporation’s activities in that state are “so substantial and of such a nature as to render the corporation at home in that State.”⁶⁸ BNSF did own more than 2,000 miles of track in Montana and did employ more than 2,000 employees there. But when considered against the backdrop of BNSF’s entire operations, those facts were not sufficient to establish that BNSF was “essentially at home” in Montana.⁶⁹ BNSF’s contacts with Montana would suffice to establish specific personal jurisdiction in a case concerning BNSF’s activities in Montana, but they were not enough to create general personal jurisdiction there.

The focus shifted to specific jurisdiction in *Bristol-Myers Squibb Co. v. Superior Court of California*.⁷⁰ In that case, nearly 680 individuals filed actions against Bristol-Myers Squibb in California for injuries they allegedly suffered from taking the defendant’s Plavix, a blood-thinning drug. Eighty-six of those plaintiffs resided in California, and, as to them, there was no jurisdictional question. The remainder of the plaintiffs, however, came from 33 other states. Did the Fourteenth Amendment’s Due Process Clause permit California’s courts to take specific jurisdiction of the non-Californians’ claims? The California Supreme Court concluded that it did, reasoning that a “sliding-scale approach” was appropriate: the greater the number of contacts between a defendant and a forum state, the looser may be the connection between the defendant’s activities in the forum and the plaintiffs’ claims. Here, although Bristol-Myers did not design, manufacture, package, or label Plavix in California, it did have numerous other contacts with the state, and the non-Californians’ claims were similar to those filed by the California residents. For the California Supreme Court, there thus was a sufficient, jurisdiction-establishing

connection between California and the activities giving rise to the non-Californians’ claims.

Over the lone dissent of Justice Sotomayor (just as in *BNSF Railway*), the Supreme Court rejected the California Supreme Court’s framework and conclusion. Writing for the Court, Justice Alito explained that California’s “sliding-scale” framework was nothing more than “a loose and spurious form of general jurisdiction.”⁷¹ The decisive factor cutting against jurisdiction here was the fact that there simply was no connection between California and the activities giving rise to the non-Californians’ claims. Those plaintiffs had not purchased, taken, or been injured by Plavix in California, and the fact that their claims were similar to claims filed by Californians was irrelevant. The Court “le[ft] open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.”⁷² Writing in dissent, Justice Sotomayor argued that “there is nothing unfair about subjecting a massive corporation to suit in a State for a nationwide course of conduct that injures both forum residents and non-residents alike,”⁷³ and she warned that the majority’s ruling would have justice-thwarting consequences in cases in which a defendant has injured plaintiffs in numerous states.

In *Town of Chester v. Laroe Estates, Inc.*,⁷⁴ the Court turned its attention to issues of standing and intervention of right under Federal Rule of Civil Procedure 24(a). Must a party seeking to intervene under that rule independently meet Article III’s familiar standing requirements of injury, causation, and redressability if the existence of an Article III “case” or “controversy” has already been established in the underlying litigation? *Laroe Estates* had sought to intervene in litigation concerning a real-estate development project that went south allegedly as a result of unlawful actions by municipal officials in Chester, New York. Like the original plaintiff, *Laroe* wished to assert a regulatory takings claim against the town. The Second Circuit held that, because the original plaintiff had standing under Article III, *Laroe* did not itself need to satisfy Article III’s requirements.

Resolving a circuit split on the relationship between Article III and Rule 24(a), the justices vacated the Second Circuit’s judgment. Writing for the unanimous Court, Justice Alito began by reminding readers that, when a plaintiff brings an action against a defendant in federal court, it must establish Article III standing for each of its claims and for each form of relief that it seeks. The same principle holds, Justice Alito explained, when a case features multiple plaintiffs: “[a]t least one plaintiff must have standing to seek each form of relief requested in the complaint.”⁷⁵ The Court held that the same logic applies when a party seeks to intervene under Rule 24(a): “[A]n intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing.”⁷⁶ *Laroe* thus would need to meet

67. 134 S. Ct. 746 (2014).

68. *BNSF Railway Co.*, 137 S. Ct. at 1558 (quoting *Daimler*, 134 S. Ct. at 761, n.19).

69. *Id.* at 1559 (quoting *Daimler*, 134 S. Ct. at 754, which in turn was quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

70. 137 S. Ct. 1773 (2017).

71. *Id.* at 1781.

72. *Id.* at 1783-84.

73. *Id.* at 1784 (Sotomayor, J., dissenting).

74. 137 S. Ct. 1645 (2017).

75. *Id.* at 1651.

76. *Id.*

Article III's requirements if it was seeking "a money judgment of its own running directly against the Town."⁷⁷ The Court remanded for a determination of whether that was, indeed, the form of relief that Laroe sought.

In *Lightfoot v. Cendant Mortgage Corp.*,⁷⁸ the Court considered whether a statutory sue-and-be-sued clause regarding the Federal National Mortgage Association (Fannie May) gives federal district courts subject-matter jurisdiction to hear all claims concerning Fannie May, or whether it merely gives Fannie May the capacity to file lawsuits and to be sued by others. The statutory language at issue authorizes Fannie May "to sue and to be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal."⁷⁹ Resolving a circuit split, the Court unanimously determined that the statute does not provide an independent source of federal jurisdiction. The Court's analysis turned primarily upon the statute's use of the phrase "any court of competent jurisdiction." By virtue of that language, Justice Sotomayor explained, the statute merely "permits suit in any state or federal court already endowed with subject-matter jurisdiction over the suit."⁸⁰

Suppose federal plaintiffs file claims on their own behalf against a defendant, as well as claims on behalf of a class they propose to represent. Suppose, further, that the district court refuses to certify the class, after which the plaintiffs voluntarily agree to the dismissal of their individual claims with prejudice but then appeal the denial of class certification. Does the federal appellate court have jurisdiction? That was the question before the Court in *Microsoft Corp. v. Baker*,⁸¹ in which owners of Microsoft's Xbox game console filed design-defect claims on behalf of themselves and a proposed class of Xbox owners. After the district court struck their class allegations—the functional equivalent of denying a motion for class certification—the plaintiffs appealed the district court's ruling on the class claims, arguing that the Ninth Circuit should take jurisdiction under Rule 23(f) of the Federal Rules of Civil Procedure. That rule gives federal appellate courts the discretionary power to take jurisdiction of orders granting or denying class certification—interlocutory orders that ordinarily would otherwise be appealable only under the stringent circumstances described in 28 U.S.C. § 1292(b). The Ninth Circuit refused to take the case, but the plaintiffs were undeterred. In an effort to render the case appealable as of right under 28 U.S.C. § 1291—the familiar statute that gives courts of appeals jurisdiction to review district courts' "final decisions"—the plaintiffs then stipulated to the dismissal of their individual claims with prejudice and appealed the district court's ruling striking their class allegations. The Ninth Circuit determined that Section 1291 did indeed give it jurisdiction to hear the plaintiffs' appeal. The court then ruled that the district court abused its

discretion when it struck the plaintiffs' class allegations.

All eight of the Court's participating justices rejected the Ninth Circuit's finding that it had jurisdiction, though they disagreed about the nature of the error. Writing for the five-member majority, Justice Ginsburg determined that the Ninth Circuit lacked jurisdiction because the district court's ruling dismissing the plaintiffs' individual claims was not a "final decision" within the meaning of Section 1291. To rule otherwise, Justice Ginsburg reasoned, would allow plaintiffs to manufacture finality in the face of what is otherwise plainly an interlocutory ruling on class certification, and would disrupt the balance of interests struck in Rule 23(f). Concurring in the judgment and joined by Chief Justice Roberts and Justice Alito, Justice Thomas concluded that the district court's dismissal of the plaintiffs' individual claims was an appealable "final decision[]" within the meaning of Section 1291, because that ruling left the district court with no further work to do.⁸² Justice Thomas nevertheless found that the plaintiffs' appeal failed to satisfy the case-or-controversy requirements imposed by Article III. "[I]t has long been the rule," he wrote, "that a party may not appeal from the voluntary dismissal of a claim, since the party consented to the judgment against it."⁸³

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PATENTS

It was a busy Term for the Court in the area of patents, and a correspondingly unhappy Term for the Federal Circuit, which suffered reversals in six of its seven cases reviewed by the Court.⁸⁴ We will take a short look at three of those reversals. Perhaps the most important of them came in *Impression Products, Inc. v. Lexmark International, Inc.*,⁸⁵ a case asking whether a patent holder can use patent law to control the downstream use of a product after the patent holder sells it. Lexmark owns various patents for toner cartridges that it manufactures and sells. It sells those cartridges at a discount if the purchaser contractually agrees to return the empty cartridges to Lexmark, rather than transferring them to another company in the business of refilling and selling cartridges. Many Lexmark cartridges sold under those terms nevertheless found their way into the hands of Impression Products, a company that refills and sells other companies' used toner cartridges. Lexmark sued Impression Products for patent infringement, arguing that, "because it expressly prohibited reuse and resale of those cartridges, [Impression Products and other companies

77. *Id.* at 1652.

78. 137 S. Ct. 553 (2017).

79. 12 U.S.C. § 1723a(a).

80. *Lightfoot*, 137 S. Ct. at 561.

81. 137 S. Ct. 1702 (2017).

82. *Id.* at 1716 (Thomas, J., concurring in the judgment). The majority did not directly respond to this seemingly powerful point.

83. *Id.*

84. See Bhatia, *supra* note 1, at 3.

85. 137 S. Ct. 1523 (2017). For contemporaneous commentary on the case and its significance, see Ronald Mann, *Opinion Analysis: Federal Circuit Loses Again, as Justices Categorically Reject Enforcement of Post-Sale Patent Restrictions*, SCOTUSBLOG (May 30, 2017, 4:35 PM), <http://www.scotusblog.com/2017/05/opinion-analysis-federal-circuit-loses-justices-categorically-reject-enforcement-post-sale-patent-restrictions/#more-256236>.

[T]he Court held in *Trinity Lutheran Church of Columbia, Inc. v. Comer* that Missouri could not categorically exclude a church-run daycare from competing for a state grant to resurface its playground.

in the same line of work) infringed the Lexmark patents when they refurbished and resold them.”⁸⁶ The Federal Circuit held that Lexmark could sue Impression Products for patent infringement, but the Supreme Court reversed. Writing for the Court, Chief Justice Roberts explained that, while Lexmark might have a breach-of-contract action when a customer disregards its promise to return an empty cartridge to Lexmark, Lexmark fully exhausts its *patent* rights at the moment of sale. “A patentee is free to set the price and negotiate contracts with purchasers,” Chief Justice

Roberts wrote, “but may not, ‘by virtue of his patent, control the use or disposition’ of the product after ownership passes to the purchaser.”⁸⁷ The Court further held that the patent-exhaustion rule applies to goods sold domestically and internationally alike.

In *Samsung Electronics Co., Ltd. v. Apple Inc.*,⁸⁸ the Court was asked to settle a disagreement about the meaning of Section 289 of the Patent Act, which imposes liability upon any person who “sells or exposes for sale any article of manufacture to which [a patented] design or colorable imitation has been applied.”⁸⁹ The Court unanimously held that, when dealing with a multicomponent product, the phrase “article of manufacture” can refer either to the entire product or to a single component of it. The Federal Circuit had thus erred when it concluded that, as a remedy for Samsung’s infringement of some of Apple’s design patents for the iPhone, Apple was necessarily entitled to all of the profits Samsung had made from sales of its infringing smartphones (rather than just to the profits Samsung had made from sales of the infringing components themselves). The Court left it to the Federal Circuit, on remand, to determine “whether, for each of the design patents at issue here, the relevant article of manufacture is the smartphone, or a particular smartphone component.”⁹⁰ Appearing as an *amicus*, the United States had proposed a test for making that determination, but the Court preferred not to make any decision about the appropriate test in the absence of full briefing on the issue.

The Federal Circuit suffered another reversal in *Life Technologies Corp. v. Promega Corp.*⁹¹ That case concerned Section 271(f)(1) of the Patent Act, which imposes patent-infringement liability upon anyone who, from within the United

States, supplies “all or a substantial portion of the components of a patented invention” for combination outside the United States.⁹² Life Technologies had shipped one component of a five-component invention from the United States to the United Kingdom, where the components were combined to make the final patented product. Focusing on the statutory phrase “all or a substantial portion,” the Federal Circuit had held that the component supplied from within the United States was an especially important piece of the patented puzzle, that the component was thus a “substantial” piece of the puzzle, and that Life Technologies had thus violated Section 271(f)(1). The Supreme Court reversed, finding that the meaning of the term “substantial” in this context is quantitative, rather than qualitative, in nature, and that the statute “does not cover the supply of a single component of a multicomponent invention.”⁹³

RELIGION

In one of its most widely anticipated rulings of the Term, the Court held in *Trinity Lutheran Church of Columbia, Inc. v. Comer*⁹⁴ that Missouri could not categorically exclude a church-run daycare from competing for a state grant to resurface its playground. Through Missouri’s Scrap Tire Program, the state offered a limited number of grants to help organizations resurface their playgrounds with material made from recycled tires. In an effort to comply with its strong constitutional commitment to the separation of church and state, however, Missouri disqualified all churches and other religious organizations—including the Trinity Lutheran Church and its daycare—from competing for one of the grants. Defending that disqualification, the state relied heavily upon the Court’s 2004 ruling in *Locke v. Davey*,⁹⁵ in which the Court ruled that the State of Washington could refuse to provide scholarship funds to a student pursuing a degree in devotional theology.

In an opinion authored by Chief Justice Roberts, the Court ruled that Missouri’s categorical exclusion violated Trinity Lutheran’s rights under the First Amendment’s Free Exercise Clause. In *Locke*, Chief Justice Roberts explained, the student “was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry.”⁹⁶ Trinity Lutheran, however, had been denied the opportunity to compete for a grant “because of what it is—a church.”⁹⁷ In this important respect, the Court found, Trinity Lutheran had suffered the same status-based injury that had been declared unconstitutional in 1978’s *McDaniel v. Paty*.⁹⁸ In that case, the Court struck down a Tennessee law that categorically barred ministers from serving as delegates to the state’s constitutional convention.

In a footnote about which we undoubtedly will hear more in the future, Chief Justice Roberts stated that “[t]his case involves express discrimination based on religious identity

86. *Impression Products*, 137 S. Ct. at 1530.

87. *Id.* at 1531 (quoting *United States v. Univis Lens Co.*, 316 U.S. 241, 250 (1942) (emphasis omitted)).

88. 137 S. Ct. 429 (2016).

89. 35 U.S.C. § 289.

90. *Samsung Electronics Co.*, 137 S. Ct. at 436.

91. 137 S. Ct. 734 (2017).

92. 35 U.S.C. § 271(f)(1).

93. *Life Technologies*, 137 S. Ct. at 743.

94. 137 S. Ct. 2012.

95. 540 U.S. 712 (2004).

96. *Trinity Lutheran*, 137 S. Ct. at 2023.

97. *Id.*

98. 435 U.S. 618 (1978).

with respect to playground resurfacing,” and that the Court was not “address[ing] religious uses of funding or other forms of discrimination.”⁹⁹ Joined by Justice Thomas, Justice Gorsuch refused to join that footnote (thereby reducing it to the status of a plurality opinion), because it could provide a basis for greatly restricting the precedential reach of the Court’s opinion. Joined by Justice Gorsuch, Justice Thomas wrote separately to express dissatisfaction with the Court’s prior ruling in *Locke*—dissatisfaction that animated portions of Justice Gorsuch’s separate opinion, as well.

Justice Breyer concurred in the judgment, arguing that, just as the Free Exercise Clause would not permit a state to deny policy and fire protection to a church, so too it bars a state from excluding churches “from participation in a general program designed to secure or to improve the health and safety of children.”¹⁰⁰ Justice Ginsburg joined Justice Sotomayor in dissent, arguing that the Establishment Clause does not permit Missouri to provide direct funding to Trinity Lutheran (just as it would not permit the state to pay for repairs to the church’s walls or pews), and that the Court’s ruling on the Free Exercise Clause was faithful neither to *Locke* nor to much of the nation’s legal history.

