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Court Review

Volume 53, Issue 4

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION
Volume 53, Issue 4 2017

EDITOR'S NOTE

This issue contains several articles of interest. We start with a review of the past year's criminal decisions from the United States Supreme Court and the Supreme Court of Canada. We are incredibly grateful to Berkeley Law Professor Chuck Weisselberg, who has been reviewing the United States Supreme Court's criminal cases for us for the past decade. This year, our Canadian columnist, Judge Wayne Gorman, has devoted his column in the issue to recent Canadian criminal decisions. The issue also includes several other articles, with topics ranging from how to reduce racial disparities in the criminal-justice system to how to cut ties on social media when ethically required to do so.

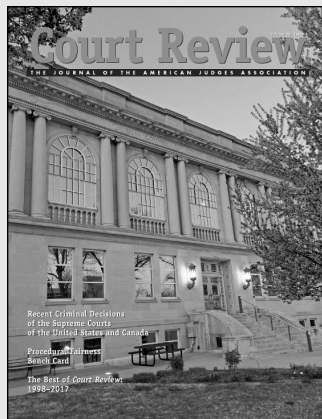
You'll find a very special item on the back cover of this issue—a Procedural Fairness Bench Card. The bench card project was initiated by the American Judges Association and joined in by the Center for Court Innovation, the National Center for State Courts, and the National Judicial College. For the *Court Review* version of the bench card, since we had to include your address on the back cover, there's some wasted space. At the AJA website (amjudges.org), you'll find a bench card with that space filled in with six suggested additional readings you can find on the web. As many of you know, promoting procedural fairness in court has been a major AJA initiative since 2007. We hope you'll find the bench card helpful.

This issue marks my last as editor, a task I took on in 1998. Working on *Court Review* has been one of the most rewarding parts of my career. I have gotten to recruit (as authors) and work with leading experts in so many fields of law and social science. I have made friends throughout the United States, Canada, and beyond. And I have learned so much that has enhanced my work as a judge.

There are too many people to thank in this note, but I do want to thank all the members of our Editorial Board and the authors who have contributed to this journal. Very special thanks to Alan Tomkins, who served as my coeditor from 2007 to 2014, and Eve Brank, who has served as my coeditor from 2015 to the present. Both of them served while also full-time professors of law and psychology, and they have been a great help in getting many of the top experts in that field to share their knowledge on these pages. My law clerks and staff have also been tremendously helpful, as have Chuck Campbell, who has served as our Managing Editor since 2000, and Mike Fairchild (m-designstudio.com), who has done our layout work since 1998.

My thanks to the American Judges Association for giving me this opportunity. And my appreciation to the four judges—Julie Kunce Field, Devin Odell, David Prince, and David Shakes—who join Eve Brank as the five-person editing team starting with the next issue.

In closing, I note that all *Court Review* issues from 1998 forward are available on the AJA website. I have gone through all of those issues to see which articles and book reviews still have the most value for judges today. That listing of *The Best of Court Review: 1998–2017* starts at page 178.—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 186 of this issue. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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The cover photo is of the Old Mesa County Courthouse in Grand Junction, Colorado. The courthouse, built in 1922, now houses county administrative offices. Cover photo by Steve Leben.

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President's Column

Catherine Shaffer

My dear colleagues and fellow *Court Review* readers, greetings.

In my last column, I told you about AJA's wonderful Cleveland conference in September, ably planned by our own Judges Michael Cicconetti, Eugene Lucci, and Gayle Williams-Byers. There, our past AJA Presidents also met and identified a key priority for AJA—enhancing the value of membership for members who are unable to attend conferences. This is the first of my three overlapping priorities for my term as AJA President. My second is to build on AJA's advances toward furthering diversity in our organization and on the bench, while helping us all achieve better understanding of and responses to diversity issues in our courts. The third is to strengthen AJA's ties to other national court-oriented organizations, reach out to national minority-lawyer organizations with judicial divisions, and find new ways to collaborate with our national court-oriented partners.

To carry out these goals, I asked AJA members to sign up for the committees that interest them. Everyone who did that got an email appointing them to their committee and suggesting that their committee zero in on and work to achieve two or three objectives to build AJA membership value for members who do not come to conference. Committee meetings are underway. It is not too late to sign up.

I also talked recently to our national partner representatives. After excellent talks with Benes Aldana, the president of the National Judicial College (NJC), there are now 10 scholarships, for \$500 each, available to AJA members who want to attend an NJC course. AJA has been invited to send a representative as an "observer," tuition free, to one of the 2018 classes on "Advanced Procedural Fairness" (one held in January and a second set for September in Anchorage). AJA will co-sponsor and plan with NJC a joint event aimed at continuing the national conversation on race. The AJA president will be invited to address the NJC's General Jurisdiction classes. NJC is distributing our membership literature at the college. AJA may support with NJC a 2019 Judicial Academy for lawyers interested in the bench. And NJC is cooperating with a presentation of one of our Hawai'i educational programs and considering possible co-location of an NJC course with a future AJA conference.

I also talked with the current presidents of the National Association for Court Management, the Conference of State Court Administrators (COSCA), and the National Association of State Judicial Educators, all longstanding partners of AJA, about potential for future closer collaboration. All three organizations seem very receptive to making their ties with us even closer.

I was honored to represent AJA at the Rehnquist Awards event on November 16 in Washington, D.C. Our own Judge

Elizabeth Hines, a longtime National Center for State Courts board member, was there and introduced me. Attendees stayed at the historic Willard Hotel and were hosted by Chief Justice John Roberts at the United States Supreme Court for the awards dinner. This year's award winner was the Honorable Kim Berkeley Clark of the Allegheny County (Pa.) Court of Common Pleas. Her practice as a judge exemplifies AJA's signature initiative, procedural fairness. Her wonderful acceptance speech will be reprinted in a future edition of *Court Review*.

In late November, I went to the COSCA mid-year meeting in New Orleans. This conference was highlighted by educational programs on developments in court technology and data management,

on responding to emerging disruptive technologies like neuroscience, block chaining, robotics, and virtual reality, on understanding and responding to opiate addiction, and on techniques to handle judicial- and court-leadership challenges. Another conference highlight was the reception in the Louisiana Supreme Court, also the seat of the Louisiana Court of Appeals for the Fourth Circuit, for which the chief judge is none other than AJA past president James F. McKay.

Much more is coming up in 2018. Our executive committee met in January in Napa, California, a possible venue for a future spring AJA conference. This year's AJA midyear conference is from April 19 to 21 in Memphis—at the Guest House at Graceland. Judge Betty Moore and Justice Robert Torres have nailed down a fantastic education program, which will include presentations on judicial ethics, courthouse security, using reflective practices in judging, and a forensic look at the cold case of Elbert Williams. Outstanding planned events include a "Barbecue Feast" at Alfred's on Beale Street.

In September 2018, we will enjoy our fall conference in Kuaui. Judge Catherine Carlson and Justice Torres have this event fully planned. Reserve your calendars to visit this beautiful Hawaiian garden island! In September 2019, we will be in Chicago, and our conference will be in partnership with the Illinois state courts. The spring 2020 midyear will be in gorgeous Savannah, Georgia. Tentatively we are planning for Philadelphia, another historic venue, in fall 2020.

Now is the time to reach out to courts in these areas to plan together in advance. Can you help? Please think about your ability to connect us to court organizations and court-oriented organizations in which you participate, for future collaboration to begin. We need you, and your knowledge, passion, and engagement.

I look forward to seeing your contributions, to hearing from you, and to seeing many of you at upcoming conferences. And I wish you a wonderful and productive 2018.



A Review of Decisions Rendered by the Supreme Court of Canada in Criminal Matters: January 1 to November 30, 2017

Wayne K. Gorman

This column will review those decisions rendered by the Supreme Court of Canada, between January 1 and November 30, 2017, that involved criminal causes or matters. In 2017, the Supreme Court of Canada considered a multitude of issues involving criminal law, including defences, evidence, and sentencing. The Court also considered the application of the Canadian Charter of Rights and Freedoms, Constitution Act, 1982, to various criminal-law provisions and procedures.

Let us start with the Supreme Court's consideration in 2017 of criminal offences.

(1) OFFENCES:

(A) BREATHALYZER DEMANDS:

Section 253 of the Criminal Code makes it an offence to operate a motor vehicle in Canada with a blood-alcohol level that exceeds 80 milligrams of alcohol per every 100 milliliters of blood. The Criminal Code allows the Crown to establish a person's blood-alcohol level through the introduction of a certificate prepared by a police officer who conducted a breathalyzer test upon the accused. Section 258 of the Criminal Code creates a presumption that the certificate is accurate if the samples were taken within a prescribed time period.

In *R. v. Alex*, 2017 SCC 37, a vehicle being operated by the accused was stopped by the police. The accused provided samples of his breath that registered blood-alcohol levels above the legal limit. He was charged with driving "over 80," contrary to section 253 of the Criminal Code. The Supreme Court noted that, to rely upon the section 258 presumptions, the Crown must prove that the breath samples were "taken within a prescribed period of time following the alleged offence; the samples have to be provided directly into an approved container or instrument; and the instrument has to be operated by a properly qualified technician" (at paragraph 4).

At his trial, the trial judge found that the police officer did

not have lawful grounds to have made the breathalyzer demand, but concluded that it was not necessary for the Crown to prove that a lawful demand had been made to rely on the evidentiary presumption contained within section 258 of the Criminal Code.

On appeal to the Supreme Court of Canada, the following issue was raised (at paragraph 5): "The issue in this appeal is whether, in addition to the three preconditions just mentioned, the Crown must also establish that the demand for the breath sample made by the police was a 'lawful' demand before it can take advantage of the evidentiary shortcuts."

The Supreme Court concluded, at paragraph 11, that the Crown did not have to

prove that the demand was lawful in order to take advantage of the shortcuts. If the taking of the samples is subjected to *Charter* scrutiny, and the evidence of the breath test results is found to be inadmissible by virtue of ss. 8 and 24(2) of the *Charter*, that will end the matter. Resort to the evidentiary shortcuts will be a non-issue. On the other hand, if the taking of the samples is subjected to s. 8 *Charter* scrutiny, and the breath test results are found to be admissible in evidence — either because no s. 8 breach occurred or because the evidence survived s. 24(2) *Charter* scrutiny — the shortcuts should remain available to the Crown.¹

(2) DEFENCES:

(A) MISTAKE OF AGE:

Section 150.1(4) of the Criminal Code allows an accused person charged with certain sexual offences, involving children less than sixteen years of age, to raise the defence of mistake of age. The section requires the accused to have taken all reasonable steps to have ascertained the age of the complainant before the defence can be applicable.

Footnotes

1. Sections 8 and 24(2) of the Charter state as follows:

8. Everyone has the right to be secure against unreasonable search or seizure.

24(2) Where, in proceedings under subsection (1), a court con-

cludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

In *R. v. George*, 2017 SCC 38, the accused was charged with the offence of sexual interference. The trial judge acquitted the accused based on having a reasonable doubt about whether the Crown had proven that the accused had failed to take all reasonable steps to determine the complainant's age. A majority of the Court of Appeal allowed an appeal, quashed the acquittals, and ordered a new trial. The accused appealed to the Supreme Court of Canada. The appeal was allowed and the acquittals restored.

The Supreme Court noted, at paragraph 8, that to

convict an accused person who demonstrates an “air of reality” to the mistake of age defence, the Crown must prove, beyond a reasonable doubt, either that the accused person (1) did not honestly believe the complainant was at least 16 (the subjective element); or (2) did not take “all reasonable steps” to ascertain the complainant's age (the objective element).

The Supreme Court concluded that, in this case, a “review of the trial judge's reasons reveals no legal errors. As a result, the Court of Appeal lacked jurisdiction to interfere with the trial judgment” (at paragraph 15).

(B) OFFICIALLY INDUCED ERROR

In *R. v. Bédard*, 2017 SCC 4, the Supreme Court considered the defence of officially induced error, though in a brief oral judgment. The Court summarized the elements of the offence in the following manner (at paragraph one):

The defence of officially induced error of law is intended to protect a diligent person who first questions a government authority about the interpretation of legislation so as to be sure to comply with it and then is prosecuted by the same government for acting in accordance with the interpretation the authority gave him or her.

(3) EVIDENCE:

(A) INFORMER PRIVILEGE

In *R. v. Durham Regional Crime Stoppers Inc.*, 2017 SCC 45, the police received a Crime Stoppers tip concerning a fatal shooting. A few days later Keenan Corner was charged with the offence of second-degree murder.

The Supreme Court of Canada noted, at paragraph 6, that at the trial

[t]he Crown brought a pre-trial application seeking to introduce evidence of the anonymous tip made to Crime Stoppers. Prior to any rulings being made by the application judge, the Crown disclosed to the defence the anonymous tip and all relevant information about it in its possession. The Crown maintained that the call was made by Keenan Corner to divert attention away from himself in the police investigation. It sought to use the call at trial as evidence relevant to Keenan Corner's general credibility . . . Keenan Corner denied making the call. In addition, he and Crime Stoppers submitted that the call was covered by informer privilege.

In response, the Crown asserted that informer privilege did not apply to the tip.

The application judge (at paragraph 7):

found that Keenan Corner had made the call and that he had done so with the intention of diverting attention away from himself in the police investigation. [The trial judge held] that informer privilege did not apply to the tip because its application would, in the circumstances, undermine the objectives which underlie the privilege.

An appeal was taken to the Supreme Court of Canada. The Supreme Court indicated, at paragraph 2, that the primary issue raised by this appeal was

whether informer privilege exists where a caller makes an anonymous tip to Crime Stoppers with the intention of interfering with the administration of justice. A secondary issue concerns the procedure to be followed when the Crown challenges a claim of informer privilege over an anonymous tip made to Crime Stoppers.

The appeal was dismissed. The Supreme Court held that informer privilege “does not exist where a person has contacted Crime Stoppers with the intention of furthering criminal activity or interfering with the administration of justice” (at paragraphs 9 and 10):

As regards the primary issue, the application judge excluded the tip from the scope of informer privilege on the basis that Keenan Corner made the call to Crime Stoppers in order to divert attention away from himself in a police investigation. In my view, he did not err in doing so. Informer privilege does not exist where a person has contacted Crime Stoppers with the intention of furthering criminal activity or interfering with the administration of justice. In such circumstances, shielding this person's identity behind the near absolute protection of informer privilege would compromise, if not negate, the privilege's objectives.

With respect to the secondary issue, I am satisfied that the procedure followed by the application judge was reasonable. That said, this case provides the Court with an opportunity to clarify the procedure that should be followed and the safeguards that can be put in place when the Crown challenges the applicability of informer privilege over an anonymous tip made to Crime Stoppers.

“[S]hielding this person's identity behind the near absolute protection of informer privilege would compromise, if not negate, the privilege's objectives.”

The Court held that “[o]nly serious misconduct can justify such a sanction against a lawyer. . . . [C]ourts must be cautious . . . in light of the duties owed by lawyers to their clients”

What Is the Procedure to Be Followed by a Court When the Crown Challenges a Claim of Privilege Over an Anonymous Tip?

The Supreme Court held that when the Crown challenges a claim of privilege over an anonymous tip, “the court must consider whether privilege in fact exists at an *in camera* hearing” (at paragraph 35). The Court also held, at paragraph 36, that the “*in camera* hearing will likely require an *ex parte* proceeding—in which the accused and defence counsel are excluded—to determine whether informer privilege

applies to the tip.” Finally, the Court concluded that “the application judge may review the record of the anonymous tip” (at paragraphs 38-39).

(4) TRIALS:

(A) THE ORDERING OF COSTS AGAINST COUNSEL:

In *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26, an application judge awarded costs personally against defence counsel after dismissing counsel’s applications for recusal of two trial judges on the basis of purported apprehensions of bias. On appeal, the Quebec Court of Appeal set aside the award of costs against counsel. The Crown appealed to the Supreme Court of Canada.

The Supreme Court of Canada restored the order of costs made against defence counsel. The Court indicated that “[t]he courts have the power to maintain respect for their authority. This includes the power to manage and control the proceedings conducted before them . . . A court therefore has an inherent power to control abuse in this regard” (at paragraph 16). The Supreme Court also held that “[t]his power of the courts to award costs against a lawyer personally is not limited to civil proceedings, but can also be exercised in criminal cases This means that it may sometimes be exercised against defence lawyers in criminal proceedings, although such situations are rare” (at paragraph 19).

THE CRITERIA:

The Supreme Court indicated that “the threshold for exercising” the power to award costs against defence counsel personally “is a high one” (at paragraph 25). The Court held that “[o]nly serious misconduct can justify such a sanction against a lawyer. Moreover, the courts must be cautious in imposing it in light of the duties owed by lawyers to their clients” (at paragraph 25). The Supreme Court held that an award of costs personally against counsel can only be ordered in “exceptional” circumstances (at paragraph 29).

THE PROCEDURE:

The Supreme Court indicated, at paragraph 36, that when a

court is considering issuing an order of costs personally against counsel, the lawyer involved

should be given prior notice of the allegations against him or her and the possible consequences. The notice should contain sufficient information about the alleged facts and the nature of the evidence in support of those facts. The notice should be sent far enough in advance to enable the lawyer to prepare adequately. The lawyer should, of course, have an opportunity to make separate submissions on costs and to adduce any relevant evidence in this regard. Ideally, the issue of awarding costs against the lawyer personally should be argued only after the proceeding has been resolved on its merits.

The Court also indicated that the Crown “must confine itself to its role as prosecutor of the accused. It must not also become the prosecutor of the defence lawyer” (at paragraph 38).

APPLICATION TO THIS CASE:

In applying these principles to this case, the Supreme Court described the conduct of counsel in this case as being “particularly reprehensible” (at paragraph 42). It indicated, at paragraph 42, that the purpose of the applications were

unrelated to the motions he brought. The respondent was motivated by a desire to have the hearing postponed rather than by a sincere belief that the judges targeted by his motions were hostile. . . . The respondent thus used the extraordinary remedies for a purely dilatory purpose with the sole objective of obstructing the orderly conduct of the judicial process in a calculated manner. It was therefore reasonable for the judge to conclude that the respondent had acted in bad faith and in a way that amounted to abuse of process, thereby seriously interfering with the administration of justice.

(B) TRIALS: DIFFERENT LEVELS OF SCRUTINY OF THE EVIDENCE:

In *R. v. Awer*, 2017 SCC 2, the accused was convicted of the offence of sexual assault. On appeal to the Supreme Court of Canada the accused argued that the trial judge subjected a defence expert to a higher level of scrutiny than the Crown’s expert.

The Supreme Court allowed the appeal, set aside the conviction, and ordered a new trial. In a brief judgment, the Court concluded that (at paragraphs 5-6):

[T]he materially different levels of scrutiny to which the evidence of the two experts was subjected—none for the Crown expert and intense for the defence expert—was unwarranted, and it tended to shift the burden of proof onto the appellant. . . . In these circumstances, we feel obliged to quash the conviction and order a new trial.

(C) TRIALS: JOINDER OF PROVINCIAL AND FEDERAL OFFENCES:

In *R. v. Sciascia*, 2017 SCC 57, the accused was charged with offences contrary to a provincial Highway Traffic Act and the

Criminal Code on separate informations (the Criminal Code offence was proceeded with by way of summary conviction). With the accused's consent the two informations were tried together in a single trial. The accused was convicted of a provincial offence and a Criminal Code offence. He appealed arguing that the trial judge lacked jurisdiction to conduct a joint trial on the criminal and provincial charges and that his trial was therefore a nullity.

The appeal was dismissed. The Supreme Court of Canada held that a Provincial Court judge has jurisdiction to conduct a joint trial of a provincial charges and summary conviction Criminal Code offence. The Supreme Court indicated that "conducting a joint trial is both permissible and desirable where the provincial charges and the summary conviction criminal charges share a sufficient factual nexus and it is in the interests of justice to try them together" (at paragraph one).

(D) JUDICIAL INTERIM RELEASE PENDING APPEAL:

In *R. v. Oland*, 2017 SCC 17, the accused was convicted of second-degree murder. Section 679 of the Criminal Code allows for a convicted person to seek judicial interim release by a single judge of the province's Court of Appeal. An unsuccessful application can be reviewed by a panel of the Court of Appeal.

In this case, a Judge of the New Brunswick Court of Appeal denied the accused's application for release. A review by a panel of three judges of the Court of Appeal upheld the denial of bail. On appeal to the Supreme Court, the Court held that the accused should have been released by the Court of Appeal Judge and that the panel of the Court of Appeal erred in affirming the denial of bail. In the course of the ruling, the Supreme Court considered sections 515(10)(c) [the public confidence test for release consideration by trial judges]; 679(3)(c) [the public confidence test for release by a single Judge of the Court of Appeal pending an appeal]; and 680(1) [review of a section 679 decision by a panel of three judges of the Court of Appeal] of the Criminal Code.

SECTION 679(3)(C):

The Supreme Court noted that in section 679(3)(c) of the Criminal Code, "Parliament has not provided appellate judges with any direction as to how a release pending appeal order is likely to affect public confidence in the administration of justice" (at paragraph 31). However, "it has done so" under section 515(10)(c) of the Criminal Code (at paragraph 31). The Court held that the four factors listed in section 515(10)(c), "with appropriate modifications to reflect the post-conviction context—should be accounted for in considering how, if at all, a release pending appeal order is likely to affect public confidence in the administration of justice" (at paragraph 32).

The Supreme Court pointed out 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). The Supreme Court concluded that in considering the public confidence component under section 679(3)(c), "the seriousness of the

crime for which a person has been convicted should . . . play an equal role in assessing the enforceability interest" (at paragraph 37).

SECTION 680(1):

The Supreme Court held that a panel reviewing a decision of a single judge under s. 680(1) should be guided by the following three principles (at paragraph 61):

First, absent palpable and overriding error, the review panel must show deference to the judge's findings of fact. Second, the review panel may intervene and substitute its decision for that of the judge where it is satisfied that the judge erred in law or in principle, and the error was material to the outcome. Third, in the absence of legal error, the review panel may intervene and substitute its decision for that of the judge where it concludes that the decision was clearly unwarranted.

The Supreme Court, at paragraph 69, concluded that that the appeal court judge

did 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[.]

(5) EVIDENCE:

(A) THE APPLICABILITY OF THE COMMON-LAW CONFESSIONS RULE TO STATEMENTS TENDERED IN A VOIR DIRE UNDER THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS:

In *R. v. Paterson*, 2017 SCC 15, the Crown sought to establish the reasonableness of a warrantless search by presenting evidence on a *Charter* voir dire of things said to the police by the accused before they entered his residence. An appeal to the Supreme Court of Canada raised the following issue: "the applicability of the common law confessions rule to statements tendered in a voir dire under the *Canadian Charter of Rights and Freedoms*" (at paragraph 1).

The accused argued that the Crown was required to prove beyond a reasonable doubt that any statements made by the accused and upon which it relied to support the police entry into the apartment, were voluntarily made (i.e., the "confessions rule"). The Supreme Court rejected this proposition. It held, at paragraph 18, that "the confessions rule should not be expanded as proposed by the appellant. More particularly . . . the confessions rule should not apply to statements tendered in the context of a voir dire under the *Charter*." The Supreme

"[A]dmitting a statement by an accused for the purpose of assessing the constitutionality of state action . . . does not engage the rationale for the confessions rule."

It held that a drug-recognition expert's expertise had been conclusively and irrebuttably established by Parliament

Charter voir dire would distort both the rule and its rationale.

(B) HEARSAY:

In *R. v. Bradshaw*, 2017 SCC 35, a witness (Thielen) provided a videotaped reenactment of two murders in which he implicated the accused. Thielen refused to testify at the accused's trial. The Crown sought to admit into evidence his reenactment. The trial judge admitted the reenactment and the accused was convicted. On appeal to the Supreme Court of Canada, the following issue was raised (at paragraph 18): "When can a trial judge rely on corroborative evidence to conclude that the threshold reliability of a hearsay statement is established?"

The Supreme Court held that (at paragraph 4):

[C]orroborative evidence may be used to assess threshold reliability if it overcomes the specific hearsay dangers presented by the statement. These dangers may be overcome on the basis of corroborative evidence if it shows, when considered as a whole and in the circumstances of the case, that the only likely explanation for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement. The material aspects are those relied on by the moving party for the truth of their contents.

However, the Court noted that (at paragraph 6):

[T]he evidence he relied on did not, when considered in the circumstances of the case, show that the only likely explanation was that Thielen was truthful about Bradshaw's involvement in the murders. It did not substantially negate the possibility that Thielen lied about Bradshaw's participation in the murders. While this corroborative evidence may increase the probative value of the re-enactment statement if admitted, it is of no assistance in assessing the statement's threshold reliability. The trial judge therefore erred in relying on this corroborative evidence.

(C) DRUG RECOGNITION EXPERT EVIDENCE:

Section 254(3.1) of the Criminal Code allows designated police officers (referred to as "drug recognition experts") to demand that the operator of a motor vehicle submit to a drug

Court held that (at paragraph 21):

[A]dmitting a statement by an accused for the purpose of assessing the constitutionality of state action, as opposed to the purpose of determining the accused's guilt, does not engage the rationale for the confessions rule. To apply the rule to evidence presented at a

evaluation (a series of physical tests designed to determine if the person's ability to operate a motor vehicle is impaired by a drug).

In *R. v. Bingley*, 2017 SCC 12, the accused was involved in a motor vehicle collision. A police officer, who was designated as a drug recognition expert, conducted a "field sobriety test" which led to the accused being charged with the offence of operating a motor vehicle while impaired by a drug.

On appeal to the Supreme Court of Canada the following issue was raised (at paragraph 1): "Can a drug recognition expert ('DRE') testify about his or her determination under s. 254(3.1) of the *Criminal Code*, R.S.C. 1985, c. C-46, without a *voir dire* to determine the DRE's expertise?"

The Supreme Court held that a *voir dire* was not required. The Court indicated that while a trial judge would normally determine whether an expert has special expertise at a *voir dire*, section 254(3.1) of the Criminal Code conclusively answered the question. It held that a drug recognition expert's expertise had been conclusively and irrebuttably established by Parliament (at paragraph 20):

The DRE, literally, is a "drug recognition expert", certified as such for the purposes of the scheme. It is undisputed that the DRE receives special training in how to administer the 12-step drug recognition evaluation and in what inferences may be drawn from the factual data he or she notes. It is for this limited purpose that a DRE can assist the court by offering expert opinion evidence.

(6) CHARTER:

(A) SECTION 8: SEARCH AND SEIZURE-EXIGENT CIRCUMSTANCES:

In *Paterson*, the police entered an apartment to seize several marijuana roaches. The police told the accused they would treat this as a "no case" seizure, meaning that they intended to seize the roaches without charging him. Once inside, the police observed a bulletproof vest, a firearm, and drugs. They arrested the accused, obtained a warrant to search his apartment, and executed the warrant. This led to the discovery of other firearms and drugs.

The accused was charged with various drug and firearm offences. He was convicted at trial. On appeal, the Court of Appeal of British Columbia upheld the convictions.

The accused appealed to the Supreme Court of Canada. The Supreme Court described one of the issues raised by the appeal as being (at paragraph 1): "[W]hether, on the facts of this case, exigent circumstances, within the meaning of s. 11(7) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ("CDSA"), made it impracticable to obtain a warrant before entering and searching the appellant's residence[.]"

The Supreme Court allowed the appeal, set aside the convictions, and entered acquittals. The Supreme Court of Canada held that the police entry into the appellant's residence "was not justified by exigent circumstances making it impracticable to obtain a warrant" (at paragraph 4). The Court excluded the evidence located by the search, pursuant to section 24(2) of the Charter and the accused was acquitted.

The Supreme Court held that (at paragraphs 33-34):

“[E]xigent circumstances” in s. 11(7) denotes not merely convenience, propitiousness or economy, but rather *urgency*, arising from circumstances calling for immediate police action to preserve evidence, officer safety or public safety. . . . Even where exigent circumstances are present, however, they are not, on their own, sufficient to justify a warrantless search of a residence under s. 11(7). Those circumstances must render it “impracticable” to obtain a warrant.

The Court held, at paragraph 34, that the “impracticability of obtaining a warrant does not support a finding of exigent circumstances.”

The Court also held, at paragraphs 36-37, that the word

“impracticable” within the meaning of s. 11(7) contemplates that the exigent nature of the circumstances are such that taking time to obtain a warrant would seriously undermine the objective of police action—whether it be preserving evidence, officer safety or public safety. . . . In sum, I conclude that, in order for a warrantless entry to satisfy s. 11(7), the Crown must show that the entry was compelled by urgency, calling for immediate police action to preserve evidence, officer safety or public safety. Further, this urgency must be shown to have been such that taking the time to obtain a warrant would pose serious risk to those imperatives.