SOVEREIGN IMMUNITY

The Court resolved two issues in memorably named *Lewis v. Clarke*,¹⁰¹ one concerning the scope of tribal sovereign immunity and the other concerning the doctrine of sovereign immunity more generally. The issues arose from a simple set of allegations. Brian and Michelle Lewis claimed that, while driving on Interstate 95 in Connecticut, they were rear-ended by William Clarke, an employee of the Mohegan Tribal Gaming Authority who was driving customers of the Mohegan Sun Casino to their homes. When the Lewises sued Clarke in his individual capacity in a Connecticut state court, Clarke argued he was protected by tribal sovereign immunity. He offered two rationales for invoking that defense: he was acting within the scope of his tribal duties at the time of the accident, and the Mohegan Tribe had statutorily agreed to indemnify tribal gaming employees for losses they suffered as a result of their negligent on-the-job conduct. The Connecticut Supreme Court embraced the first rationale, but the U.S. Supreme Court rejected both.

Writing for the Court,¹⁰² Justice Sotomayor first determined that there was no reason to extend the sovereign-immunity defense to tribal employees under circumstances in which the defense would not extend to state and federal employees. Under well-settled principles, Justice Sotomayor explained, the availability of sovereign immunity as a defense turns in large part on whether a governmental employee has been sued in his or her official or individual capacity. Suits against employees in their official capacities are really suits against their sovereign

employers, and so sovereign immunity is in play. When an employee has been sued in his or her personal capacity, however, it is the employee—and not the employer—that is the real party in interest.

Justice Sotomayor next observed that this case presented the Court with its first opportunity “to decide whether an indemnification clause is sufficient to extend a sovereign immunity defense to a suit against an employee in his individual capacity.”¹⁰³ The Court made short work of that question, answering it in the negative. “The critical inquiry,” Justice Sotomayor wrote, “is who may be legally bound by the court’s adverse judgment, not who will ultimately pick up the tab.”¹⁰⁴ In an individual-capacity lawsuit, a court’s judgment binds the employee, not the sovereign employer—and that remains true even when the sovereign has volunteered to make its employees whole for losses they suffer as a result of negligently carrying out their job duties.

Those awaiting a major ruling concerning the intersection of the Internet and the First Amendment’s Speech Clause got at least part of what they wanted in *Packingham v. North Carolina*.

SPEECH

Those awaiting a major ruling concerning the intersection of the Internet and the First Amendment’s Speech Clause got at least part of what they wanted in *Packingham v. North Carolina*.¹⁰⁵ Lester Packingham had posted a statement on Facebook, thanking God that a court dismissed his traffic ticket. The problem? As a convicted sex offender, Packingham was barred by North Carolina law from accessing social networking sites like Facebook, Twitter, and LinkedIn (and possibly also sites like Amazon, Washingtonpost.com, and WebMD). In an opinion joined by the Court’s Democratic appointees, Justice Kennedy observed that cyberspace had joined streets and parks as a key place where Americans routinely go to inquire, speak, listen, learn, and protest. Turning to the intermediate scrutiny appropriate for content-neutral speech regulations, the Court found that the law burdened substantially more speech than was necessary to achieve its goal of protecting children from sexual abuse. The statute’s prohibition was “unprecedented in the scope of First Amendment speech it burdens,” Justice Kennedy wrote, and “no case or holding of this Court has approved of a statute as broad in its reach.”¹⁰⁶

Joined by Chief Justice Roberts and Justice Thomas, Justice Alito concurred in the judgment. Because North Carolina’s law “precludes access to a large number of websites that are most unlikely to facilitate the commission of a sex crime against a child,”¹⁰⁷ Justice Alito agreed that the statute burdened sub-

99. *Trinity Lutheran*, 137 S. Ct. at 2024 n.3.

100. *Id.* at 2027 (Breyer, J., concurring in the judgment).

101. 137 S. Ct. 1285 (2017).

102. Justices Ginsburg and Thomas separately concurred in the judgment.

103. *Id.* at 1293.

104. *Id.* at 1293-94.

105. 137 S. Ct. 1730 (2017).

106. *Id.* at 1737.

107. *Id.* at 1741 (Alito, J., concurring in the judgment).

In *Murr v. Wisconsin*, the Court confronted a potentially tricky question that sometimes arises when trying to determine whether a regulatory taking has occurred

stantially more speech than necessary. He declined to join the majority's opinion, however, because Justice Kennedy had appeared to equate the Internet with streets and parks. There are differences between the Internet and physical spaces, Justice Alito observed: parents can monitor their children's physical locations and in-person contacts more easily than they can monitor their kids' Internet traffic, for example, and criminals can cloak themselves in anonymity more

easily online than they can in person. For Justice Alito, those differences suggested that the Court should proceed cautiously before appearing to indicate that the First Amendment restricts states' ability to regulate speech on the Internet just as vigorously as it restricts their ability to regulate speech in traditional public forums. Justice Kennedy agreed that caution was appropriate, but for him that caution ran largely in the opposite direction: he worried that the Court would be too slow to acknowledge all of the speech-facilitating implications of the Internet revolution.

Packingham was not the Court's only noteworthy decision concerning the freedom of speech this year. In its sole affirmation of the Federal Circuit this Term, the Court agreed with that court's finding that a federal statute strayed into unconstitutional territory when it authorized the government to withhold a trademark on the ground that it may "disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute."¹⁰⁸ In *Matal v. Tam*,¹⁰⁹ the Patent and Trademark Office had relied upon that statute when refusing to register "The Slants" as an Asian band's trademark. The Federal Circuit found the statutory provision facially unconstitutional, and—led in part by Justice Alito—the Supreme Court agreed. In a portion of the opinion joined by all eight of the participating justices, Justice Alito began by eviscerating the government's suggestion that registered trademarks are government speech and thus beyond the reach of First Amendment limitations. In a passage attracting only a plurality, Justice Alito then found that, even if the case was governed by the somewhat more relaxed scrutiny appropriate for regulations of commercial speech—a question the plurality found unnecessary to resolve—the statutory language here was plainly unconstitutional. The First Amendment does not permit the government to restrict speech merely on the ground that it will offend or demean people on the basis of their race, ethnicity, sex, or other trait. Joined by Justices Ginsburg, Sotomayor, and Kagan, Justice Kennedy concurred in part and concurred in the judgment, finding that the statute impermissibly discriminated based upon viewpoint.

TAKINGS

In *Murr v. Wisconsin*,¹¹⁰ the Court confronted a potentially tricky question that sometimes arises when trying to determine whether a regulatory taking has occurred: When evaluating the extent to which government regulation has reduced the value of an owner's property, what is the unit of property on which that analysis should focus? The facts in *Murr* illustrate the problem. In successive years, siblings in the Murr family together acquired two adjacent parcels of land in Wisconsin. To help pay for improvements on one of the lots, the siblings wished to sell the other. A Wisconsin regulation stated, however, that when adjacent lots were held under common ownership, none of the lots could be separately sold or developed unless it contained at least one acre of land suitable for development. The lot that the siblings wished to sell did not meet that requirement. Did the restriction amount to a compensable taking under the Fifth Amendment? The answer to that question depended largely on how one defined the property at issue: should a court look at the diminution in value of the single lot that the Murrs could not sell (in which case there likely would be a taking), or should a court look instead at the diminution in value of the two lots taken together?

Writing for the majority, and emphasizing that "[a] central dynamic of the Court's regulatory takings jurisprudence . . . is its flexibility,"¹¹¹ Justice Kennedy concluded that what ultimately mattered was the regulation's impact on the value of the two lots taken together. In reaching that conclusion, the majority did not narrowly focus—as Chief Justice Roberts and Justices Thomas and Alito, in dissent, would have had it—on whether Wisconsin law continued to define the two lots as separate parcels of land. Rather, Justice Kennedy concluded that a court should examine numerous factors:

These include the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land. The endeavor should determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts. The inquiry is objective, and the reasonable expectations at issue derive from background customs and the whole of the legal tradition.¹¹²

After examining each of those factors, the Court concluded that it should treat the Murr siblings' two lots as a single parcel of land, and that no compensable taking had occurred.

THE TRUMP ADMINISTRATION'S "TRAVEL BAN"

Laying the groundwork for what will likely be one of its most significant rulings next Term, the Court in *Trump v. International Refugee Assistance Project*¹¹³ agreed to review lower courts' decisions temporarily enjoining enforcement of the Trump Administration's "travel ban." The executive order

108. 15 U.S.C. § 1052(a).

109. 137 S. Ct. 1744 (2017).

110. 137 S. Ct. 1933 (2017).

111. *Id.* at 1943.

112. *Id.* at 1945.

113. 137 S. Ct. 2080 (2017).

being challenged seeks to limit the flow of refugees into the United States and (with case-by-case exceptions) seeks temporarily to bar the entry of nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen. Oral arguments on those matters are slated to be heard early in the Court's October 2017 Term.

Pending its review, the Court partially granted the Government's request to stay enforcement of the lower courts' injunctions. Until the Court says otherwise, the injunctions remain in place only for those who possess a "bona fide relationship with a person or entity in the United States."¹¹⁴ That is, the injunctions are effective only for those who have either "a close familial relationship" with a person in the United States or a formal, documented relationship with an entity in the United States (such as a student's relationship with a university, a worker's relationship with an employer, or a lecturer's relationship with an audience). Joined by Justices Alito and Gorsuch, Justice Thomas concurred in part and dissented in part, arguing that the Court should have stayed the enforcement of the injunctions in their entirety.

OTHER NOTABLE RULINGS

In *McLane Co., Inc. v. Equal Employment Opportunity Commission*,¹¹⁵ the Court determined that "a court of appeals should review a district court's decision to enforce or quash an EEOC subpoena" for abuse of discretion, rather than *de novo*.¹¹⁶

In *Star Athletica, L.L.C. v. Varsity Brands, Inc.*¹¹⁷—a case featuring a copyright dispute between two makers of cheerleader uniforms—the Court held that "a feature of the design of a useful article is eligible for copyright if, when identified and imagined apart from the useful article [as with the decorations on the uniforms at issue here], it would qualify as a pictorial, graphic, or sculptural work either on its own or when fixed in some other tangible medium."¹¹⁸

Resolving a circuit split and a disagreement among the members of the Texas Court of Appeals, the Court determined in *Water Splash, Inc. v. Menon*¹¹⁹ that the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (also known as the Hague Service Convention) does not forbid the international service of process by mail.

In *Kokesh v. SEC*,¹²⁰ the Court resolved another circuit split by unanimously holding that, when the Securities and Exchange Commission orders disgorgement in an enforcement proceeding, it is imposing a "penalty" within the meaning of 28 U.S.C. § 2462, and any such action for disgorgement thus must be brought within the five-year period established by that statutory provision. In a footnote, the Court cautioned readers that it was not stating "an opinion on whether courts possess

authority to order disgorgement in SEC enforcement proceedings," but was instead only addressing the reach of Section 2462's limitations period.¹²¹

In another securities case—*California Public Employees' Retirement System v. ANZ Securities, Inc.*¹²²—the Court ruled that the three-year time bar established by Section 13 of the Securities Act of 1933 is a statute of repose, rather than a statute of limitations, and thus is not subject to equitable tolling on behalf of investors who opt out of a timely filed putative class action but fail to file their own complaints the time bar.

LOOKING AHEAD

At the time of this writing, several politically charged cases are looming especially large for the Court's October 2017 Term: *Trump v. International Refugee Assistance Project*¹²³ and *Trump v. Hawaii*,¹²⁴ on the Trump Administration's "travel ban"; *Gill v. Whitford*,¹²⁵ on partisan gerrymandering; and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,¹²⁶ on the scope of a baker's religious freedom to refuse to make wedding cakes for same-sex couples. There will, of course, be a host of others, on issues ranging from whether Iranian property on loan to the University of Chicago can be seized to satisfy a judgment against Iran arising out of a 1997 bombing in Jerusalem,¹²⁷ to whether Congress may bar the states from repealing their bans on sports gambling.¹²⁸



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114. *Id.* at 2008.

115. 137 S. Ct. 1159 (2017).

116. *Id.* at 1164.

117. 137 S. Ct. 1002 (2017).

118. *Id.* at 1012.

119. 137 S. Ct. 1504 (2017).

120. 137 S. Ct. 1635 (2017).

121. *Id.* at 1642 n.3.

122. 137 S. Ct. 2042 (2017).

123. No. 16-1436.

124. No. 16-1540.

125. No. 16-1161.

126. No. 16-111.

127. *Rubin v. Islamic Republic of Iran*, No. 16-534.

128. *Christie v. NCAA*, No. 16-476; *New Jersey Thoroughbred Horsemen's Association, Inc. v. NCAA*, No. 16-477.

Tort Law and Commonsense Justice: Convergence and Divergence

Jennifer K. Robbennolt & Valerie P. Hans

Most judges, by necessity, work case by case, addressing only the legal questions that must be decided to handle that case. For many, there's little opportunity to reflect on how the law may change over time—either about how and why those changes may occur or about whether such changes are for the better. In this article, we analyze the links between tort law and legal practice on the one hand and psychological notions of justice on the other. We explore situations in which commonsense notions of justice have converged with legal doctrine and legal practice in tort cases, creating changes in tort law, as well as circumstances in which tort law and legal practice have diverged from commonsense justice. We think judges will enjoy having the chance to step back from day-to-day case consideration to reflect on these intriguing patterns in tort law and practice.

In his book on commonsense justice and law, Norman Finkel described a dispute at his university that arose each spring. The grounds crew carefully maintained walking paths in a grassy quad, but students ignored those paths and created their own, romping along the once-beautiful grass until bare earth began to show. The grounds crew reseeded, placing “Keep Off” signs around the tender area. But the signs were routinely ignored, and the new grass failed to thrive. Finally, the grounds crew laid new sod on the bare earth just in time for late spring graduation. The following spring, the cycle repeated. Eventually, the grounds crew conformed their paths to the improvised student paths, breaking this perennial cycle. Finkel analogizes this dispute to the challenge raised by divergence between law and commonsense ideas of justice, asking: “Should the law follow the path laid by community sentiment, or should the community follow the path the law has laid?”¹

When it comes to tort law, we see much convergence between the law and community sentiment—places where tort doctrine and psychological intuition are aligned—with tort law both reflecting and shaping community views of civil justice. Convergence is understandable, even to be expected in many cases. Many societal and cultural expectations, values, and norms are embedded in the form and content of laws. Over time, commonly shared ideas of justice in torts are incorporated into specific legal rules.

However, we also see instances in which law and intuition

diverge. In some cases of divergence, it seems that the differing assumptions of the law and the tendencies of human psychology can quietly coexist. In other cases, the perceived legitimacy of the tort system may be undermined when the law diverges from community sentiment. And in still others, psychological tendencies may run counter to the legitimate purposes of tort law.

CONVERGENCE

At the intersection of psychology and torts, we observe many instances in which the two paths coincide, instances in which psychological intuitions are in accord with the foundational principles and rules of tort law. One example of this pattern is the shift from contributory to comparative negligence in most jurisdictions. The classic 1809 English case of *Butterfield v. Forrester*² ushered in the English regime of contributory negligence, a legal doctrine that was quickly adopted in the United States and proved to have considerable staying power. Many defendants in the nineteenth and early twentieth centuries availed themselves of the defense of the plaintiff's contributory negligence. Proving that the plaintiff was even slightly at fault in causing his or her own injury completely barred recovery. But over time, the wisdom of refusing to hold negligent defendants liable—particularly when their victims were much less at fault than they were—was increasingly questioned. Such an approach was hard to justify on either deterrence or compensation grounds. Juries operating under a contributory negligence regime reportedly practiced, under the table, a rough version of comparative negligence. They were said to reject defense verdicts in favor of reduced awards for negligent plaintiffs who contributed to their own injuries.