In the circumstances of this case, the Supreme Court concluded that (at paragraph 39):

[T]he police had a practicable option: to arrest the appellant and obtain a warrant to enter the residence and seize the roaches. If, as the Crown says, the situation was not serious enough to arrest and apply for a warrant, then it cannot have been serious enough to intrude into a private residence without a warrant.

The Supreme Court concluded, at paragraph 41, that “the warrantless entry by the police into the appellant’s residence was not authorized by s. 11(7) of the CDSA, and infringed his right under s. 8 of the *Charter* to be secure against unreasonable search.”

(B) EXCLUSION OF EVIDENCE UNDER SECTION 24(2):

Section 24(2) of the *Charter* allows a Canadian trial judge to exclude evidence that “was obtained in a manner that infringed” any of the provisions of the *Charter* if the admission of the evidence “would bring the administration of justice into disrepute.”

In *Paterson*, the Supreme Court held that the evidence obtained by the police was obtained in violation of section 8 of the *Charter* should be excluded despite the seriousness of the offences (at paragraphs 56-57):

It is therefore important not to allow the third *Grant* 2009 factor of society’s interest in adjudicating a case on

its merits to trump all other considerations, particularly where (as here) the impugned conduct was serious and worked a substantial impact on the appellant’s *Charter* right. In this case, I find that the importance of ensuring that such conduct is not condoned by the court favours exclusion. As Doherty J.A. also said in *McGuffie*, at para. 83, “[t]he court can only adequately disassociate the justice system from the police misconduct and reinforce the community’s commitment to individual rights protected by the *Charter* by excluding the evidence. . . . This unpalatable result is the direct product of the manner in which the police chose to conduct themselves.”

Having considered these factors separately and together, I am of the view that the evidence obtained as a result of the entry and search of the appellant’s residence should be excluded, as its admission would bring the administration of justice into disrepute.

(C) SECTION 11(B): TRIAL WITHIN A REASONABLE PERIOD OF TIME:

Section 11(b) of the *Charter* protects the right of an accused person to be tried within a reasonable period of time. It states as follows:

Any person charged with an offence has the right
. . . .
(b) to be tried within a reasonable time[.]

In *R. v. Jordan*, 2016 SCC 27, the Supreme Court issued its landmark decision in relation to section 11(b) of the *Charter*. In that decision the Court created presumptive time frames (18 months for summary conviction offences and 30 months for indictable offences), the breach of which will result in the staying of charges for unreasonable delay. In *R. v. Cody*, 2017 SCC 31, the Court had the opportunity to revisit *Jordan*, particularly in relation to cases in which the charges had been laid prior to *Jordan* being issued (referred to as “transitional cases”).

The Supreme Court held in *Cody* that the “new framework in *Jordan* applies to cases already in the system. . . . However, in some cases, the transitional exceptional circumstance may justify a presumptively unreasonable delay where the charges were brought prior to the release of *Jordan*” (at paragraph 67). The Court indicated that (at paragraph 68):

[T]he transitional exceptional circumstance assessment involves a qualitative exercise. . . . The Crown may rely on the transitional exceptional circumstance if it can show that “the time the case has taken is justified based on the parties’ reasonable reliance on the law as it previously existed” . . . Put another way, the Crown may show

“If . . . the situation was not serious enough to arrest and apply for a warrant, then it cannot have been serious enough to intrude into a private residence without a warrant.”

“In light of these findings, the Crown cannot show that the 36.5 months of net delay in this case was justified”

that it cannot be faulted for failing to take further steps, because it would have understood the delay to be reasonable given its expectations prior to *Jordan* and the way delay and the other factors such as the seriousness of the offence and prejudice would have been assessed under *Morin*.

The Supreme Court concluded that a stay of proceedings was appropriate because the Crown was unable to establish that the delay “was justified based on its reliance on the previous state of the law” (at paragraphs 73-74):

The charges in this case were serious. In our view, however, this consideration is overcome by the trial judge’s findings of “real and substantial actual prejudice” The trial judge also made an express finding that Mr. Cody’s conduct was not “inconsistent with the desire for a timely trial”

In light of these findings, the Crown cannot show that the 36.5 months of net delay in this case was justified based on its reliance on the previous state of the law. To the contrary, the trial judge’s findings under the previous law strengthen the case for a stay of proceedings. Where a balancing of the factors under the *Morin* analysis, such as seriousness of the offence and prejudice, would have weighed in favour of a stay, we expect that the Crown will rarely, if ever, be successful in justifying the delay as a transitional exceptional circumstance under the *Jordan* framework. We therefore find that the delay in this case was unreasonable.²

(D) SECTION 11(F): THE RIGHT TO A TRIAL BY JURY

Section 11(f) of the Charter guarantees the right to trial by jury. It states as follows:

Any person charged with an offence has the right

. . . .

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment[.]

In *R. v. Peers*, 2015 ABCA 407 (Can. Alta.), the accused was charged with an offence, contrary to section 194 of the Securities Act, R.S.A. 2000, c. S-4 (Can. Alta.). The maximum penalty for a conviction under this provision was a period of imprisonment of five years less a day, a fine of up to \$5 million,

or both. The Alberta Court of Appeal held that the phrase “imprisonment for five years or a more severe punishment” found in section 11(f) of the Charter primarily engaged the deprivation of liberty inherent in the maximum sentence of imprisonment imposed by the statute. The Court of Appeal concluded that a maximum penalty of “five years less a day” did not become a more severe penalty just because some collateral negative consequences were added to it.

On appeal to the Supreme Court of Canada, the Court in *R. v. Peers*, 2017 SCC 13, stated in a brief oral judgment (at paragraph 1): “The appeal is dismissed. We conclude that the appellant was not entitled to a trial by jury, substantially for the reasons of the majority of the Court of Appeal, 2015 ABCA 407, 609 A.R. 352.”

(7) SENTENCING:

(A) CONDITIONAL SENTENCES:

Section 742.1 of the Criminal Code allows a judge to order that a period of imprisonment of less than two years be served in the community under certain conditions (normally including “house arrest”). These sentences are referred to as “conditional sentences.”

In *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, the Supreme Court of Canada considered the nature of conditional sentences in the following context (at paragraph 2):

This appeal concerns the obligation of permanent residents to avoid “serious criminality”, as set out in s. 36(1)(a) of the *IRPA* [*Immigration and Refugee Protection Act*, S.C. 2001, c. 27.]. This obligation is breached when a permanent resident is convicted of a federal offence punishable by a maximum term of imprisonment of at least 10 years, or of a federal offence for which a term of imprisonment of more than 6 months has been imposed.

The Supreme Court made the following comments concerning the nature and purpose of conditional sentences (at paragraphs 28, 32, 33):

[C]onditional sentences generally indicate less “serious criminality” than jail terms. As Lamer C.J. said, a “conditional sentence is a meaningful alternative to incarceration for less serious and non-dangerous offenders” Thus, more serious crimes may be punished by jail sentences that are *shorter* than conditional sentences imposed for less serious crimes—shorter because they are served in jail rather than in the community. . . . Conditional sentences are designed as an alternative to incarceration in order to encourage rehabilitation, reduce the rate of incarceration, and improve the effectiveness of sentencing

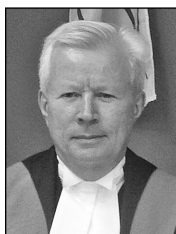
2. For a review of *Cody*, see Matthew R. Gourlay, *After Jordan: The Fate of the Speedy Trial and Prospects for Systemic Reform*, 36:2 *Advoc. J.* 22-27 (2017).

CONCLUSION

As we have seen, the Supreme Court of Canada considered a number of issues in 2017 related to criminal law and procedure. This included the defences of mistake of age (*R. v. George*) and officially induced error (*R. v. Bédard*). In addition, the Supreme Court commented upon conditional sentences (*Tran v. Canada*), clarified the law of bail at the appellate level (*R. v. Oland*), and considered the nature and extent of informer privilege (*R. v. Durham Regional Crime Stoppers Inc.*). In the constitutional context, the Court considered exigent circumstances in the law of search and seizure and when evidence obtained in violation of the Charter should be excluded (*R. v. Paterson*).

Finally, it is difficult to predict over the course of a year which decision rendered by the Supreme Court will have the most significant long-term effect. For the Supreme Court of Canada in 2017, I would choose the Court's decision in *Cody*. In *Cody* the Court affirmed its groundbreaking and controver-

sial decision in *Jordan*. *Cody* provided the Supreme Court with the opportunity to step back from *Jordan* or to affirm its remarkable transformation of the right to be tried within a reasonable period of time in Canada. It chose the latter.



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The Calm Before the Storm?

Selected Criminal-Law Cases in the Supreme Court's 2016-2017 Term

Charles D. Weisselberg & Whayeun Chloe Kim

Last year's review was titled *One Term, Two Courts*, and it noted some of the differences in the Court's decision making before and after Justice Antonin Scalia's passing.¹ Justice Scalia's replacement, Justice Neil Gorsuch, was sworn in on April 10, 2017, too late to have an impact on the criminal side of the 2016-2017 Term's ledger. He participated in only three of the twenty-two cases we discuss here,² and none of his votes was decisive. This was one Term, one Court.

Two characteristics mark the Term. One is a light criminal-law docket (with some significant rulings, but no blockbusters). The other is a relatively high degree of consensus—a high percentage of unanimous opinions—as well as fewer merits cases determined by a single vote than in the five previous Terms with a full Court.³ The October 2017 term may well be different.

We will begin with two Fourth Amendment cases that may illustrate the way in which an eight-member Court strove for consensus.

FOURTH AMENDMENT

The Supreme Court decided two civil-rights cases before Justice Gorsuch joined the bench, issuing narrow holdings, perhaps avoiding a deadlock. In *Manuel v. City of Joliet*,⁴ the justices addressed the threshold question whether the Fourth Amendment governs unlawful pretrial-detention claims even if the detention occurs after the start of legal process. In *County of Los Angeles v. Mendez*,⁵ the Court unanimously rejected the Ninth Circuit's "provocation rule" in excessive-force claims, holding that a different Fourth Amendment violation cannot transform a reasonable use of force into an unreasonable seizure.

UNLAWFUL PRETRIAL DETENTION

In *Manuel*, police officers searched Elijah Manuel during a traffic stop and found a bottle of pills. According to Manuel, police officers falsely claimed that there was evidence of ecstasy, and a judge found probable cause to detain him based on the officers' claims. He brought a lawsuit under 42 U.S.C. § 1983, alleging that he was arrested unlawfully and detained

without probable cause. The Seventh Circuit found that a detention following a legal process could not give rise to a Fourth Amendment claim, holding that any claim would have to be under the Due Process Clause. In a 6-2 decision, the U.S. Supreme Court reversed.⁶

Writing for the majority, Justice Kagan explained that the Supreme Court's precedents reflect that "pretrial detention can violate the Fourth Amendment not only when it precedes, but also when it follows, the start of legal process in a criminal case."⁷ If the legal process itself goes wrong—for example, when a probable-cause determination is predicated solely on a police officer's false statements—the pretrial detention should be challenged under the Fourth Amendment. Although the Court addressed this "threshold inquiry" of which constitutional right is at issue, the Court did not define "the contours and prerequisites of a § 1983 claim."⁸ Notably, the Court left open the question of whether the Fourth Amendment cause of action continues to accrue throughout the period of detention, which would be critical in determining whether Manuel's claim is time-barred.⁹

Justice Alito, joined by Justice Thomas, dissented.¹⁰ Although they agreed with the Court that the Fourth Amendment continues to apply after the start of legal process, they would still have dismissed the unlawful-detention claim. They also accused the majority of not addressing the critical questions in Manuel's case: whether a malicious-prosecution claim could be brought under the Fourth Amendment and whether Fourth Amendment detention claims continue to accrue during pretrial detention.¹¹

EXCESSIVE FORCE

Mendez involved a police shooting of two innocent individuals. Two deputy sheriffs entered a shack occupied by Angel Mendez and Jennifer Garcia without a warrant and without knocking or announcing their presence. Mendez, who had been napping, rose from the bed and picked up a BB gun nearby to place it on the floor. The deputies saw Mendez holding a gun and immediately opened fire. Mendez and Garcia were shot multiple times. Mendez and Garcia brought a 42

Footnotes

1. Charles D. Weisselberg and Juliana DeVries, *One Term, Two Courts: Selected Criminal-Law Cases in the Supreme Court's 2015-2016 Term*, 52 COURT REV. 142, 150 (2016).
2. The three cases were *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017), *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), and *Virginia v. LeBlanc*, 137 S. Ct. 1726 (2017) (per curiam).
3. This Term, 41 decisions (59%) were unanimous and only seven merits cases (10%) were decided by a single vote. By contrast, the five terms before October 2015 had an average rate of unanimity of 49% and an average of 22% of the merits cases decided by one vote. See SCOTUSblog, *Final Stat Pack for October Term 2016*, at 5, <http://www.scotusblog.com/wp-content/uploads/2017/06/>

SB_votesplit_20170628.pdf.

4. 137 S. Ct. 911 (2017).
5. 137 S. Ct. 1539 (2017).
6. *Manuel*, 137 S. Ct. at 915-17, 922.
7. *Manuel*, 137 S. Ct. at 918.
8. *Id.* at 920.
9. *Id.* at 916, 920.
10. *Id.* at 923 (Alito, J., dissenting).
11. Although Justice Thomas joined Justice Alito's opinion in full, he wrote separately to argue that the issue of the accrual date should have been left open for another case. *Id.* at 922 (Thomas, J., dissenting).

U.S.C. § 1983 action alleging several Fourth Amendment violations, including use of excessive force. The lower courts found that the deputies acted reasonably in shooting to protect themselves. Still, they determined that the officers used excessive force under the Ninth Circuit's provocation rule, which holds that an officer's otherwise appropriate use of force is unreasonable "if (1) the officer intentionally or recklessly provoked a violent response, and (2) that provocation is an independent constitutional violation" (such as entering without a warrant).¹² The Supreme Court reversed.

In a unanimous ruling, Justice Alito wrote that the provocation rule "is incompatible with our excessive force jurisprudence."¹³ Courts should determine whether the force used is reasonable by examining "whether the totality of the circumstances justifies a particular sort of search or seizure."¹⁴ This inquiry is dispositive; if the officer carries out a seizure that is reasonable based on the circumstances, there is no valid excessive-force claim.¹⁵ The provocation rule, however, would allow an excessive-force claim if there was a different Fourth Amendment violation, such as entering without a warrant. The Court decried the practice of "us[ing] another constitutional violation to manufacture an excessive force claim where one would not otherwise exist."¹⁶ Although the Court sharply criticized the provocation rule, it stopped short of dismissing the case. Instead, the justices sent the case back for further analysis of the officers' liability under an alternative theory.

FIFTH AND FOURTEENTH AMENDMENTS

This was a significant part of the Term's criminal-law docket, with notable rulings on double jeopardy, expert assistance, compensation for wrongful convictions and disclosure of exculpatory evidence.

DOUBLE JEOPARDY CLAUSE

Over the years, the Supreme Court has wrestled with the preclusive effect that may be given to inconsistent jury determinations. In *Bravo-Fernandez v. United States*,¹⁷ the defendants were convicted of federal-program bribery charges but acquitted of conspiracy and other related offenses, which were inconsistent verdicts. On appeal, their bribery convictions were reversed due to an instructional error. Should the jury acquittal prevent the government from retrying the defendants on the bribery charges? A unanimous Court said no.

The Court's opinion, written by Justice Ginsburg, is a primer on issue preclusion in criminal law. When a jury returns a verdict of not guilty on some charges but fails to reach a verdict on a different count that depends on the same critical issue, *Yeager v. United States* provides that the hung count may not be retried because "there is no way to decipher

what a hung count represents."¹⁸ By contrast, when there are rationally irreconcilable verdicts of both acquittal and conviction, the acquittal has no preclusive effect under the rule established in *United States v. Powell*.¹⁹ The *Bravo-Fernandez* case is more like *Powell* than *Yeager*, the Court held, because the defendants could not show that the jury necessarily resolved in their favor the question of whether they violated the bribery statute. We cannot know which of the inconsistent verdicts the jury really meant. And that the bribery convictions were later vacated for instructional error does not change the analysis since issue preclusion depends upon the jury's assessment of the evidence in light of the allegations as presented at trial.²⁰ The Court thus declined an invitation to deviate from the general rule that the Double Jeopardy Clause does not prevent reprosecution when a conviction is reversed for grounds other than insufficiency of the evidence.²¹ Justice Thomas concurred to suggest that, in an appropriate case, the Court should reconsider *Yeager* and a prior case, *Ashe v. Swenson*.²²

The Court granted certiorari to decide . . . whether *Ake* [v. *Oklahoma*] requires the appointment of an independent defense expert [but] instead decided a narrower question.

DUE PROCESS CLAUSE — ASSISTANCE OF EXPERTS

*Ake v. Oklahoma*²³ is the foundational case on an indigent defendant's right to expert assistance. *Ake* establishes that when an accused's mental condition is relevant to criminal culpability and punishment, the State must provide a mental-health professional capable of "conduct[ing] an appropriate examination and assist[ing] in evaluation, preparation, and presentation of the defense."²⁴ The Court granted certiorari in *McWilliams v. Dunn*²⁵ to decide whether *Ake* requires the appointment of an independent defense expert. It instead decided a narrower question.

James McWilliams was convicted of capital murder. At the jury portion of the penalty phase, the prosecution called two psychiatrists who had previously evaluated him for competency to stand trial. The defense subpoenaed mental-health records from the facility where he was held, though the records did not arrive before the jury recommended a sentence of death. Prison records and a report from a neuropsychologist employed by the State arrived two days before the sentencing hearing. Although the defense had asked for a continuance and for expert assistance to evaluate the materials, the requests

12. *Mendez*, 137 S. Ct. at 1545 (internal citations omitted).

13. *Id.* at 1546.

14. *Id.* (citing *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)).

15. *Id.* at 1547.

16. *Id.* at 1546.

17. 137 S. Ct. 352 (2016).

18. *Id.* at 357 (quoting *Yeager v. United States*, 557 U.S. 110, 121-22 (2009)).

19. 469 U.S. 57, 68 (1984).

20. 137 S. Ct. at 363-64.

21. *Id.*

22. *Id.* at 366, 367 (Thomas, J., concurring) (addressing *Yeager*, *supra*, and *Ashe v. Swenson*, 397 U.S. 436 (1970)).

23. 470 U.S. 68 (1985).

24. *Id.* at 83.

25. 137 S. Ct. 1790 (2017).

[T]he justices ruled that [Colorado’s “Exoneration Act”] failed to afford a constitutionally adequate remedy.

were denied and the defendant was sentenced to death. His case reached the Supreme Court on federal habeas corpus.

In a 5-4 decision authored by Justice Kennedy, the Court found that the state appellate court’s decision was contrary to, or involved an unreasonable application, of law clearly established by *Ake*.²⁶ Neither

the State neuropsychologist “nor any other expert helped the defense evaluate [the] report or McWilliams’ extensive medical records and translate these data into a legal strategy.”²⁷ No one helped the defense prepare arguments or testimony, nor did the short time frame allow for more expert assistance.²⁸ The majority noted that, “[a]s a practical matter, the simplest way for a State to meet this standard may be to provide a qualified expert retained specifically for the defense team” and that “appears to be the approach the overwhelming majority of jurisdictions have adopted.”²⁹ However, the majority did not need to reach the broader question whether an *independent* expert is constitutionally required, since it was clear that that McWilliams was denied the help of *any* expert.³⁰ The Court remanded for the Court of Appeals to address whether the error required habeas relief to be granted.³¹

Justice Alito dissented, joined by the Chief Justice and Justices Thomas and Gorsuch.³² Criticizing the majority for avoiding the broader question, these four justices would hold that *Ake* left open whether due process requires the appointment of a defense-team expert as opposed to simply a neutral expert, so McWilliams could not show that the state courts had failed to follow clearly established law.³³

DUE PROCESS CLAUSE — REFUND OF FEES, COSTS, AND RESTITUTION

The petitioners in *Nelson v. Colorado*³⁴ were two defendants whose criminal convictions had been overturned. Shannon Nelson was acquitted in a retrial that followed an appellate reversal; Luis Alonzo Madden was not retried after his convictions were overturned. Nelson and Madden both sought return of costs, fees, and restitution that they had paid.³⁵ Colorado’s “Exoneration Act” provides for refund only if a person affirmatively brings a civil claim and proves actual innocence of the

offense by clear and convincing evidence.³⁶ The Colorado Supreme Court found that the Act affords the only process to obtain a refund, and that it comports with the Due Process Clause. Seven members of the Supreme Court disagreed.

In an opinion by Justice Ginsburg, the justices ruled that the Act failed to afford a constitutionally adequate remedy. The majority measured the State’s procedures under the three-part test set forth in *Mathews v. Eldridge*,³⁷ reasoning that *Mathews* provides the appropriate framework since the challenge was to the continuing deprivation of property after a conviction was reversed or vacated, and no further criminal process is implicated. Applying *Mathews*, the former defendants’ “interest in regaining their funds is high, the risk of erroneous deprivation of those funds under the Exoneration Act is unacceptable, and the State has shown no countervailing interests” in retaining the funds.³⁸ They “should not be saddled with any proof burden” since they are presumed innocent.³⁹ The State “may not impose anything more than minimal procedures on the refund of exactions dependent upon a conviction subsequently invalidated.”⁴⁰

Justice Alito concurred, but would have analyzed the issue under the due-process framework of *Medina v. California*,⁴¹ which applies to rules that are part of the criminal process.⁴² He would have reached the same outcome under *Medina* for fines and monetary penalties, drawing in part on historical practices.⁴³ Noting that a restitution order is much like a civil judgment, however, Justice Alito would have held that refunds of restitution awards are not constitutionally required, especially awards that follow a final judgment later vacated on collateral review.⁴⁴ Justice Thomas dissented, arguing that there is no substantive right under the Due Process Clause to repayment of funds that were lawfully paid to the State, and Colorado was free to craft its own procedures, if any, for recoupment.⁴⁵

The case may have a substantial impact. It clarifies which due process test—*Mathews* or *Medina*—applies after the criminal process is completed. And, of course, it instructs states not to impose more than “minimal procedures” for reimbursement of fees when a conviction is invalidated.

DUE PROCESS CLAUSE — VAGUENESS

Two terms ago, the Supreme Court decided *Johnson v. United States*⁴⁶ and held that a residual clause in the Armed Career Criminal Act of 1984 (“ACCA”) was unconstitutionally vague. The same language in the ACCA’s residual clause, defining a

26. *Id.* at 1801.

27. *Id.* at 1800.

28. *Id.* at 1800-01.

29. *Id.* at 1800.

30. *Id.*

31. *Id.* at 1801.

32. *Id.* at 1801 (Alito, J., dissenting).

33. *Id.* at 1804, 1806. The dissenting justices also argued that the majority decided the case on an issue for which review was denied. *Id.* at 1806-07.

34. 137 S. Ct. 1249 (2017).

35. *Id.* at 1253.

36. *Id.* at 1254. The individual must also have served at least part of a

term of incarceration for a felony conviction, and the conviction must have been overturned for reasons other than insufficiency of the evidence, or legal error not related to actual innocence. *Id.*

37. 424 U.S. 319, 335 (1976).

38. 137 S. Ct. at 1257-58.

39. *Id.* at 1256.

40. *Id.* at 1258.

41. 505 U.S. 437 (1992).

42. 137 S. Ct. at 1258, 1258 (Alito, J., concurring).

43. *Id.* at 1260.

44. *Id.* at 1261-62.

45. *Id.* at 1263, 1265-66 (Thomas, J., dissenting).

46. 135 S. Ct. 2551 (2015).

“crime of violence” as involving conduct “that presents a serious potential risk of physical injury to another,” is in the U.S. Sentencing Guidelines and is one of the criteria that allows a defendant to be sentenced as a career offender.⁴⁷ The District Court found that the defendant in *Beckles v. United States*⁴⁸ qualified as a career offender under the Guidelines, and he challenged the provision in light of the holding in *Johnson*. Although the statute was void for vagueness, a majority of the Court ruled that the relevant guideline was not susceptible to such a challenge.

Writing for five members of the Court, Justice Thomas relied upon the justices’ earlier ruling in *United States v. Booker*, which made the Guidelines “effectively advisory.”⁴⁹ Reasoning that “[b]ecause they merely guide the District Courts’ discretion, the Guidelines are not amenable to a vagueness challenge.”⁵⁰ A defendant can challenge a sentence or a Guidelines provision on other grounds, such as under the *Ex Post Facto* Clause, the Eighth Amendment in a capital prosecution, or the Due Process Clause if a court uses materially false evidence to sentence an uncounseled defendant.⁵¹ But since the Guidelines do not fix the permissible range of sentences, and merely guide the exercise of discretion within the sentencing range, they are different from statutes.

Justice Ginsburg concurred in the result because the official commentary to the challenged guideline expressly designated *Beckles*’ offense as a crime of violence.⁵² Justice Sotomayor agreed with Justice Ginsburg, but wrote separately to address the majority’s vagueness ruling. She noted that while the Guidelines were no longer binding, they play a central role in federal sentencing, providing the framework for the thousands of sentencing proceedings each year.⁵³ Justice Sotomayor contended that a district court’s reliance on a vague guideline creates a serious risk of arbitrary enforcement, since the Guidelines functionally anchor the judge’s discretion. She also queried how a guideline could be treated as formal law for *Ex Post Facto* Clause and Eighth Amendment but not for a vagueness challenge.⁵⁴

DUE PROCESS CLAUSE — BRADY MATERIAL

The *Brady* case—*Turner v. United States*⁵⁵—arose from a highly publicized murder prosecution in the District of Columbia. The seven petitioners were convicted on a theory that they participated in a group attack upon the victim, who was robbed, beaten, and sodomized. Decades later, they sought to vacate their convictions based upon evidence withheld by the prose-

cution, the most important of which was the identity of a man seen near the scene of the crime, and who was arrested for attacks in the neighborhood shortly after the murder took place. The petitioners sought to tie that together with other undisclosed evidence—noises heard by another witness—which might have supported a theory that the offense was committed by a single perpetrator, rather than a group.⁵⁶

In a 6-2 ruling, authored by Justice Breyer, the Court found that the suppressed evidence was “*Brady* information” since it was favorable to the accused, as either exculpatory or impeaching evidence.⁵⁷ However, the majority agreed with the lower courts that the withheld evidence was not material, and thus the non-disclosure did not violate the Due Process Clause. The guilt of a single other perpetrator would be inconsistent with the petitioners’ guilt only if there was no group attack. Since virtually every witness to the crime testified that it was a group attack, the withheld evidence was insufficient to undermine confidence in the outcome of the jury’s verdict.⁵⁸ Justices Kagan and Ginsburg dissented.⁵⁹ They did not disagree on the law, but saw the potential impact of the withheld evidence differently, arguing that it could have changed the tenor of the entire trial.⁶⁰

In addition to these merits cases with full opinions, the justices issued a memorandum disposition worth a brief mention. In *Rippo v. Baker*,⁶¹ the justices emphasized that the Due Process Clause may require a judge to recuse himself even if he has no actual bias. “Recusal is required when, objectively speaking, ‘the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.’”⁶²

SIXTH AMENDMENT

The Court handed down four significant Sixth Amendment cases last Term. In *Pena-Rodriguez v. Colorado*,⁶³ the Court examined the impact of juror racial bias on a defendant’s right to an impartial jury, and the evidence that can establish bias. The justices also decided three noteworthy ineffective-assistance-of-counsel cases.

[T]he Court found that the suppressed evidence was “*Brady* information” since it was favorable to the accused, as either exculpatory or impeaching evidence.

47. U.S. Sentencing Comm’n, Guidelines Manual §§ 4B1.1(a), 4B1.2(a)(2) (Nov. 2006).

48. 137 S. Ct. 886 (2017).

49. *Id.* at 894 (quoting *United States v. Booker*, 543 U.S. 220, 245 (2005)). Justice Kennedy joined the majority opinion but noted that the vagueness doctrine, which is concerned with giving fair warning to an offender and preventing arbitrary enforcement, cannot automatically be transferred to sentencing. *Id.* at 897, 897 (Kennedy, J., concurring). Justice Kagan did not participate in the decision.

50. *Id.*

51. *Id.* at 895-96 (citations omitted).

52. *Id.* at 897, 897-98 (Ginsburg, J., concurring).

53. *Id.* at 898, 899 (Sotomayor, J., concurring).

54. *Id.* at 901-03.