Eventually, the contributory negligence regime's complete bar to recovery fell out of favor. In most U.S. jurisdictions, it was replaced with comparative negligence, an alternative that reduces rather than bars recovery. When the negligence of both the plaintiff and the defendant constitute legal causes of an injury, lay observers favor responsibility and damages that are proportionate to the responsibility of each party. The current laws of most states are now in accord with this commonly held community view of justice.³ Tort law has followed the path laid by the community.

This article draws on material from the authors' book, JENNIFER K. ROBBENNOLT & VALERIE P. HANS, *THE PSYCHOLOGY OF TORT LAW*, published in 2016 by the NYU Press.

Footnotes

1. NORMAN J. FINKEL, *COMMONSENSE JUSTICE: JURORS' NOTIONS OF LAW*

1 (1995).

2. *Butterfield v. Forrester*, 11 East. 60, 103 Eng. Rep. 926 (K.B. 1809).

3. Eli K. Best & John J. Donohue III, *Jury Nullification in Modified Comparative Negligence Regimes*, 79 U. CHI. L. REV. 945 (2012).

Another example of the convergence between tort law and psychological intuition comes from the rules of causation. Consider the classic case of *Kingston v. Chicago & N.W. Ry.*, the “twin fires” case, in which two independent fires of roughly equal size combined into a single fire and destroyed the plaintiff’s property.⁴ What makes such cases interesting is that they cause problems for the standard rule for causation in tort law, the “but-for” rule of causation. The difficulty lies in the fact that even if only one of the fires had occurred, the plaintiff’s property would still have been destroyed. Nevertheless, when asked to evaluate causation in such cases of multiple sufficient causation, people still tend to attribute causation to each of the two causes (the fires). Or consider another situation involving multiple sufficient causes in which two snipers simultaneously fire at a victim, both shots hit their mark at the same time, and either shot would have been sufficient to cause death. In such a case, people tend to classify both snipers as causal, even though a straightforward counterfactual analysis would indicate that neither shooter is a but-for cause.⁵

This lay intuition is consistent with an exception to the but-for rule of causation, as embodied in the *Restatement (Third) of Torts*, which provides that “[i]f multiple acts occur, each of which . . . alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm.”⁶ The commentary to the *Restatement* affirms this intuitive connection:

Perhaps [the] most significant [justification for this exception] is the recognition that, while the but-for standard . . . is a helpful method for identifying causes, it is not the exclusive means for determining a factual cause. Multiple sufficient causes are also factual causes because we recognize them as such in our common understanding of causation, even if the but-for standard does not. Thus, the standard for causation in this Section comports with deep-seated intuitions about causation and fairness in attributing responsibility.⁷

Thus, both the shift from contributory to comparative negligence and the exceptions to but-for causation are consistent with lay intuitions about causation.

DIVERGENCE

Yet in other instances, we see divergent paths, places in which psychological predispositions are at odds with tort-law principles. To continue an earlier example, although comparative responsibility accords with current societal norms, some states continue to employ contributory negligence regimes. In

four states and the District of Columbia the plaintiff’s contributory negligence remains a complete barrier to recovery.⁸ But strict adherence to the legal regime of contributory negligence and its vestiges in modified forms of comparative negligence can produce results at odds with commonsense justice. These instances may lead fact finders to engage in motivated reasoning about the evidence to arrive at a just result in the case.

Consider an experiment that presented a product-design-defect lawsuit to mock jurors. The case included evidence of defective design, as well as testimony that supported an inference of plaintiff fault. One group of mock jurors was given comparative negligence instructions, and asked to assess the relative responsibility of the defendant and the plaintiff. Other jurors were instructed to decide the case under contributory negligence rules. Only 8 percent of those who received the comparative negligence instructions concluded that the plaintiff was not at all responsible. In contrast, 24 percent of those deciding under contributory-negligence instructions found that the plaintiff was not at all at fault, a finding that permitted recovery.⁹ In short, the jurors generously interpreted the facts in the case to allow them to reach what they considered to be a just result.

This experimental study is consistent with analyses of outcomes in real-world civil jury trials. Eli Best and John Donohue examined two large national samples of civil jury trials from 2001 and 2005, focusing on those cases in which the jury attributed a percentage of negligence to the plaintiff.¹⁰ In pure comparative-negligence jurisdictions, where partial recovery was permitted even when plaintiff fault was greater than 50 percent, juries found that plaintiff responsibility exceeded 50 percent in 22 percent of the cases. In modified comparative-negligence jurisdictions, where plaintiff recovery would be barred if juries found that plaintiff responsibility exceeded a threshold around 50 percent, relatively few juries (7.5 percent) found the plaintiff’s responsibility to be above 50 percent. Compared to their counterparts deciding cases in pure comparative-negligence jurisdictions, the juries in modified comparative-negligence jurisdictions found lower levels of plaintiff responsibility (particularly in the 40–49 percent range, and at exactly 50 percent), ensuring that plaintiffs would receive some compensation for their injuries.¹¹

[T]he jurors generously interpreted the facts in the case to allow them to reach what they considered to be a just result.

4. See *Kingston v. Chicago & N.W. Ry.*, 211 N.W. 913 (Wis. 1927).
 5. Barbara A. Spellman & Alexandra Kincannon, *The Relation between Counterfactual (“But For”) and Causal Reasoning: Experimental Findings and Implications for Jurors’ Decisions*, 64 *LAW & CONTEMP. PROBS.* 241 (2001).
 6. *RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM* § 27 (2010).
 7. *Id.* at cmt. c.
 8. Alabama, Maryland, North Carolina, Virginia, and the District of Columbia still employ contributory negligence. Peter Nash

Swisher, *Virginia Should Abolish the Archaic Tort Defense of Contributory Negligence and Adopt a Comparative Negligence Defense in Its Place*, 46 *U. RICH. L. REV.* 359, 360 n.8 (2011).
 9. Kristin L. Sommer, Irwin A. Horowitz and Martin J. Bourgeois, *When Juries Fail to Comply with the Law: Biased Evidence Processing in Individual and Group Decision Making*, 27 *PERSONALITY & SOC. PSYCHOL. BULL.* 309 (2001).
 10. Best & Donohue, *supra* note 3.
 11. *Id.* at 976.

[T]he plaintiff's comparative negligence can work to reduce the plaintiff's recovery beyond that contemplated by the law.

These studies suggest that fact finders are motivated to perceive, construe, and discuss plaintiff responsibility in a way that allows recovery when they believe that recovery would be just. Courts are sometimes sensitive to this tendency. Consider, for example, a decision by the Tennessee Supreme Court in which the court adopted a modified form of the comparative negligence rule

that bars the plaintiff's recovery if the plaintiff is found to be 50 percent or more responsible. The court hesitated to credit a jury's 50–50 split of the responsibility to the plaintiff and the defendant because the jury made the allocation without having been instructed about the consequences of that allocation.¹² The rules of contributory negligence and modified comparative negligence, therefore, cause problems for the justice intuitions of fact finders and may motivate them to find workarounds that allow them to fulfill their concepts of justice.

Another related instance in which the law and lay intuition are at odds is in the calculation of damage awards in comparative-negligence cases. The processes by which we ask jurors and judges to make and report their comparative decisions and to calculate final damage awards do not appear to comport with the psychological tendencies of fact finders, ultimately inviting what has come to be known as “double discounting.”

Consider what we ask fact finders to do when defendants raise the plaintiff's fault as a defense. Fact finders must first determine whether the plaintiff has met the burden of proving that the defendant acted negligently and that such negligence was a legal cause of the plaintiff's injury. Then, they must determine whether the defendant has met the burden of proving that the plaintiff acted negligently and that this negligence was a legal cause of the injury. Next, fact finders must determine the percentages of responsibility that ought to be assigned to the defendant and to the plaintiff. Separately, they must calculate the total amount of damages suffered by the plaintiff without regard to this division of responsibility. The final step is the reduction of the total damage award by the percentage of plaintiff responsibility. In many jurisdictions, if the fact finder is a jury, this final task is done by the court.

As we described above, fact finders may be motivated to ensure some recovery to a plaintiff injured by a defendant's negligence, even when the plaintiff has also been negligent. At the same time, however, the plaintiff's comparative negligence can work to reduce the plaintiff's recovery beyond that contemplated by the law.

Neal Feigenson, Jaihyun Park, and Peter Salovey conducted a mock juror experiment using comparative negligence cases, and found participants appeared to attribute more fault to plaintiffs than was justified by the scenario facts.¹³ Mock jurors read about the actions of both the defendant and the plaintiff as well as the severity of the plaintiff's injury in four accident scenarios. Participants answered a series of questions about the plaintiff and the defendant, and attributed percentages of fault to both the plaintiff and the defendant. They were then asked to give two damage awards—a gross damage award that represented the total damage associated with the injury and an adjusted damage award that discounted the award to account for plaintiff fault. In an actual jury trial, this adjustment for plaintiff fault is typically done by the judge once the jury's damage award is submitted.

As expected, high plaintiff responsibility led to a higher apportionment of fault to the plaintiff. The damage awards, however, showed a striking pattern. Recall that from a legal perspective, the initial, unadjusted damage award should not reflect a discount for plaintiff responsibility, but should represent the full cost of the plaintiff's injuries. The adjustment takes place afterwards, when the percentage of plaintiff fault is taken into account and a proportionate amount is deducted from the full compensatory award number to arrive at the adjusted award. What Feigenson and his colleagues discovered, however, was that the initial, *unadjusted* damage awards were significantly lower in the conditions in which the plaintiff was described as also blameworthy. The award to the plaintiff, therefore, was discounted twice—once when jurors made their initial valuation of the plaintiff's total damages and again when those damages were reduced to take account of the plaintiff's responsibility.

Researchers have also found evidence of double discounting in patterns of real-world torts. In a study of automobile-accident cases, researchers found that initial damage assessments were systematically lower in cases with partially negligent plaintiffs, declining “almost in proportion to the plaintiff's negligence.”¹⁴ The researchers concluded that “awards to negligent plaintiffs are double discounted—the jury reports smaller (gross) damages, which the court (or jury) further discounts in accordance with the plaintiff's negligence.”¹⁵

Psychologically, it is not surprising that participants would reduce an award to take into account the plaintiff's responsibility for his or her own injury. A holistic perspective that takes relative responsibility into account is part of why comparative negligence seems fair to many observers. And we have already seen the holistic approach that was said to be practiced by juries who decided cases under regimes of contributory negligence, with juries adjusting plaintiff responsibility and awards downward rather than eliminating the pos-

12. *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992).

13. Neal Feigenson, Jaihyun Park & Peter Salovey, *Effect of Blame-worthiness and Outcome Severity on Attributions of Responsibility and Damage Awards in Comparative Negligence Cases*, 21 *LAW & HUM. BEHAV.* 597 (1997). For another demonstration of double discounting of plaintiff fault, see Douglas J. Zickafoose & Brian H. Bornstein, *Double Discounting: The Effects of Comparative Negli-*

gence on Mock Juror Decision Making, 23 *LAW & HUM. BEHAV.* 577 (1999).

14. James K. Hammitt, Stephen J. Carroll & Daniel A. Relles, *Tort Standards and Jury Decisions*, 14 *J. LEGAL STUD.* 751, 756–58 (1985).

15. *Id.* at 757.

sibility of any recovery for negligent plaintiffs.

It is reasonable to expect to find that the parties' relative responsibility contributes to the jurors' underlying sense of deserved damages.¹⁶ However, the structure imposed on the fact finders' decision making in comparative-negligence cases results in double discounting. An initial reduction occurs implicitly as fact finders calculate the total gross-damage-award amount, and a second reduction occurs when the percentage of plaintiff responsibility is used to adjust the award amount. In effect, the plaintiff is penalized twice for the same negligent behavior.

How might judges manage the problem of double discounting? Maine has adopted an interesting approach to the problem of double discounting. In Maine, the judge instructs the jury to return both an assessment of the total damages and an adjusted damages figure. The judge informs the jury that it should "reduce the total damages by dollars and cents, and not by percentage, to the extent deemed just and equitable, having regard to the claimant's share in the responsibility for the damages."¹⁷ The judge reminds the jury that the lower figure will be the final verdict. It would be interesting to study whether Maine's approach to comparative negligence is an effective way to address the possibility of double discounting.

Divergence can also be seen in other areas. Imagine, for example, a case alleging that a doctor was negligent in failing to identify the presence of a cancerous tumor in a patient's X-ray. A recent scan clearly shows the tumor, and the patient alleges that the doctor should have detected it in the earlier X-ray as well. Had the cancer been detected earlier, the patient's prognosis would have been much better. The difficulty for the fact finder (and for any medical experts called to testify) is that the assessment of the earlier X-ray is inevitably conducted with the knowledge now possessed—the fact that we now know about the tumor.¹⁸

But legal determinations of whether particular conduct is reasonable are supposed to be made from an *ex ante* perspective, judging the reasonableness of the conduct *before* the consequences of the chosen action were known. As Prosser and Keeton note,

The actor's conduct must be judged in the light of the possibilities apparent to him at the time, and not by looking backward "with the wisdom born of the event." The standard is one of conduct, rather than of conse-

quences. It is not enough that everyone can see now that the risk was great, if it was not apparent when the conduct occurred.¹⁹

Research in psychology, however, has demonstrated that people have difficulty taking a forward-looking perspective when making judgments in hindsight. The *hindsight bias* makes it difficult to figure out what predictions one would have made in foresight.²⁰ When outcome information is known, other information about the event can be reconstrued in light of that outcome, creating an integrated picture of the event and its outcome that is hard to disentangle and leading to a feeling that one "knew it all along." Of particular importance for tort law, people "not only tend to view what has happened as having been inevitable, but also to view it as having appeared 'relatively inevitable' *before* it happened. People believe that others should have been able to anticipate events much better than was actually the case."²¹

A related phenomenon, the *outcome bias*, occurs when people judge the quality of a decision based on its outcome. That is, decisions resulting in negative consequences are judged to have been bad decisions.²² Thus, for example, people tend to judge the quality of the same medical decision more favorably when the treatment turns out to be successful than when it does not.²³

Hindsight biases have implications for the types of judgments and decisions required of experts and fact finders in tort cases, as they will typically know that harm has in fact occurred. Hindsight and outcome biases are likely to affect judgments about the range of risks that were foreseeable, whether a particular risk was foreseeable, the likelihood that a particular risk would materialize, and estimates of the likely severity of harm. In the aftermath of an injury, the risk of loss is likely to seem significant and any precautions taken are likely to seem less reasonable.

Experimental studies that have explored the hindsight bias in the context of tort litigation support these predictions. Susan LaBine and Gary LaBine, for example, compared judg-

Research in psychology . . . has demonstrated that people have difficulty taking a forward-looking perspective when making judgments in hindsight.

16. Valerie P. Hans & Valerie F. Reyna, *To Dollars from Sense: Qualitative to Quantitative Translation in Jury Damage Awards*, 8 J. EMPIRICAL LEGAL STUD. 120 (2011).

17. ME. REV. STAT. ANN. TIT. 14, § 156.

18. Example adapted from Neal J. Roese & Kathleen D. Vohs, *Hindsight Bias*, 7 PERSPECTIVES ON PSYCHOL. SCI. 411 (2012).

19. W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 31 (5th ed. 1984).

20. For reviews of the research demonstrating the hindsight bias, see Jay J. Christensen-Szalanski & Cynthia Fobian Willham, *The Hindsight Bias: A Meta-Analysis*, 48 ORG. BEHAV. & HUM. DECISION PROCESSES 147 (1991); Rebecca L. Guilbault, Fred Bryant, Jennifer

Howard Brockway & Emil Posavac, *A Meta-Analysis of Research on Hindsight Bias*, 26 BASIC & APPLIED SOC. PSYCHOL. 103 (2004); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998).

21. Baruch Fischhoff, *Debiasing*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 422, 428 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982) (emphasis added).

22. See Jonathan Baron & John C. Hershey, *Outcome Bias in Decision Evaluation*, 54 J. PERSONALITY & SOC. PSYCHOL. 569, 570 (1988); Philip J. Mazzocco, Mark D. Alicke & Theresa L. Davis, *On the Robustness of Outcome Bias*, 26 BASIC & APPLIED SOC. PSYCHOL. 131 (2004).