55. 137 S. Ct. 1885 (2017).

56. *Id.* at 1891-93.

57. *Id.* at 1893.

58. *Id.* at 1894-95.

59. *Id.* at 1896 (Kagan, J., dissenting).

60. *Id.* at 1897.

61. 137 S. Ct. 905 (2017) (per curiam).

62. *Id.* at 907 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

63. 137 S. Ct. 855 (2017).

Writing for the majority, Justice Kennedy emphasized the unique nature of racial bias.

RIGHT TO AN IMPARTIAL JURY AND EVIDENCE OF BIAS

The Court has generally protected jury deliberations from intrusive inquiry by barring a criminal defendant from impeaching a verdict through juror testimony.⁶⁴ In *Pena-Rodriguez*, the Court recognized a constitutional

exception to the “no-impeachment rule” when there is clear evidence of racial bias.

A Colorado jury convicted Miguel Angel Peña-Rodriguez of unlawful sexual contact and harassment.⁶⁵ After the verdict, two jurors disclosed that a juror made racially biased statements during deliberations, including his belief that Mr. Peña-Rodriguez was guilty because he is Mexican.⁶⁶ Peña-Rodriguez brought a motion for a new trial, but the trial court denied relief under Colorado Rule of Evidence 606(b). Like its federal counterpart, the Colorado evidentiary rule prohibited a juror from testifying about a statement made during deliberations in a proceeding inquiring into the validity of the verdict.⁶⁷ The state’s appellate courts affirmed. In a 5-3 ruling, the Supreme Court reversed.

Writing for the majority, Justice Kennedy emphasized the unique nature of racial bias. Unlike other types of jury bias, “racial bias implicates unique historical, constitutional, and institutional concerns” and is “a familiar and recurring evil that, if left unaddressed, would risk systematic injury to the administration of injustice.”⁶⁸ The Court also found racial bias to be distinct in a pragmatic sense. Safeguards that generally protect the right to an impartial jury, such as *voir dire*, may be less effective in exposing racial bias and may even exacerbate existing prejudice.⁶⁹ Thus, where there is clear evidence of racial bias, the Court held, the Sixth Amendment requires an exception to the no-impeachment rule and permits “the trial court to consider the evidence of the juror’s statement and any resulting denial of the jury trial guarantee.”⁷⁰ But the Court limited the scope of this exception. An offhand comment indicating racial bias or hostility is not sufficient to overcome the no-impeachment bar. Instead, “the statement must tend to show that racial animus was a significant motivating factor in the juror’s vote to convict.”⁷¹

Justice Alito, joined by Chief Justice Roberts and Justice

Thomas, dissented.⁷² He analogized the no-impeachment rule to other well-established rules that limit a criminal defendant’s ability to introduce evidence, and argued that the no-impeachment rule should not be cast aside lightly.⁷³ Justice Alito also wrote that the majority’s holding runs counter to the Court’s precedents and prevents jurisdictions from developing their own evidence rules to address juror bias.⁷⁴

The full impact of the Court’s holding remains to be seen. The majority took some comfort in the fact that 17 jurisdictions have already recognized a racial-bias exception.⁷⁵ The dissent noted, however, that it would be difficult to measure the difference in the quality of jury deliberations in different jurisdictions and expressed concern that the Court’s exception will invite the harms that the no-impeachment rule was designed to prevent.⁷⁶

INEFFECTIVE ASSISTANCE OF COUNSEL

*Lee v. United States*⁷⁷ is the latest in a series of rulings about effective assistance and the immigration consequences of a conviction. *Weaver v. Massachusetts*⁷⁸ addresses whether prejudice is presumed when a structural error is raised via an ineffective-assistance claim or whether the defendant must establish prejudice under the *Strickland* standard. And in *Buck v. Davis*,⁷⁹ the Court held that defense counsel’s decision to call a witness, who testified that one’s race increases the probability of future dangerousness, was both deficient and prejudicial.⁸⁰

Jae Lee was charged with possessing ecstasy with intent to distribute. After his attorney assured him that he would not be deported, Lee accepted a plea agreement. But his attorney was mistaken, and Lee was subject to mandatory deportation. The lower courts rejected his ineffective-assistance claim; although Lee established that his attorney acted deficiently, he could not establish prejudice because there was overwhelming evidence of guilt.⁸¹ In a 6-2 decision, the Supreme Court reversed.

Writing for the Court, Chief Justice Roberts began by addressing two types of ineffective-assistance claims. Where a defendant alleges that the attorney’s incompetence led to an unreliable judicial proceeding, the defendant must demonstrate prejudice by showing “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”⁸² But sometimes a defendant alleges that the counsel’s deficient performance led to the for-

64. *See, e.g.*, *Tanner v. United States*, 483 U.S. 107 (1987) (refusing to impeach a jury’s verdict in spite of evidence that some jurors were under the influence of drugs and alcohol during the trial); *Warger v. Shauers*, 135 S. Ct. 521 (2014) (same where jury forewoman failed to disclose her pro-defendant bias during *voir dire*). Of course, even under the “no impeachment” rule, evidence is admissible to show that extraneous prejudicial information or outside influences were brought to bear. *See, e.g.*, Fed. R. Evid. 606(b).

65. *Id.* at 861.

66. *Id.* at 861-62.

67. *Id.* at 862.

68. *Id.* at 868.

69. *Id.* at 868-69.

70. *Id.* at 869.

71. *Id.*

72. *Id.* at 874, 874 (Alito, J., dissenting). Justice Thomas also wrote separately to argue that the Court’s holding contravenes the original understanding of the Sixth or Fourteenth Amendments.

73. *Id.* at 875-77.

74. *Id.* at 878-81.

75. *Id.* at 870.

76. *Id.* at 884-85.

77. 137 S. Ct. 1958 (2017).

78. 137 S. Ct. 1899 (2017).

79. 137 S. Ct. 759 (2017).

80. We are not addressing *Davila v. Davis*, 137 S. Ct. 2058 (2017), which relates to procedural default.

81. *Lee*, 137 S. Ct. at 1963-64.

82. *Id.* at 1964 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984) and *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000)).

feiture of a proceeding itself, such as a trial. In these circumstances, prejudice can be demonstrated by “a reasonable probability that, but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.”⁸³ Here, Lee had repeatedly told his attorney that avoiding deportation was the determinative factor for him. Given that accepting the plea agreement would *certainly* lead to deportation, while going to trial would *almost* certainly lead to deportation, it was not irrational for Lee to go to trial. Thus, Lee adequately demonstrated prejudice.⁸⁴

In a dissent joined by Justice Alito, Justice Thomas strongly disagreed.⁸⁵ He argued that Lee failed to demonstrate prejudice because there was not a reasonable probability that he would have obtained a more favorable result at trial given the overwhelming evidence of guilt and the absence of a bona fide defense.⁸⁶ Justice Thomas warned that the majority’s decision “will have pernicious consequences”⁸⁷ by undermining the finality of decisions and imposing significant costs. We note that this concern may be somewhat mitigated by the majority’s admonition that judges should look to “contemporaneous evidence to substantiate”⁸⁸ a defendant’s assertion that he would not have accepted a plea deal had he been competently advised.

The defendant in *Weaver* was tried in a courtroom so small that anyone who was not a potential juror was excluded from the room during jury selection. Kentel Weaver’s counsel failed to object to the closure at trial or on direct review, but Weaver later filed a motion for a new trial claiming ineffective assistance of counsel. He argued that his attorney’s failure to object violated his right to a public trial. The state courts found that Weaver failed to establish that the error was prejudicial.⁸⁹ The Supreme Court agreed.

Writing for the majority, Justice Kennedy explained that the case required the reconciliation of two doctrines: structural error and ineffective assistance of counsel. A violation of the right to a public trial is a structural error. If raised at trial and on direct appeal, “the defendant is generally entitled to automatic reversal regardless of the error’s actual effect on the outcome.”⁹⁰ Here, however, the error was raised in an ineffective-assistance-of-counsel claim, and prejudice is not presumed. When a defendant raises a public-trial violation through an ineffective-assistance-of-counsel claim, “the burden is on the defendant to show either a reasonable probability of a different outcome . . . or . . . to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair.”⁹¹ In the case at bench, Weaver

failed to establish prejudice under either test.⁹²

Justice Alito concurred, but noted that the Court should not have assumed that prejudice might also be established through a showing of “fundamental unfairness,” arguing instead for a straightforward application of the *Strickland* prejudice prong.⁹³ Justice Thomas agreed with Justice Alito, but wrote separately to question whether the closure of the courtroom during jury selection should be considered a Sixth Amendment violation at all.⁹⁴ Justice Gorsuch joined the majority and concurring opinions.

Justices Breyer and Kagan dissented.⁹⁵ “[S]ome errors—such as the public-trial error at issue in this case—have been labeled structural because they have effects that are simply too hard to measure.”⁹⁶ Instead of requiring a defendant to take on an impossible task or require lower courts to determine which kinds of structural errors actually undermine fundamental fairness, the dissenters would grant relief as long as the defendant can establish that an attorney’s constitutionally deficient performance produced a structural error.⁹⁷

In the last of the three cases, *Buck*, the Court examined the impact of race-based testimony at the penalty phase of a capital case.⁹⁸ Duane Buck was convicted of capital murder. Under Texas law, the jury could impose a death sentence only if it found that Buck was likely to commit acts of violence in the future. Defense counsel called a number of witnesses, including a psychologist, Dr. Quijano. Dr. Quijano prepared a written evaluation in which he stated that Buck was statistically more likely to act violently in the future because he was black. Nonetheless, Buck’s counsel called Dr. Quijano to the stand, and he testified that Buck’s race was known to predict future dangerousness.⁹⁹ On cross-examination, Dr. Quijano emphasized that “the race factor, black, increases the future dangerousness for various complicated reasons.”¹⁰⁰ The jury returned a sentence of death, which was affirmed on appeal. While Buck’s case was on collateral review, the Texas Attorney General issued a statement concerning capital cases in which Dr. Quijano had testified, decrying the use of race in sentencing. The Attorney General confessed error in a number of those cases, but not Buck’s.¹⁰¹ Buck argued that his counsel was inef-

The defendant in Weaver was tried in a courtroom so small that anyone who was not a potential juror was excluded from the room during jury selection.

83. *Id.* at 1965 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

84. *Id.* at 1967-69.

85. *Id.* at 1969, 1969. (Thomas, J., dissenting).

86. *Id.* at 1974.

87. *Id.* at 1974-75.

88. *Id.* at 1967.

89. *Weaver*, 137 S. Ct. at 1906-07.

90. *Id.* at 1910 (internal quotation marks omitted).

91. *Id.* at 1911.

92. *Id.* at 1913.

93. *Id.* at 1914, 1914 (Alito, J., concurring).

94. *Id.* (Thomas, J., concurring).

95. *Id.* at 1916, 1916 (Breyer, J., dissenting).

96. *Id.* (internal quotation marks omitted).

97. *Id.* at 1917-18.

98. 137 S. Ct. at 759.

99. *Id.* at 767-69.

100. *Id.* at 769.

101. *Id.* at 770.

The justices held that the Texas court applied the wrong standard for determining Moore's intellectual disability.

fective for introducing the evidence. Writing for the majority, Chief Justice Roberts agreed.

Dr. Quijano's report in effect said that "the color of Buck's skin made him more deserving of execution" and, the Court found, "[n]o competent defense attorney would introduce such evidence about his own client."¹⁰² Buck also established prejudice under *Strickland*. Although Dr. Quijano

only referred to Buck's race twice in his testimony, the Court found that these references were not *de minimis*. Dr. Quijano's testimony tied the probability of future violence to the color of Buck's skin, an immutable characteristic. It also appealed to a powerful racial stereotype. The harm to the defendant was significant whether Dr. Quijano was called as a witness by the prosecution or the defense.¹⁰³ In the procedural part of the decision, the majority also held that Buck was entitled to reopen his federal habeas corpus case so that the lower courts could address his ineffective-assistance-of-counsel claim.¹⁰⁴

Justices Thomas and Alito dissented from the merits and procedural holdings. They principally disagreed with the majority's finding of prejudice under *Strickland*, pointing to the heinous nature of the crime and Buck's lack of remorse.¹⁰⁵

EIGHTH AMENDMENT

The past Term saw one important ruling on the Eighth Amendment, capital punishment, and intellectual deficits, as well as two summary dispositions.

In *Moore v. Texas*,¹⁰⁶ the Court examined whether a state used the appropriate standard to determine if a defendant is intellectually disabled and may not be executed under *Atkins v. Virginia*.¹⁰⁷ A state habeas court recommended granting relief to Bobby James Moore, but the Texas Court of Criminal Appeals declined to adopt that recommendation, finding that Moore failed to establish his intellectual disability.¹⁰⁸ In an opinion written by Justice Ginsburg, the Court reversed.

The justices held that the Texas court applied the wrong standard for determining Moore's intellectual disability. The states have some flexibility, but not "unfettered discretion," in enforcing the ban on execution of intellectually disabled inmates.¹⁰⁹ Courts should look to the medical community and

"current medical standards" to inform their decisions.¹¹⁰ Here, the Texas court failed to do so in two ways. First, in determining Moore's intellectual functioning, the Texas court did not properly adjust Moore's IQ score of 74 by the test's standard error of measurement. This outcome was irreconcilable with *Hall v. Florida*,¹¹¹ which instructed courts to adjust IQ scores to account for the inherent imprecision of the test. If the Texas court had done so, Moore would have been placed within the clinically established range for intellectual functioning deficits.¹¹² Second, in evaluating Moore's adaptive functioning, the Texas court deviated from prevailing clinical standards by overemphasizing Moore's perceived adaptive strengths rather than his adaptive deficits; it also looked to Moore's adaptive strengths in a controlled setting, which clinicians caution against. The Court also criticized the lower court for continuing to rely on a prior Texas case and its list of "evidentiary factors," which are grounded on lay stereotypes and have not been followed in any contexts other than the death penalty.¹¹³

Chief Justice Roberts, joined by Justices Alito and Thomas, dissented.¹¹⁴ Agreeing that the Texas evidentiary factors were flawed, he still would have upheld the Texas court's decision because Moore's IQ score was above 70.¹¹⁵ The Chief Justice also criticized the majority for excessively relying on the medical standards and not providing adequate guidance to states seeking to determine the bounds of intellectual disability.¹¹⁶

In addition to *Moore*, the justices also issued two summary dispositions in Eighth Amendment cases. In *Virginia v. LeBlanc*,¹¹⁷ the Court considered a follow-up to *Graham v. Florida*,¹¹⁸ which requires states to give juvenile offenders convicted of nonhomicide offenses a meaningful opportunity to obtain release based upon demonstrated maturity and rehabilitation. The Court ruled that under the deferential federal habeas corpus standards, it was not objectively unreasonable to find that Virginia's geriatric release program met *Graham*'s requirements.¹¹⁹ In the other summary disposition, *Bosse v. Oklahoma*,¹²⁰ the Court reversed a state court's conclusion that *Booth v. Maryland*¹²¹ was overturned. *Booth* prohibits a capital sentencing jury from considering victim impact evidence that does not "relate directly to the circumstances of the crime."¹²² *Payne v. Tennessee*¹²³ partially overruled *Booth*, but *Booth* remains good law and still prohibits victim-impact evidence that relates to characterizations and opinions about the crime and the defendant.¹²⁴ It is "this Court's prerogative alone to overrule one of its precedents."¹²⁵

102. *Id.* at 775.

103. *Id.* at 775-77.

104. *Id.* at 778, 780.

105. *Id.* at 780, 782-83 (Thomas, J., dissenting).

106. 137 S. Ct. 1039 (2017).

107. 536 U.S. 304 (2002).

108. *Moore*, 137 S. Ct. at 1044.

109. *Moore*, 137 S. Ct. at 1052-53 (citations omitted).

110. *Id.* at 1049.

111. 134 S. Ct. 1986, 1998 (2014).

112. *Moore*, 137 S. Ct. at 1048-50.

113. *Id.* at 1051-53.

114. 137 S. Ct. at 1053, 1053 (Roberts, C.J., dissenting).

115. *Id.* at 1060-61.

116. *Id.* at 1057-58.

117. 137 S. Ct. 1726 (2017) (per curiam).

118. 560 U.S. 48 (2010).

119. *LeBlanc*, 137 S. Ct. at 1729. The Court expressed no view on the merits of the underlying Eighth Amendment claim were it presented on direct review.

120. 137 S. Ct. 1 (2016) (per curiam).

121. 482 U.S. 496 (1987).

122. *Id.* at 501-02.

123. 501 U.S. 808 (1991).

124. 501 U.S. at 817.

125. 137 S. Ct. at 2 (internal quotations omitted).

FIRST AMENDMENT

The Court also issued one of its first opinions to examine the relationship between the First Amendment and the Internet, *Packingham v. North Carolina*.¹²⁶

In 2002, North Carolina made it a felony for a registered sex offender to access commercial social-networking websites that allow minors to create accounts.¹²⁷ Lester Gerard Packingham, a registered sex offender, was convicted of violating this statute after he wrote a Facebook post thanking God for dismissing his traffic ticket.¹²⁸ Packingham challenged his conviction on First Amendment grounds, and a unanimous Court agreed.

Writing for the Court, Justice Kennedy explained that “[a] fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen.”¹²⁹ The Court has historically protected the right to speak in places that are important for the exchange of views, such as streets or parks. Noting that cyberspace, and social media in particular, fills a similar role, the Court wrote that it “must exercise extreme caution” before limiting First Amendment protections to such vast networks.¹³⁰ The Court assumed that the North Carolina statute was content-neutral.¹³¹ Thus, the law was subject to intermediate scrutiny and must not “burden substantially more speech than is necessary to further the government’s legitimate interests.”¹³² Applying this standard, the justices found that the government had a legitimate interest in protecting children from sexual abuse, but the statute was overly broad. Even if the Court were to limit the scope of the statute to Facebook and other similar social networks, the statute enacted an unprecedented prohibition on First Amendment speech.¹³³ States, of course, are free to enact more specific and narrow laws, such as prohibiting a sex offender from contacting a minor or using a website to gather information about a minor.¹³⁴

In a concurrence joined by Chief Justice Roberts and Justice Thomas, Justice Alito expressed his disapproval of the majority’s “undisciplined dicta.”¹³⁵ Although he agreed that the North Carolina law was overly broad, he criticized the majority for equating the entirety of the Internet with public streets and parks. Justice Alito focused on the fact that the the North Carolina law encompasses a large number of websites that are most unlikely to facilitate to commission of a sex crime against a child, such as Amazon, the Washington Post, and WebMD.¹³⁶ Limiting a registered sex offender’s access to such websites would not appreciably advance the State’s goal of protecting children from recidivist sex offenders.¹³⁷

126. 137 S. Ct. 1730 (2017).

127. *Id.* at 1733; N.C. Gen. Stat. Ann. § 14-202.5 (2015).

128. 137 S. Ct. at 1734.

129. *Id.* at 1735.

130. *Id.* at 1736.

131. *Id.*

132. *Id.* (quoting *McCullen v. Coakley*, 134 S. Ct. 2518, 2535 (2014).)

133. *Id.* at 1737.

134. *Id.*

135. *Id.* at 1738, 1738 (Alito, J., concurring).

136. *Id.* at 1741.

137. *Id.* at 1743.

FEDERAL CIVIL-RIGHTS-ACTIONS — BIVENS

The justices also made it more difficult for plaintiffs to bring civil-rights actions against federal officers under *Bivens v. Six Unknown Federal Narcotics Agents*.¹³⁸ In *Ziglar v. Abbasi*,¹³⁹ the Court again addressed claims brought by non-citizens who were held at the Metropolitan Detention Center in New York post 9/11, based on tips provided to the FBI. The plaintiffs, six men of Arab or South Asian descent, alleged that their detention under harsh conditions violated the substantive-due-process and equal-protection components of the Fifth Amendment, among other provisions.¹⁴⁰ In a 4-2 ruling authored by Justice Kennedy, the Court rejected the plaintiffs’ *Bivens* claim against three high-level Department of Justice officials.

The majority held that separation-of-powers principles are central to the question whether a party may assert a new implied cause of action under the Constitution. Henceforth, “a [new] *Bivens* remedy will not be available if there are ‘special factors counselling hesitation in the absence of affirmative action by Congress.’”¹⁴¹ “Special factors” might include burdens on government employees, projected costs and consequences, or the existence of alternative remedial structures.¹⁴² Whether a case presents a new cause of action, rather than one fitting within an already established *Bivens* context, may turn on circumstances such as the officer’s rank; the right at issue; the generality of the official action; existing judicial guidance for the officer; the statute or other legal authority under which the officer operated; the risk of disruptive intrusion by the judiciary; and other factors.¹⁴³ Because this case is meaningfully different from previous *Bivens* cases and because it necessarily implicates special factors, the Court refused to allow the plaintiffs’ detention claims to proceed under *Bivens*.¹⁴⁴

Justice Breyer and Justice Ginsburg dissented, arguing that the plaintiffs’ claims did not arise in a “new context” and were not “expanding” the scope of the *Bivens* remedy.¹⁴⁵ Even if the context were “fundamentally different,” the dissent still would have permitted the plaintiffs’ claims because no alternative remedy was available for them, at least for a considerable time, and there were no special factors that counsel hesitation.¹⁴⁶

The justices also made it more difficult for plaintiffs to bring civil-rights actions against federal officers under *Bivens v. Six Unknown Federal Narcotics Agents*.

138. 403 U.S. 388 (1971).

139. 137 S. Ct. 1843 (2017). Justices Sotomayor, Kagan, and Gorsuch did not participate in the case.

140. *Id.* at 1853-54.

141. *Id.* at 1857 (quoting *Carlson v. Green*, 446 U.S. 14, 18 (1980) and *Bivens*, 403 U.S. at 396).

142. *Id.* at 1858.

143. *Id.* at 1860.

144. *Id.* at 1860-63.

145. *Id.* at 1872, 1872, 1876 (Breyer, J., dissenting).

146. *Id.* at 1879-80.

Abbasi is a very important case for suits brought against federal officers. *Abbasi* has already been applied in *Hernandez v. Mesa*,¹⁴⁷ a closely watched case of a cross-border shooting by a U.S. Border Patrol agent. There, the justices remanded to the Court of Appeals to apply *Abbasi* and determine whether there was an implied cause of action under *Bivens*.

FEDERAL CRIMINAL AND IMMIGRATION LAW

The Court decided three interesting federal criminal cases on the scope of liability for criminal acts or forfeitures, plus one about removability from the United States following a conviction for statutory rape. All four were unanimous decisions.

The defendant in *Shaw v. United States*¹⁴⁸ was convicted of “defraud[ing] a financial institution.” He argued that the statute did not cover his conduct because he only sought to obtain funds belonging to a bank depositor rather than the bank itself. The Court rejected this claim, ruling that a bank has property rights in accounts it holds and the statute does not require an intent to cause the bank financial harm.¹⁴⁹ *Salman v. United States*¹⁵⁰ holds that a conviction for insider trading under the Securities and Exchange Act does not require that the tipper receive something of pecuniary or like value in exchange for a gift of information to family or friends. *Honeycutt v. United States*¹⁵¹ addresses whether, under the federal drug-crime forfeiture statute, a defendant convicted in a conspiracy may be held jointly and severally liable for property that a co-conspirator derived from the crime. After noting that joint and several liability is a creature of tort law, the justices found that forfeiture under the federal statute is limited to property that the defendant actually acquired as a result of the crime.¹⁵²

The question in the immigration case, *Esquivel-Quintana v. Sessions*,¹⁵³ was whether a conviction under a statute criminalizing consensual sexual intercourse between a 21-year-old and a 17-year-old is an “aggravated felony” and grounds for removal from the United States. In making that determination, a court takes a categorical approach—examining the statute of conviction (not the conduct)—and decides whether the least of the criminalized conduct fits within the federal definition of the crime. The Court determined that “in the context of statutory rape offenses that criminalize sexual intercourse based solely on the age of the participants, the generic federal definition of sexual abuse of a minor requires that the victim be younger than 16.”¹⁵⁴ Thus, “[a]bsent some special relationship of trust, consensual sexual conduct involving a younger partner who is at least 16” is not an aggravated felony supporting removal “regardless of the age differential between the two participants.”¹⁵⁵

THE CURRENT TERM

If the 2016-2017 Term was a bit of a snoozer, the 2017-2018 may have a blockbuster docket—and the Court is fully constituted. The past Term may have been the calm before a coming storm. The justices will consider whether the Fifth Amendment is violated when compelled statements are used at a probable-cause hearing, but not at trial;¹⁵⁶ whether the existence of probable cause defeats a First Amendment retaliatory-arrest claim;¹⁵⁷ and whether defense counsel can concede an accused’s guilt at trial over the accused’s express objection.¹⁵⁸ But the Court’s Fourth Amendment docket has captured much attention, and rightfully so.

The most significant criminal-law case in the current Term may well be *Carpenter v. United States*,¹⁵⁹ which asks whether officers need a warrant to obtain historical cell-site records. In *Carpenter*, investigators went to a service provider and acquired 127 days of Carpenter’s call records, as well as the locations of the cell towers to which his phone connected. The records contained an average of 101 location points per day for more than four months’ time. The evidence was used to place Carpenter near the scene of four robberies. The case may give the Court an opportunity to consider the application of the “third-party doctrine” to longer-term cell-site location information. In addition to *Carpenter*, the Court will also weigh whether an officer may enter private property without a warrant to search a vehicle parked a few feet from a house,¹⁶⁰ and whether a driver has a reasonable expectation of privacy in a rental car when he has the renter’s permission to drive but is not listed on the rental agreement.¹⁶¹

Stay tuned for a very eventful Term with a new Court!



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147. 137 S. Ct. 2003 (2017).

148. 137 S. Ct. 462 (2016).

149. *Id.* at 466-67.

150. 137 S. Ct. 420, 428 (2016).

151. 137 S. Ct. 1626 (2017).

152. *Id.* at 1631, 1635.

153. 137 S. Ct. 1562 (2017).

154. *Id.* at 1568.

155. *Id.* at 1572.

156. *City of Hays, Kansas v. Voght*, No. 16-1495.

157. *Lozman v. City of Riviera Beach, Florida*, No. 17-21.

158. *McCoy v. Louisiana*, No. 16-8255, argued January 17, 2018.

159. No. 16-402, argued November 29, 2017.

160. *Collins v. Virginia*, No. 16-1027, argued January 9, 2018.

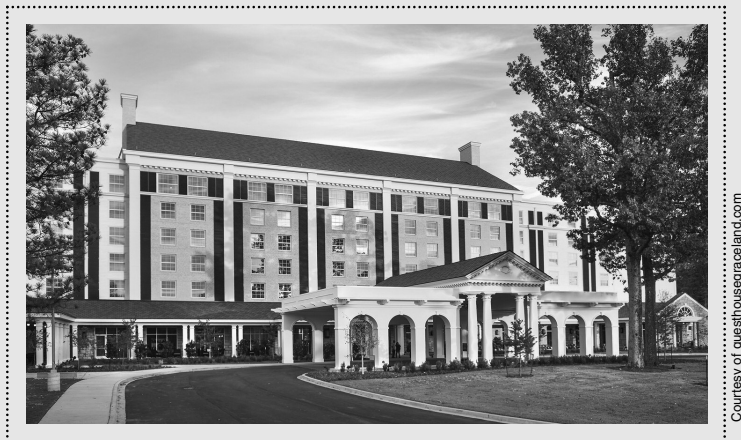
161. *Byrd v. United States*, No. 16-1371, argued January 9, 2018.

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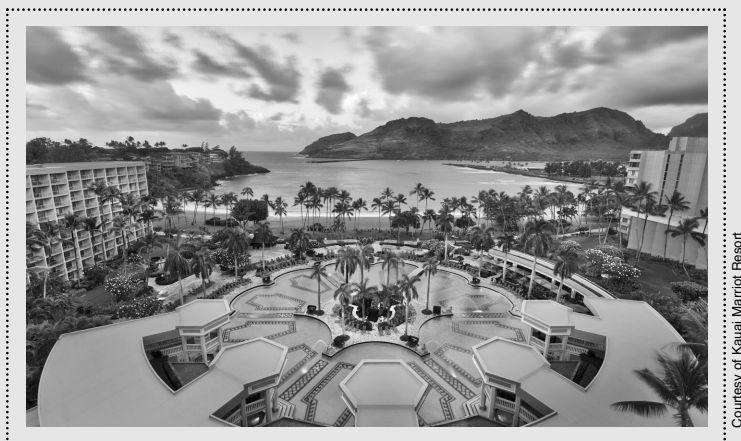
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How Judges Can Reduce Racial Disparities in the Criminal-Justice System

Matthew Clair & Alix S. Winter

For decades, researchers and policymakers have been concerned about the disproportionate presence of blacks and Latinos in the criminal-justice system.¹ While a fairly substantial proportion of these racial disparities can be explained by greater criminal involvement among blacks and Latinos in certain crimes,² researchers continue to find that, even after controlling for differences in criminal behavior and other legally relevant factors, minorities are treated more punitively than similarly situated whites from arrest to sentencing in numerous jurisdictions.³ Consequently, researchers suggest that racial disparities arise not just from disproportionate criminal involvement or the disparate impact of facially neutral laws but also from differential treatment by criminal-justice officials, such as police officers, lawyers, probation officers, and judges.