23. See, e.g., Baron & Hershey, *supra* note 22, at 571–72.

The hindsight bias has proven to be difficult to overcome in the legal context.

ments about therapists' assessments of patient dangerousness in foresight and hindsight. When mock jurors were told that the patient became violent, they rated the actions taken by the therapist as being less reasonable, were more likely to believe that the therapist

should have done more, thought that the violence was more foreseeable, and were more likely to believe that they would have predicted violence themselves than did mock jurors who did not have this hindsight information. Ultimately, mock jurors were more likely to find that the therapist was negligent when they were told that a violent outcome had occurred (24 percent) than when no violence resulted (6 percent) or when the outcome was not specified (9 percent).²⁴

A similar study compared judges' evaluation of a physician's decision to grant a resident of a psychiatric ward permission to leave the facility for three hours. The resident then escaped and caused significant harm. Judges who were told of the disastrous consequences thought that it was more foreseeable that harm would occur than did judges who assessed the foreseeability of harm in foresight. In addition, only 12 percent of judges judging in foresight believed that the physician's decision was negligent, while 30 percent of those judging in hindsight indicated that they believed that the physician's decision was negligent.²⁵

The hindsight bias has proven to be difficult to overcome in the legal context. Therefore, some scholars have suggested bifurcating trials or otherwise structuring proceedings so that fact finders do not know the specific consequences of the decision or conduct at issue, using a clear and convincing standard for determining negligence, increasing reliance on strict liability or the regulatory system, or allowing for increased deference to industry standards and practice guidelines.²⁶

Others are more optimistic, noting aspects of the current system that may work to minimize or offset hindsight bias.²⁷ The most effective debiasing technique—considering alternatives to the outcome that occurred—is inherent in an adversarial system in which the other side often proposes an alter-

native scenario for fact finders to consider. Other tort system features that may help are the existing reliance on deviation from custom as evidence of negligence and the availability of comparative-negligence rules. In addition, the hindsight effect may be smaller in the kinds of situations that result in tort lawsuits. Negative outcomes, real-world events, and tasks that require subjective assessments of the probability of risk tend to produce weaker hindsight effects.²⁸ Given that tort lawsuits tend to involve real-world case scenarios that have resulted in negative outcomes, that opposing sides present alternative conceptualizations of the case, and that fact finders are not required to provide numerical probability estimates, we might expect attenuated hindsight effects in evaluations of legal cases.

SUMMARY AND CONCLUSIONS

We have described a number of instances in which the links between tort law and practice have converged with lay intuitions of justice, and others in which they have diverged. Convergence helps to explain the direction of shifts in tort law doctrine, where community sentiment helps to shape, and in turn is shaped by, tort law.

But when paths diverge, when public views and tort law do not coincide, the legitimacy of the tort system may suffer as a result. The legitimacy of the legal system, including the rules and practices of tort law, depends a great deal on public acceptance. To the extent that the law departs from deeply held intuitions, tort law risks being perceived as illegitimate. Tom Tyler has empirically examined the consequences of public support or lack of support for legal authorities and the legal system, investigating why people obey the law.²⁹ Many of us might assume that people obey the law because of the criminal punishments or civil consequences that come from violating it. Indeed, this is the crux of the deterrence argument in tort law: We establish civil sanctions to attempt to shape conduct in desirable ways.

Tyler argues, however, that a prime reason that most people obey the law is that they believe in the law's legitimacy. Compliance with the law is linked to its moral credibility. When those in authority enact laws that are out of step with the public's sense of justice and fairness, the authorities and the legal

24. Susan J. LaBine & Gary LaBine, *Determinations of Negligence and the Hindsight Bias*, 20 LAW & HUM. BEHAV. 501 (1996). For another demonstration of hindsight bias on mock jurors, see Kim A. Kamin & Jeffrey J. Rachlinski, *Ex Post ≠ Ex Ante: Determining Liability in Hindsight*, 19 LAW & HUM. BEHAV. 89 (1995) (using a scenario based on *Petition of Kinsman Transit Co.*, 338 F.2d 708 (2d Cir. 1964)).

25. Aileen Oeberst & Ingke Goekenjan, *When Being Wise After the Event Results in Injustice: Evidence for Hindsight Bias in Judges' Negligence Assessments*, 22 PSYCHOL., PUB. POLY, & L. 271 (2016). For other demonstrations of hindsight bias in judges, see Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001); Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477 (2009). *But see* Jeffrey J. Rachlinski, Chris Guthrie, &

Andrew J. Wistrich, *Probable Cause, Probability, & Hindsight*, 8 J. EMPIRICAL LEGAL STUD. 72 (2011) (finding some evidence that hindsight bias influences judges' assessments of the likely outcome of a search, but not their legal judgments of probable cause).

26. For a review, see Jennifer K. Robbennolt & Valerie P. Hans, *THE PSYCHOLOGY OF TORT LAW* (2016).

27. The *Restatement* notes that "if there is such a [hindsight] bias, it is one that the negligence system evidently finds generally acceptable." *RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM* § 3 cmt. g (2010).

28. See Guilbault et al., *supra* note 20.

29. TOM TYLER, *WHY PEOPLE OBEY THE LAW* (1990). *See also* Tom R. Tyler, *Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375 (2006).

system may lose credibility and legitimacy. Declining legitimacy, in turn, reduces a legal system's ability to control conduct. Indeed, the dystopian image of tort law widely promulgated by tort-reform groups may already have led to decline in public perceptions of the tort system's legitimacy.

As we have described, legal decision makers may respond to divergence between their views and the law through creative fact finding and other mechanisms that allow them to achieve what they consider to be justice in a particular case. People may adjust their perceptions of the parties and the evidence so that they align better with their ideas of a fair ultimate outcome. Recall how perceptions of plaintiff fault are modified under contributory fault regimes to permit some recovery for the plaintiff even when strict adherence to the tort law rule would lead to no recovery. In essence, people walk where they want to, creating paths that serve their goals and taking small detours to accommodate the formal letter of the law.

In some instances of divergence, however, taking psychological predispositions and social norms into account might undermine the purposes of tort law. Consider the impact of implicit racial bias, which may lead fact finders to devalue the injuries of racial and ethnic minorities. Here, other important social and political values lead us to insist that the community must walk on the path laid by the law.

Psychologists have begun to study debiasing remedies, testing the effectiveness of techniques aimed at limiting the impact of psychological heuristics and other biases.³⁰ Some hopeful evidence of this is found in research on jury instructions about damages. In general, legal instructions may be admonitions that are akin to "Keep Off" signs, and may have similarly modest effects. But legal instructions to jurors that include reasons and explanations about the purposes of the law can be more effective in helping jurors make decisions that are consistent with the law, even when the law goes against their intuitions.³¹

Ultimately, psychological intuitions and the purposes of tort law will interact to determine the path that tort law takes. At times, convergence between psychology and tort law will fur-

ther the overall purposes of the tort system, deterring tortious conduct and promoting just compensation. In other circumstances, the same policies of deterrence and compensation will be better served by demanding that psychological intuitions be put aside. In either case, understanding the relevant intuitions and the many other ways that psychology influences the real world of tort law and practice will make it more likely that the tort system will find the best path.



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30. JAMES M. JONES, JOHN F. DOVIDIO & DEBORAH L. VIETZE, *THE PSYCHOLOGY OF DIVERSITY: BEYOND PREJUDICE AND RACISM* (2014).

31. See, e.g., Roselle L. Wissler, Katie A. Rector & Michael J. Saks, *The Impact of Jury Instructions on the Fusion of Liability and Compensatory Damages*, 25 *LAW & HUM. BEHAV.* 125 (2001).

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Risk Assessment for Future Offending:

The Value and Limits of Expert Evidence at Sentencing

Kirk Heilbrun, Jaymes Fairfax-Columbo, Suraji Wagage & Leah Brogan

The question of a criminal defendant's risk for future offending may be of interest to courts in a variety of contexts. Courts may request or consider information from forensic mental health professionals regarding risk assessment, which is the formal appraisal of the probability that an offender will reoffend or commit particular acts of violence in the future.¹ Risk assessment is relevant in criminal contexts such as capital sentencing, criminal responsibility, and commitment of sexually violent predators; it also arises in civil contexts including civil commitment, workplace disability, child custody, and child protection.² In some instances, risk assessment also may be done in cases involving risk of harm to identifiable third parties.³ Despite its growing use in the United States legal system in recent years, violence risk assessment has historically come under critical scrutiny in U.S. courts. Such concern about the practice of risk assessment and its evidentiary value is appropriate, considering the consequences that can be associated with a conclusion that an individual is high risk. Such consequences might include, *inter alia*, longer sentences or lost custody of a child.⁴

However, it is important that concerns about risk assessment be accurate and current with respect to the supporting science. As evidentiary gatekeepers, whether acting in accordance with *Daubert* or *Frye* admissibility standards, the court must be aware of the foundational scientific base of risk assessment, and whether the practice is generally accepted in the field. Other criticisms, however, may no longer be accurate, if they ever were. The predictive accuracy of violence risk assessment has been improved considerably through theoretical advances, empirical research, and the development of specialized, structured risk-assessment measures over the last 25 years. This Article provides a primer for judges regarding these advances. First, we review some of the historical criticisms of risk assessment, including a recent criticism in a capital context. Second, we discuss an important theoretical advance (the risk-need-responsivity framework) through which forensic

mental health professionals currently conceptualize risk. Third, we review the four most frequently observed approaches to risk assessment: (1) clinical judgment, (2) anamnestic assessment, (3) actuarial prediction, and (4) structured professional judgment (SPJ). Finally, we provide a critical analysis of each of these approaches and offer recommendations for their application in legal contexts.

HISTORICAL CRITICISM OF RISK ASSESSMENT

Historically, risk assessment provided by mental health professionals has been criticized as little better than chance in its accuracy.⁵ Before the mid-1970s, forensic mental health professionals were largely forced to rely on their own judgment, without the assistance of specialized risk-assessment measures, when appraising an individual's level of risk.⁶ A series of studies in the 1970s revealed that mental health professionals who used their own judgment in this way were mistaken in about two-thirds of their predictions identifying those who would commit future violence.⁷ More recent studies showed some modest improvement in accuracy, but still identified errors in nearly half (47%) of the cases in which mental health professionals used their judgment to identify those who would be violent in the future.⁸ The majority of the errors were "false positives"—individuals wrongly predicted to be violent in the future. Mental health professionals were somewhat more accurate in identifying those who would *not* be violent.

This very limited ability of psychiatrists and psychologists to accurately appraise risk of future violence was part of the defendant's argument in the 1983 Supreme Court case *Barefoot v. Estelle*.⁹ Defendant Thomas Barefoot challenged his conviction for capital murder on several grounds, including the argument that testimony by mental health professionals regarding an individual's future dangerousness should be inadmissible at trial.¹⁰ Barefoot argued specifically that psychiatrists "individually, and as a class [were] not competent to predict future dangerousness" and that any sentence predicated on such predictions was so likely to be erroneous that it constituted cruel and unusual punishment in violation of the Eighth Amendment.¹¹

Footnotes

1. Jerrod Brown & Jay P. Singh, *Forensic Risk Assessment: A Beginner's Guide*, 1 ARCHIVES OF FORENSIC PSYCHOL. 49, 49 (2014).
2. KIRK HEILBRUN, EVALUATION FOR RISK OF VIOLENCE IN ADULTS 12 (2009).
3. *Id.*
4. GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 299 (6th ed. 2007).
5. JOHN MONAHAN, PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF

CLINICAL TECHNIQUES (1981).

6. Mairead Dolan & Michael Doyle, *Violence Risk Prediction: Clinical and Actuarial Measures and the Role of the Psychopathy Checklist*, 177 BRITISH J. PSYCH. 303, 303 (2000).
7. MELTON ET AL., *supra* note 4.
8. *Id.*
9. *Barefoot v. Estelle*, 463 U.S. 880 (1983).
10. *Id.* at 884-85.
11. *Id.* at 885.

The defense was supported in this case by an *amicus* brief from the American Psychiatric Association, which observed that psychiatrists had no professional expertise in the prediction of future dangerous behavior, and that such predictions were likely to be inaccurate in a large majority of cases.¹² The Supreme Court, faced with considerable evidence that mental health professionals could not provide consistently accurate testimony regarding defendants' future dangerousness, nevertheless held that barring such testimony would be like "disinventing the wheel," and it should be evaluated for reliability by the jury, not the court.¹³

The Supreme Court's subsequent holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* provided a different perspective on the use of the clinical judgment of mental health professionals in providing expert evidence regarding a defendant's risk of future violent behavior.¹⁴ In *Daubert*, the Court outlined five factors to consider in determining the reliability and subsequent admissibility of scientific evidence: (1) whether the scientific theory at issue had been tested, (2) whether the theory had been subject to peer review and publication, (3) what the error rate for the theory was, (4) whether scientific standards controlling the technique exist, and (5) how much the theory in question has been accepted by the scientific community.¹⁵ Applying these five factors provides a much stronger argument that risk-assessment testimony based only on clinical judgment should be inadmissi-

ble. For example, in *Flores v. Johnson*, though the United States Court of Appeals for the Fifth Circuit decided the case on other grounds, Judge Emilio Garza condemned risk assessment based solely on clinical judgment in his concurrence, opining that the practice failed to satisfy any of the five *Daubert* factors.¹⁶

As will be discussed later in this Article, risk assessment has advanced considerably since the time it was based solely on clinical judgment. It is now possible to identify four distinct approaches to risk assessment in legal contexts: unstructured clinical judgment,¹⁷ actuarial,¹⁸ structured professional judgment,¹⁹ and anamnestic.²⁰

Actuarial risk assessment has been criticized in legal contexts for its failure to account for changing individual circumstances. It also represents the ultimate form of "statistical" evidence—not only individual items, but the scoring and combination of items to yield a conclusion by the measure, not the user—and has been criticized on that basis as well. A recent example of this criticism can be seen in the 2013 Virginia Supreme Court case *Lawlor v. Commonwealth*.²¹ In *Lawlor*, the defendant appealed his conviction for capital murder and subsequent death sentence on multiple grounds, one of which was the trial court's exclusion of certain portions of the testimony of psychologist Dr. Mark Cunningham. The defense proffered Dr. Cunningham's testimony to rebut the Commonwealth's evidence of future dangerousness as an aggravating factor and

12. *Id.* at 889-91.

13. *Id.* at 896-902.

14. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

15. *Id.* at 593-94.

16. *Flores v. Johnson*, 210 F.3d 456, 464-65 (5th Cir. 2000) (Garza, J., concurring). Judge Garza stated:

On the basis of any evidence thus far presented to a court, it appears that the use of psychiatric evidence to predict a murderer's "future dangerousness" fails all five *Daubert* factors. First, "testing" of these theories has never truly been done, as "such predictions often rest . . . on psychiatric categories and intuitive clinical judgments not susceptible to cross-examination and rebuttal." Second, as is clear from a review of the literature in the field, peer review of individual predictions is rare, and peer review of making such predictions in general has been uniformly negative. Third, the rate of error, at a minimum, is fifty percent, meaning such predictions are wrong at least half of the time. Fourth, standards controlling the operation of the technique are nonexistent. Overall, the theory that scientific reliability underlies predictions of future dangerousness has been uniformly rejected by the scientific community absent those individuals who routinely testify to, and profit from, predictions of dangerousness.

Id. (citations omitted).

17. Unstructured clinical judgment is the use of clinical judgment by a mental health professional, without the assistance of specialized risk-assessment measures or specific focus on violence history, to reach an opinion about the likelihood that a defendant will threaten or harm others in the future.