While researchers have theorized how criminal-justice officials' biases and stereotypes may result in differential treatment,⁴ researchers have little understanding of how officials make sense of the social problem of racial disparities and how, if at all, they work to address the problem.

From December 2013 to March 2015, we interviewed 59 state-level judges in a Northeastern state, where blacks and Latinos are disproportionately represented in the criminal-justice system. Although blacks and Latinos each comprised less than 10 percent of the state population in 2014, they each comprised about 25 percent of its incarcerated population. We sought to interview judges from a range of professional, racial, and gender backgrounds since existing literature has found these characteristics to be relevant in explaining judges' vary-

ing philosophies, views of defendants,⁵ and observed decision making.⁶ We continued recruiting respondents until we no longer obtained novel information from our interviews.⁷ For additional insight, we also interviewed prosecutors, public defenders, and private attorneys, and we did fieldwork within upper and lower courthouses across the state. Our interviews focused on court officials' decision making from arraignment to sentencing. A thorough analysis of our findings is presented in a peer-reviewed journal article published in an academic criminology journal.⁸ In this article, we summarize the key takeaways for judges from this study.

JUDGES' EXPLANATIONS OF RACIAL DISPARITIES

A nontrivial number of the judges we interviewed (13 of 55, 24%)⁹ attributed racial disparities to differences in criminal offending rates alone, often highlighting the roles of poverty and family dysfunction in shaping defendants' criminal trajectories before contact with the criminal-justice system. These judges attributed disparities to the disparate impact of facially neutral laws that criminalize behaviors in which they believe blacks and Latinos happen to be disproportionately involved because of their socioeconomic positions and the neighborhoods in which they live. As one judge noted, "[T]here seems to be almost like a self-fulfilling prophecy for a lot of young black men . . . that it is OK to go to [jail], that it is a badge of honor. . . . Sometimes they want to go because that's where their best friend is."

Perhaps surprisingly, however, the majority of judges in our sample (42 of 55, 76%) attributed racial disparities, at least in

Footnotes

1. JEREMY TRAVIS, BRUCE WESTERN & STEVE REDBURN, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* (2014).
2. Robert J. Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, 21 *CRIME & JUSTICE* 311–74 (1997); MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* (1995).
3. Cassia Spohn, *Racial Disparities in Prosecution, Sentencing, and Punishment*, in *THE OXFORD HANDBOOK OF ETHNICITY, CRIME, AND IMMIGRATION* (Sandra M. Bucerius and Michael Tonry eds., 2013); Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 *CRIME & JUSTICE* 1–44 (2008).
4. Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?* 84 *NOTRE DAME L. REV.* 1195–246 (2009); Darrell Steffensmeier, Jeffery Ulmer & John Kramer, *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 *CRIMINOLOGY* 763–798 (1998); Jeffery T.

Ulmer, *Recent Developments and New Directions in Sentencing Research*, 29 *JUSTICE Q.* 1–40 (2012).

5. CASSIA C. SPOHN, *HOW DO JUDGES DECIDE? THE SEARCH FOR FAIRNESS AND JUSTICE IN PUNISHMENT* (2009).
6. Brian D. Johnson, *The Multilevel Context of Criminal Sentencing: Integrating Judge- and County-Level Influences*, 44 *CRIMINOLOGY* 259–98 (2006).
7. Mario Luis Small, "How many cases do I need?" *On Science and the Logic of Case Selection in Field-Based Research*, 10 *ETHNOGRAPHY* 5–38 (2009).
8. Matthew Clair & Alix S. Winter, *How Judges Think about Racial Disparities: Situational Decision-Making in the Criminal Justice System*, 54 *CRIMINOLOGY* 332–59 (2016).
9. Although we interviewed 59 judges in total, our interview guide evolved during data collection; consequently, some judges were not asked all of our questions about racial disparities. These judges were removed from our analysis, resulting in a sample of 55 judges with respect to beliefs about the causes of racial disparities and 48 judges with respect to strategies for dealing with disparities.

part, to differences in treatment by court officials or police officers at some point along the criminal-justice process. Many of these judges believe that court and law-enforcement officials, including themselves, might have implicit biases against people of color. As one judge noted, “We’re all vulnerable to prejudice.” These judges also attributed disparities to what they believed to be police officers’ and departments’ differentially harsh enforcement of laws in majority-minority neighborhoods.

JUDGES’ STRATEGIES FOR DEALING WITH RACIAL DISPARITIES

Judges reported two groupings of strategies for dealing with racial disparities at different stages of the criminal-court process. We define these two sets of strategies as “noninterventionist” and “interventionist.”

Noninterventionist strategies defer to other actors (e.g., prosecutors and defense attorneys) in decision making. These strategies usually involve judges considering their personal biases and potential differential treatment of defendants, but not addressing possible differential treatment by other actors or the disparate impact of their own decisions or of the criminal-justice process as a whole.

Interventionist strategies, by contrast, contest other actors in decision making. These strategies usually involve judges not only considering their own differential treatment of defendants but also questioning possible differential treatment by other actors, as well as (sometimes) addressing the disparate impact of their own decisions and of the criminal-justice process as a whole.

Each set of strategies manifests in particular ways at particular stages of the criminal-court process—from arraignment to plea negotiation to jury selection to sentencing. For example, at arraignment, a judge employing a noninterventionist strategy defers to prosecutors in bringing charges and to both prosecutors and defense attorneys in the setting of bail, often setting bail in between the recommendations of each side. At this stage, judges employing a noninterventionist strategy often feel that prosecutors and defense attorneys have more information about the case than they do and it would, therefore, be “out of line” to “weigh in,” as one judge told us. By contrast, a judge employing an interventionist strategy at arraignment may keep records of prosecutors’ differential charging histories, dismiss a charge on the basis of differential treatment, or set a lower bail amount than either the defense or prosecution

recommends when he or she perceives a disparate pattern of bail requests for non-legal reasons. Through such interventionist strategies at arraignment, judges seek to ensure that “people [from different racial/ethnic groups] are treated equally.”

State judges who employ interventionist strategies recounted taking the following steps to mitigate racial disparities:

At arraignment, judges reported keeping records of the types of situations/defendants attached to particular charges. Based on these records, judges reported actively inquiring into disparities in charging decisions.

At bail hearings, judges reported soliciting detailed information about the socio-economic status (SES) of defendants when not already available, so as to set informed bail amounts that will ensure defendants return for trial.

At the plea stage, judges reported keeping records of the types of situations/defendants typically attached to particular dispositions. Based on these records, judges reported actively inquiring into the nature of agreed-on pleas that appeared disparately punitive.

At jury selection, judges reported keeping tallies of the presence of potential minority jurors in the jury pool and actively questioning whether racial bias may be involved in their own removal of a minority juror for cause and/or in counsel’s preemptory strike of a minority juror.

Judges reported choosing a minority juror as the foreperson of the jury when possible, especially when the defendant is a minority.

At sentencing, judges reported considering the merits of a “social adversity” defense,¹⁰ whereby they account for mitigating factors such as poverty and racial discrimination that may have contributed to the convicted defendant’s criminal behavior. This enables judges to give broader consideration to why a black or Latino defendant may have a lengthier criminal record than a white defendant charged with the same crime.

Judges reported considering creative ways to make alternative sentences—such as drug rehabilitation—as available to low-SES defendants as they are to their more affluent peers.

At each stage of the criminal-court process that we examined, only a small number of judges in our sample reported

TABLE 1. NUMBER OF JUDGES EMPLOYING EACH STRATEGY CATEGORY, BY STAGE (N=48)

	ARRAIGNMENT	PLEA HEARING	JURY SELECTION	SENTENCING
Interventionist	12	7	13	7
Noninterventionist	36	41	35	41

Source: Matthew Clair & Alix S. Winter, *How Judges Think about Racial Disparities: Situational Decision-Making in the Criminal Justice System*, 54 *CRIMINOLOGY* 332-359 (2016).

10. See Richard Delgado, “Rotten social background”: *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*,

3 *LAW & INEQUALITY* 9–90 (1985).

TABLE 2. JUDGES BY NUMBER OF STAGES AT WHICH THEY EMPLOY AN INTERVENTIONIST STRATEGY (N=48)

INTERVENTIONIST AT 0 STAGES	INTERVENTIONIST AT 1 STAGE	INTERVENTIONIST AT 2 STAGES	INTERVENTIONIST AT 3 STAGES	INTERVENTIONIST AT 4 STAGES
23	15	7	2	1

Source: Matthew Clair & Alix S. Winter, *How Judges Think about Racial Disparities: Situational Decision-Making in the Criminal Justice System*, 54 *CRIMINOLOGY* 332-359 (2016).

employing interventionist strategies that would mitigate possible differential treatment by other criminal justice officials (Table 1). Indeed, a plurality of judges in our sample (23 of 48, 48%) did not employ interventionist strategies at any of the four stages of court processing we examined (Table 2).

IMPLICATIONS: HOW MIGHT JUDGES CONTRIBUTE TO RACIAL DISPARITIES?

The judges we spoke with did not express explicitly racist attitudes, at least not in the interview setting or in courthouse observations. This finding stands in contrast to qualitative research on judges conducted in the 1980s¹¹ and in contemporary court systems in some states.¹² Moreover, many judges acknowledged that they may have racial and class biases that may contribute to racial disparities. And as noted earlier, most judges in our sample believed that racial disparities arise from at least some form of differential treatment by criminal-justice officials.

Although most judges in our sample exhibit well-intentioned judging, the overwhelming use of noninterventionist strategies by these judges (Tables 1 and 2) likely contributes to racial disparities. Most judges in our sample found it appropriate to account for only their own possible differential treatment of criminal defendants (noninterventionist) and not that of other actors nor the disparate implications of poverty and racial inequality before contact with the criminal-justice system (interventionist). By deferring to other actors in the sys-

tem, judges who employ noninterventionist strategies may unintentionally allow for the reproduction of racial disparities that emanate at earlier stages of the criminal-justice process, such as through the actions and possible biases of the police, prosecutors, and defense attorneys, as well as through the social adversities faced by many black and Latino criminal defendants. However, by employing interventionist strategies, a small number of judges more actively work to combat disparity-producing legal practices, policies, and decisions.



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11. See e.g., George S. Bridges, Robert D. Crutchfield, & Edith E. Simpson, *Crime, Social Structure and Criminal Punishment: White and Nonwhite Rates of Imprisonment*, 34 *SOCIAL PROBLEMS* 345-61 (1987).

12. See, e.g., NICOLE GONZALEZ VAN CLEVE, *CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT* (2016).

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R-E-S-P-E-C-T:

Transgender Pronoun Preference and the Application of the Model Code of Judicial Conduct

Francesco G. Salpietro

Amnesty International—a civil-rights organization that “work[s] to protect people wherever justice, freedom, [and] truth . . . [have been] denied”¹—put it best in its mission statement: “We all have a sexual orientation and a gender identity, and this shared fact means that discrimination against members of the Lesbian, Gay, Bisexual[,] and Transgender community, based on sexual orientation and/or gender identity, is an issue that transcends that community and affects all of us.”² Fundamental to this communal conception are notions of dignity and respect, both of which are to be enjoyed by all people of all backgrounds. When transgender individuals litigate in court, the adversarial system sometimes ignores these basic dignities and instead gives way to practices that impede upon such individuals’ ability to freely express themselves in a manner consistent with their own identities. Moreover, under the Model Code of Judicial Conduct and its various state codifications, judges must rely upon traditional notions of justice, judicial integrity, impartiality, and respect³ to ensure that transgender persons enjoy the same rights as do other members of society.

This Note addresses this issue and responds with a set of proposed solutions. Part I introduces a potential problem faced by judges when addressing transgender individuals in court proceedings after being presented a set of conflicting pronouns—individuals’ preferred gender pronouns and those that do not match these individuals’ true identities—and includes a brief discussion of relevant case law. Part II applies the Model Code of Judicial Conduct to the general fact pattern

outlined in Part I and articulates relevant ethical canons, rules, and comments that may give rise to disciplinary violations. Part III provides a set of solutions to this problem, including better educating the courts in areas of LGBT cultural competency and sensitivity, adopting local court rules or standards with respect to LGBT issues, and promulgating amendments to the Model Code of Judicial Conduct to better address the ethical dilemmas surrounding transgender individuals in court.

IT STARTS WITH A PRONOUN—CASE LAW

On August 21, 2013 a military judge convicted former Army Private First Class (PFC) Bradley E. Manning to 35 years in prison for voluntarily disclosing classified documents to WikiLeaks.⁴ The next day, PFC Manning issued a public statement in response to the court’s conviction on NBC’s *Today* show, including a shocking announcement: “I am Chelsea Manning. I am a female.”⁵ Manning’s announcement prompted nationwide discord as to how to properly address the former military private, now a transitioning transgender individual.⁶ While some media outlets referred to Manning with masculine pronouns,⁷ others consistently referred to Manning in the feminine form.⁸ This debate ultimately prompted Manning to file a court motion upon appeal of her conviction, asking the court to use “[her] legal name, Chelsea Elizabeth Manning, [] to preclude [her] former name, Bradley Edward Manning, and to use female pronouns in reference to [Manning], in all future formal papers” filed with and issued by the U.S. Army Court of Crim-

Editor’s Note: An earlier version of this article was the winning entry in a writing competition sponsored by the International Association of LGBT Judges. The Association then submitted the article to *Court Review* for publication consideration.

Author’s Note: Thanks to the International Association of LGBT Judges for their invaluable feedback. All errors are my own.

Footnotes

1. *About Us*, AMNESTY INT’L, <http://www.amnestyusa.org/about-us> (last visited Dec. 11, 2017).
2. *Gender, Sexuality, & Identity*, AMNESTY INT’L, <https://www.amnestyusa.org/issues/gender-sexuality-identity> (last visited Dec. 11, 2017). This particular mission statement relates to Lesbian, Gay, Bisexual, and Transgender (LGBT) Human Rights and is one of several “Human Rights Issues” for which Amnesty International serves. *Id.*
3. MODEL CODE OF JUDICIAL CONDUCT R. 2.8(B) (AM. BAR ASS’N 2011).
4. Julie Tate, *Bradley Manning Sentenced to 35 Years in WikiLeaks Case*, WASH. POST (Aug. 21, 2013), [https://www.washingtonpost.com/world/national-security/judge-to-sentence-bradley-manning-today/2013/08/20/85bee184-09d0-11e3-b87c-](https://www.washingtonpost.com/world/national-security/judge-to-sentence-bradley-manning-today/2013/08/20/85bee184-09d0-11e3-b87c-476db8ac34cd_story.html)

[476db8ac34cd_story.html](https://www.washingtonpost.com/world/national-security/judge-to-sentence-bradley-manning-today/2013/08/20/85bee184-09d0-11e3-b87c-476db8ac34cd_story.html).

5. Aaron Blake & Julie Tate, *Bradley Manning Comes Out as Transgender: ‘I am a Female’*, WASH. POST (Aug. 22, 2013), https://www.washingtonpost.com/world/national-security/bradley-manning-comes-out-as-transgendered-i-am-a-female/2013/08/22/0ae67750-0b25-11e3-8974-f97ab3b3c677_story.html (quoting an official statement made by Chelsea Manning).
6. Paul Farhi, *Media Wrestles with How to Refer to Manning*, WASH. POST (Aug. 22, 2013), https://www.washingtonpost.com/lifestyle/style/media-wrestles-with-how-to-refer-to-manning/2013/08/22/60dc0f0c-0b44-11e3-b87c-476db8ac34cd_story.html.
7. *Id.* (citing to the *Christian Science Monitor*’s use of the pronoun, “he,” as well as the *Washington Post*’s “early articles,” which drew serious criticism by members of Twitter).
8. *Id.* (citing to ABCNews and the *Today* show, both of which used the pronoun, “she,” to refer to Manning). Other news outlets, such as CNN and later articles published by the *Washington Post*, avoided the question altogether, couching discussions of Manning in gender-neutral forms, including “Manning,” “former Army private,” and “intelligence analyst.” *Id.*

inal Appeals (ACCA).⁹ Notwithstanding public knowledge of this gendered-pronoun controversy, the motion, itself, contained no substantive justification for the request.¹⁰ Accordingly, the government filed a motion in response asking for justification, and Manning responded.¹¹ In her reply, Manning argued that referring to her in the feminine form would not cause confusion for the court and was required by the interests of justice.¹² First, Manning cited to her own psychological condition, gender dysphoria, for which the government's own medical professional consistently referred to her "as female and use[d] female pronouns when referring to [Manning]."¹³ Next, Manning argued that the weight of authority supported the grammatical use of her "[c]orrect [g]ender, which is [f]emale," since other courts traditionally deferred to transitioning individuals by using their preferred gender pronouns.¹⁴ Finally, Manning argued that, based on medical consensus, "[f]ailure to honor a person's gender on legal documents [would be] tantamount to erasing a core part of their identity and [would] be damaging to treatment outcomes and mental health of persons with gender dysphoria."¹⁵ As such, Manning contended that

justice demanded a ruling in her favor.¹⁶

A three-judge panel, writing for the ACCA, agreed with Manning.¹⁷ Without justification, the panel demanded that "[r]eference to [Manning] in all future formal papers filed before this court and all future orders and decisions issued by this court shall either be neutral, e.g., Private First Class Manning or appellant, or employ the feminine pronoun."¹⁸ Some commentators contend that this was the first time a court expressly ruled on a transgender-pronoun issue,¹⁹ and many transgender-rights organizations applauded the ACCA for its acceptance of Manning's pronoun preference: this practice is in accordance with the Gay and Lesbian Association Against Defamation (GLAAD)²⁰ and is further endorsed by Lambda Legal—a legal advocacy group "whose

Some commentators contend that this was the first time a court expressly ruled on a transgender-pronoun issue . . .

9. Motion for Court Order to Use Appellant's Legal Name and to Preclude the Use of Appellant's Former Name in All Court Documents, *United States v. Manning*, No. ARMY 20130739 (A. Ct. Crim. App. Feb. 4, 2015) [hereinafter Name Change Recognition Motion]. The Pentagon released a comprehensive set of pleadings, motions, opinions, and orders pursuant to a series of Freedom of Information Act (FOIA) requests demanding full disclosure of Manning's first trial. Adi Robertson, *Pentagon Releases Trial Documents as Bradley Manning Prepares Formal Plea*, THE VERGE (Feb. 27, 2013), <http://www.theverge.com/2013/2/27/4036448/pentagon-releases-trial-documents-as-bradley-manning-prepares-formal/in/3801093>. These documents can be found by searching the Army's FOIA library. Rec. Mgmt. & Declassification Agency, *RMDA Freedom of Information Act Library*, U.S. ARMY, <https://www.foia.army.mil/ReadingRoom/Detail.aspx?freeText=manning> (last visited May 14, 2016).
10. See Name Change Recognition Motion, *supra* note 9.
11. Response to Appellant's Motion for Court Order to Use Appellant's Legal Name and to Preclude the Use of Appellant's Former Name in All Court Documents, *United States v. Manning*, No. ARMY 20130739 (A. Ct. Crim. App. Feb. 9, 2015); Reply to Government Response to Appellant's Motion for Court Order to Use Appellant's Legal Name and to Preclude the Use of Appellant's Former Name in All Court Documents, *United States v. Manning*, No. ARMY 20130739 (Feb. 18, 2015) [hereinafter Manning Reply].
12. Manning Reply, *supra* note 11, at 2.
13. *Id.* at 2–3 (citing internal court filings).
14. *Id.* at 4 (citing *Schwenk v. Hartford*, 204 F.3d 1187, 1192 n.1 (9th Cir. 2000); *Murray v. U.S. Bureau of Prisons*, 106 F.3d 401, 410 n.1 (6th Cir. 1997); *Merriweather v. Faulkner*, 821 F.2d 408, 408 n.1 (7th Cir. 1987); *Smith v. Rasmussen*, 57 F. Supp. 2d 736, 740 n.2 (N.D. Iowa 1999); and *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600 (Me. 2014)).
15. *Id.* at 5 (referencing the World Professional Association for Transgender Health, the American Medical Association, the Endocrine Society, and the American Psychological Association). Note that the singular "their" is often used as a third-person singular possessive adjective to reflect the non-binary nature of gender and sexuality; its use is also preferred by many gender non-conform-

ing individuals. Avinash Chak, *Beyond 'He' and 'She': The Rise of Non-Binary Pronouns*, BBC NEWS (Dec. 7, 2015), <http://www.bbc.com/news/magazine-34901704>.

16. Manning Reply, *supra* note 11, at 5.

17. Order, *United States v. Manning*, No. ARMY 20130739 (Mar. 5, 2015) [hereinafter Preferred Gender Pronoun Order]. Note that, unlike state or federal judges who are either elected or appointed and subsequently confirmed by the legislative branch, the military judiciary functions differently:

[T]he military judge . . . is appointed by the Judge Advocate General [] of the appropriate armed service, serves without a fixed term at the pleasure of the Judge Advocate General, and is evaluated at least annually by senior officers. Subsequent promotion and reassignment are dependent upon the judge's annual officer evaluation and the personal knowledge and desires of those senior officers responsible for assignments.

Fredric I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary—A Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY L. REV. 629, 630 (1994). Military judges are nevertheless still subject to their own judicial code of conduct that mirrors that of the American Bar Association's Model Code of Judicial Conduct. See CODE OF JUDICIAL CONDUCT FOR ARMY TRIAL & APPELLATE JUDGES (U.S. ARMY JUDICIARY 2008).

18. Preferred Gender Pronoun Order, *supra* note 17, at 1–2. Note that the panel added a parenthetical qualifier to Manning's original case name: "nka Chelsea E. Manning." *Id.* In the legal context, the acronym "nka" stands for "now known as." AM. SOC'Y NOTARIES, IDENTIFYING THE SIGNER 1–2 (2005), at <http://www.asnotary.org/img/Identifying%20the%20Signer.pdf>.
19. Miranda Leitsinger, *Army Must Refer to Chelsea Manning as a Woman*, NOT MAN: COURT, NBCNEWS (Mar. 5, 2015), <http://www.nbcnews.com/news/us-news/army-must-refer-chelsea-manning-woman-not-man-court-n318286>.
20. GLAAD Media Reference Guide—Transgender Issues, GLAAD, <http://www.glaad.org/reference/transgender> (last visited May 14, 2016); Farhi, *supra* note 6.

[O]ther courts have not been so willing to endorse a transgender party's preferred gender pronouns in court proceedings.

mission is to achieve full recognition of the civil rights of lesbians, gay men, bisexuals, [and] transgender people”²¹

Despite the ACCA's deferential respect for Manning's pronoun preference, especially given her formal name change, other courts have not been so willing to endorse a transgender party's preferred gender pronouns in court proceedings. While certainly not the norm,²² some courts refuse to

defer to a transgender individual on that individual's preferred mode of expression. For example, the U.S. District Court for the Eastern District of Wisconsin recognized that a transgender plaintiff filed an action under her chosen name, but, since she “remain[ed] a biological male,” utilized male pronouns for ease of discussion.²³ Additionally, the U.S. District Court for the District of Massachusetts, although “recogniz[ing] that it is painful for [the plaintiff] to be referred to as ‘he’ and that courts have, at times, referred to male transsexuals as ‘she,’” nevertheless referred to the plaintiff in the masculine form for

the sake of administrative clarity.²⁴ More unpalatably, one immigration-law judge has been reported to have said, in the context of an appeal of a denial of a claim for asylum, that “referring to a transgender woman by her preferred gender pronouns was like actor Paul Reubens requesting to use his stage name Pee-wee Herman”²⁵ By failing to respect a transgender individual's gender-pronoun preference, these judges seem to perpetuate transphobia in modern culture, and, in wake of an individual's express request to use their preferred gender pronouns, may also violate the American Bar Association's (ABA) Model Code of Judicial Conduct, especially in the context of local, state, and federal anti-discrimination laws.

APPLICATION OF THE ABA MODEL CODE OF JUDICIAL CONDUCT

In 1924, the ABA promulgated its first formal Canon of Judicial Ethics (“Canons”), couched in lofty, aspirational goals for the judiciary.²⁶ In 1972, the ABA adopted a more practical Model Code of Judicial Conduct (MCJC), which replaced the Canons with better-articulated “Rules” of judicial conduct under broader canons of aspirational ethics.²⁷ The MCJC went through a series of amendments in the 1980s, 1990s, and 2000s, and it now contains a comprehensive set of provisions

21. *About Us*, LAMBDA LEGAL, <http://www.lambdalegal.org/about-us> (last visited Dec. 11, 2017); *Know Your Rights in Court*, LAMBDA LEGAL, <http://www.lambdalegal.org/know-your-rights/in-court/faq> (last visited Dec. 11, 2017).

22. In a comprehensive search for court orders specifically discussing gender-pronoun preferences of transgender individuals, most courts do, in fact, defer to an individual's preferred gender pronouns. See *Farmer v. Perrill*, 275 F.3d 958, 959 n.1 (10th Cir. 2001) (“Although a biological male, [plaintiff] considers herself to be a female and uses the feminine pronoun in referring to herself. In deference to her wishes, this opinion will do the same.”); *Levy v. Wexford Health Sources, Inc.*, No. TDC-14-3678, 2016 WL 865364, at *1 n.1 (D. Md. Mar. 7, 2016) (“Because [plaintiff] identifies as female, the [c]ourt will use the feminine pronoun to refer to her.”); *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 230 n.1 (D. Mass. 2012) (“Although [p]laintiff is biologically male, the court will refer to her using feminine pronouns in deference to her expressed gender identity.”); *Inscow v. Yates*, No. 1:08-cv-001588 DLB PC, 2009 WL 3617810, at *1 n.1 (E.D. Cal. Oct. 28, 2009) (“Plaintiff uses the feminine pronoun for self-identification, which the [c]ourt will use here.”); *Houston v. Trella*, No. 04-1393 (JLL), 2006 WL 2772748, at *1 n.1 (D.N.J. Sept. 26, 2006) (“Because [p]laintiff is a transsexual and identifies herself as feminine, the [c]ourt will use the feminine pronoun when referencing [p]laintiff.”); *Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at *1 n.4 (Mass. Sup. Ct. Oct. 11, 2000) (“This [c]ourt will use female pronouns when referring to plaintiff: a practice which is consistent with the plaintiff's gender identity and which is common among health and other professionals who work with transgender clients.”). For courts that do not pay such deference, or for courts that have not yet confronted the issue, this Note serves to educate and notify judges of potential risks should they refuse to follow this majority approach.

23. *Konitzer v. Frank*, 711 F. Supp. 2d 874, 877 n.1 (E.D. Wisc. 2010).

24. *Kosilek v. Mahoney*, 221 F. Supp. 2d 156, 158 n.1 (D. Mass. 2002); see also *Gammett v. Idaho State Bd. Dep't of Corr.*, No. CV05-257-

S-MHW, 2007 WL2186896, at *1 n.1 (D. Idaho July 27, 2007) (“Plaintiff was granted a legal name change after filing this lawsuit. Plaintiff is now known as Jenniffer Ann Spencer. Plaintiff's counsel used the feminine pronoun throughout court documents, and [d]efendant's counsel used the male pronoun. The [c]ourt . . . has elected to use the male pronoun for ease of discussion.”).

25. Jorge Rivas, *Court Blasts Judge Who Compared Transgender Immigrant to Pee-wee Herman*, FUSION (Sept. 4, 2015, 1:49 PM), <http://fusion.net/story/193788/circuit-court-blasts-immigration-judge-transgender>. Luckily, the Ninth Circuit overruled a series of this immigration-law judge's rulings that blankly rejected transgender persons' asylum claims. See *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1075 (9th Cir. 2015) (“[T]he BIA erred, however, in denying her application for [asylum] relief, ironically exhibiting some of the same misconceptions about the transgender community that Avendano-Hernandez faced in her home country.”). This Note recognizes that immigration-law judges may not fall under the purview of the Model Code of Judicial Conduct. For the purposes of this Note, assume that the judge's discriminatory statement could have been uttered by any judge (elected or appointed, state or federal, etc.) for which the Model Code of Judicial Conduct could apply. For a comparison of immigration-law judges to judges in state and federal court, see Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 428–430 (2011) (arguing that immigration-law judges, because they are appointed by the U.S. Department of Justice, lack true independence and a conscious motive to maintain impartiality).

26. Nancy L. Sholes, *Judicial Ethics: A Sensitive Subject*, 26 SUFFOLK U. L. REV. 379, 381–85 (1992).

27. LaDonna Childress, *To Fulfill a Promise: Using Canons 3B(5) and 3B(6) of the Judicial Code of Conduct to Combat Sexual Orientation Bias Against Gay and Lesbian Criminal Defendants*, 34 SW. U. L. REV. 607, 614 (2005) (citing Jennifer Gerarda Brown, *Sweeping Reform from Small Rules? Anti-Bias Canons as a Substitute for Heightened Scrutiny*, 85 MINN. L. REV. 363, 375–76 (2000)).

“to provide guidance and assist judges in maintaining the highest standards of judicial and personal conduct”²⁸ Should a judge refuse to accept a transgender individual’s gender-pronoun preference, that judge may be in violation of the MCJC. This part discusses and applies relevant MCJC Canons to the typical “preferred gender pronoun” situation described above.

A. MCJC Canons 1 & 2: Integrity, Impartiality, and the Manifestation of Bias

In its broadest sense, the MCJC requires a judge to “uphold and promote the independence, integrity, and impartiality of the judiciary”²⁹ Implicit in the definition of “integrity” is the concept of respect—for the law, the parties, the lawyers, the juries, and, most broadly, the public. How can a judge be viewed as exhibiting respect when that same judge ignores an individual’s chosen identity by refusing to adopt an individual’s preferred gender pronouns, either in the courtroom or in a judicial opinion? By failing to defer to an individual’s preferred mode of reference, this lack of respect directly aggravates a chief medical concern of the World Professional Association for Transgender Health—“to reduce the distress of gender dysphoria.”³⁰ Gender dysphoria is an “internationally recognized treatment protocol” that focuses on “affirming people in their true sex—their gender identity—socially, medically, and legally” and is not subject to voluntary control.³¹ Accordingly, the refusal to affirm an individual’s chosen identity carries with it the risk of serious psychological trauma by failing to validate transgender individuals and their identities on a humanistic level.³² Moreover, MCJC Rule 2.8 requires an air of courtesy from judges when dealing with those in court: “A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, [and] lawyers. . . .”³³ Thus, the express requirement of courtesy further (and more explicitly) mandates a judge’s respect for litigants, which includes respect for an individual’s gender identity and preferred mode of self-expression. Judges should be cognizant of this risk when addressing transgender individuals in court.

The ignorance of a transgender individual’s proper, medically endorsed treatment further contributes to the very real

problem of microaggressions, or “subtle forms of [intentional or unintentional] discrimination that occur daily and can manifest as behavioral, verbal, or environmental slights.”³⁴ A common example in the LGBT context, cited in Galupo’s study, is the “use of incorrectly gendered terminology,”³⁵ including the disregard of a transgender person’s preferred gender pronouns.³⁶

These aggressions often compound with one another and work to “erode a[n individual’s] feeling of value.”³⁷ Judges should recognize this risk of psychological harm and interference with legitimate methods of treatment and strive to avoid the manifestation of bias, whether conscious or not, by refusing to defer to an individual’s own preferred gender pronouns. Accordingly, to combat implicit biases, judges must first recognize that such biases exist.³⁸ Thereafter, they must “[r]outinely check thought processes and decisions for possible bias” and “possess[] a certain degree of self-awareness” to prevent its manifestation through their conduct in court.³⁹

In fact, the MCJC contains express provisions against this manifestation of bias in judicial proceedings, also expressly outlined in the definition of “impartiality.”⁴⁰ The ABA defines the term “impartiality” broadly to mean the “absence of bias or prejudice,”⁴¹ and MCJC Rule 2.3 contains the following prohibitive provision:

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge’s direction and control to do so.⁴²

In fact, the [Model Code] contains express provisions against this manifestation of bias in judicial proceedings

28. MODEL CODE OF JUDICIAL CONDUCT pmbl. (AM. BAR ASS’N 2011).

29. *Id.* Canon 1.

30. WORLD PROF’L ASS’N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER NON-CONFORMING PEOPLE 167 (Coleman et al. eds., 7th ed. 2012), http://www.wpath.org/uploaded_files/140/files/IJT%20SOC,%20V7.pdf.

31. M. Dru Levasseur, Esq., *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 VT. L. REV. 943, 956 (2015) (internal citations and quotations omitted).

32. *Id.* at 963.

33. MODEL CODE OF JUDICIAL CONDUCT R. 2.8(B) (AM. BAR ASS’N 2011) (emphasis added).

34. M. Paz Galupo et al., *Transgender Microaggressions in the Context of Friendship: Patterns of Experience Across Friends’ Sexual Orientation and Gender Identity*, 1 PSYCHOL. SEXUAL ORIENTATION & GENDER DIVERSITY 461, 461 (2014).

35. *Id.* at 465 tbl.3.

36. *Id.*

37. Astead W. Herndon, *Harvard Allows Students to Pick New Gender Pronouns*, BOSTON GLOBE (Sept. 2, 2015), <https://www.boston-globe.com/metro/2015/09/02/harvard-allows-students-pick-new-gender-pronouns/C0EXpZHw09zwCzo4hVhjdJ/story.html> (quoting Genny Beemyn, director of the Stonewall Center—“a resource center for LGBTQ and allied communities at the University of Massachusetts Amherst”).

38. NAT’L CENTER FOR STATE COURTS, STRATEGIES TO REDUCE THE INFLUENCE OF IMPLICIT BIAS 5 (2012), http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_Strategies_033012.ashx.

39. *Id.* at 10.

40. MODEL CODE OF JUDICIAL CONDUCT R. 2.2 (AM. BAR ASS’N 2011); see *id.* TERMINOLOGY (defining “impartiality”).

41. *Id.* TERMINOLOGY.

42. *Id.* R. 2.3(B). Section (C) of Rule 2.3 also requires judges to ensure that lawyers presenting in front of the tribunal “refrain from manifesting bias or prejudice” on the basis of sex, gender, or sexual orientation. *Id.* R. 2.3(C). This proscription carries with it the additional responsibility on judges to ensure that lawyers,

LGBT individuals . . . are part of a traditionally marginalized group, and judges are in a unique position of power in our legal system, charged with promoting and ensuring justice.

In this regard, manifestations of bias are grounds for discipline. Arguably, these include subtle microaggressions such as the refusal to defer to a party's preferred gender pronouns as a form of self-affirming identification. Yet, prominent legal ethics commentator Bruce A. Green argues that the "bias" the MCJC seeks to curtail is not the sort-of implicit bias—that is, "unconscious, non-deliberate attitudes . . . that affect individuals' decisions"—at issue, here.⁴³ This Note argues a different interpretation: the MCJC requires a broader showing

of respect, not just impartiality, by requiring judges to be self-aware of the effects of their conduct. This heightened self-awareness, coupled with the court's responsibility to promote justice,⁴⁴ supports the contention that microaggressions and implicit biases should be actively avoided, even when not apparent on the face of a judge's conduct.⁴⁵ Even so, a judge's refusal to defer to a transgender individual's preferred gender pronouns might not be a reflection of implicit bias at all; absent explanation, it could draw an inference of *overt* discrimination, or, if a judge does provide an explanation, such rationale could be a mere guise—i.e., a mere pretext—for a discriminatory animus against identifying individuals. These "active" forms of discrimination are most certainly grounds for discipline under the MCJC.⁴⁶

Finally, as Martha Minnow argues, each person—especially those in the legal profession—maintains a special responsibility to create "cultures, institutions, and resources to help individuals empathize with those who are oppressed."⁴⁷ LGBT individuals, including transgender persons, are part of a traditionally marginalized group, and judges are in a unique position of power in our legal system, charged with promoting and ensuring justice.⁴⁸ Accordingly, it is a judge's affirmative role to create this culture of upstanding citizenship in the interests of justice, which includes empathy for minority communities. It is arguably unjust for a judge, in the course of a judicial proceeding, to disregard a transgender individual's preferred choice of pronoun, especially when such disregard knowingly (and deleteriously) interferes with treatment techniques for gender dysphoria normally left to the sound discretion of medical professionals. Doing so only strengthens the stigma associated with transgender persons and undercuts their positive inclusion in modern society.

B. "Respect for the Law"

In earlier versions, the MCJC specifically held that a judge must "respect and comply with the law."⁴⁹ Thus, to duly respect the law, judges should be mindful of the current legal landscape regarding transgender issues. The broadly couched term requires a cognizance of the law and posits an affirmative duty to avoid violating the law to "avoid the appearance of impropriety."⁵⁰ For example, the New York City Commission on Human Rights ("Commission") promulgated legal guidance in response to its Human Rights Law, which protects against discrimination on the basis of gender identity, gender expression, and transgender status.⁵¹ Under this local legislative scheme, transgender individuals are protected from discrimination in the areas of

through their written or verbal conduct, do not contribute to the deleterious effects of bias arising out of lawyers' refusal to defer to a transgender individual's preferred gender pronouns. See *id.* Accordingly, judges have the affirmative responsibility to prevent the risk of discriminatory bias from *all* persons in the courtroom from the very outset of litigation.

43. Bruce A. Green, *Legal Discourse and Racial Injustice: The Urge to Call "Bias,"* 28 GEO. J. LEGAL ETHICS 177, 180 (2015) (referencing Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 951 (2006)); *id.* at 183–85.

44. MODEL CODE OF JUDICIAL CONDUCT pmbl. (AM. BAR ASS'N 2011) ("[T]he judiciary plays a central role in the preserving the principles of justice.").

45. Note, too, that Rule 2.3 does not include a "knowledge" requirement. *Id.* R. 2.3. Thus, judges should not be willfully ignorant of bias—implicit or explicit—and should take proactive steps to mitigate any such bias before it manifests in court.

46. See *id.*

47. Martha Minnow, *Upstanders, Whistle-Blowers, and Rescuers*, 2014 KONINGSBERGER LECTURE 1, 31 (2014). Upstanders, as opposed to bystanders, are those who do not idly wait to see social change and progress; instead, they are those who "speak out and act against what is wrong." *Id.* at 1.

48. See MODEL CODE OF JUDICIAL CONDUCT pmbl. (AM. BAR ASS'N 2011).

49. MODEL CODE OF JUDICIAL CONDUCT 2A (AM. BAR ASS'N 1990). Although the word "respect" was deleted in later versions of the MCJC, the drafters made clear that the term is implicit within

MCJC Canon 2. In fact, the remnants of the "respect" language are found in Rule 2.2, wherein "[a] judge shall uphold and apply the law." ABA JOINT COMM'N TO EVALUATE THE CODE OF JUDICIAL CONDUCT, REPORTER'S EXPLANATION OF CHANGES: ABA MODEL CODE OF JUDICIAL CONDUCT, R. 8 (2007) ("The reference to a judge's duty to 'respect' the law was deleted because it was . . . unnecessary."); MODEL CODE OF JUDICIAL CONDUCT R. 2.2 (AM. BAR ASS'N 2011). Even so, the original language is still maintained in numerous state and federal codifications of the MCJC, so respect for the law, in its broadest sense, is most applicable to the practical judicial profession. See, e.g., GA. CODE OF JUDICIAL CONDUCT R. 1.1 (2016) ("Judges shall respect and comply with the law."); N.C. CODE OF JUDICIAL CONDUCT Canon 2A (2006) (amended 2015) ("A judge should respect and comply with the law . . ."); U.S. COURTS CODE OF JUDICIAL CONDUCT R. 2.15 cmt. (2014) ("*Respect for Law.* A Judge should respect and comply with the law. . . ."); 22 NYCCR 100.2(A) (2006) ("A judge shall respect and comply with the law . . .").

50. MODEL CODE OF JUDICIAL CONDUCT R. 1.2. The MCJC defines "impropriety" as "conduct that violates the law, court rules, or provisions of th[e] MCJC, and conduct that undermines a judge's independence, integrity, or impartiality." *Id.* Terminology.

51. N.Y.C. COMM'N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON THE DISCRIMINATION ON THE BASIS OF GENDER IDENTITY OR EXPRESSION: LOCAL LAW NO. 3 (2016); N.Y.C. Admin. Code 88-102(23), at 3 (Dec. 21, 2015) [hereinafter N.Y.C. LEGAL ENFORCEMENT GUIDANCE], http://www.nyc.gov/html/cchr/downloads/pdf/publications/GenderID_InterpretiveGuide_2015.pdf.

employment, public accommodation, and housing, and those found in violation are potentially liable for up to \$250,000 in civil fines for conduct that is willful, wanton, or malicious.⁵² In its guidance, the Commission provides articulated examples of violations of the law, including “failing to use an individual’s preferred name or pronoun,” since “all people . . . have the right to use their preferred name.”⁵³ Courts in New York City—as places of public accommodation⁵⁴—must be aware of this guidance and must take precaution to avoid potential violations. Again, failing to do so expressly violates the MCJC, since avoiding the “appearance of impropriety” carries with it the duty to avoid violating the law.⁵⁵

Certainly, the obvious response is that judges, themselves, are granted absolute judicial immunity and cannot be held liable for damages under comparable local statutes.⁵⁶ In the landmark decision of *Stump v. Sparkman*, the U.S. Supreme Court held that judges maintain absolute immunity from actions for damages taken in their official capacity, even when judges’ acts are done maliciously or corruptly.⁵⁷ However, the Court in *Pulliam* clarified this holding: while absolute judicial immunity still bars a claim for monetary relief, it does not pre-

clude a claim for injunctive relief, provided the claimant continues to suffer real harm.⁵⁸ Since then, at least one circuit court has made available prospective injunctive relief against courts in other contexts of discrimination.⁵⁹ In fact, seeking injunctive relief to demand the use of a transgender litigant’s preferred gender pronouns is expressly endorsed and encouraged by Lambda Legal.⁶⁰ As such, provided a transgender litigant can show a continued harm that can only be remedied by a prospective injunction, that litigant may be able to successfully seek judicial relief.⁶¹

Finally, judicial ethics go beyond these legalistic arguments and reach issues of fundamental morality and integrity. As the MCJC Preamble points out, the MCJC “is not intended as an exhaustive guide for the conduct of judges . . . who are governed in their

[S]eeking injunctive relief to demand the use of a transgender litigant’s preferred gender pronouns is expressly endorsed and encouraged by Lambda Legal.

52. N.Y.C. ADMIN. CODE § 8-102, 107(23) (West 2016); see also Kelsey Harkness, *In New York, You Could Be Fined \$250K for Failing to Use a Transgender Person’s ‘Preferred’ Pronoun*, DAILY SIGNAL (Jan. 6, 2016), <http://dailysignal.com/2016/01/06/in-new-york-you-could-be-fined-250k-for-failing-to-use-a-transgender-persons-preferred-pronoun/>. The New York City Administrative Code also provides for injunctive relief. N.Y.C. Admin. Code § 8-402 (West 2016).

53. N.Y.C. LEGAL ENFORCEMENT GUIDANCE, *supra* note 51, at 54. Specifically, the Commission provides the following examples of conduct that give rise to municipal violations:

1. Intentional or repeated refusal to use an individual’s preferred name, pronoun[,] or title. For example, repeated calling a transgender woman “him” or “Mr.” after she has made clear which pronouns and title she uses.
2. Refusal to use an individual’s preferred name, pronoun, or title because they do not conform to gender stereotypes. For example, calling a woman “Mr.” because her appearance is aligned with traditional gender-based stereotypes of masculinity.

Id.; Harkness, *supra* note 52.

54. The New York City Administrative Code defines a “place of public accommodation” as “providers, whether licensed or unlicensed, or goods, services, facilities, accommodations, advantages, or privileges of any kind, and places, whether licensed or unlicensed, where goods, services, facilities, services, accommodations, advantages, or privileges of any kind are extended, offered, sold, or otherwise made available.” N.Y.C. Admin. Code § 807(9) (West 2016). In holding out services to all members of the public, as courts are required to do, courthouses and courtrooms arguably constitute “places of public accommodation” under the law. In other contexts of discrimination legislation, courts have generally held that courthouses are subject to such statutes. See, e.g., *Duvall v. County of Kitsap*, 260 F.3d 1124 (9th Cir. 2001) (finding that courthouses are “public accommodations” subject to the American with Disabilities Act); *Livingston v. Guice*, No. 94-

1915, 1995 WL 610355 (4th Cir. Oct. 18, 1995) (same).

55. MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (AM. BAR ASS’N 2011). Notwithstanding an underlying violation of substantive law, the “appearance of impropriety” also reaches conduct in reasonable violation of the MCJC, not just state or federal law. *Id.* Thus, conduct that gives rise to prejudicial bias or the inference of discrimination should be avoided, as MCJC Rule 2.3 expressly prohibits discriminatory conduct. *Id.* r. 2.3(A)–(B). Moreover, judges who fail to act courteously or who lack integrity are also arguably subject to disciplinary action. See *supra* Part II.A.; MODEL CODE OF JUDICIAL CONDUCT R. 2.8 AM. BAR ASS’N 2011).

56. For a comprehensive discussion of judicial immunity, see SHRIVER CENTER, FED. PRACTICE MANUAL FOR LEGAL AID ATTORNEYS § 8.2.A.1 (2013), <http://federalpracticemanual.org/book/export/html/46>.

57. *Stump v. Sparkman*, 435 U.S. 349, 356–57, 59 (1978).

58. *Pulliam v. Allen*, 466 U.S. 522, 541–42 (1984) (holding that judicial immunity does not bar a claim for prospective injunctive relief in a § 1983 civil-rights action).

59. *Livingston*, 68 F.3d 460 (holding in an Americans with Disabilities Act action that, in light of *Pulliam*, the litigant was not foreclosed from bringing a claim for injunctive relief against a state court judge).

60. On its “Know Your Rights in Court” webpage, Lambda Legal provides a sample filing to the court, similar to a motion presented in *Manning*. *Know Your Rights in Court*, *supra* note 21. The sample motion expressly states that: (1) county courts are places of public accommodation; and (2) county legislation expressly prohibits discrimination on the basis of gender identity in any place of public accommodation, including any county “facility, service[,] or program.” LAMBDA LEGAL, SAMPLE MOTION 1–2 (July 30, 2008), http://www.lambdalegal.org/sites/default/files/sample_motion.pdf.

61. A similar argument citing judicial immunity was brought to the Maryland Office of the Attorney General (OAG) by a member of the Maryland House of Delegates. Letter from Md. Assistant Att’y Gen. Kathryn M. Rowe to Md. Delegate Virginia P. Claggett (Mar. 5, 2004), <https://www.oag.state.md.us/Opinions/Advice2004/ClaggettMar12.pdf>.

Rather than forcing judges to address the issue of transgender individuals' preferred gender pronouns . . . as in *Manning*, judges should be more proactive in combatting issues of transgender discrimination.

models to maintain public confidence in the judiciary.⁶⁴

PROPOSED SOLUTIONS

Rather than forcing judges to address the issue of transgender individuals' preferred gender pronouns via formal court motions as in *Manning*,⁶⁵ judges should be more proactive in combatting issues of transgender discrimination. Just as the ABA Model Rules of Professional Conduct (MRPC) direct lawyers to "keep abreast of changes in the law and its practice,"⁶⁶ and just as many state bars mandate a certain allotment of hours dedicated to continuing legal education,⁶⁷ so, too, should judges remain updated with the changing legal landscape and corresponding ethical considerations. Judges can borrow successful efforts of various corporate organizations and educational institutions, both of which routinely engage in LGBT "sensitivity" training for their bodies. For example, prominent business advisory firm EY (formerly Ernst & Young) encourages LGBT inclusion in a "cultural competency" program, educating its employees and clients on the benefits and necessity of fostering an inclusive environment.⁶⁸ Additionally, various educational institutions offer

judicial and personal conduct by general ethical standards. . . .⁶² Moreover, "judges should strive to exceed the standards of conduct established by the [MCJC]," especially since the "the judiciary plays a central role in preserving the principles of justice" in the U.S. legal system.⁶³ As discussed above, a judge maintains the ethical responsibility to protect the dignity and integrity of the courts, which hinges on the concept of respect. Thus, self-directing judicial standards should maintain a higher level of morality, even beyond the confines of the law, since judges are perceived as role

"Ally" training for their student and professional populations in order to help "participants grow in their personal awareness, knowledge, skills, and ability to act as social justice allies."⁶⁹ Finally, LGBT advocacy groups across the country offer public materials to organizations to help these organizations conduct their own inclusivity training for their members.⁷⁰ In fact, consistent with the position of this Note, Lambda Legal offers a "Fair Courts Toolkit for Everyday Advocates," which provides guidance to judges and court staffers as to how to best respect LGBT individuals in a court environment.⁷¹ Education is key.

In addition, to avoid potential conflict at a later stage in litigation, to avoid a potential violation of the MCJC, and to avoid potential trauma to transgender individuals, judges should encourage determinations of this preferred-gender-pronoun issue up front. Thus, courts should consider incorporating transgender sensitivity guidelines into their local rules. For example, the U.S. District Court for the Western District of Pennsylvania prescribes detailed requirements regarding what is to be specifically discussed during pretrial conferences under the Federal Rules of Civil Procedure.⁷² Pursuant to these local rules, parties must answer inquiries related to the underlying litigation, including issues of electronic discovery, use of proposed search terms, anticipated dispositive motions to be filed, proposals for alternative dispute resolution procedures, and other inquiries and deadlines.⁷³ Correspondingly, judges, as managers of these conferences, should encourage full and frank discussions of the potential ethical issues surrounding transgender litigants from the outset of litigation, including, if applicable, a specific inquiry regarding the use of a transgender individual's preferred gender pronouns. Doing so would avoid potential trauma down the line for transgender litigants and expedite litigation by anticipating and resolving likely court motions before they have even been filed. Courts can adequately incorporate this solution in their local rules by adding the following point for discussion to their pretrial conference agenda: "Identify and establish preferred names (including, if applicable, preferred pronouns) for all parties subject to the litigation." The proposed directive would maintain consistency

62. MODEL CODE OF JUDICIAL CONDUCT pmbl. (AM. BAR ASS'N 2011).

63. *Id.* Scope.

64. Cf. Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405 (2000) (arguing that diverse judges are both role models and figures of public confidence but should be seen as "something more"—as achieving cultural plurality on the bench).

65. Name Change Recognition Motion, *United States v. Manning*, No. ARMY 20130739 (A. Ct. Crim. App. Feb. 4, 2015).

66. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 8 (AM. BAR ASS'N 2011).

67. MCLE Information by Jurisdiction, AM. B. ASS'N, https://www.americanbar.org/cle/mandatory_cle/mcle_states.html (last visited Dec. 11, 2017) (providing a list of CLE requirements by state, many of which require one or more hours of legal ethics education).

68. EY (formerly Ernst & Young), LEADING THROUGH INCLUSION: LGBT INCLUSION IN THE WORKFORCE (2012). A description of EY's LGBT-inclusion program is on its website at [http://www.ey.com/us/en/about-us/our-people-and-culture/diversity-and-inclusive-](http://www.ey.com/us/en/about-us/our-people-and-culture/diversity-and-inclusive-ness/better-together)

[ness/better-together](https://www.ey.com/us/en/about-us/our-people-and-culture/diversity-and-inclusive-ness/better-together) (last visited February 5, 2018).

69. *Allyhood Development Training*, U. MICH. SPECTRUM CTR., <https://spectrumcenter.umich.edu/article/allyhood-development-training> (last visited May 14, 2016); *LGBT Ally Network*, U. ILL. OFF. INCLUSION & INTERCULTURAL RELATIONS, <https://oiir.illinois.edu/lgbt-resource-center/our-programs/lgbt-ally-network> (last visited Dec. 11, 2017).

70. *Diversity Training on Sexual Orientation and Gender Identity Issues*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/diversity-training-on-sexual-orientation-and-gender-identity-issues> (last visited May 14, 2016).

71. LAMBDA LEGAL, GEAR UP! A FAIR COURTS TOOLKIT FOR EVERYDAY ADVOCATES (2009), http://data.lambdalegal.org/publications/downloads/gu_gear-up.zip. The toolkit expressly includes guidance on deferring to and affirming a transgender individual's self-identity and use of preferred gender pronouns. *Id.*

72. W.D. PA. LOCAL CIV. R. (LCvR) 16.1.

73. *Id.* app. LCvR 16.1A.

across legal documents and would apply to all litigants—transgender or not. More simply, courts can implement a “check-the-box” system upon initial electronic filings that instructs lawyers to specify a party’s pronoun and salutation preference to guide judges and other court staffers from the outset of litigation.

Even if not formally incorporated in a court’s local rules, state or federal authorities can and should provide official guidance to help judges and courts foster a more inclusive environment. For example, the New York state judicial system already maintains a quick-reference manual to help judges adequately respond to transgender issues.⁷⁴ Included in this document is specific guidance addressing transgender pronoun use: “Transgender people frequently choose to use a name that affirms their gender identity, even if it is not what is on legal documents. . . . Judges should make every effort to use pronouns and salutations that affirm a party’s gender identity.”⁷⁵ Other courts should follow suit. Since judges have an affirmative duty to protect litigants from lawyers who exhibit bias and prejudice against others on the basis of sex, gender, and sexual orientation,⁷⁶ these problems must be addressed as early as possible. Judges should be mindful of this duty and take active steps to avoid a breach of this duty.

Finally, the MCJC could be changed to include an express provision and an associated comment to curtail this problem. First, drafters could amend MCJC Rule 2.3 to expressly include “gender identity” in its list of prohibited bases for bias and prejudice. Although implicit in discrimination on the basis of “sex” and “gender,” an express provision regarding gender *identity* would better guide judges in understanding the repercussions of their actions in court proceedings by explicitly flagging the issue.⁷⁷ Also, the ABA could provide more detailed guidance in its comments to Rule 2.3. Currently, Comment 2 provides examples of manifestations of bias or prejudice: “epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics.”⁷⁸ Even though the comment makes clear that these manifestations “include, but are not limited to” those outlined in the non-exhaustive list, more explicit guidance can better flag transgender issues and prevent bias from ever entering into the courtroom in the first place.⁷⁹ Thus, a proposed revision to Comment 2 could include “failing or refusing to adopt a transgender person’s preferred pronoun” to help curtail this risk of potential trauma. Doing so would put judges on better notice of this problem within the judicial system.

CONCLUSION

Judges serve as pillars of the U.S. system of justice. Their unique position of power carries with it the responsibility to promote courtesy, impartiality, dignity, integrity, and respect. The MCJC guides the ethical conduct of judges to protect their status and preserve this notion of justice. In the case of Chelsea Manning, the ACCA undoubtedly reached the correct decision in forcing all parties to utilize Manning’s preferred gender pronouns as per her identification as female. However, judges should not be forced to reach the issue *only* when brought by a party seeking protection; they should proactively seek to protect transgender individuals and their identities from the outset of litigation. Doing so is not only consistent with the MCJC, but also with the current legal landscape of transgender rights in the United States. To promulgate this change, judges do not need to pen a landmark decision for the court. Instead, it starts with education. It starts with respect.

It starts with a pronoun.



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74. SYLVIA RIVERA LAW PROJECT, *TRANSGENDER 101: TERMS AND CONSIDERATIONS FOR OFFICERS OF THE COURT* (2011), <https://www.nycourts.gov/ip/judicialinstitute/transgender/220B.pdf>.

75. *Id.* at 1.

76. MODEL CODE OF JUDICIAL CONDUCT R. 2.3(C) (AM. BAR ASS’N 2011).

77. MODEL CODE OF JUDICIAL CONDUCT R. 2.3. Some state codifications of the MCJC expressly include “gender identity” on the list of protected classes under Rule 2.3. ABA POL’Y IMPLEMENTATION COMM., *COMPARISON OF ABA MODEL JUDICIAL CODE OF CONDUCT AND STATE VARIATIONS* 3–4 (Dec. 11 2015), <http://www.americanbar.org/>

content/dam/aba/administrative/professional_responsibility/2.3.authcheckdam.pdf. These states include Maine, Massachusetts, New Mexico, and Oregon. *Id.*

78. MODEL CODE OF JUDICIAL CONDUCT R. 2.3 cmt. 2.

79. *Id.*

The Impact of the *Gerhardt* Decision on Marijuana Driving Cases

Mary A. Celeste

One of the major consequences of legalizing marijuana is that it can affect drivers on the roadways. Courts across the country are facing issues such as the applicability of the long established standard field sobriety test for alcohol-driving impairment to determine marijuana-driving impairment; the characteristics indicative of marijuana-driving impairment; and the blood nanogram concentration levels that establish marijuana-driving impairment. The Massachusetts Supreme Court was the first state Supreme Court out of the box to address these issues.