18. A formal method that "uses an equation, a formula, a graph, or an actuarial table to arrive at a probability, or expected value, of some outcome." William M. Grove & Paul E. Meehl, *Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical-Statistical Controversy*, 2 PSYCHOL. PUB. POL'Y & LAW 293, 294 (1996). It uses predictor variables that can be quantified or rated reliably. *Id.* The predictor variables are empirically validated against the outcome that is being predicted. Thus it involves an objective, mechanistic, reproducible combination of predictive factors, selected and validated through empirical research against known outcomes. *Id.*

19. Structured professional judgment uses specified variables usually developed from a review of the relevant research instead of collected specifically for the development of an SPJ measure. These variables are defined so they can be rated reliably. After completing the rating of variables, the SPJ evaluator considers the needs for management, treatment, or supervision as part of the final "structured professional judgment." SPJ typically uses some risk factors that are dynamic (potentially changeable through planned intervention) rather than mostly static (unchanging through planned intervention), as is more usual in actuarial assessment.

20. Anamnestic assessment is used to obtain detailed information about a person's history of violence. The individual is asked about details associated with each prior violent act, such as thoughts, feelings, those involved, the use of drugs or alcohol, the use of weapons, the targeting of victim(s), and other details. MELTON ET AL., *supra* note 4, at 307-08. The goal is to identify recurring risk factors and protective factors rather than to appraise the risk of future violence.

21. *Lawlor v. Commonwealth*, 738 S.E.2d 847 (2013).

as mitigating evidence,²² and the Supreme Court of Virginia held that the trial court did not abuse its discretion in excluding his testimony. The Virginia Supreme Court's rationale was that actuarial or statistical information of the type offered by Dr. Cunningham is not satisfactorily individualized to the defendant's "character, history, and background." In the court's words:

[C]haracteristics alone are not character. Merely extracting a set of objective attributes about the defendant and inserting them into a statistical model created by compiling comparable attributes from others, to attempt to predict the probability of the defendant's future behavior based on others' past behavior does not fulfill the requirement that evidence be "peculiar to the defendant's character, history, and background..." To the contrary, it is mere "statistical speculation."²³

The Court elaborated that "the mere fact that an attribute is shared by others from whom a statistical model has been compiled, and that the statistical model predicts certain behavior,

is neither relevant to the defendant's character nor a foundation for expert opinion."²⁴

Whether based on clinical judgment or specialized actuarial measures, expert testimony on risk assessment has been criticized by legal commentators. But much of this criticism stems from a misunderstanding of the strengths and limitations of various approaches to risk assessment. The next two sections of this Article will address these points.

RISK-NEED-RESPONSIVITY AS A CONCEPTUAL FRAMEWORK FOR RISK ASSESSMENT

The development of the risk-need-responsivity (RNR) framework represents a major conceptual advance in the field of risk assessment. The RNR approach holds that risk-reducing rehabilitation should vary in focus, intensity, and duration depending on an offender's risk and criminogenic needs (deficits that increase the risk of offending).²⁵ It is based on three principles: *risk*, *need*, and *responsivity*.²⁶ The risk principle indicates that the intensity of treatment should vary depending upon the individual's risk level, with high-risk offenders receiving more intensive treatment than lower-risk offenders.²⁷ The need principle directs the focus of interven-

22. The excluded testimony by Dr. Cunningham that the defense hoped to proffer was as follows:

1. Q: What is your expert opinion as to how Mark Lawlor's behavior pattern while [previously] in custody/incarceration, impacts his future prison adaptability?

A: Because of Mark Lawlor's prior adaption in prison and jail, and particularly because of his lack of violent activity in these settings, Mr. Lawlor represents a low likelihood of committing acts of violence while in prison.

2. Q: What is your expert opinion as to how Mark Lawlor's age impacts his future prison adaptability? Does that opinion take into account the fact that Mr. Lawlor committed his current crime at age 43?

A: Because of Mark Lawlor's age of 45 years old, Mr. Lawlor represents a low likelihood of committing acts of violence while in prison. The fact that Mr. Lawlor committed his current offense at age 43 has been taken into account in forming this opinion, but it does not change my opinion about his future prison adaptability.

3. Q: What is your expert opinion as to how Mark Lawlor's education impacts his future prison adaptability? Is this risk factor predictive of violence in the free community as well?

A: The fact that Mr. Lawlor has earned his G.E.D. is predictive of a low likelihood of committing acts of violence while in prison. This risk factor is far more predictive of violent conduct in the prison context than it is in the free community context.

4. Q: What is your expert opinion as to how Mark Lawlor's employment history impacts his future prison adaptability?

A: Mark Lawlor's employment history in the community is predictive that Mr. Lawlor represents a low likelihood of committing acts of violence while in prison.

5. Q: What is your expert opinion as to how Mark Lawlor's continued contact with his family and friends in the community impacts his future prison adaptability?

A: Mark Lawlor's continued contact with these individuals

while in prison, is predictive that Mr. Lawlor represents a low likelihood of committing acts of violence while in prison.

6. Q: What is your expert opinion as to how Mark Lawlor's past correctional appraisal impacts his future prison adaptability?

A: Mark Lawlor's past correctional appraisal is predictive that Mr. Lawlor represents a low likelihood of committing acts of violence while in prison.

7. Q: What is your expert opinion as to how Mark Lawlor's lack of gang affiliation impacts his future prison adaptability?

A: Mark Lawlor's lack of gang affiliation is predictive that Mr. Lawlor represents a low likelihood of committing acts of violence while in prison.

8. Q: Have you reached an opinion, to a reasonable degree of psychological certainty, based on all of the factors relevant to your studies of prison risk assessment, as to what Mark Lawlor's risk level is for committing acts of violence while incarcerated? And if so, what is your opinion?

A: Yes. It is my opinion based on my analysis of all of the relevant risk factors which are specific to Mr. Lawlor's prior history and background, that Mr. Lawlor represents a very low risk for committing acts of violence while incarcerated.

9. Q: Are all of your opinions concerning the above questions and answers about Mr. Lawlor, grounded in scientific research and peer-reviewed scientific literature?

A: Yes.

Id. at 884-85.

23. *Id.* at 884 (citations omitted).

24. *Id.*

25. Leigh Harkins & Anthony R. Beech, *A Review of the Factors that Can Influence the Effectiveness of Sexual Offender Treatment: Risk, Need, Responsivity, and Process Issues*, 12 *AGGRESSION & VIOLENT BEHAV.* 615, 616 (2007).

26. *Id.*

27. *Id.*

tions toward specific criminogenic deficits, which have also been termed dynamic (modifiable through planned intervention) risk factors.²⁸ The responsivity principle indicates that rehabilitative interventions should be tailored to the learning style and ability level of the offender (specific responsivity) and delivered using empirically supported methods (general responsivity); these combine to make intervention more accessible and effective, and promote treatment adherence.²⁹ RNR was originally developed for use in correctional contexts, but it has clear application as well to questions before the court at trial and sentencing.

There are eight key domains associated with risk of future violent offending: (1) history of antisocial behavior, (2) antisocial personality pattern, (3) antisocial cognition, (4) antisocial associates, (5) family and/or marital trust, (6) school and/or work, (7) leisure and/or recreation, and (8) substance abuse.³⁰ Of these, seven are dynamic and thus potentially changeable. When they are modified through a reduction in severity, this tends to reduce that individual's risk. These needs and their indicated interventions are summarized in Table 1. The individual may also experience influences that either reduce the risk from other influences (e.g., a young man with family dysfunction, education problems, and antisocial peers is employed working in a car-parts store by a responsible older man who is also a role model) or increases the likelihood of responsible behavior by itself (e.g., a young man is very gifted

musically, and spends most of his time practicing and performing despite substantial family problems and a history of substance abuse). Such “protective factors” make violence less likely to occur.³¹ Protective factors may be static—for example, high intelligence or having had a secure bond with caretakers as a child.³² They may also be dynamic; examples include coping and problem-solving skills; self-control; strong motivation, and a responsible, supportive social network.³³

By identifying modifiable risk factors for violence, this approach has promoted the development of risk assessment measures that are both empirically testable and possess action implications for risk reduction. Through the provision of substantial structure in risk assessment, moreover, these changes have reduced bias and other sources of inaccuracy in risk assessment by guiding judgments of risk using empirically supported domains. The next section of this Article will describe these newer approaches to risk assessment, as well as review the unstructured clinical judgment and anamnestic approaches to risk assessment, discussing the benefits and detriments to each approach and their effectiveness in accurately predicting an individual's risk of future violence.

CURRENT APPROACHES TO RISK ASSESSMENT: STRENGTHS AND LIMITATIONS

We now turn to a more in-depth description of three approaches to risk assessment: actuarial, structured profes-

TABLE 1: MODIFIABLE RISK FACTORS (CRIMINOGENIC NEEDS)

Criminogenic Need	Description	Intervention
Antisocial personality pattern	Pleasure focused, poor self-control, aggressive	Teach/model problem-solving, anger-management, and coping skills
Antisocial cognition	Holding antisocial attitudes, values, and beliefs, such as being supportive of crime	Promote alternative, prosocial thinking; weaken criminal identity; strengthen responsible identity
Antisocial associates	Association with antisocial others or non-association with prosocial others	Reduce antisocial associations and increase prosocial associations
Family and/or marital problems	Problems with nurturance, caring/monitoring, and supervision	Conflict reduction, relationship building, improvement monitoring
School and/or work	Poor performance, lack of opportunity, or dissatisfaction with education and work	Education, vocational training
Leisure and/or recreation	Excessive leisure time, few antisocial hobbies/pursuits, few organized activities	Increase involvement in prosocial pursuits and organized activities to reduce leisure time
Substance abuse	Problematic use of drugs or alcohol	Substance-abuse treatment and education

28. *Id.*
 29. *Id.*
 30. D. A. Andrews et al., *The Recent Past and Near Future of Risk and/or Need Assessment*, 52 CRIME & DELINQ. 7, 11 (2006).
 31. See Brown & Singh, *supra* note 1, at 50.
 32. Michiel de Vries Robbe & Vivienne de Vogel, *Protective Factors for Violence Risk: Bringing Balance to Risk Assessment and Management*, in MANAGING CLINICAL RISK: A GUIDE TO EFFECTIVE PRACTICE 293, 294-95 (Caroline Logan & Lorraine Johnstone eds., 2012).
 33. *Id.*

sional judgment, and anamnestic. We do not discuss unstructured clinical judgment in detail for several reasons. First, more than 50 years of research indicate that there is a consistent advantage in accuracy in using structured approaches, generally, in conducting risk assessment.³⁴ Unstructured clinical judgment is significantly less accurate than more-structured approaches.³⁵ Second, it is this increased structure—using predetermined questions, risk factors, and protective factors—that has promoted the substantial progress of the last 25 years in risk assessment, so unstructured clinical judgment is no longer necessary or even appropriate as part of risk assessment.³⁶ There does remain a role for clinical judgment as part of psychological evaluations for the courts more broadly, of course, in such tasks as interviewing the evaluatee and collateral observers, interpreting data, and drawing conclusions.³⁷ When risk assessment is conducted as part of such an evaluation, then professional judgment will continue to make an essential contribution to the risk opinion. But there is a great deal of structure guiding the judgment exercised under these circumstances, as it is informed by material that is directly related to the probability of future violence (e.g., risk factors, protective factors). This is similar to “structured professional judgment” or “anamnestic assessment” as they are discussed throughout this article.

VALIDATION OF ACTUARIAL, STRUCTURED PROFESSIONAL JUDGMENT, AND ANAMNESTIC APPROACHES TO RISK ASSESSMENT

This section summarizes evidence from the behavioral science literature on actuarial and structured professional judgment approaches to risk assessment. Although there are no specific studies on anamnestic assessment to review, we describe its foundation and contribution to the process of risk assessment—and why we believe it can play an important part in such risk assessments for the courts. For the reader’s convenience, Table 2 provides an overview of the risk-assessment measures we discuss, along with each measure’s commonly used acronym.

ACTUARIAL APPROACHES. Meta-analysis is an analytic technique that allows the investigator to aggregate the results of multiple studies, creating a more stable estimate of the outcome.³⁸ The scientific literature in the area of risk assessment includes numerous meta-analyses that have been performed since specialized actuarial violence risk-assessment instru-

ments were first developed. One valuable meta-analysis involving research on mentally disordered offenders and outcomes of general offending (any crimes) and violent offending (crimes against persons) found a number of factors that are empirically associated with these outcomes, including historical variables (criminal history, juvenile delinquency, hospital admissions, violence, escape), personality variables (antisocial personality), and substance abuse.³⁹ But it is noteworthy that the strongest predictor of violent recidivism was risk level yielded by objective risk assessment—underscoring the importance of a risk assessment that is structured and actually includes these positive predictors and does not include factors such as offense

TABLE 2: RISK-ASSESSMENT MEASURES CITED IN THIS ARTICLE

ACRONYM	FULL NAME	STRUCTURED PROFESSIONAL JUDGMENT OR ACTUARIAL
HCR-20	Historical, Clinical, Risk Management-20	SPJ
LSI-R	Level of Service Inventory-Revised	Actuarial
LCSF	Lifestyle Criminality Screening Form	Actuarial
PCL	Psychopathy Checklist	Actuarial
PCL-R	Psychopathy Checklist-Revised	Actuarial
PCL:SV	Psychopathy Checklist-Screening Version	Actuarial
SVR-20	Sexual Violence Risk-20	SPJ
SAVRY	Structured Assessment of Violence Risk in Youth	SPJ
Static-99	Static-99	Actuarial
VRAG	Violence Risk Appraisal Guide	Actuarial
YLS/CMI	Youth Level of Service/Case Management Inventory	Actuarial

34. Stefania Aegisdottir et al., *The Meta-Analysis of Clinical Judgment Project: Fifty-Six Years of Accumulated Research on Clinical versus Statistical Prediction*, 34 COUNSEL. PSYCHOLOGIST 341, 341-382 (2006); Seena Fazel et al., *Use of Risk Assessment Instruments to Predict Violence and Antisocial Behavior in 73 Samples Involving 24,827 People: Systematic Review and Meta-Analysis*, 345 BMJ 1 (2012); William M. Grove et al., *Clinical versus Mechanical Prediction: A Meta-Analysis*, 12 PSYCHOL. ASSESSMENT 19, 19-30 (2000).

35. Douglas Mossman, *Assessing Predictions of Violence: Being Accurate about Accuracy*. 62 J. CONSULT. & CLIN. PSYCHOL. 783, 783-792 (1994).

36. There are some cases for which a specialized risk-assessment mea-

sure is not available. In such cases, evaluators can “structure” their risk assessment by using known risk factors for outcome of interest. These risk factors may be derived from the scientific literature, the individual’s history, or both.

37. HEILBRUN, *supra* note 2.

38. For an overview of meta-analysis, see Nancy K. Steblay, *Meta-Analysis as an Aid for Judicial Decision Making*, 52 CT. REV. 120 (2016).

39. James Bonta et al., *The Prediction of Criminal and Violent Recidivism among Mentally Disordered Offenders: A Meta-Analysis*. 123 PSYCHOL. BULL., 123, 123-142 (1998).

seriousness, which is virtually unrelated to the risk of future offending or even violent offending.⁴⁰

The personality construct of psychopathy, characterized by a cluster of interpersonal, affective, and lifestyle characteristics such as callousness, manipulativeness, impulsivity, superficiality, and violating the rights of others,⁴¹ has been robustly associated with violent offending risk for offenders in the community. Most research on psychopathy has used the Psychopathy Checklist (PCL) or the updated Psychopathy Checklist-Revised (PCL-R) to measure it.⁴² However, it is noteworthy that the PCL-R is an “accidental” risk-assessment measure. It was developed to provide a better way of measuring a personality disorder to facilitate research on psychopathy—and turned out to be a strong measure of re-offense risk in the community.

Nevertheless, several meta-analyses provide support for the association between PCL-R score and violence risk in the community. A 1996 meta-analysis of over 50 studies found the PCL-R to perform comparably to an established measure of offense risk and needs (the Level of Service Inventory-Revised, or LSI-R)⁴³ in predicting violent behavior, with each described as strongly associated with general and violent recidivism in the community.⁴⁴ In a subsequent meta-analysis,⁴⁵ the predictive capacity of the PCL-R was compared to that of the Lifestyle Criminality Screening Form⁴⁶ regarding both general and violent criminal recidivism for individuals who were already justice-involved. Both were effective in predicting criminal recidivism, with neither significantly more accurate than the other.