On January 6, 2017, the Massachusetts Supreme Court heard oral arguments in the case of *Commonwealth v. Gerhardt*¹, which required the court to consider several novel questions:

- What physical characteristics (e.g., bloodshot eyes, dilated pupils, lack of coordination, slow balance or reaction times, garbled or slow speech) permit an inference of impaired driving by reason of marijuana use?
- Is there a scientifically established correlation between performances on field sobriety tests and marijuana-impaired driving?

- Is there a level of intoxication that is generally accepted as establishing impairment as to driving?
- Has any jurisdiction, foreign or domestic, recognized such a level of intoxication?²

As far as marijuana-driving cases go, the facts of the *Gerhardt* case were not unusual. The defendant (*Gerhardt*) was stopped for driving without working tail lights. Once stopped, an officer saw smoke inside the vehicle and detected the odor of marijuana. The defendant stated that he had smoked around three hours before the stop, although another passenger said it had only been 20 minutes. *Gerhardt* pulled two marijuana cigarettes (“roachies”) from an ashtray and handed them to the officer. In a subsequent search, officers found two more roaches.³

As more and more marijuana-driving cases come forward, the plain view doctrine will play a large role. The plain-view doctrine has been expanded to include plain feel, plain smell, and plain hearing.⁴ The U.S. Supreme Court agrees that the smell of marijuana may provide probable cause to obtain a search warrant.⁵ Further, some state courts hold that detection of the odor of marijuana or marijuana smoke provides probable cause for a warrantless search.⁶ Oddly enough, searches based upon marijuana smell have decreased in the states of

Footnotes

1. *Commonwealth v. Gerhardt*, 477 Mass. 775, 81 N.E.3d 751 (2017); *Public Case Information*, SUPREME JUDICIAL COURT AND APPEALS COURT OF MASSACHUSETTS, http://www.ma-appellate-courts.org/display_docket.php?dno=SJC-11967 (last updated Oct. 18, 2017).
2. *Gerhardt*, 477 Mass. at 774–88; Martha Bebinger, *Mass. High Court Tackles Driving Under the Influence of Marijuana*, ALL THINGS CONSIDERED (Jan. 6, 2017), <http://www.wbur.org/all-things-considered/2017/01/06/supreme-judicial-court-marijuana-driving>.
3. *Gerhardt*, 477 Mass. at 778–79.
4. See, e.g., *United States v. Fisch*, 474 F.2d 1071 (9th Cir. 1973) (recognizing a “plain hear” exception, the Court held there was no search where officers overheard conversation in adjoining hotel room); *United States v. Pierre*, 958 F.2d 1304 (5th Cir.1992) (holding that an officer smelling marijuana in defendant’s car was not an unreasonable search under the Fourth Amendment).
5. See *Florida v. Jardines*, 569 U.S. 1, 3, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013).
6. See, e.g., *State v. Sarto*, 195 N.J. Super. 565, 574, 481 A.2d 281 (App. Div. 1984) (reversing the order of suppression because “the strong odor of unburned marijuana gave police probable cause to search the trunk for evidence of contraband”); *Waugh v. State*, 20 Md. App. 682, 691, 318 A.2d 204 (Md. Ct. Spec. App. 1974) (stating that “[t]rained investigators are entitled to rely upon the sense of smell to establish probable cause, just as surely as they are entitled to rely upon the senses of sight, hearing, touch or taste”), *rev’d on other grounds*, 275 Md. 22, 338 A.2d 268 (1975); see also Andrea Ben-Yosef, Annotation, *Validity of Warrantless Search of*

Motor Vehicle Based on Odor of Marijuana—State Cases, 114 A.L.R. 5th 173 (2003); 68 AM. JUR. 2d *Searches and Seizures* § 72 (1993); *Odor of Narcotics as Providing Probable Cause for Warrantless Search*, 5 A.L.R. 4th 681 (1981). In Virginia, the Court of Appeals has hinted at an acceptance of plain smell, but has never clearly adopted the doctrine. See *Commonwealth v. Jones*, No. 0857-97-3, 1997 WL 557005, at *1 (Va. Ct. App. Sept. 9, 1997) (appearing to find probable cause based on odor alone, but not clearly excluding other factors from the holding); *Lewis v. Commonwealth*, No. 1483-96-1, 1997 WL 260581, at *1–2 (Va. Ct. App. May 20, 1997) (suggesting, but not expressly stating, that the odor of marijuana alone gave officer probable cause to search vehicle). The situation in Georgia is substantially similar to that in Virginia. Compare *Brewer v. State*, 199 S.E.2d 109, 112 (Ga. Ct. App. 1973) (stating that odor of marijuana is not in itself sufficient evidence to establish probable cause), *overruled by State v. Folk*, 521 S.E.2d 194, 198 (Ga. Ct. App. 1999), and *Albert v. State*, 511 S.E.2d 244, 248 (Ga. Ct. App. 1999) (recognizing that the issue of plain smell was still unresolved in Georgia, and holding that odor of marijuana was only one factor in the determination of probable cause), *with Rogers v. State*, 205 S.E.2d 901, 903 (Ga. Ct. App. 1974) (recanting prior statement from *Brewer* that odor alone cannot establish probable cause), and *Folk*, 521 S.E.2d at 198 (“We now hold that a trained police officer’s perception of the odor of burning marijuana . . . constitutes sufficient probable cause to support the warrantless search of a vehicle.”). Although *Folk* appeared to settle the issue of plain smell in Georgia, it remains to be seen whether the Georgia Supreme Court will ratify that decision if given the opportunity to rule on plain smell.

Colorado and Washington, which were two of the first states to legalize recreational marijuana.⁷

All of the facts related to the Gerhardt stop established probable cause to request that he perform a standard field sobriety test and Gerhardt consented. He failed several tests:

Rather than standing heel to toe, with his right foot in front and his left toes touching his heel, as he had been shown, Gerhardt moved his feet so that they were side by side; he also did not turn around as instructed . . . Gerhardt[t] did not remain upright on one foot, instead putting his foot down multiple times, and swayed.⁸

It should be noted that counting backwards and reciting the alphabet, although frequently used by law enforcement in suspected driving-impairment stops, is not part of National Highway Traffic Safety Administration sanctioned alcohol field sobriety tests.

For purposes of alcohol impairment, a standard field sobriety test consists of the horizontal gaze nystagmus, the one-leg stand, and the walk-and-turn.⁹ For purposes of detecting drug impairment, sometimes the Romberg or modified Romberg test is added:

[T]he officer will ask you to stand with your feet together, head tilted slightly back and eyes closed. You will be asked to estimate when 30 seconds has passed, and say “stop” when you think it’s been that long. While you are balancing, the officer will look for six clues: amount

and direction of swaying, eyelid/body tremors, estimate of when 30 seconds has passed, muscle tone, sounds or statements made during the test, ability to follow directions.¹⁰

Some research says that standard field sobriety tests are effective in identifying marijuana-driving impairment¹¹, some research says that they are only moderately successful¹², while other research says that only the walk-and-turn or the one-leg stand tests are effective.¹³ One study stated that the finger-to-nose test was the best test to accurately predict cannabis impairment.¹⁴ Many agree, however, that the horizontal gaze nystagmus test is not effective.¹⁵

Indicators of marijuana-driving impairment include eyelid tremors, increased pulse, elevated systolic blood pressure, dilated pupil size, lane weaving, driving on the wrong side of the road, drifting, following too close, driving a large distance from the vehicle ahead, not responding to questions, reddened eyes, slow pupil reaction, nervousness, laughing, and unusual facial expressions.¹⁶ Some believe that one side effect includes “green tongue,” although the appellate courts in both Utah and Washington are skeptical.¹⁷

Studies and reports from 2004 through 2012 designated THC blood concentration levels from 2 to as high as 30 THC ng/ml as establishing marijuana-driving impairment.¹⁸ The

Some research says that standard field sobriety tests are effective in identifying marijuana-driving impairment . . .

7. Sam Petulla & Jon Schuppe, *Police Searches Drop Dramatically in States that Legalized Marijuana*, NBC NEWS (June 23, 2017), <http://www.nbcnews.com/news/us-news/police-searches-drop-dramatically-states-legalized-marijuana-n776146>.
8. Gerhardt, 477 Mass. at 779.
9. *A Resource Guide Describes the Science and the Law About Horizontal Gaze Nystagmus*, NHTSA (Sept. 1999), <https://one.nhtsa.gov/About-NHTSA/Traffic-Techs/current/ci.A-Resource-Guide-Describes-The-Science-And-The-Law-About-Horizontal-Gaze-Nystagmus.print>; DWI DETECTION AND STANDARDIZED FIELD SOBRIETY TESTING, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION (March 2013), http://www.njsp.org/division/investigations/pdf/adtu/20160105_participantmanual.pdf.
10. *Romberg Balance Test*, FIELD SOBRIETY TESTS.ORG, <http://www.fieldsobrietytests.org/rombergbalancetest.html> (last visited Dec. 13, 2017).
11. Hartman et al., *Drug Recognition Expert (DRE) Examination Characteristics of Cannabis Impairment*, 92 ACCIDENT ANALYSIS & PREVENTION 219–29 (July 2016), <https://shawglobalnews.files.wordpress.com/2017/03/2016-hartman-dre-examination-characteristics-of-cannabis-impairment.pdf>
12. Bosker et al., *A Placebo-Controlled Study to Assess Standardized Field Sobriety Tests Performance during Alcohol and Cannabis Intoxication in Heavy Cannabis Users and Accuracy of Point of Collection Testing Devices for Detecting THC in Oral Fluid*, 223 PSYCHOPHARMACOLOGY 439–46 (2012).
13. K. Papafotiou et al., *An Evaluation of the Sensitivity of the Standardised Field Sobriety Tests (SFSTs) to Detect Impairment due to Marijuana Intoxication*, 180 PSYCHOPHARMACOLOGY 107–14 (2005); Luke A. Downey et al., *Detecting Impairment Associated with*

- Cannabis with and without Alcohol on the Standardized Field Sobriety Tests*, 224 PSYCHOPHARMACOLOGY 581–89 (2012); AJ Porath-Waller & DJ Beirness, *An Examination of the Validity of the Standardized Field Sobriety Test in Detecting Drug Impairment Using Data from the Drug Evaluation and Classification Program*, 15 TRAFFIC INJURY PREVENTION 125–31 (2014).
14. Hartman et al., *supra* note 11, at 223.
 15. *Id.* at 226; see also *Drug Categories*, LOS ANGELES POLICE DEPARTMENT, http://www.lapdonline.org/special_operations_support_division/content_basic_view/1039 (last visited Dec. 18, 2017).
 16. Karl Citek, *The Drug Evaluation Classification Program: Using Ocular and Other Signs to Detect Drug Intoxication*, 69 J. AMER. OPTOMETRIC ASS'N 211, 213 (1998).
 17. *State v. Hechtle*, 89 P.3d 185, 190 (Utah Ct. App. 2004); *State v. Wheeler*, No. 24397–1–II, 2000 WL 646511, *2 (Wash. Ct. App. May 19, 2000).
 18. Drummer et al., *The Involvement of Drugs in Drivers of Motor Vehicles Killed in Australian Road Traffic Crashes*, 36 ACCIDENT ANALYSIS & PREVENTION 239–48 (2004); J.G. Ramaekers et al., *Cognition and Motor Control as a Function of THC Concentration in Serum and Oral Fluid: Limits of Impairment*, 85 DRUG & ALCOHOL DEPENDENCE 114–22 (2006); Franjo Grotenherman et al., *Developing Limits for Driving Under Cannabis*, 102 ADDICTION 1910–17 (2007); Sewell et al., *The Effect of Cannabis Compared to Alcohol on Driving*, 18 AM. J. ADDICTIONS 185–93 (2009); W. M. Bosker et al., *A Placebo-Controlled Study to Assess Standardized Field Sobriety Tests Performance During Alcohol and Cannabis Intoxication in Heavy Cannabis Users and Accuracy of Point of Collection Testing Devices for Detecting THC in Oral Fluid*, 223 PSYCHOPHARMACOLOGY 439, 445 (2012).

[T]he Gerhardt court stated that “[t]he absence of scientific consensus regarding the use of standard [field sobriety tests] in attempting to evaluate marijuana intoxication does not mean that they have no probative value.”

more recent studies and reports, however, do not support the designation of a blood nanogram concentration level as the sole indicator of marijuana-driving impairment. The July 2017 National Highway Traffic Safety Administration Marijuana-Impaired Driving Report to Congress stated that there is a “poor correlation of THC concentrations in the blood with impairment” and that “setting *per se* levels is not meaningful.”¹⁹ In 2016 the AAA Traffic Safety Administration also stated that “it is difficult to establish a relationship between a person’s THC blood or plasma concentration and performance impairing effects. Concentrations of parent

drug and metabolite are very dependent on pattern of use as well as dose. . . . It is inadvisable to try and predict effects based on blood THC concentration alone.”²⁰ Also in 2016, the AAA Traffic Safety Research Foundation conducted a study and concluded that “quantitative threshold for *per se* laws for THC following cannabis use cannot be scientifically supported.”²¹

There are pending federal studies related to marijuana and driving. The National Institute on Drug Abuse is using a \$1.4 million grant to conduct a five-year study to determine how marijuana impacts critical brain functions for driving.²² The National Highway Traffic Safety Administration is conducting a second research project to take initial steps towards developing a battery of tests to identify drivers who have recently used marijuana.²³ The State of Colorado granted the University of Colorado \$1.68 million to look at the impacts of marijuana use on driving.²⁴

In the midst of all of this attention on marijuana and driving, the long-awaited *Gerhardt* decision was handed down in September 2017. The applicability of standard field sobriety tests to marijuana-driving impairment presented a few important legal issues for the Massachusetts Supreme Court. One

issue was that standard field sobriety tests were established to detect alcohol driving impairment—not marijuana or drug-driving impairment. Additionally, as the court noted, there are conflicting studies on the topic and no consensus in the scientific community to support their applicability to marijuana-driving impairment.

Regardless, the *Gerhardt* court stated that “[t]he absence of scientific consensus regarding the use of standard [field sobriety tests] in attempting to evaluate marijuana intoxication does not mean that they have no probative value.”²⁵ As such, the court concluded that, although a police officer may testify about their observations related to standard field sobriety tests:

A police officer may not suggest, however, on direct examination that an individual’s performance on a [standard field sobriety test] established that the individual was under the influence of marijuana. Likewise, an officer may not testify that a defendant “passed” or “failed” any [standard field sobriety test], as this language improperly implies that the [standard field sobriety test] is a definitive test of marijuana use or impairment.²⁶

The court went even further and concluded that:

The fact that the [standard field sobriety tests] cannot be treated as scientific “tests” of impairment means that evidence of performance on [standard field sobriety tests], *alone*, is not sufficient to support a finding that a defendant’s ability to drive safely was impaired due to the consumption of marijuana, and the jury must be so instructed.²⁷

What other factors should be considered in determining driving impairment? Perhaps toxicology reports indicating THC blood nanogram concentration levels; the degree of bad driving; physical evidence, such as marijuana paraphernalia or cigarettes in plain view; inculpatory statements, such as “I just smoked some marijuana”; an odor of marijuana; observations by law enforcement of characteristics like bloodshot eyes; and others as identified by the *Gerhardt* Court. Toxicology reports offering THC blood concentration levels are themselves under scrutiny. As noted above in the National Highway Traffic Safety Administration’s report to Congress, setting *per se* levels is not

19. R. COMPTON, MARIJUANA-IMPAIRED DRIVING—A REPORT TO CONGRESS, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, DOT HS 812 440, iii (July 2017).

20. DRUGS AND HUMAN PERFORMANCE FACT SHEETS, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, DOT HS 809 725, 8–9 (April 2004); *see also* AMY BERNING & DERECE D. SMITHERS, UNDERSTANDING THE LIMITATIONS OF DRUG TEST INFORMATION, REPORTING, AND TESTING PRACTICES IN FATAL CRASHES, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, DOT HS 812 072 (November 2014).

21. BARRY LOGAN ET AL., AAA FOUNDATION FOR TRAFFIC SAFETY, AN EVALUATION OF DATA FROM DRIVERS ARRESTED FOR DRIVING UNDER THE INFLUENCE IN RELATION TO *PER SE* LIMITS FOR CANNABIS 3 (2016).

22. Gregory B. Hladky, *Hartford Hospital Researches Studying Pot Smoking and Driving*, HARTFORD COURANT (April 30, 2017),

<http://www.courant.com/health/hc-marijuana-studies-hartford-hospital-20170403-story.html>.

23. ADVANCED ROADSIDE IMPAIRED DRIVING ENFORCEMENT, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION 8 (2007), <https://oag.dc.gov/sites/default/files/dc/sites/oag/publication/attachments/2007%20NHTSA%20ARIDE%20Manual.pdf>.

24. John Ingold, *Colorado Researchers Receive \$2.35M to Study Marijuana Use in Driving, Other Impacts of Legalization*, DENVER POST (December 13, 2016), <http://www.denverpost.com/2016/12/13/colorado-researchers-grant-marijuana-driving-legalization-impacts/>.

25. *Gerhardt*, 477 Mass. at 782.

26. *Id.* at 784.

27. *Id.* at 785 (emphasis added).

meaningful,²⁸ and last year's AAA Traffic Safety Research Foundation study concluded that "quantitative threshold for *per se* laws for THC following cannabis use cannot be scientifically supported."²⁹ If the toxicological findings also become an issue, then Massachusetts may only be left with the drug recognition expert observations as identified and supported by the ruling: bad driving, physical evidence, odor, and inculpatory statements.

This may cause the "road" to conviction in marijuana-driving cases to narrow in Massachusetts and perhaps in other *Daubert* states. Massachusetts, federal courts, and over half of the state courts in the U.S. use the *Daubert* standard for the admissibility of scientific evidence.³⁰ Does this mean that other courts will adopt the Massachusetts analysis on the admissibility of standard field sobriety tests in marijuana-driving cases even though the Massachusetts decision is not binding on them? Is the Massachusetts Supreme Court ruling in *Gerhardt* setting the stage for how courts should treat standard field sobriety tests for marijuana-driving-impairment cases and maybe even all drugged-driving cases?

What about other drugs and driving impairment? A recent report authored by the Foundation for Advancing Alcohol Responsibility and the Governors Highway Safety Association found that 43% of drivers who died in a crash had used a legal or illegal drug compared to 37% who tested above the illegal *per se* limit for alcohol.³¹ While this information may be indicative of an increase in drugged-driving fatalities as surpassing alcohol-driver fatalities, the report states that "[d]ata on drug presence in crash-involved drivers are incomplete in most jurisdictions, inconsistent from state to state, and some-

times inconsistent across jurisdictions within states."³² Although the Foundation for Advancing Alcohol Responsibility has the best nationwide data on this matter, there are some shortcomings in the data because it only tested 57% of drivers involved in crashes.³³ It is also important to note that driving under the influence of drugs or drugs found at the time of an autopsy is not necessarily equivalent to impaired driving.

All things considered, driving under the influence of marijuana in particular, and driving under the influence of drugs in general, is an escalating problem for the roadways and the courts. State trial and supreme courts will have to make important decisions about how to address the science establishing impairment, the role of the drug recognition expert, and the applicability of standard field sobriety tests in drugged-driving cases. Will the Massachusetts findings regarding marijuana and driving under a *Daubert* analysis influence how courts will treat driving under the influence of other drugs as well? Slowly the answers will come.



Judge Mary A. Celeste (retired) served as a judge of the Denver County Court from 2000 to 2015 and was the presiding judge from 2008 to 2010. She was president of the American Judges Association in 2010–2011. Celeste is the immediate past chair of the ABA National Conference for Specialized Court Judges and a former liaison for judicial outreach for NHTSA.

28. COMPTON, *supra* note 19, at iii.

29. BARRY LOGAN ET AL., *supra* note 21, at 3.

30. Commonwealth v. Lanigan, 419 Mass. 15, 24, 641 N.E.2d 1342, 1348 (1994); 50 State Survey of Daubert/Frye Applicability, ABA, <https://apps.americanbar.org/litigation/committees/trialevidence/daubert-frye-survey.html> (last visited Dec. 19, 2017); *Daubert Standard*, LEGAL INFO. INST., [https://www.law.cornell.edu/](https://www.law.cornell.edu/wex/daubert_standard)

[wex/daubert_standard](https://www.law.cornell.edu/wex/daubert_standard) (last visited Dec. 19, 2017).

31. JAMES HEDLUND, DRUG-IMPAIRED DRIVING, GOVERNORS HIGHWAY SAFETY ASSOCIATION & FOUNDATION FOR ADVANCING ALCOHOL RESPONSIBILITY 7, 9 (2017).

32. *Id.* at 4.

33. *Id.* at 7.

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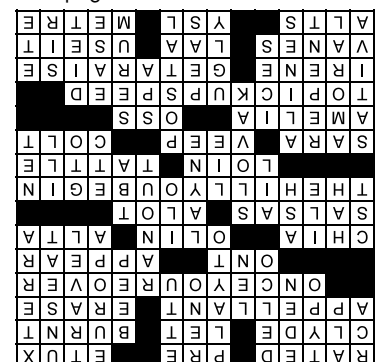
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Answers to Crossword

from page 177



Asocial Media:

When Lawyers and Judges Must Disconnect

Kelly Lynn Anders

For many lawyers and judges, the use of social media can pose as many risks as rewards. With electronic communication methods sometimes surpassing the use of more traditional methods, legal professionals have little choice but to engage in some of the more popular social-media platforms, such as Facebook, LinkedIn, and Twitter.

Certainly, countless other communication methods exist and will continue to be developed; however, like the aforementioned trio, social media will likely always continue to share several key traits, each of which will continue to pose challenges for ethical communication among legal professionals. First, it is public—so public, in fact, that access spans the globe. Second, it is immediate. When comments are posted, they appear in “real time” and for all to see. Finally, it is permanent. Even after deleting comments, photos, and hyperlinks, there’s no guarantee that they will not be copied before they have been deleted, thereby leading to the possibility (no matter how slim) that anything posted online can take on a life of its own.

Any one of these possibilities, viewed singularly, could create enough ethical minefields to make even the most seasoned practitioners take pause. As a result, this uncertainty has inspired myriad articles, seminars, and guides for “best practices” in maneuvering through the potential pitfalls involved in social media where lawyers and judges are concerned. Although the American Bar Association has published several useful directives,¹ clear guidelines have yet to be included in the *Model Rules of Professional Conduct* (MRPC) or the *Model Rules of Judicial Conduct* (MRJC).

There are many valuable references that provide general guidance on social-media usage for lawyers and judges,² but they fail to address yet another delicate component involved in social-media ties—breaking them. Severing ties on social media carries with it a variety of ethically sensitive considerations, ones that involve rules of professional conduct, professionalism, and a skill that is becoming ever more nuanced—tact.

Several years ago, some states began to ban certain social-media connections between lawyers and judges, thereby requiring them to retroactively sever ties.³ But no advice was given as to how best to do so. This article will address the mechanics of severing ties on three currently popular sites, the professional implications of severing social-media connections, relevant rules governing judicial and attorney conduct,

and a discussion of “best practices” for lawyers and judges to follow when social-media ties must be broken.

I. THE MECHANICS OF SEVERING TIES ON FACEBOOK, LINKEDIN, AND TWITTER

Developing contacts is much easier than ending them. Mechanically, the processes for doing so on Facebook, LinkedIn, and Twitter are simple. Ethically and professionally, this task can be nuanced and complex.

A. UNFRIENDING AND UNLIKING ON FACEBOOK

There are two ways to sever ties on Facebook—via the “unfriend” and “unlike” features. The former is associated with disconnecting from a user’s personal page, while the latter provides a way to sever ties from pages associated with companies, clubs, groups, organizations, and other business-related pages that belong to individuals.

When one unfriends or unlikes, page owners are not notified; however, page owners and administrators are advised of new friends and likes. Unfriending and unliking are most noticeable on pages with the fewest friends and likes, or when they involve users that page owners or administrators know particularly well.

Although it is likely that fleeting friendships and affiliations routinely come and go among more junior or casual users, such as minors and college students, and they may have hundreds (and, sometimes, thousands) of friends and likes on their pages, the same cannot commonly be assumed of lawyers and judges. As a result, each disconnection could be much easier to detect, not only by page owners and administrators, but also by other friends or visitors who might be monitoring friends and likes on particular pages. In instances where connections involve lawyers and judges, it may be awkward to unlike and unfriend, even when directed to do so.

B. UNLINKING ON LINKEDIN

In contrast to Facebook and Twitter, LinkedIn is almost solely used for professional purposes, including networking, establishing and broadening contacts, joining professional groups, and even job searches and “following” companies to keep track of their news. As a result, affiliations tend to be limited to users who are less interested in participating in some of the more personal features found on Facebook (e.g., posting photographs, announcing one’s immediate whereabouts, etc.),

This article was adapted from Kelly Lynn Anders, *Ethical Exits: When Lawyers and Judges Must Disconnect on Social Media*, 7 CHARLESTON L. REV. 187 (2012-13).

Footnotes

1. See, e.g., ABA Formal Opinion 462, “Judges’ Use of Electronic Social Networking Media” (Feb. 21, 2013).

2. One of the most comprehensive and current examples is JAN L. JACOBOWITZ & JOHN G. BROWNING, *LEGAL ETHICS AND SOCIAL MEDIA: A PRACTITIONER’S HANDBOOK*, Ch. 8 (2017). Another is “Social Media and Judicial Ethics,” JUD. CONDUCT REP., Vol. 39, No. 1 (Nat’l Ctr. for St. Cts., 2017).

3. *Id.* See also Samuel V. Jones, *Judges, Friends, and Facebook: The Ethics of Prohibition*, 24 GEO. J. LEGAL ETHICS 281 (2011).

and are instead more inclined to use the site to monitor career transitions, read business-related news articles targeted to their interests, recommend colleagues, and send emails. It should be noted, however, that users may opt to link to their pages on Facebook and Twitter so that posting a message on one platform will automatically ensure the identical posting on the other.

Depending on the level of privacy selected on one's profile, it is possible for users who are linked to see others' connections within their networks. In the most lax privacy option, a user's connections may be viewed by any LinkedIn user—both inside and outside of the user's immediate network. It cannot be assumed that every lawyer and judge uses the most stringent privacy setting; even if some do, this does not erase the possibility that others will gain access to lists of connections that were intended to have limited access.

On LinkedIn, the unlinking process is as simple as clicking a button. As with Facebook, there are no notifications sent when links are broken.

C. UNFOLLOWING ON TWITTER

Just as Facebook has added new words to the popular cultural lexicon with “unliking” and “unfriending,” Twitter has introduced the concept of “unfollowing,” which enables users to cease receiving tweets from users they once “followed.” On Twitter, a user's followers remain public knowledge, particularly for accounts used for business or professional purposes. Twitter assists users in locating companies, schools, organizations, and public figures to follow, based on perceived interests that stem from tracking accounts followed by users and others in their networks.

Lawyers and judges may have Twitter accounts that are used for personal or professional purposes, and there are many articles and seminars that provide general guidance about the ethical considerations involved in doing so. The same is true for law firms, which, in small numbers, also use Twitter for firm marketing and informational purposes. It is uncertain whether these resources provide instruction about the potential complications that may be involved in severing ties. Rather, they appear to be focused more on their formation and maintenance.

Tweets are currently limited to 280 characters, but users may send unlimited numbers of such updates on a daily basis. A simple “unfollow” button is all that one needs to click to end a connection. As with Facebook and LinkedIn, users are not notified when this occurs.

II. SOCIAL-MEDIA DISCONNECTIONS AND THE MODEL RULES

Because of the lack of notification when a user opts to end a social-media connection, one could wrongly assume that severing ties would automatically be easier, less awkward, and more socially graceful. On the contrary, this simple act can test even the most experienced legal professional's rudimentary understanding of the concept of professionalism in the law.

Regardless of whether attorneys and judges are parting ways through traditional or virtual channels, ethical expectations are the same—or they should be. The following sections will address relevant rules in the MRPC and MRJC that may directly or indirectly relate to severing social-media ties.

A. EXITING SOCIAL MEDIA AND THE MODEL RULES OF PROFESSIONAL CONDUCT

As previously mentioned, social media is not currently included in the MRPC. However, it is surprising to note that the current rules do not include any language or guidance about lawyers severing ties with judges or other lawyers in any medium. Perhaps it's thought that parting ways is merely a part of general communications, such as “hello” and “good-bye”; it is more likely that such “goodbyes” were not previously envisioned. But times have changed, and social media is no longer new. As a result, the absence of guidance in the MRPC highlights a lack of clarity about modern expectations of professional communication among legal professionals that needs to be addressed and resolved.

The primary focus of communication in the MRPC, Rule 1.4, concerns a lawyer's duties in reference to communications with clients. Additional expectations concerning communicating with clients can be found in Rule 7.1; however, even in text addressing client communications, very little, if any, guidance exists to instruct lawyers on “best practices” or even basic expectations for severing ties. With recent discussions in legal education, media, and other sources about the lacking preparation of “practice-ready” lawyers, it cannot be assumed that this skill has been mastered (or even addressed) simply because one has successfully completed law study and has the wherewithal to create a social-media presence.

Absent clear-cut guidance, general participation in social media may, in part, be governed by Rules 3.5 (Impartiality and Decorum of the Tribunal), 8.4(d) and (e) (Misconduct), and the various rules concerning advertising, along with the aforementioned Rules 1.4 and 7.1. Yet another applicable section of the MRPC is Rule 5.1, which addresses “Responsibilities of Partners, Managers, and Supervisory Lawyers,” who are charged with establishing guidelines for the professional performance of junior lawyers.

Additionally, there are some firms and managing partners who may have established internal guidelines for attorneys to follow when engaging in social-media activities. However, absent guidelines from the MRPC, lawyers' performance will likely continue to lack consistency or uniformity, which can cause confusion about expectations of best practices for lawyers, judges, and others who are directly or indirectly involved in the legal community, including clients, jurors, and the general public.

B. EXITING SOCIAL MEDIA AND THE MODEL RULES OF JUDICIAL CONDUCT

Much like the lack of coverage in the MRPC, the MRJC neither specifically addresses social media, nor provides guidance for severing ties with lawyers or other judges. Indirect guidance is contained in Canons 2 and 3, specifically in Rules 2.2 (Impartiality and Fairness), 2.4 (External Influences on Judi-

Regardless of whether attorneys are parting ways through traditional or virtual channels, ethical expectations are the same—or they should be.

cial Conduct), and 3.1 (Extrajudicial Activities in General). Additional guidance for performance in this area is found in Rules 1.2 (Promoting Confidence in the Judiciary) and 1.3 (Avoiding Abuse of the Prestige of Judicial Office).

Of the scant number of directives in the MRJC related to communication, most are focused on the interests of parties whose cases are being heard in court proceedings. Although traditional methods of communication have logically and historically been left to judicial discretion—and, for the most part, with great success—the public and uncontrollable nature of social media calls for a different approach. Guidance in entering into active participation in social-media communication, along with clearly defined rules for severing ties with lawyers and others inside and outside of the legal community with whom judges may be linked, would provide much-needed clarity about an increasingly important element of what it means to serve as a judge in the new millennium—and to do so in a way that deftly combines professionalism, decorum, and accessibility.

III. RECOMMENDED BEST PRACTICES FOR LAWYERS AND JUDGES WHO MUST SEVER TIES ON SOCIAL MEDIA

Although Facebook, LinkedIn, and Twitter do not advise a user of broken connections, a lawyer's or judge's basic understanding of professionalism in the law should dictate the importance of disclosure. Regardless of who is breaking the tie—the judge or the lawyer—one should notify the other of the intention to do so, along with the rationale. For casual acquaintances, an email would be sufficient. For more personal connections, which, for this purpose, are limited to the small number of one's closest colleagues, a brief telephone call or in-person meeting to discuss the reason for the impending disconnection would be preferable, provided adequate time exists to do so. However, considering the limited amount of free time enjoyed by any legal professional, availability for personal advisories may be limited at best. An email, though not preferred, would at least put close contacts on notice of the need to sever ties so that they would know to expect it, and an invitation to call or meet to discuss the matter could be included in the message.

Although it is unlikely that anyone would take offense to severing ties due to a mandate, there are also instances where lawyers and judges opt to do so voluntarily. Examples may include breaking ties because of changes in employment, disassociations due to sanctions, or the ending of friendships. With the exception of the last reason, advance notice of the intention to sever the tie is the most professionally prudent approach.

Lawyers and judges may wish to draft standard email language to have on hand to use for this purpose, based on a variety of reasons, with text that can be cut and pasted to suit the occasion. They may also wish to cite to the opinion that, in mandated instances, has caused the reason for the disconnection. As an example, in the case of Florida's 2012 opinion concerning connections between lawyers and judges on LinkedIn, an email from a judge to a lawyer could read:

Although we have been connected on LinkedIn in the past, and this connection has been beneficial, I

must reluctantly break all connections on this site with lawyers who may appear before me, due to a recent opinion issued in May 2012 by the Judicial Ethics Advisory Committee of the Florida Supreme Court (Opinion No. 2012-12). Of course, this does not alter our opportunities to interact collegially outside of social-media channels. Understandably, the Committee is concerned about mistaken impressions about judicial influence, which I am sure you agree is essential for us all to protect. So that you are not caught by surprise, or left to wonder why I have broken our connection, I am sending this note as an advisory. Please contact me with any questions.

A lawyer could send a similarly worded advisory to judges in his or her network. Advance notice is far preferable to disappearing without any explanation for doing so, and having email text readily available literally takes seconds to employ, while leaving positive impressions that will be recalled for the duration of one's career.

IV. CONCLUSION

Social media, in some form, is very likely here to stay. Currently popular sites, such as Facebook, LinkedIn, and Twitter, may come and go, but their commonalities (public, immediate, and permanent) will form the bases for any social-media sites that may replace them in the future. Yet another commonality that these social-media sites share is the lack of notification to users when a connection chooses to sever ties.

No one engages in social-media activities planning to disconnect. On the contrary, the ultimate goals of becoming involved in social-media activities on a professional level are to strengthen and enhance current connections, develop new contacts, and to establish an online presence that positively solidifies one's reputation in the legal community.

Because lawyers and judges are held to a higher standard of professionalism than the average social-media user, clarification about best practices for disconnections between lawyers and judges on social media has become a necessity. Such a lack of guidance has the potential to create unnecessary confusion, particularly in instances where the severing of social-media ties is mandated. If such guidance were included in the MRPC and MRJC based on the aforementioned general traits inherent to social media, this would provide much-needed clarity for years to come.



Kelly Lynn Anders is the executive director of the Jackson County (Mo.) Law Library and serves on the Editorial Board of Court Review. Formerly an associate dean and law professor, Anders has published and presented extensively on the topic of social-media ethics. She is also the author of three books published by the Carolina Academic Press, including Advocacy to Zealousness: Learning Lawyering Skills from Classic Films (2012) and The Organized Lawyer (2d ed. 2015).

ELDER LAW? by Judge Victor Fleming

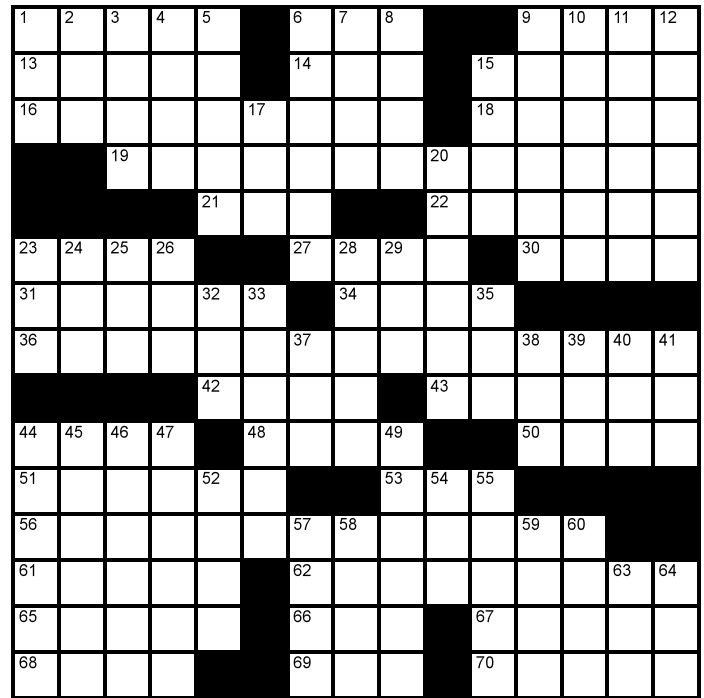
Across

- 1 Evaluated, as a movie
 6 Before, up front
 9 And wife (Latin abbr.)
 13 Drexler or Darrow
 14 Fail to prevent
 15 Overdone, as toast
 16 What a trial loser may become
 18 Clear
 19 Start of an observation by Charles Schulz
 21 Canadian prov.
 22 Show up, as in court
 23 "Pet" that sprouts
 27 Ken or Lena
 30 Canadian prov.
 31 Spicy sauces
 34 Oodles
 36 Part 2 of the observation
 42 Pork ____
 43 Be a snitch
 44 Gilbert of "Roseanne"
 48 "I Married the ____" (Jane Barkley memoir)
 50 Paddock youngster
 51 Pilot Earhart
 53 Covert WWII org.
 56 End of the observation
 61 Castle of dance
 62 Start to earn more
 65 Wind direction finders
 66 When doubled, a Teletubby
 67 Start of an asset-exploitation adage

- 68 Nos. reported to a control tower
 69 Initials in fashion
 70 About a yard, in York

Down

- 1 HDTV choice
 2 Yodeling spot
 3 Mistranscription, perhaps
 4 Genesis place
 5 Car battery brand
 6 ____ the crowd (ham it up)
 7 Ashcroft predecessor
 8 Dramatic accusation
 9 Satellite of Jupiter
 10 Expense account listing
 11 Topple, as from a throne
 12 Nissan SUV model
 15 Honk
 17 Dawson or Dykstra
 20 Expired, as a subscription
 23 69-Across setting
 24 "Yeah, right!"
 25 "____ de France"
 26 Fireplace fleck
 28 Bobby of the Bears
 29 U.N. agency
 32 Be laid up, say
 33 European tongue
 35 Program guide abbr.
 37 Tell a whopper
 38 Abbr. after a comma
 39 Sporty Pontiac
 40 "____ be darned!"



- 41 Fishbowl accessory
 44 Cannabis ____ (marijuana)
 45 Nihilistic, perhaps
 46 Atone
 47 Some triangular garments
 49 Mail-related
 52 Chills, as a drink
 54 Place to recuperate
 55 Blood bank fluid
 57 Like the storied duckling
 58 Green veggies

- 59 Soften
 60 Slim down
 63 General address?
 64 Summer, in Lyon

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

Answers are found on page 173.

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The Best of Court Review

1998–2017

AJA WHITE PAPERS

Minding the Court: Enhancing the Decision-Making Process, by Pamela Casey, Kevin Burke, and Steve Leben, 49 CT. REV. 76 (2013).

Social psychologist Pamela Casey and judges Kevin Burke and Steve Leben jointly explored how the science of decision making might help judges in their daily work.

Procedural Fairness: A Key Ingredient in Public Satisfaction, by Kevin Burke and Steve Leben, 44 CT. REV. 4 (2008).

The first of the American Judges Association's white papers, this paper made the case for judges focusing on procedural-fairness principles as the key to getting public satisfaction with the courts in general and greater compliance with court orders in specific cases. The paper reviewed the research on procedural fairness (also called procedural justice) and presented detailed recommendations for judges, court administrators, courts, court leaders, researchers, and judicial educators.

The Debate over the Selection and Retention of Judges: How Judges Can Ride the Wave, by Mary A. Celeste, 46 CT. REV. 82 (2011).

Judge Mary Celeste put the debates over judicial-selection systems in context—a context of American history and recent United Supreme Court decisions about what could be said in judicial campaigns. She identified challenges judges might face regardless of selection system.

The Judge Is the Key Component: The Importance of Procedural Fairness in Drug-Treatment Courts, by Brian MacKenzie, 52 CT. REV. 8 (2016).

Based on his own experience as a drug-court judge and data from other studies, Judge Brian MacKenzie argued that the judge is the key to drug-court success and that the successful drug-court judge must practice the principles of procedural fairness.

ALTERNATIVE DISPUTE RESOLUTION

Breaking Impasses in Judicial Settlement Conferences: Seven (More) Techniques for Resolution, 46 CT. REV. 130 (2011).

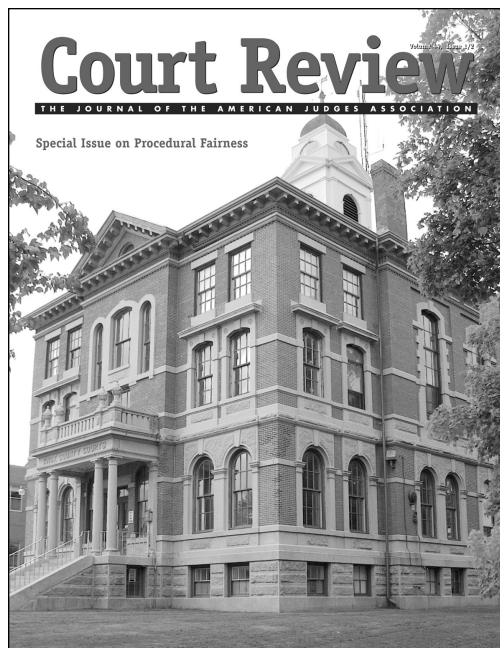
United States Magistrate Judge Morton Denlow provided seven techniques (with examples) for getting parties to settle cases.

Concluding a Successful Settlement Conference: It Ain't Over Till It's Over, by Morton Denlow, 39(3) CT. REV. 14 (2002).

United States Magistrate Judge Morton Denlow provided practical advice—and a handy “Judge’s Settlement Checklist/Term Sheet”—to help make sure that settlement agreements reached in a settlement conference couldn’t fall apart afterward.

Municipal Court Mediation: Reducing the Barking Dog Docket, by Karen Arnold-Burger, 35(3) CT. REV. 50 (1998).

Then municipal-court judge Karen Arnold-Burger told how she started a mediation program with no money: “And the best news? I haven’t heard a barking dog case in months.”



BOOK REVIEWS

Actual Innocence: The Justice System Confronts Wrongful Convictions, by Steve Leben, reviewing JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGFULLY CONVICTED (2000), 36(4) CT. REV. 12 (2000).

The book set out in separate chapters the typical ways the justice system may go awry and the innocent found guilty. The four most frequent causes for 62 convictions found wrongful by DNA testing: eyewitness error, flawed blood-serology inclusions, police misconduct, and prosecutorial misconduct.

A Psycholegal Deskbook for Bench and Bar: Book Review of Forensic Assessments in Criminal and Civil Law, by John W. Brown and Benjamin K. Hoover, reviewing FORENSIC ASSESSMENTS IN CRIMINAL AND CIVIL LAW: A HANDBOOK FOR LAWYERS (Ronald Roesch and Patricia A. Zapf eds. 2012), 51 CT. REV. 4 (2015).

Virginia trial judge John W. Brown and his court’s staff attorney, Benjamin Hoover, looked at the usefulness for judges of a comprehensive deskbook about forensic psychological assessments used in civil and criminal proceedings. The book covers empirical foundations and limits for all of the leading types of assessments, and our reviewers found that the book’s “value lies as a solid background and reference volume.”

Do Happier Judges Make Better Judges?, by Steve Leben, reviewing NANCY LEVIT and DOUGLAS O. LINDER, THE HAPPY LAWYER: MAKING A GOOD LIFE IN THE LAW (2010), 45 Ct. Rev. 132 (2010).

Law professors Nancy Levit and Douglas Linder brought

All Court Review articles from 1998 to the present can be found at amjudges.org/publications.

together psychological research on what makes people happy in their lives and work, applying it to lawyers. Our reviewer considered how those lessons might be used to make courts and courthouses better places to work.

Fugitive Justice: Slavery and the Law in Pre-Civil War America, by Karen Arnold-Burger, reviewing STEVEN LUBET, *FUGITIVE JUSTICE: RUNAWAYS, RESCUERS, AND SLAVERY ON TRIAL* (2010), 46 CT. REV. 116 (2010).

The book looks at enforcement of the Fugitive Slave Acts in the years leading up to the Civil War and the role of attorneys and judges of the time in using it to shape the debate over slavery. Judge Karen Arnold-Burger reviewed the book and the times, noting that the book includes detailed accounts of three trials, with excerpts from trial transcripts and considerations of trial strategy.

Law in a Therapeutic Key: A Resource for Judges, by Thomas T. Merrigan, reviewing LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996), 37(1) CT. REV. 8 (2000).

Judge Thomas Merrigan reviewed this book on therapeutic jurisprudence, the view generally that since legal proceedings can affect the psychological well-being of participants, judges should use their discretion to promote therapeutic outcomes where that's possible without running contrary to any of the judge's legal duties. The book collected key articles exploring the role of therapeutic jurisprudence.

The Politics of Judges, by Frank B. Cross, reviewing TERRI JENNINGS PERETTI, *IN DEFENSE OF A POLITICAL COURT* (1999), 37(2) CT. REV. 18 (2000).

In her book, Terri Jennings Peretti argued that judges made decisions based on their politics, not neutral principles of law, that judges must tailor decisions to congressional politics, and that this is a good thing. Professor Frank Cross noted limitations in her review of political-science research, but also found her argument "an interesting one, well supported, and deserving of a hearing."

Writing Like the Best Judges, by Steve Leben, reviewing ROSS GUBERMAN, *POINT TAKEN: HOW TO WRITE LIKE THE WORLD'S BEST JUDGES* (2014), 51 CT. REV. 90 (2015).

Legal-writing consultant Ross Guberman uses opinion excerpts from 34 judges known for their writing abilities to show how every part of a judicial opinion can be done at the highest level. Our reviewer's conclusion: "Any judge who studies the book will become a better writer. And an already talented writer who reads the book will also become a better judge."

DOMESTIC VIOLENCE AND FAMILY LAW

Dealing with Complex Evidence of Domestic Violence: A Primer for the Civil Bench, by Jane H. Aiken and Jane C. Murphy, 39(2) CT. REV. 12 (2002).

Professors Jane Aiken and Jane Murphy discussed how to handle the evidentiary issues that frequently arise in domestic-violence cases.

Special Issue on Handling Domestic-Violence Cases, 53 CT. REV. 1 (2017).

Our most recent special-issue on handling domestic-violence cases included a bench card on steps to increase safety when handling domestic-violence cases, resources (including a list of key articles), and separate articles on expert-witness standards, batterer-intervention programs, and the vantage point of victims.

Screening for Domestic Violence: Meeting the Challenge of Identifying Domestic Relations Cases Involving Domestic Violence and Developing Strategies for Those Cases, by Julie Kunce Field, 39(2) CT. REV. 4 (2002).

A primer on how to screen for safety issues and what judges can—and cannot—do to keep people safe in those cases.

The Myth of Epidemic False Allegations of Sexual Abuse in Divorce Cases, by Marilyn McDonald, 35(1) CT. REV. 12 (1998).

Social worker Marilyn McDonald reviewed the incidence of child sexual abuse in society and in divorce cases, as well as the research showing that false allegations were not widespread.

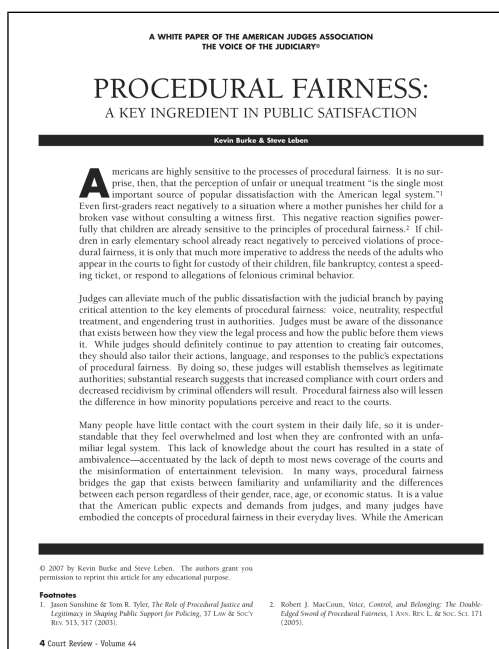
Visits in Cases Marked by Violence: Judicial Actions That Can Help Keep Children and Victims Safe, by Julie Kunce Field, 35(3) CT. REV. 23 (1998).

The introduction to the article put it well: "It's a judge's worst nightmare—a mother and child killed in the process of making a court-ordered visitation exchange." Then-Professor Julie Kunce Field went from that real-life case example to explain both the power dynamics and domestic violence and a series of steps judges could take in court orders to help keep victims safe.

FOR THE NEW JUDGE

Isolation in the Judicial Career, by Isaiah M. Zimmerman, 36(4) CT. REV. 4 (2000).

Psychologist Isaiah Zimmerman talked about how the cutting of ties with many others that typically occurs when a person becomes a judge may affect judges of varying personality traits. Though "[i]solation is not going to be removed from the judicial career," he suggested several steps judges can take to maintain a healthy life and judicial career:



“By understanding and actively employing the measures recommended, a judge can transmute isolation into a rewarding resource.”

So You're Going to Be a Judge: Ethical Issues for New Judges, by Cynthia Gray, 52 CT. REV. 80 (2016).

Judicial-ethics expert Cynthia Gray presented a primer for every new judge on the steps the judge must take to clear the decks ethically when taking the bench.

JUDICIAL ETHICS

Extrajudicial Speech: Navigating Perils and Avoiding Pitfalls, by William G. Ross, 38(2) CT. REV. 36 (2001).

Professor William Ross examined the disqualification of the federal judge who had been presiding over a Microsoft antitrust case for extrajudicial speech to reporters. Ross provides practical suggestions for dealing with the media in an ethical manner.

Good Judging and Good Judgment, by Stephen C. Yeazell, 35(3) CT. REV. 8 (1998).

Professor Stephen Yeazell addressed the question, “When does independence become lawlessness?,” examining the case of an intermediate appellate judge who announced he would refuse to follow a ruling of the court above him. Yeazell: “[A]ny discerning defense of judicial independence will mean disapproval of some judicial behavior.”

On Judge Posner and the Perils of Commenting on Pending or Impending Proceedings, by Steven Lubet, 37(2) CT. REV. 4 (2000).

The Ethics of Judicial Commentary: A Reply to Lubet, by Richard A. Posner, 37(2) CT. REV. 6 (2000).

When Is an Investigation Merely an Investigation? A Reply to Posner, by Steven Lubet, 37(2) CT. REV. 7 (2000).

Free Speech for Judges: A Commentary on Lubet et al. v. Posner, by Monroe H. Freedman, 37(4) CT. REV. 4 (2001).

Free Speech and Judicial Neutrality: A Reply to Professor Freedman, by Steven Lubet, 37(4) CT. REV. 6 (2001).

In 1999, Judge Richard Posner wrote a book about the impeachment of President Bill Clinton, offering the opinion that President Clinton had committed “various felonious obstructions of justice” and clearly “perjured himself in the Paula Jones deposition.” Professor Steven Lubet, an expert on judicial ethics, argued in *Court Review* that Posner had violated judicial-ethics rules “by commenting on both pending and impending proceedings.” We gave Judge Posner the opportunity to respond and Professor Lubet the opportunity to close out the discussion.

That debate led to another essay by Professor Monroe Freedman, another legal-ethics expert. Freedman sided generally with Judge Posner on First Amendment grounds, though he

suggested an amendment to judicial-ethics rules. Professor Lubet again responded.

So You're Going to Be a Judge: Ethical Issues for New Judges, by Cynthia Gray, 52 CT. REV. 80 (2016).

See the description under “For the New Judge.”

JUDICIAL INDEPENDENCE

Remarks on Judicial Independence, by Ruth Bader Ginsburg, 43 CT. REV. 112 (2008).

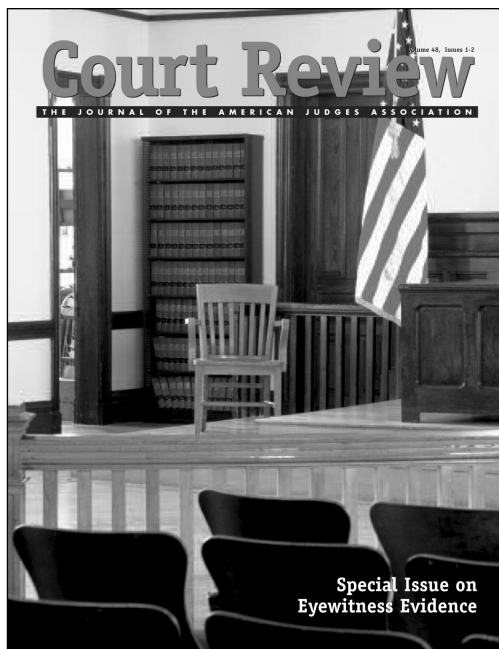
In remarks to the AJA's annual educational conference, Justice Ginsburg discussed both historic and recent threats to judicial independence.

JURY TRIALS

First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making, by Jennifer K. Elek and Paula Hannaford-Agor, 49 CT. REV. 190 (2013).

Implicit Bias and the American Juror, by Jennifer K. Elek and Paula Hannaford-Agor, 51 CT. REV. 116 (2015).

In a 2013 article, researchers Jennifer Elek and Paula Hannaford-Agor reviewed various measures that have been used in an attempt to reduce the potential for implicit bias in jury verdicts. Based on social-science research, they identified the most promising practices. In a follow-up article in 2015, they reviewed the results of a mock-jury experiment using specialized jury instructions aimed at reducing juror bias. The researchers found “some preliminary evidence to suggest that a specialized instruction could alter expressions of bias in juror judgments.” The 2015 article provided a sample instruction that might be used, annotated to show the research supporting each of the statements it contained.



Jury Instructions in the New Millennium, by Peter M. Tiersma, 36(2) CT. REV. 28 (1999).

Law professor and linguist Peter Tiersma shows how pattern jury instructions based on legal language can easily be misunderstood by jurors. He also provides several suggestions for writing instructions the average juror would understand. His conclusion: “Today there are modern doomsayers who continue to claim that the law is scarcely expressible in ordinary English. It is time to prove them wrong.”

On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room, by Gregory E. Mize, 36(1) CT. REV. 10 (1999).

After cochairing the District of Columbia's jury-reform project, Judge Gregory Mize began his own experiment, conducting individual voir dire in a small room with each potential juror. He found that potential jurors who had been silent in open court often told much more in this setting—with example after example of key information that would not

have been discovered under normal procedures. His conclusion: “I am convinced that even if individual questioning took up significant amounts of time (which it has not for me), it would be well worth expending the effort in order to avoid juror UFO’s and the consequent danger of mistrials caused by impaneling biased or disabled citizens.”

Special Issue on Jury Reform, 41(1) CT. REV. 1 (2004).

In this special issue, we reviewed the use of various jury-trial innovations (like letting jurors ask questions or take notes), evaluative research on how well these innovations allowed jurors to better understand the evidence, and what happened when questions jurors submitted weren’t asked.

LEGAL WRITING

Clearing the Cobwebs from Judicial Opinions, by Bryan A. Garner, 38(2) CT. REV. 4 (2001).

Against Footnotes, by Richard A. Posner, 38(2) CT. REV. 24 (2001).

No Longer Speaking in Code, by Rodney Davis, 38(2) CT. REV. 26 (2001).

Afterword, by Bryan A. Garner, 38(2) CT. REV. 28 (2001).

Bryan Garner, editor of *Black’s Law Dictionary* and author of several usage books, including *Garner’s Dictionary of Legal Usage*, presented a simple proposition for judges: put all the citations in footnotes while keeping all the substance in the text. If you’ve never tried it, take a look at the examples Garner provided in this article. Judge Richard Posner responded—opposing footnotes altogether. Another judge, Rodney Davis, explained how he’d adapted to putting citations in footnotes.

First Things First: The Lost Art of Summarizing, by Joseph Kimble, 38(2) CT. REV. 30 (2001).

Professor Joseph Kimble showed how to summarize to write great judicial-opinion openers, better legal memos, and understandable contracts, statutes, and rules.

How to Write an Impeachment Order, by Joseph Kimble, 36(2) CT. REV. 8 (1999).

While Professor Joseph Kimble used the order that ended the impeachment of President Bill Clinton as the take-off point for this piece, he mainly showed how to take bloated prose and prune it down to its essence. His conclusion: “How do you write an impeachment order? The same way you should write any legal sentence, paragraph, page, or document. In plain language.”

Writing Like the Best Judges, by Steve Leben, reviewing ROSS GUBERMAN, *POINT TAKEN: HOW TO WRITE LIKE THE WORLD’S BEST JUDGES* (2014), 51 CT. REV. 90 (2015).