Another meta-analysis addressed the relationship between antisocial behavior (including crime) and the PCL-R.⁴⁷ This meta-analysis included 95 published studies with more than 15,000 participants, creating a broad, stable sample from which to generalize findings.⁴⁸ Both PCL-R Factor 1 (aggregating interpersonal characteristics such as callousness, deceptiveness, and superficial charm) and Factor 2 (combining behavioral and historical attributes such as early conduct problems, versatility in offense history, and the like) were significantly associated with recidivism risk, and Factor 2 was the stronger predictor.⁴⁹

Additional meta-analyses show strong results for the ability of other actuarial instruments to accurately provide risk information for both male offenders (for whom it was originally developed) and female offenders.⁵⁰ In a 2009 study reviewing 25 published and unpublished sets of data, the researchers found that the effect sizes (a measure of how much a variable influences an outcome) for females were comparable to those for males, indicating that the LSI-R works comparably well with female offenders.⁵¹ It is always possible, of course, that the development of a risk-assessment measure specific to females would perform even better. However, it also indicates that the LSI-R can currently be applied to women without a substantial loss of accuracy—and suggests that many of the risk factors that are applicable to men are also important with women.

These meta-analytic reviews underscore the substantial body of evidence relevant to the actuarial prediction of violent behavior. Another important piece in this puzzle is apparent

40. There are obviously reasons other than future offense risk to consider offense severity in legal decision making. But offense seriousness is a very poor proxy for future risk, so consideration of such seriousness should be for reasons such as retribution, proportional sentencing, and the like.

41. Robert D. Hare, *Psychopathy as a Risk Factor for Violence*, 70 *PSYCH. Q.* 181, 181 (1999). Other distinctive features of psychopathy include quickness to anger, irresponsibility, dominance orientation, grandiosity, an inability to bond with others, an inability to feel guilt or anxiety, irresponsibility, and arrogance. *Id.*

42. ROBERT D. HARE & HANS VERTOMMEN, *THE HARE PSYCHOPATHY CHECKLIST-REVISED 1* (1991); ROBERT D. HARE, *HARE PCL-R: TECHNICAL MANUAL 1* (2003). Both the PCL and the PCL-R are 20-item measures of psychopathic traits scored on a 0-2 scale. Scores of 0 indicate that the individual does not exhibit the trait; scores of 1 indicate that the individual shows some of the trait across life domains; and scores of 2 indicate that the individual definitely exhibits the trait across life domains. Scores range from 0-40, with higher scores indicating the presence of a greater amount of psychopathic traits.

43. DONALD A. ANDREWS & JAMES BONTA, *THE LEVEL OF SERVICE INVENTORY—REVISED 1* (2000). The LSI-R is an actuarial measure of offender risk, need, and responsivity. It measures these areas consistent with RNR theory, providing guidance for reducing risk most effectively in addition to classifying risk level. The LSI-R uses information obtained from interviewing the offender and reviewing collateral information to rate the offender on 54 items encompassing 10 domains: criminal history, education/employment, financial stability, family/marital status and histories, current accommodations/housing, leisure/recreation activities, companions/associates, current and history of alcohol/drug problems,

emotional functioning/adjustment, and criminal attitudes/orientation. MELTON ET AL., *supra* note 4, at 312. Items are rated on a scale from 0 to 3 where 0 and 1 = 1 and 2 and 3 = 0. Clive Hollin & Emma J. Palmer, *Level of Service Inventory-Revised Profiles of Violent and Nonviolent Prisoners*, 18 *J. INTERPERSONAL VIOLENCE* 1075, 1079 (2003). Higher scores reflect a higher probability of recidivating. The LSI-R demonstrates satisfactory reliability and predictive validity as evidenced in a considerable amount of research. Anthony W. Flores et al., *Predicting Outcome with the Level of Service Inventory-Revised: The Importance of Implementation Integrity*, 34 *J. CRIM. JUST.* 523, 524 (2006).

44. Paul Gendreau et al., *Is the PCL-R Really the “Unparalleled” Measure of Offender Risk? A Lesson in Knowledge Cumulation*, 29 *CRIM. JUST. & BEHAV.* 397, 397-426 (2002).

45. Glenn D. Walters, *Predicting Criminal Justice Outcomes with the Psychopathy Checklist and Lifestyle Criminality Screening Form: A Meta-Analytic Comparison*, 21 *BEHAV. SCI. & L.* 89, 89-102 (2003).

46. Glenn D. Walters et al., *The Lifestyle Criminality Screening Form: Preliminary Data*, 18 *CRIM. JUST. & BEHAV.* 406, 406-418 (1991). The LCSF uses only information from the file to rate an individual's irresponsibility, self-indulgence, interpersonal intrusiveness, and social rule-breaking.

47. Anne-Marie R. Leistico et al., *A Large-Scale Meta-Analysis Relating the Hare Measures of Psychopathy to Antisocial Conduct*, 32 *LAW & HUM. BEHAV.* 28, 28-45 (2008).

48. *Id.*

49. *Id.*

50. Paula Smith et al., *Can 14,737 Women Be Wrong? A Meta-Analysis of the LSI-R and Recidivism for Female Offenders*, 8 *CRIMINOLOGY & PUB. POLY* 1601, 1601-1626 (2009).

51. *Id.*

from the results of the MacArthur Risk Assessment Study.⁵² This study remains the largest and best-designed single research project addressing violence in the community by those who had been treated in psychiatric hospitals and subsequently discharged to the community. These data, along with additional data from a subsequent study, were combined to develop an actuarial tool (the Classification of Violence Risk, or COVR) that is effective in predicting serious acts of violence in the community (defined as a threat with a weapon in hand, or a physical act resulting in significant harm to another person) committed by individuals with mental disorders.⁵³

Although there has been very noteworthy progress in the development of specialized actuarial risk assessment measures since the 1990s, the evidence does not support the superiority of one particular measure over others. Rather, existing research seems to indicate that specialized measures that (a) use predictor variables that are empirically supported and reliably scored; (b) combine these variables to yield a score that is calculated to provide maximally advantageous information about the “cut score” to separate different categories of risk, and (c) are used consistently as intended tend to be comparably good. To illustrate this in a very specific way, we note that one study compared the predictive accuracy of three widely recognized actuarial tools, another approach using “General Statistical Information on Recidivism,” and four additional instruments that they developed themselves by randomly selecting items from the total item pool.⁵⁴ None of these seven tools was substantially more accurate than the others. This strongly suggests that good actuarial measures, while more accurate than unstructured clinical judgment, apparently owe much of this enhanced accuracy to their structure (using predictive variables that show a statistical association with violence or other offending; requiring that the user follow the rules of the measure by scoring the items and using the score as indicated). If

this is indeed accurate, then it will not be surprising that another approach to risk assessment—structured professional judgment—will also benefit from the application of this kind of structure.

STRUCTURED PROFESSIONAL JUDGMENT

APPROACHES TO VIOLENCE RISK ASSESSMENT. Structured professional judgment is a more recently developed approach to violence risk assessment, with the earliest SPJ tools appearing in the 1990s. It is similar to actuarial assessment in the use of pre-specified items that can be reliably scored. But how it uses these items differs. Rather than combining scored items into a final score, the SPJ approach calls for an evaluator to consider the results of all information collected and then reach a conclusion about whether the evaluatee’s risk is low, moderate, or high. Items on an SPJ measure are typically derived from a review of the literature regarding factors associated with violence rather than adopted from a specific study or dataset. SPJ also makes the assumption that the greater the number and severity of the risk factors present, the greater the evaluated person’s risk.⁵⁵ Since evaluators can consider situational influences, special circumstances, and other factors not specified on the measure—and since they can weigh the different items as they like—one might suspect that SPJ measures are more flexible but somewhat less accurate than actuarial measures in appraising risk. As we will describe in a moment, however, they are indeed more flexible but comparable in accuracy when compared with actuarial measures.

First, there is clear evidence that SPJ approaches provide an accurate way of appraising risk. A total of 20 published studies and one dissertation⁵⁶ on the relationship between SPJ risk judgments and violence have been identified.⁵⁷ Of these 20, a total of 18 have supported the predictive accuracy of SPJ judgments in relation to violent recidivism.⁵⁸ Only two studies did

52. JOHN MONAHAN ET AL., *RETHINKING RISK ASSESSMENT: THE MACARTHUR STUDY OF MENTAL DISORDER AND VIOLENCE I* (2001); Henry J. Steadman et al., *Violence by People Discharged from Acute Psychiatric Facilities and by Others in the Same Neighborhoods*, 55 ARCHIVES GEN. PSYCHIATRY 393, 393-401 (1998).

53. The COVR is a computer-based actuarial assessment that measures the probability of violence following discharge into the community among adults who are hospitalized for psychiatric treatment. The COVR guides the evaluator through a brief, structured chart review and 5- to 10-minute interview with the examinee. Information obtained through this process is used to rate the examinee on up to 106 items. The COVR generates a statistical estimate of the examinee’s violence risk, corresponding confidence intervals for that estimate, and identifies the risk factors considered in deriving that estimate. JOHN MONAHAN ET AL., *CLASSIFICATION OF VIOLENCE RISK: PROFESSIONAL MANUAL I* (2005); Stephanie Wilson et al., *Structured Instruments Commonly Used in Violence Risk Assessments*, in *INTERNATIONAL PERSPECTIVES ON VIOLENCE RISK ASSESSMENT* 353 (Jay Singh et al., eds. 2016); John Monahan et al., *The Classification of Violence Risk*, 24 BEHAV. SCI. & LAW 721, 721-22 (2006).

54. Daryl G. Kroner et al., *A Coffee Can, Factor Analysis, and Prediction of Antisocial Behavior: The Structure of Criminal Risk*, 28 INT’L J. L.

& PSYCHIATRY 360, 360-374 (2005).

55. Kevin S. Douglas & P. Randall Kropp, *A Prevention-Based Paradigm for Violence Risk Assessment: Clinical and Research Applications*, 29 CRIM. JUST. & BEHAV. 617, 617-658 (2002).

56. Mark R. McGowan, *The Predictive Validity of Violence Risk Assessment within Educational Settings*, DISSERTATION ABSTRACTS INT’L: HUMAN. & SOC. SCI. 876 (2007).

57. Kirk Heilbrun et al., *Approaches to Violence Risk Assessment: Overview, Critical Analysis, and Future Directions*, in *HANDBOOK OF VIOLENCE RISK ASSESSMENT* (2d ed., Randy K. Otto & Kevin Douglas, eds. in press).

58. Rosalind E. H. Catchpole & Heather M. Gretton, *The Predictive Validity of Risk Assessment with Violent Young Offenders: A 1-Year Examination of Criminal Outcome*, 30 CRIM. JUST. & BEHAV. 688, 688-708 (2003); Kristina Childs et al., *A Comparison of Empirically Based and Structured Professional Judgment Estimation of Risk using the Structured Assessment of Violence Risk in Youth*, 12 YOUTH VIOLENCE & JUV. JUST. 40, 40-57 (2014); Vivienne de Vogel & Corine de Ruiter, *The HCR-20 in Personality Disordered Female Offenders: A Comparison with a Matched Sample of Males*, 21 CLIN. PSYCHOL. & PSYCHOTHERAPY 226, 226-240 (2005); Vivienne de Vogel & Corine de Ruiter, *Structured Professional Judgment of Violence Risk in Forensic Clinical Practice: A Prospective Study into the*

not support SPJ judgments in their prediction of violent recidivism.⁵⁹

It would also be possible to simply add the item scores on an SPJ measure to obtain a total score, which could then be used to make a prediction. Does the judgment made by the evaluator using an SPJ measure add anything to scores combined in this fashion? Five studies have addressed this question. In all five, the final judgment added significantly to the results that would have been obtained by adding the scores of the individual items.⁶⁰

ACTUARIAL VERSUS STRUCTURED PROFESSIONAL JUDGMENT APPROACHES TO VIOLENCE RISK ASSESSMENT.

The scientific evidence described thus far strongly supports the validity of both actuarial and structured professional judgment approaches to risk assessment. But how do these approaches compare to one another? Given that both use pre-selected items that have a statistical association with violent recidivism, they are quite similar in both data selection and data coding. They diverge in their approach to data combination, however, with actuarial approaches yielding a conclusion

based on an established formula and SPJ approaches calling for a professional judgment in light of the information obtained. Given these similarities, it should not come as a surprise if the two approaches are comparable in their accuracy in appraising risk.

Indeed, that is what the limited available evidence shows. In the five available studies comparing actuarial with SPJ approaches, three (including one meta-analysis) reflect no significant differences between these approaches and the other two show some advantage to SPJ measures. This is a small number of studies on which to base a conclusion about a question like this, so the conservative interpretation is that these approaches are comparable.

One study compared the predictive accuracy of one SPJ measure (the Historical-Clinical-Risk Management 20, or HCR-20)⁶¹ and two actuarial approaches (the Violence Risk Appraisal Guide, or VRAG⁶², and the PCL-R and PCL:SV).⁶³ All measures performed well, but there was not a particular advantage to a specific approach or measure.⁶⁴ A second study again compared two actuarial measures (the LSI-R and PCL-R) with an SPJ measure (the HCR-20).⁶⁵ Only minor differ-

Predictive Validity of the Dutch HCR-20, 12 *PSYCHOL. CRIME & L.* 321, 321-336 (2006); Vivienne de Vogel et al., *Predictive Validity of the SVR-20 and Static-99 in a Dutch Sample of Treated Sex Offenders*, 28 *LAW & HUM. BEHAV.* 235, 235-251 (2004); Michiel de Vries Robbe et al., *Risk Factors and Protective Factors: A Two-Sided Dynamic Approach to Violence Risk Assessment*, 24 *J. FORENSIC PSYCHIATRY & PSYCHOL.* 440, 440-457 (2013); Michiel de Vries Robbe et al., *Changes in Dynamic Risk and Protective Factors for Violence During Inpatient Forensic Psychiatric Treatment: Predicting Reductions in Postdischarge Community Recidivism*, 39 *LAW & HUM. BEHAV.* 53, 53-61 (2015); Kevin S. Douglas, Zachary Yeoman et al., *Comparative Validity Analysis of Multiple Measures of Violence Risk in a Sample of Criminal Offenders*, 32 *CRIM. JUST. & BEHAV.* 479, 479-510 (2005); Kevin S. Douglas, James Ogloff et al., *Evaluation of a Model of Violence Risk Assessment among Forensic Psychiatric Patients*, 54 *PSYCHIATRIC SERVICES* 1372, 1372-1379 (2003); Pia Enebrink et al., *Predicting Aggressive and Disruptive Behavior in Referred 6 to 12-year-old Boys: Prospective Validation of the EARL-20B Risk/Needs Checklist*, 13 *ASSESSMENT* 356, 356-367 (2006); Alexandra Garcia-Mansilla et al., *Violence Risk Assessment and Women: Predictive Accuracy of the HCR-20 in a Civil Psychiatric Sample*, 29 *BEHAV. SCI. & L.* 623, 623-633 (2011); Nicola S. Gray et al., *Predicting Violence Using Structured Professional Judgment in Patients with Different Mental and Behavioral Disorders*, 187 *PSYCHIATRY RESEARCH* 248, 248-253 (2011); P. Randall Kropp & Stephen D. Hart, *The Spousal Assault Risk Assessment (SARA) Guide: Reliability and Validity in Adult Male Offenders*, 24 *LAW & HUM. BEHAV.* 101, 101-118 (2000); McGowan, *supra* note 56; Joanna R. Meyers & Fred Schmidt, *Predictive Validity of the Structured Assessment for Violence Risk in Youth (SAVRY) with Juvenile Offenders*, 35 *CRIM. JUST. & BEHAV.* 344, 344-355 (2008); Laura E. O'Shea et al., *Predictive Validity of the HCR-20 for Violent and Non-Violent Sexual Behaviour in a Secure Mental Health Service*, *CRIM. BEHAV. & MENTAL HEALTH* (2015); Michael J. Vitacco et al., *Can Standardized Measures of Risk Predict Inpatient Violence? Combining Static and Dynamic Variables to Improve Accuracy*, 39 *CRIM. JUST. & BEHAV.* 589, 589-606 (2012); Jennifer Welsh et al., *A Comparative Study of Adolescent Risk Assessment Instruments: Predictive and*

Incremental Validity, 15 *ASSESSMENT* 104, 104-115 (2008).

59. Gabrielle Sjöstedt & Niklas Långström, *Assessment of Risk for Criminal Recidivism among Rapists: A Comparison of Four Different Measures*, 8 *PSYCHOL. CRIME & L.* 25, 25-40 (2002); Jodi L. Viljoen et al., *Assessing Risk for Violence in Adolescents Who Have Sexually Offended: A Comparison of the J-SOAP-II, J-SORRAT-II, and SAVRY*, 35 *CRIM. JUST. & BEHAV.* 5, 5-23 (2008).

60. de Vogel & de Ruiter, *supra* note 58; Douglas, Yeoman et al., *supra* note 58; Douglas, Ogloff et al., *supra* note 58; Enebrink et al., *supra* note 58; Kropp & Hart, *supra* note 58.

61. The HCR-20 (Historic, Clinical, and Risk Management-20) measures risk of future violence across three domains: static historical factors, clinical factors, and risk management factors. The HCR-20 consists of 20 items scored as either 0 (absent), 1 (possibly present), or 2 (present); however, these scores do not yield a statistical recidivism probability. Rather, such scores are meant to structure the clinician's decision regarding the individual's propensity for future violence. The reliability and validity of the HCR-20 has been established with correctional, civil psychiatric, and forensic populations—featuring high rates of interrater agreement and scale consistency. MELTON ET AL., *supra* note 4, at 312-13.

62. The VRAG (Violence Risk Appraisal Guide) assesses violence risk in adult offenders and psychiatric patients using 12 items that are both historical (e.g., academic history and marital history) and dynamic (e.g., attitudes supportive of crime, psychiatric diagnostic criteria met). An examinee is rated on each item to generate a total score that is compared to 7- and 10-year probabilities of violence risk among people with the same total score. The VRAG has well established reliability and validity. *Id.* at 313.

63. Douglas, Yeomans et al., *supra* note 58. The PCL:SV is a shorter version of the PCL-R designed for screening, as opposed to diagnostic, purposes. ADELLE FORTH ET AL., *THE PSYCHOPATHY CHECKLIST: YOUTH VERSION 1* (2003).

64. *Id.*

65. Klaus-Peter Dahle, *Strengths and Limitations of Actuarial Prediction of Criminal Reoffence in a German Prison Sample: A Comparative Study of the LSI-R, HCR-20, and PCL-R*, 29 *INT. J. LAW & PSYCH.* 341 (2006).

ences in predictive accuracy were observed among these three measures.

Another two studies reported a modest advantage in predictive accuracy to SPJ measures. Comparing a brief actuarial measure (the Static-99) with an SPJ measure (the SVR-20) led to the conclusion that the latter was significantly better predictively than the former with 122 sexual offenders admitted to a Dutch forensic psychiatric hospital between 1974 and 1996.⁶⁶ Focusing on the use of these measures with adolescents involved a comparison of two actuarial approaches—the Youth Level of Service/Case Management Inventory (YLS/CMI)⁶⁷ and the Psychopathy Checklist: Youth Version (PCL:YV)⁶⁸—with the Structured Assessment of Violence Risk in Youth (SAVRY).⁶⁹ The SPJ measure (the SAVRY) was significantly more accurate predictively than either of the actuarial measures.⁷⁰

Finally, a total of nine risk-assessment tools were evaluated in a meta-analysis that included both a standard SPJ tool (the HCR-20) and an established actuarial measure (the VRAG).⁷¹ All performed with moderate predictive accuracy, and no significant superiority was seen for any particular tool or approach.

The evidence reviewed thus far supports two important points. First, the predictive accuracy of specialized, structured risk assessment tools is superior to unstructured clinical judgment in appraising risk. Second, actuarial and structured professional judgment approaches are substantially equivalent in their predictive accuracy—although SPJ approaches are more flexible, allowing the evaluator to make allowances for different situational influences that might not be readily incorporated into an actuarial measure. For example, an individual with a history of serious violent behavior as an adolescent, major family dysfunction, substance abuse, impulsivity, and a “hot temper” might very well be classified as high risk by either an actuarial or an SPJ measure. But if that same individual had recently been in a car accident and sustained a serious

head injury, the actuarial measure (typically composed of largely static, historical variables) would not change in its conclusion that this individual was at high risk for future violence. The SPJ approach, by contrast, allows the incorporation of this kind of change far more easily.

ANAMNESTIC APPROACHES TO VIOLENCE RISK ASSESSMENT. Finally, we turn to the question of whether the use of yet another approach might enhance the accuracy of predictions made using either an actuarial or an SPJ approach. This kind of approach, which uses the person’s own history to obtain information about risk factors specifically applicable to that person, is difficult to investigate through research on predictive accuracy. The identification of risk factors, particularly treatment targets that are subject to change through intervention, is much better suited to risk management and risk reduction than it is to prediction.

Three important points should be made. Assuming a relationship between the number (and severity) of risk factors present and the overall risk level is consistent with broad findings from SPJ studies. Second, risk assessments performed in the course of legal proceedings must satisfy the parameters of the larger legal context. When they do not, there is the risk that such evidence will not be admitted—or will be accorded little weight if it is. So the “individualizing” of information collected as part of psychological or psychiatric evaluations for the courts is a high priority; unless the court is convinced that the evidence applies to this individual, at this time, it will not be seen as useful.⁷² Third, there can be the kind of drastic changes in circumstance referenced earlier with the example about the individual with a head injury. Obtaining detailed information about a person’s history of violent behavior and the circumstances surrounding each event allows a careful look at such changes and their impact.

66. de Vogel et al., *supra* note 58. The Static-99 is a 10-item actuarial measure of static risk factors associated sexual recidivism. See ANDREW HARRIS ET AL., *STATIC-99 CODING RULES REVISED-2003* 3 (2003). The Sexual Violence Risk-20 is a 20-item SPJ checklist of risk factors associated with sexual violence. See DOUGLAS PETER BOER ET AL., *MANUAL FOR THE SEXUAL VIOLENCE RISK-20: PROFESSIONAL GUIDELINES FOR ASSESSING RISK OF SEXUAL VIOLENCE* 1 (2003).

67. The YLS/CMI is intended to guide professionals’ clinical judgment regarding risk assessment and treatment planning of delinquent youth between the ages of 12 and 17. Professionals using the YLS/CMI, obtain information from multiple collateral sources, including interviews with parents, youth, and knowledgeable third parties, as well as legal, educational, and mental health records, to rate the youth on eight variables associated with delinquency (offense history, family history and situation, education and employment history and adjustment, peer group, quality of peer relationships, substance use/abuse, leisure and recreation activities, psychopathology and personality factors, and antisocial disposition). The goal of the YLS/CMI is to facilitate case management and treatment planning for youth, such that youth with higher risk of reoffending are offered more intensive interventions. The YLS/CMI demonstrates adequate internal consistency and interrater reliability among adolescent male and female offenders

and research supports its criterion and predictive validity. ROBERT HOGE & D.A. ANDREWS, *THE YOUTH LEVEL OF SERVICE/CASE MANAGEMENT INVENTORY MANUAL AND SCORING KEY 1* (2002); MELTON ET AL., *supra* note 4, at 312.

68. FORTH ET AL., *supra* note 63.

69. RANDY BORUM ET AL., *MANUAL FOR THE STRUCTURED ASSESSMENT OF VIOLENCE RISK IN YOUTH-CONSULTATION VERSION 1* (2002).

70. The SAVRY is an SPJ assessment meant for use with adolescents between ages 12 and 18. The SAVRY consists of 24 risk factors, classified as Historical (e.g., exposure to violence in the home), Social/Contextual (e.g., peer delinquency), and Individual/Clinical (e.g. risk taking/impulsivity), and six protective factors from reoffending (i.e., strong attachments and bonds). The professional rates the youth on each risk item as high, moderate, or low and protective factors are marked as either present or absent. The SAVRY is intended to define, rather than quantify, the primary risk factors for recidivating in youth. With regards to validity, the SAVRY demonstrates moderate to strong correlations with the YLS/CMI and Hare Psychopathy Checklist: Youth Version. MELTON ET AL., *supra* note 4, at 313; Catchpole & Gretton, *supra* note 58.

71. Min Yang et al., *The Efficacy of Violence Prediction: A Meta-Analytic Comparison of Nine Risk Assessment Tools*, 136 *PSYCHOL. BULL.* 740 (2010).

72. HEILBRUN, *supra* note 2.

We cannot assert that anamnestic assessment would be defensible for use in risk assessment in legal contexts when used alone, therefore. It does not have the existing scientific support that has been reviewed in this article for actuarial and SPJ approaches. But it does enjoy one major advantage over both of these approaches: risk factors identified using anamnestic assessment are derived entirely from the individual's own history. There is no need to navigate the complex and thorny problem of "group to individual" inference when applying evidence.⁷³ In this respect, anamnestic assessment provides relevant and potentially valuable information while simultaneously satisfying any concern about whether that information is insufficiently individualized, inapplicable to the particular individual, or "statistical speculation."

RECOMMENDATIONS FOR BEST PRACTICE IN LEGAL CONTEXTS

We conclude with several recommendations in light of the legal context and relevant scientific evidence we have reviewed regarding risk assessment. First, it is no longer defensible to provide appraisals of an individual's risk of future violent behavior using only unstructured clinical judgment. The empirical support for such appraisals has been consistently described as so limited that this practice would not seem appropriate under either *Daubert* (which requires some showing of scientific foundation) or *Frye* (with the development of specialized measures for risk assessment of a variety of populations, the rendering of an opinion on risk without guidance from a specialized measure or some structuring from the literature would no longer appear to be generally accepted practice within the field). Second, the use of a specialized measure of risk like those reviewed in this article is strongly indicated. They provide empirical scientific support to this kind of expert evidence that is clearly useful and even compelled under *Daubert*. Third, it is appropriate whenever possible to "individualize" appraisals of risk using an anamnestic approach that derives risk factors from the individual's history. The combination of specialized measures with highly individualized evidence should address concerns about evidentiary relevance and "statistical speculation" as part of expert evidence on risk assessment.



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73. David L. Faigman et al., *Group to Individual (G2i) Inference in Scientific Expert Testimony*, 81 U. CHI. L. REV. 417 (2014).

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Answers to Crossword

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I	N	E	T	S	D	S	A	D	S	E	L	S	E	E
R	E	S	A	T	R	I	C	S	O	C	I	E	S	I
A	V	A	L	A	V	A	R	E	A	R	F	E	A	R
K	O	K	R	A	K	E	A	W	A	K	E	A	V	A
M	O	N	K	T	N	O	N	D	E	M	A	T	M	H
A	K	A	S	O	S	A	R	E	N	O	E	N	A	
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Courts may not incarcerate a defendant/respondent, or revoke probation, for nonpayment of a court-ordered legal financial obligation unless the court holds a hearing and makes one of the following findings:

1. The failure to pay was not due to an inability to pay but was willful or due to failure to make bona fide efforts to pay; or
2. The failure to pay was not the fault of the defendant/respondent and alternatives to imprisonment are not adequate in a particular situation to meet the State's interest in punishment and deterrence.

If a defendant/respondent fails to pay a court-ordered legal financial obligation but the court, after opportunity for a hearing, finds that the failure to pay was not due to the fault of the defendant/respondent but to lack of financial resources, the court should consider alternative measures of punishment other than incarceration. *Bearden v. Georgia*, 461 U.S. 660, 667-669 (1983). Punishment and deterrence can often be served fully by alternative means to incarceration, including an extension of time to pay or reduction of the amount owed. *Id.* at 671.

Court-ordered legal financial obligations (LFOs) include all discretionary and mandatory fines, costs, fees, state assessments, and/or restitution in civil and criminal cases.

1. Adequate Notice of the Hearing to Determine Ability to Pay

Notice should include the following information:

- a. Hearing date and time;
- b. Total amount claimed due;
- c. That the court will evaluate the person's ability to pay at the hearing;
- d. That the person should bring any documentation or information the court should consider in determining ability to pay;
- e. That incarceration may result only if alternate measures are not adequate to meet the state's interests in punishment and deterrence or the court finds that the person had the ability to pay and willfully refused;
- f. Right to counsel*; and
- g. That a person unable to pay can request payment alternatives, including, but not limited to, community service and/or a reduction of the amount owed.

2. Meaningful Opportunity to Explain at the Hearing

The person must have an opportunity to explain:

- a. Whether the amount charged as due is incorrect; and
- b. The reason(s) for any nonpayment (e.g., inability to pay).

3. Factors the Court Should Consider to Determine Willfulness¹

- a. Income, including whether income is at or below 125% of the Federal Poverty Guidelines (FPG);²

For 2016, 125% of FPG is:

\$14,850 for an individual;	\$30,375 for a family of 4;
\$20,025 for a family of 2;	\$35,550 for a family of 5;
\$25,200 for a family of 3;	\$40,725 for a family of 6.

- b. Receipt of needs-based, means-tested public assistance, including, but not limited to, Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), Social Security Disability Insurance (SSDI), or veterans' disability benefits (Such benefits are not subject to attachment, garnishment, execution, levy, or other legal process);

¹ See *Bearden v. Georgia*, 461 U.S. 660 (1983)

² U.S. Dep't of Health & Human Servs., Poverty Guidelines, Jan. 26, 2016, <https://aspe.hhs.gov/poverty-guidelines>

- c. Financial resources, assets, financial obligations, and dependents;
- d. Whether the person is homeless, incarcerated, or resides in a mental health facility;
- e. Basic living expenses, including, but not limited to, food, rent/mortgage, utilities, medical expenses, transportation, and child support;
- f. The person's efforts to acquire additional resources, including any permanent or temporary limitations to secure paid work due to disability, mental or physical health, homelessness, incarceration, lack of transportation, or driving privileges;
- g. Other LFOs owed to the court or other courts;
- h. Whether LFO payment would result in manifest hardship to the person or his/her dependents; and
- i. Any other special circumstances that may bear on the person's ability to pay.

4. Findings by the Court

The court should find, on the record, that the person was provided prior adequate notice of:

- a. Hearing date/time;
- b. Failure to pay an LFO is at issue;
- c. The right to counsel*;
- d. The defense of inability to pay;
- e. The opportunity to bring any documents or other evidence of inability to pay; and
- f. The opportunity to request an alternative sanction to payment or incarceration.

After the ability to pay hearing, the court should also find on the record that the person was given a meaningful opportunity to explain the failure to pay.

If the Court determines that incarceration must be imposed, the Court should make findings about:

- 1. The financial resources relied upon to conclude that nonpayment was willful; or
- 2. If the defendant/respondent was not at fault for nonpayment, why alternate measures are not adequate, in the particular case, to meet the state's interest in punishment and deterrence.

Alternative Sanctions to Imprisonment That Courts Should Consider When There Is an Inability to Pay

- a. Reduction of the amount due;
- b. Extension of time to pay;
- c. A reasonable payment plan or modification of an existing payment plan;
- d. Credit for community service (*Caution:* Hours ordered should be proportionate to the violation and take into consideration any disabilities, driving restrictions, transportation limitations, and caregiving and employment responsibilities of the individual);
- e. Credit for completion of a relevant, court-approved program (e.g., education, job skills, mental health or drug treatment); or
- f. Waiver or suspension of the amount due.

*Case law establishes that the U.S. Constitution affords indigent persons a right to court-appointed counsel in most post-conviction proceedings in which the individual faces actual incarceration for nonpayment of a legal financial obligation, or a suspended sentence of incarceration that would be carried out in the event of future nonpayment, even if the original sanction was only for fines and fees. See *Best Practices for Determining the Right to Counsel in Legal Financial Obligation Cases*.

This bench card was produced by the National Task Force on Fines, Fees and Bail Practices. The Task Force is a joint effort of the Conference of Chief Justices and the Conference of State Court Administrators, sponsored by the State Justice Institute and the Bureau of Justice Assistance, coordinated by the National Center for State Courts.



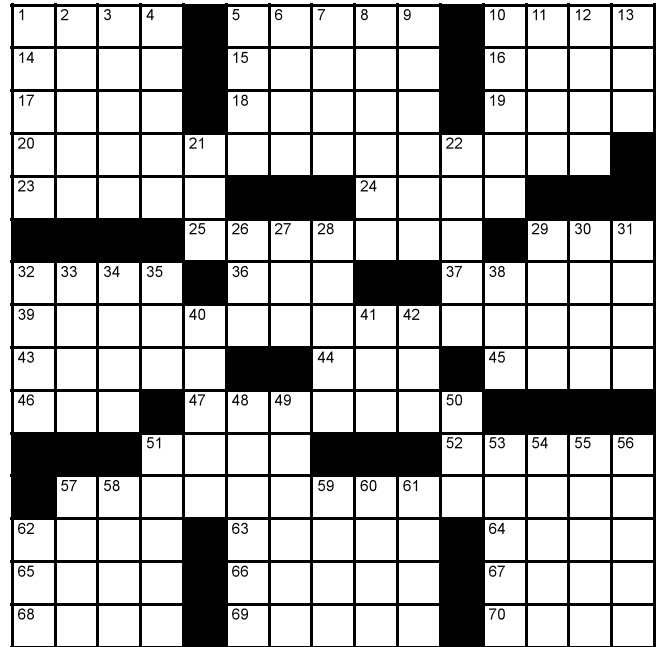
LEARNING CURVE by Judge Victor Fleming

Across

- 1 Edible herring
- 5 Haus wives, aptly
- 10 Wouk genre
- 14 To a slight degree, musically
- 15 Kramden of "The Honeymooners"
- 16 Home ___ (get close)
- 17 Speller's clarification phrase
- 18 Febrero preceder
- 19 Small but annoying biter
- 20 Start of a quip by Laurence J. Peter
- 23 Foul
- 24 Famous ___ (cookie brand)
- 25 More easily understood
- 29 Ed.'s work
- 32 Blocks of time
- 36 Guns N' Roses singer Rose
- 37 Take care of
- 39 Part 2 of the quip
- 43 Burger extra
- 44 Besides
- 45 Channel owned by Disney
- 46 Kesey or Follett
- 47 Kid's wheels
- 51 Ultra-bright
- 52 Honshu seaport
- 57 End of the quip
- 62 Panic
- 63 Stirring
- 64 Cajun pod
- 65 Novelist Ambler
- 66 Hotel quote

Down

- 67 Jai ___
- 68 Wiggly swimmers
- 69 Twosomes
- 70 Ash Wednesday follower
- 1 Reproduce, as salmon
- 2 Old Testament book
- 3 Low-pH compounds
- 4 Proscriptive phrase
- 5 Guitar-neck bump
- 6 Assign places to
- 7 Architect William Van ___
- 8 Big commotion
- 9 "Demonstrate!"
- 10 Sorrowful sounds
- 11 King of Siam's lady
- 12 Navy mascot
- 13 Aardvark victim
- 21 Big Apple, initially
- 22 More than bad
- 26 What a criminal breaks
- 27 Abbr. after a telephone number
- 28 Samuel on the Supreme Court
- 29 Word on a door sign
- 30 Word on an octagon
- 31 Scattered, like seeds
- 32 Furry "Star Wars" creature
- 33 Descartes or Lacoste
- 34 Very similar
- 35 ___-cone
- 38 Barely make, with "out"
- 40 Advent



- 41 Outdoor parking facility
- 42 Anguish
- 48 Fraidy-cat
- 49 Words on an arrow
- 50 Go bad
- 51 Pushers' nemeses
- 53 Swede's "Cheers!"
- 54 Bracelet site
- 55 Mosque text
- 56 Look forward to
- 57 "Wish You ___ Here" (1975 Pink Floyd album)
- 58 Ice pellets
- 59 It's put in banks
- 60 Signed off on
- 61 Costner, in "The Untouchables"
- 62 Attorney's ___

Vic Fleming is a district judge in Little Rock, Arkansas.

Answers are found on page 125.

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AMERICAN JUDGES ASSOCIATION AWARDS 2017

HAROLD V. FROELICH AWARD FOR JUDICIAL COURAGE

The award is named in honor of Judge Harold Froehlich of Wisconsin, who as a freshman Republican Congressman risked his political career by voting in the House Judiciary Committee in favor of the impeachment of President Richard Nixon. Froehlich lost re-election but later served as a trial judge in Wisconsin from 1981 to 2011. The award honors a judge who makes fair and impartial judgments in accord with the rule of law while exercising independence from personal consequences.

Winner: **United States District Judge Gonzalo P. Curiel**, San Diego, California, who was recognized for his dignity, courage, and professionalism when, while handling ongoing litigation involving a presidential candidate, he faced unfair criticism based on his heritage. (The AJA reprints in this issue Judge Curiel's letter in response to the award, in which he notes several judges worthy of note for their own displays of judicial courage.)

CHIEF JUSTICE RICHARD W. HOLMES AWARD OF MERIT

The award honors a judge for outstanding contributions to the judiciary; it's named in honor of the late Kansas Chief Justice Richard W. Holmes, who was one of the founders of the AJA.

Winner: **Judge Steve Leben**, Kansas Court of Appeals, who was recognized for his national work promoting procedural fairness in court, for coauthoring AJA white papers on procedural fairness and the mental aspects of judging, and as the editor of *Court Review* since 1998.

JUDGE WILLIAM H. BURNETT AWARD

The award honors a judge who is a member of the American Judges Association for outstanding service to the association.

Winner: **Judge John Conery**, Louisiana Court of Appeals, who was recognized for his service as an AJA president, officer and committee chair; for helping to improve links between the AJA and other organizations; and for his work to educate other judges in the areas of domestic violence and elder law.

JUDGE BOB JONES MEMORIAL AWARD

The award honors a judge who is a member of the American Judges Association for significant contributions to judicial education.

Winner: **Judge Catherine Carlson**, Provincial Court of Manitoba, who was recognized for her work on educational programming for the AJA's 2016 conference in Toronto, for organizational efforts already underway for the educational programming for the AJA's 2018 conference in Hawaii, and for chairing the AJA's Education Committee.

JUDGE LIBBY HINES DOMESTIC VIOLENCE AWARD

The award is named in honor of Michigan Judge Libby Hines, who while an active AJA member and trial judge has been a national leader and educator for many years on the appropriate judicial handling of domestic-violence cases.

Winner: **Judge Ramona Gonzalez**, LaCross County (Wisconsin) Circuit Court, who was recognized for her expertise on family-law topics, including domestic violence and child abduction, and for her national and international leadership on the handling of these matters in court.



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
221 W. BROADWAY, SUITE 2190
SAN DIEGO, CALIFORNIA 92101

September 11, 2017

American Judges Association
300 Newport Avenue
Williamsburg, VA 23185-4147

Re: Judge Harold V. Froehlich Award

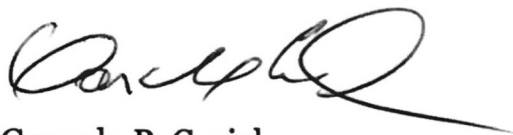
To the Board of Governors of the American Judges Association,

With great appreciation and humility, I thank the American Judges Association for naming me as the 2017 recipient of the Judge Harold V. Froehlich Award for Judicial Courage. It is a tremendous privilege to receive an award whose namesake is a man who demonstrated great courage by making a decision guided by conscience, while ignoring the likelihood that it would produce adverse consequences for his career. Time and time again, similar courage has been demonstrated by trial and appellate judges who have rendered decisions that were unpopular at the time they were made but have been vindicated with the passage of time. This courage is found in the 1946 decision of U.S. District Court Judge Paul J. McCormick striking down school board policies segregating Mexican Americans into separate “Mexican” schools in *Mendez v. Westminster School District*. It is seen in the 1954 decision *Brown v. Board of Education* where the U.S. Supreme Court struck down “separate but equal.” After *Brown* district courts were called upon to integrate schools, leading to protests and threats on the lives of federal jurists such as U.S. District Judge S. Hugh Dillin, from my home state of Indiana, after his school desegregation order in *United States v. Board of School Commissioners of the City of Indianapolis*. These jurists never flinched; they did what they knew was required under the U.S. Constitution.

When I think about the courage demonstrated by these fearless jurists, I am certain that I am not deserving of this recognition. I have done nothing more than what each of us does every day—that is, to serve our communities—by aiming to apply the law fairly to all who appear before us

whether the parties are rich or poor, powerful or powerless. I accept the award on behalf of our brethren who toil day in and day out to perform their constitutional duty without regard to the consequences or criticism that follows. As judges, we recognize that our challenges are derived from the distinct privilege that we have been granted to serve the people of our great nation within a judicial system that is guided by the overarching principle that all men and women are created equal.

Sincerely,



Gonzalo P. Curiel

United States District Judge



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*The Judge Is
the Key Component:
The Importance of
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in Drug-Treatment
Courts*

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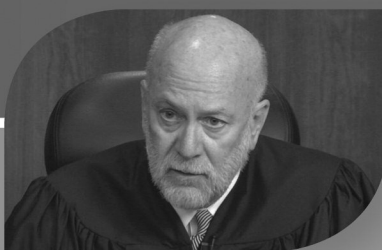
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Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United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

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

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

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

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

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

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

Submission: Submissions may be made by e-mail to Editor@CourtReview.org. Submissions will be acknowledged by e-mail; notice of acceptance or rejection will be sent following review.



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**The Judge Is
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in Drug-Treatment
Courts**

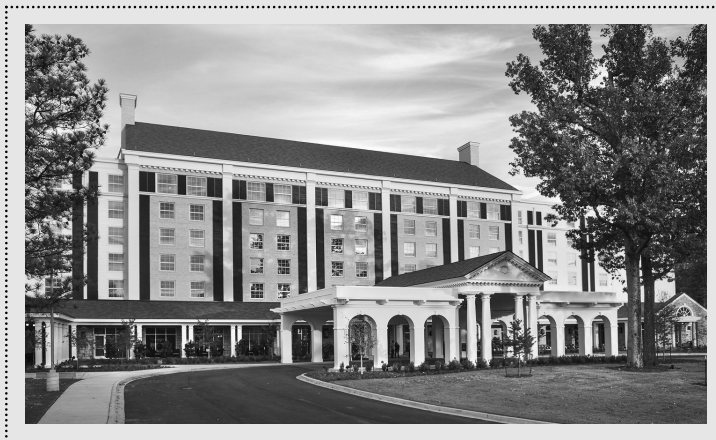
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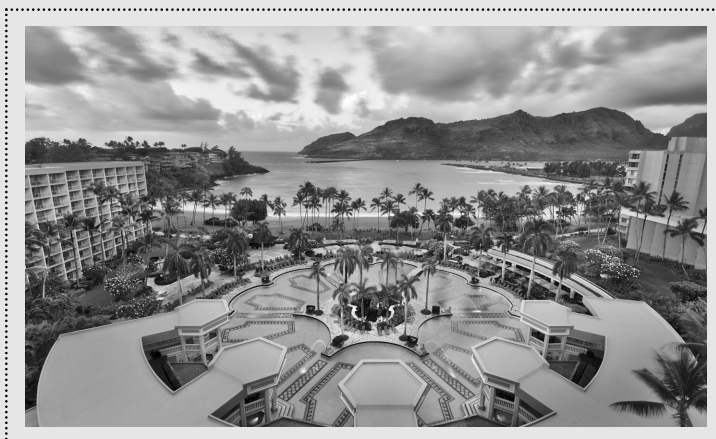
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The Resource Page



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You can upload any brief or legal memorandum into CARA—and it will return a list of cases relevant but not already cited in the brief or memorandum. Obviously, that could be of great use to judges. For understandable reasons (not enough money to justify extensive research or briefing, sloppy work, etc.), the briefs we get from lawyers aren't always as thorough as they should be. CARA offers an easy way to quickly check for missing caselaw. And at the price, it's at least worth a tryout.

Many attorneys already subscribe to CARA and use its features by paying a subscription fee. Casetext tells us that it has no plans at this point to change its present practice, which is to make the CARA product (along with all of its features) available to judges at no cost. That lets you follow links of the cases to the full text, to see how later cases have summarized the original case, and to filter your searches by jurisdiction.

For judges who would like to try out the product, send an email to courts@casetext.com.



NEW PUBLICATIONS

PAMELA CASEY, JENNIFER ELEK & ROGER WARREN, *USE OF RISK AND NEEDS ASSESSMENT INFORMATION IN STATE SENTENCING*

PROCEEDINGS. National Center for State Courts, Center for Sentencing Initiatives, 2017. 5 pp.
<https://goo.gl/EV9jDe>

The National Center for State Courts' Center for Sentencing Initiatives has issued another of its short, highly readable reports on key questions involved in criminal sentencing. Their reports are backed up by extensive footnotes (here, endnotes) citing to key research in the field.

The last report looks at risk-assessment instruments used to predict the risk of reoffending, as well as risk-and-needs-assessment instruments that also look to see what services might be offered to reduce an offender's likelihood of reoffending. These reports are structured around answers to a series of questions, in this case ones like how risk-and-needs-assessment scores are used at sentencing, how widespread is their use, is there evidence about the effects of their use, and are they biased against racial minorities?

If these questions seem relevant to your daily work—and you'd like to read some research-based answers—head over to the Internet link listed above to take a look at the report. It complements quite nicely the article by Professor Heilbrun and his colleagues found at page 116 of this issue.

JASON A. CANTONE. *ENHANCING COOPERATION THROUGH STATE-FEDERAL JUDICIAL COUNCILS*. Federal Judicial Center, 2017. 45 pp.
<https://goo.gl/LmsFqX>

The Federal Judicial Center issues pocket guides to assist federal judges. One of the latest pocket guides, however, is aimed at both state judges and federal judges and details how enhanced cooperation between state and federal courts can increase overall efficiency and assist both courts. The pocket guide focuses on the use of state-federal judicial councils, which allow judges and administrators a forum to identify sources of potential tension (e.g., calendar and scheduling conflicts, certification of state-law questions,

access to records) and consider how to share limited resources (e.g., facilities, emergency preparedness, civics education programs, translators).

The Federal Judicial Center features the pocket guide on a new public website (<https://goo.gl/T1e165>) that also expands beyond the use of formal councils to show how state and federal courts can work informally to address areas of mutual concern. For courts interested in forming a state-federal judicial council (or expanding their current one), the pocket guide and website offer a list of topics that could benefit from collaboration, sample activities and handbooks already completed by active state-federal judicial councils, and sample forms for creating a charter or organizing a meeting. For courts not interested in a formal council, the website also features a 2016 Federal Judicial Center report detailing a survey on state-federal cooperation that went out to every federal chief district judge. The survey results showed a wide range of activities and topics benefiting from state-federal cooperation, federal judges' interest in further collaboration with state courts, and an ability to cooperate outside of formal councils. The website also encourages users to submit other examples of how cooperation between state and federal courts improves both judicial systems.

NATIONAL TASK FORCE ON FINES, FEES, AND BAIL PRACTICES, *LAWFUL COLLECTION OF LEGAL FINANCIAL OBLIGATIONS: A BENCH CARD FOR JUDGES*. National Center for State Courts, 2017. 2 pp.

Key leaders of the state courts, including the Conference of Chief Justices, have formed a task force to address issues concerning the handling in court of fine and fee collection and the setting of bail. As part of a new Resource Center (available at <https://goo.gl/Kv7LPK>), the task force has produced a two-page bench card for judges to use when determining whether to find someone in contempt for the failure to pay a fine or fee. We've reprinted the bench card for your use at pages 127-128 of this issue. Additional resources can be found at the website.