See the description under “Book Reviews.”

MAKING BETTER JUDGES®

A Court and a Judiciary That Is as Good as Its Promise, by Kevin S. Burke, 40(2) CT. REV. 4 (2003).

In remarks on receiving the William H. Rehnquist Award for Judicial Excellence, Judge Kevin Burke argued for a judiciary “known not just for speed and efficiency . . . but also for other, less quantifiable aspects of justice—things like fairness and respect, attention to human equality, a focus on careful listening, and a demand that people leave our courts understanding our orders.”

A New Model for Civil Case Management: Efficiency Through Intrinsic Engagement, by David Prince, 50 CT. REV. 174 (2014).

Colorado trial judge David Prince considered ways to mold the management of civil litigation around procedural-justice and organizational-management research findings. He explained how these findings should frame a judge’s thinking about case management and made specific suggestions for managing civil cases.

Addressing Implicit Bias in the Courts, Pamela M. Casey, Roger K. Warren, Fred L. Cheesman, and Jennifer K. Elek, 49 CT. REV. 64 (2013).

Researchers Pamela Casey, Fred Cheesman, and Jennifer Elek joined with former judge and National Center for State Courts president Roger Warren to outline seven research-based strategies for reducing the influence of implicit bias in decision making. The article was research-based, highly practical, and written specifically for judges and other court personnel.

Courting Justice with the Heart: Emotional Intelligence in the Courtroom, by Nancy Perry Lubiani and Patricia H. Murrell, 38(1) CT. REV. 10 (2001).

Two judicial educators discussed the importance of emotional intelligence for judging and how to use judicial education to enhance it.

Heuristics and Biases in Judicial Decisions, by Eyal Peer and Eyal Gamliel, 49 CT. REV. 114 (2013).

Israeli researchers Eyal Peer and Eyal Gamliel review common decision-making fallacies judges are susceptible to, including confirmation bias, hindsight bias, the conjunction fallacy, and an inability to ignore inadmissible evidence. They also recount a famous Israeli experiment with judges making parole decisions where the judges were more likely to grant paroles at the beginning of the day or after a break.

High-Profile Cases: Are They More Than a Wrinkle in the Daily Routine?, by Robert Alsdorf, 47 CT. REV. 32 (2011).

Seattle judge Robert Alsdorf handled a very high-profile case during the year he would be up for reelection. He provided guidance on how to craft the decision to be accessible and understood. Excerpts from his written decision, which over-

A Method for Analyzing the Accuracy of Eyewitness Testimony in Criminal Cases

Richard A. Wise & Martin A. Saker

Although no one knows precisely how many wrongful convictions occur each year, a study examining DNA-exonerations cases estimated that in 3.3% to 5% of the capital rape-murder convictions in the U.S. from 1982-1989, the defendants were innocent.¹ If this percentage of wrongful convictions applied to other types of crimes, there would be 33,000 to 50,000 wrongful felony convictions per year in the U.S.²

Eyewitness error is the leading cause of wrongful convictions.³ In fact, Professor Gary Wells and other prominent eyewitness researchers stated that “cases of proven wrongful convictions of innocent people have consistently shown that mistakes in eyewitness identification are responsible for more of these wrongful convictions than all the other causes combined.”⁴ For example, in the first 271 DNA-exoneration cases, eyewitness error occurred in 73% of the cases.⁵ In many of the DNA-exoneration cases, multiple eyewitnesses identified the defendant as the perpetrator of the crime and several of the defendants were on death row when they were exonerated.⁶ Because eyewitness evidence is frequently the sole or primary evidence in a criminal case, the justice system needs to enhance the ability of judges, other legal professionals, and jurors to assess its accuracy. This article presents a method for analyzing the accuracy of eyewitness testimony that can help judges achieve this vital goal (hereafter referred to as “Method”).

It consists of four steps. First, determine if during the inter-

views law enforcement obtained the maximum amount of information from the eyewitness, did not contaminate the eyewitness memory of the crime, or artificially increased the eyewitness confidence. Second, ascertain if the identification procedures in the case were fair and unbiased. Third, evaluate how the eyewitness factors at the crime scene likely affected accuracy. Finally, make conclusions about the probable accuracy of the eyewitness testimony. Scientific guidelines for making these determinations are discussed.

This article also describes how judges can use this Method to better perform judicial functions related to eyewitness testimony in criminal cases, such as determining whether to grant a motion to suppress an eyewitness identification, deciding whether an eyewitness expert’s testimony should be admitted at trial, and evaluating eyewitness accuracy in bench trials and on appeal.

THE CAUSES OF EYEWITNESS ERROR

To understand why eyewitness error occurs and what safeguards are needed to prevent and reduce eyewitness error, it is first necessary to understand the nature of memory.⁷ Although an eyewitness memory of a crime can be reasonably accurate, it does not operate like a video camera.⁸ Accordingly, it is not like a videotape passage that created that the eyewitness can replay at will to create an exact replica of the crime. Instead, memory is an active, ongoing, dynamic process that consists of four stages: perception, encoding, storage, and retrieval.⁹

The authors thank Professor Clifford Fishman for his contributions to the law-review article about the Method and his excellent suggestions for improving the present article. They also thank the editors of the *Court Review* for giving us permission to publish a shorter version of this law-review article. The original, complete article is available at Richard A. Wise et al., *How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case*, 42 *COT. L. REV.* 435-513 (2009).

Footnotes

1. D. Michael Bregman, *Innocents Convicted: An Empirically Justified Tactual Wrongful Conviction Rate*, 97 *J. Crim. L. & Criminology* 791, 808 (2007).
2. Id. see Richard A. Wise et al., *How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case*, 42 *COT. L. REV.* 435, 440-41 (2009). This article contains a more detailed explanation of the Method.
3. See, e.g., C. Ronald Huff, *Wrongful Convictions: Social Tolerance of Error*, 4 *Rev. on Sci. Pers. & Soc. Psch.* 99, 103 (1987); Anne Burton, *Convicted But Innocent*, 12 *Law & Hum. Behav.* 283, 286 (1988).

4. Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Law Enforcement*, 22 *Law & Hum. Behav.* 361, 377 (1998), at C1.
5. *Eyewitness Identification: THE INNOCENCE PROJECT* (2011), available at <http://www.innocenceproject.org/understand/EyewitnessMisidentification.php> (last visited May 18, 2013).
6. Rob Warden, *How Mistakes and Perjured Eyewitness Identification Testimony Put 40 Innocent Americans on Death Row*, N.Y. STATE OF LAW, CTR. ON WRONGFUL CONVICTIONS, available at <http://www.law.nyu.edu/news/centerforwrongfulconvictions/warden/>; Wells et al., *supra* note 4, at 803.
7. See Daniel Goleman, *Stable Prior to Flares in Linings of Suspects*, N.Y. TIMES, Jan. 17, 1995, at C1.
8. See Wise et al., *supra* note 2, at 454-64 (for a more detailed explanation of why eyewitness error occurs).
9. John C. Brigham et al., *Disputed Eyewitness Identification Evidence: Important Legal and Scientific Issues*, 36 *Cr. J.* 12, 13 (1999).
10. ERIC GREENE ET AL., *WITNESSING THE PROSECUTION AND THE LEGAL SYSTEM*, 129-32 (9th ed. 2007).

turned a change in the state constitution adopted in a referendum, were included.

Informing Criminal Defendants of the Immigration Consequences of Their Convictions: The Trial Judge's Duty, by Kate Ono Rahel and Justin Shilhanek, 50 CT. REV. 196 (2014).

After the United States Supreme Court's 2010 decision in *Padilla v. Kentucky*, which held that defense attorneys must advise their clients in some circumstances of the immigration consequences of a guilty plea, we recruited two law students to look at the obligation of judges during these same plea proceedings. Kate Ono Rahel and Justin Shilhanek provided a thorough review of the caselaw and detailed recommendations for trial judges handling plea proceedings.

Isolation in the Judicial Career, by Isaiah M. Zimmerman, 36(4) CT. REV. 4 (2000).

See description under "For the New Judge."

Judges and Wrongful Convictions, by Brandon L. Garrett, 48 CT. REV. 132 (2012).

Law professor Brandon Garrett wrote a book, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (2011), discussing the mistakes found in the first 250 DNA-exoneration cases. In this article for *Court Review*, he focused on the lessons for judges.

Judicial Wisdom: An Introductory Empirical Account, by Jeremy A. Blumenthal and Daria A. Bakina, 52 CT. REV. 72 (2016).

The late professor Jeremy Blumenthal and professor Daria Bakina conducted a study on what makes a judge wise based on surveys of both judges and law students. Professor Bakina summarized the findings, some of the first empirical studies of what might constitute judicial wisdom. Any judge would benefit just from reading through the lists of traits that might make for a wise and excellent judge.

Minding the Court: Enhancing the Decision-Making Process, by Pamela Casey, Kevin Burke, and Steve Leben, 49 CT. REV. 76 (2013).

See the description under "AJA White Papers."

Practical Advice from the Trenches: Best Techniques for Handling Self-Represented Litigants, by Dorothy J. Wilson and Miriam B. Hutchins, 51 CT. REV. 54 (2015).

Baltimore judges Dorothy Wilson and Miriam Hutchins, who have more than 30 years of combined experience dealing with self-represented litigants, gave their advice on what techniques work best. They discussed the concept of neutral engagement, in which judges remain neutral but help make sure cases are fully presented and gave step-by-step

advice about handling cases with one or more self-represented parties.

Special Issue on Elder Mistreatment, 53 CT. REV. 53 (2017).

With the help of special-issue editor, Professor Nina Kohn, this special issue covered aspects of elder mistreatment that judges can impact. Separate articles presented perspectives of the physician, judge, prosecutor, law professor, and guardian.

Special Issue on Indian Law and Tribal Courts, 45 CT. REV. 1 (2009).

This special issue focused on the ways Indian Law arises in state-court proceedings, interactions between tribal courts and state courts, and how to research Indian Law.

Special Issue on Law and Neuroscience, 50 CT. REV. 44 (2014).

Court Review teamed up with the MacArthur Foundation Research Network on Law and Neuroscience (www.lawneuro.org) for this special issue. Articles covered an overview of the ways in which brain science has been integrated into law; what the legal system can infer about individuals from group-based neuroscience data; how science on adolescent development should (and shouldn't) be applied; how pain neuroimaging may be used in legal disputes; and where neuroscience contributions may be the most useful in law.

Special Issue on Therapeutic Jurisprudence, 37(1) CT. REV. 1 (2000).

This special issue explored therapeutic jurisprudence—"TJ" to its friends and supporters—which focuses on the therapeutic or antitherapeutic consequences legal proceedings may cause. TJ proponents suggest that judges should, wherever possible, work to obtain therapeutic outcomes without violating other important values, like due process. Articles in the issue explored TJ in multiple contexts, including domestic-violence courts, mental-health courts, and on appeal.

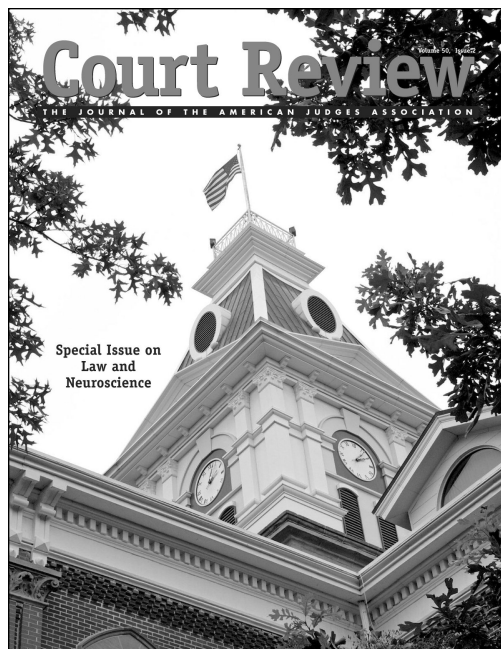
Articles in the issue explored TJ in multiple contexts, including domestic-violence courts, mental-health courts, and on appeal.

Starting a Help Center in Twelve Easy Steps: One Court's Experience with Trial, Error, and Lots of Help, by Keven M.P. O'Grady, 51 CT. REV. 74 (2015).

Many courts have set up self-help centers for the self-represented. Given the existence of established centers in many places, a Kansas court was able to draw on the wisdom of others when starting its own. Judge Keven O'Grady uses the lessons he learned—from other courts and starting his own center—to provide a step-by-step guide for any court looking to provide better help for the self-represented.

Ten Tips for Judges Dealing with the Media, by Steve Leben, 47 CT. REV. 38 (2011).

This article presented ten tips for dealing with the media



based on the recommendations of journalists and experience handling two high-profile murder trials.

The Emotional Dimension of Judging: Issues, Evidence, and Insights, by Sharyn Roach Anleu, David Rottman, and Kathy Mack, 52 CT. REV. 60 (2016).

Researchers Sharyn Roach Anleu, David Rottman, and Kathy Mack provided a look at the background research on judging and emotions, presented specific examples of judicial misbehavior that seemed emotionally based, and described a four-year international study they are conducting on judges and emotion.

The Emotionally Intelligent Judge: A New (and Realistic) Ideal, by Terry A. Maroney, 49 CT. REV. 100 (2013).

Law professor Terry Maroney discusses how judges can deal with the emotions that naturally arise from their work, drawing on insights from psychology, neuroscience, and the experiences of judges.

The Implication of Therapeutic Jurisprudence for Judicial Satisfaction, by Deborah J. Chase and Peggy Fulton Hora, 37(1) CT. REV. 12 (2000).

Based on a survey of drug-court and family-court judges, Deborah Chase and Judge Peggy Fulton Hora found that “[p]erception of litigant gratitude was the most important overall predictor of feeling positively about the judicial assignment.” Family-court judges scored low in perceptions of litigant gratitude; drug-court judges scored high. The authors speculated that “the therapeutic effects of these new types of courts,” such as drug courts, “which employ the social sciences and are oriented to problem solving” had “beneficial effects on the litigants and court personnel.”

Two Letters to Judge Eaton, by Paul D. Carrington, 37(2) CT. REV. 14 (2000).

Law professor Paul Carrington presented two letters he wrote to a federal judge about the sentencing of a man he knew. In the first letter, Carrington explained that the young man had recently taken Carrington’s advice to get a job—actually two—and was also in school. Carrington suggested the man be given a chance to show he had truly changed. Twenty-eight years later, Carrington told the judge, who had given a suspended sentence, how the man had since become a professor of cell biology at a major university. Carrington’s conclusion: “I am informed that if [the man] had come up for sentencing [at a later time] the judge would have had no authority to suspend the sentence, and that he would have spent as much as twenty years in the federal penitentiary. What a tragic waste!”

Understanding and Diagnosing Court Culture, by Brian J. Ostrom and Roger A. Hanson, 45 CT. REV. 104 (2010).

Brian Ostrom and Roger Hanson explained that court performance is often affected greatly by court culture. They described and categorized court cultures, while noting the impact court culture may have on attempts at court reform.

Who Are You Going to Believe?, by Richard Schauffler and Kevin S. Burke, 49 CT. REV. 124 (2013).

Researcher Richard Schauffler and Judge Kevin Burke reviewed the research on whether credibility judgments can be accurately made either by judges or juries: “The notion that whether a person is lying or telling the truth can be detected by a trained expert remains a popular one, but it is simply not supported by behavioral science.” Given that limitation, they made three practical suggestions for judges.

PROCEDURAL FAIRNESS/PROCEDURAL JUSTICE

An Experiment in the Law: Studying a Technique to Reduce Failure to Appear in Court, by Alan J. Tomkins, Brian Bornstein, Michael N. Heriam, David I. Rosenbaum, and Elizabeth M. Neeley, 48 CT. REV. 96 (2012).

Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Pilot Project and Resulting Court Date Notification Program, 48 CT. REV. 86 (2012).

These two articles presented the results of two pilot projects that achieved some success in reducing no-show rates for criminal defendants—saving time and money while also having fewer warrants and pretrial incarcerations. The articles report for each test what worked, what

didn’t, and what merits further consideration. Researchers indicated both that reducing failures-to-appear should result in improved perceptions of court fairness by defendants and that incorporating procedural-fairness principles into reminder notices seemed to help reduce no-shows.

A New Model for Civil Case Management: Efficiency Through Intrinsic Engagement, by David Prince, 50 CT. REV. 174 (2014).

See the description under “Making Better Judges®.”

Decision Makers and Decision Recipients: Understanding Disparities in the Meaning of Fairness, by Diane Sivasubramaniam and Larry Heuer, 44 CT. REV. 672 (2008).

Researchers Diane Sivasubramaniam and Larry Heuer discuss important differences in the importance that decision recipients and decision makers place on fair procedures: decision makers are more concerned with outcome, while decision recipients are more concerned with process. This has important implications for judges, who are the decision makers.

The Emotionally Intelligent Judge:

A New (and Realistic) Ideal

Terry A. Maroney

As a Supreme Court Justice once wrote, “dispassionate judges” are “mythical beings.” Like “Santa Claus or Jack Sam or Easter bunnies,” judges have emotions, and emotions influence decision making. These observations may seem obvious, even banal. But their implications are broad-reaching. Judicial emotion is more common than most people—certainly laypeople, and perhaps judges as well—would like to believe. Further, emotion almost certainly has a substantial impact on judicial decision making and behavior—and that is not necessarily a bad thing.

The ideal of the emotionless, “dispassionate” judge has a very long pedigree. More than three centuries ago, Thomas Hobbes wrote in *Leviathan* that the ideal judge is “divested of all fear, anger, hatred, love, and compassion.”¹ In a modern era such a blunt statement sounds, perhaps, antiquated. To the extent this is so, it is because the legal realism of the early twentieth century largely convinced us of the importance of the person wearing the robe. Law is not certain, and judges have discretion, within which space ostensibly “logical” or “non-rational” forces have room to operate.² As the great Benjamin Cardozo once mused, “Deep below consciousness are other forces, the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigator or judge.”³

In our post-Realist world, such frank acknowledgment of judges’ humanity is relatively commonplace. As other contributions to this special issue make clear,⁴ judges are affected by factors as diverse as fatigue and life experiences, and they deploy common but sometimes misleading decision-making shortcuts known as heuristics. Judges are likely no better than ordinary humans at multitasking or truth-telling. An entire academic cottage industry is devoted to ascertaining the decisional influence of personal characteristics such as gender and political party.

Footnotes
Many of the ideas expressed in this article are explored in much greater depth in my prior works, all of which are available at my Vanderbilt Law School faculty website and on SSRN. See Terry A. Maroney, *Judges’ Emotions*, 49 *YOUNG L.* REV. 1207 (2012); *Emotional Regulation and Judicial Decision*, 99 *CAL. L. REV.* 1485 (2011); and *The Psychology of Judicial Decision*, 99 *CAL. L. REV.* 629 (2011). This article is by design highly footnoted; I defer the interested reader to the extensive citations in these longer publications.

1. *United States v. Bland*, 322 U.S. 78, 93-94 (1944) (Jackson, J., dissenting).

2. THOMAS HOBBES, *LEVIATHAN* 203 (A.B. Walker ed., 1996) (1651).

3. ROBERT FRANK, *The Passions in Reason and Judgment*, 44 *HARV. L. REV.* 497, 506 (1931).

4. BENJAMIN N. CARDOZO, *The Nature of the Judicial Process* 167, 60 (1931).

5. See Pamela Carey, Kevin Burke & Steven Leiben, *Minding the Court: Enhancing the Decision-Making Process*, 49 *CT. REV.* 70 (2013).

But we still seldom talk about the emotional aspect of judges’ humanity. And when we do, we run into a fairly solid wall of opposition. Judicial emotion generally is seen as an unfortunate consequence of having to populate the legal system with fallible, biased, real people. Indeed, emotion traditionally has been counted among the primary sources of fallibility and bias. A Maryland judge expressed this well: “Judges, being flesh and blood, are subject to the same emotions and human frailties as affect other members of the species.”⁵ The task of the legal system, under this contemporary view, is to systematically reduce the opportunities for judicial emotion to insert itself, the task of the good judge is to prevent emotion from exerting any influence wherever such opportunities exist.

We saw this view vividly articulated during the 2000 nomination of now-Justice Sonia Sotomayor, who some feared would have an overly “empathic” judging style. One senator implied that judges’ emotions posed a threat to liberty: “A prominent professor declared that a ‘compassionate, empathic judge was very likely to be a bad judge.’”⁶ A journalist noted that the mere suggestion that emotion might affect judging was “radical.”⁷ Even among Sotomayor’s supporters, defense of empathy (or any emotional influence) was tepid at best. She was finally able to put the issue to rest by offering a standard post-Realist narrative: that while judges are not “robots” and do have feelings, a good judge recognizes those feelings and puts them aside.⁸

Certainly, judges are not robots, so the first half of that story is correct. But what if the latter part is wrong? What if emotion—at least sometimes—offers something of value to judicial decision making? Judge Richard A. Posner has suggested as much, writing that judges ought not try to become “emotionless, like computers,” because feelings might sometimes be necessary to good judging.⁹ Justice William J. Brennan similarly asserted that good judging flows from a “dialogue of

Eyal Peer & Eyal Gamliel, *Heuristics and Biases in Judicial Decision*, 49 *CT. REV.* 114 (2013).

6. *State v. Huchinson*, 271 A.2d 641, 644 (Md. 1970).

7. Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. On the Judiciary, 110th Cong. 13 (2008) (statement of Sen. Orrin Hatch) (See also at 17 (statement of Sen. Lindsay Graham) (a judge’s most critical qualification is “the capacity to set aside one’s own feelings so he or she can boldly and dispassionately administer equal justice for all”).

8. John Yoo, *Closing America’s Obama Nod to Neural Justice*, *PINKA*, *BOGERTS*, May 10, 2009, at C3.

9. Peter Baker, *The Court’s Emotions*, *THE OREGON JOURNAL OF EMPLOYMENT & LABOR*, May 10, 2009, at A12.

10. Sotomayor Confirmation Hearings, at 71, 129 (statement of J. Sonia Sotomayor).

11. RICHARD A. POSNER, *PROBLEMS OF LITIGATION* 226 (2001).

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Fair Procedures, Yes. But We Dare Not Lose Sight of Fair Outcomes, by Brian H. Bornstein and Hannah Dietrich, 44 CT. REV. 72 (2008).

Law-and-psychology researchers Brian Bornstein and Hannah Dietrich reminded us that even if improving procedural fairness is important, outcomes matter too. They noted that the perception of unfairness is also based in part on perceptions of unfairness in distributive justice (the probability of different outcomes for certain groups).

Opinions as the Voice of the Court: How State Supreme Courts Can Communicate Effectively and Promote Procedural Fairness, by William C. Vickrey, Douglas G. Denton, and Wallace B. Jefferson, 48 CT. REV. 74 (2012).

Former Texas Chief Justice Wallace Jefferson, former California court administrative director William Vickrey, and California court staffer Douglas Denton addressed the changing audience for state supreme court opinions—an audience now far beyond lawyers. They urged further attention to procedural-fairness principles by state high courts and noted practices (plain-language summaries, instant web access, and cooperation with the media) that have helped clearly communicate court opinions.

Procedural Fairness: A Key Ingredient in Public Satisfaction, by Kevin Burke and Steve Leben, 44 CT. REV. 4 (2008).

See description under “AJA White Papers.”

Procedural Justice and the Courts, by Tom R. Tyler, 44 CT. REV. 26 (2008).

Professor Tom Tyler is the leading researcher in procedural justice for both law enforcement and the courts. He provided an overview of the concepts and research showing the effectiveness of procedural-justice concepts when used in court proceedings.

Procedural Justice as a Court Reform Agenda, by David B. Rottman, 44 CT. REV. 32 (2008).

Researcher David Rottman described how procedural justice could act as an organizing principle for court reform.

The Courtroom-Observation Program of the Utah Judicial Performance Evaluation Commission, by Nicholas H. Woolf and Jennifer MJ Yim, 47 CT. REV. 84 (2012).

Utah has a governmentally established commission that evaluates judicial performance and provides public reports before each judge’s retention election. The commission adopted procedural-justice principles to govern its review process and sends citizens to observe judges’ adherence to those principles in the courtroom. Researcher Nicholas Woolf and then commission vice chair Jennifer Yim

described the process, including a list of 20 evaluative criteria that could be used by courtroom observers anywhere.

The Judge Is the Key Component: The Importance of Procedural Fairness in Drug-Treatment Courts, by Brian MacKenzie, 52 CT. REV. 8 (2016).

See description under “AJA White Papers.”

PSYCHOLOGY AND THE LAW

A Judge’s Guide to Using Social Science, by John Monahan and Laurens Walker, 43 CT. REV. 156 (2007).

Professors John Monahan and Laurens Walker wrote the book, literally, on *Social Science in Law*, a law-school text that went through seven editions. In this article, they broke down for judges how and when social-science information can be used to determine a relevant question in a contested court case.

Children as Witnesses: What We Hear Them Say May Not Be What They Mean, by David B. Battin and Stephen J. Ceci, 40(1) CT. REV. 4 (2003).

Researchers David Battin and Stephen Ceci reviewed ways in which young children aren’t as prepared to answer questions in court as adults perceive them to be, including problems understanding prepositions like above or behind, and problems with temporal terms.

Disputed Eyewitness Identification Evidence: Important Legal and Scientific Issues, by John C. Brigham, Adina W. Waserman, and Christian A. Meissner, 36(2) CT. REV. 12 (1999).

Three academic researchers reviewed both the leading research on what leads to eyewitness-identification errors and the United States Supreme Court cases on the subject, noting a disconnect between

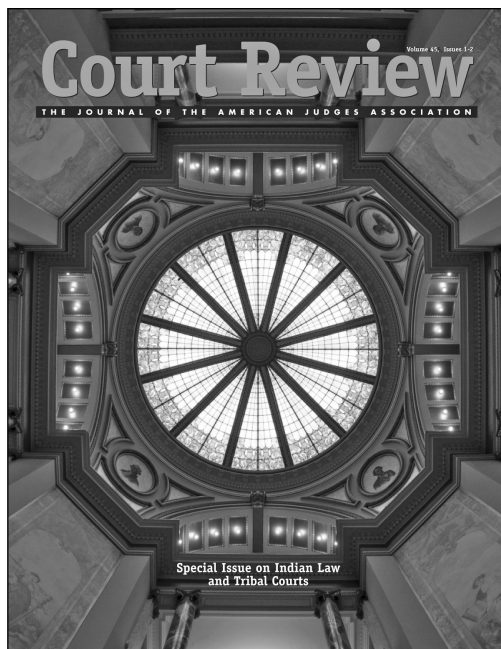
them. They also reviewed the “common knowledge” of jurors in the area and safeguards that could be taken to protect against reliance on unreliable testimony.

Fact or Fiction? The Myth and Reality of the CSI Effect, by Steven M. Smith, Veronica Stinson, and Marc W. Patry, 47 CT. REV. 4 (2011).

Should Judges Worry About the “CSI Effect”?, by Simon A. Cole and Rachel Dioso-Villa, 47 CT. REV. 20 (2011).

Studying Juror Expectations for Scientific Evidence: A New Model for Looking at the CSI Myth, by Donald E. Shelton, Gregg Barak, and Young S. Kim, 47 CT. REV. 8 (2011).

In these three articles, we explored the claim that jurors (and attorneys and judges) have changed their behavior based on an expectation that forensic evidence should be available if a defendant has committed a crime. Professors Steven Smith, Veronica Stinson, and Marc Patry found that evidence that the CSI effect is real but wondered whether the effect was more due to changed attorney behavior than to the views of



jurors. Judge Donald Shelton and researchers Gregg Barak and Young Kim also concluded the effect was real but due not to television but to advances generally in technology. And researchers Simon Cole and Rachel Dioso-Villa expressed skepticism about the existence of a CSI effect while offering suggested steps judges could take to guard against it.

Mental Competency Evaluations: Guidelines for Judges and Attorneys, by Patricia A. Zapf and Ronald Roesch, 37(2) CT. REV. 28 (2000).

Two leading psychology professors provided an overview of methods for conducting competency exams and key information that should be in reports to the court.

Mental Illness and the Courts: Some Reflections on Judges as Innovators, by John P. Petrila and Allison D. Redlich, 43 CT. REV. 164 (2008).

Researchers John Petrila and Allison Redlich discussed the roles judges might play in helping those with mental illness on their journey through the court system, including as a program designer, as a community leader, as an advocate, and as a member of the treatment team.

Risk Assessment for Future Offending: The Value and Limits of Expert Evidence at Sentencing, by Kirk Heilbrun, Jaymes Fairfax-Columbo, Suraji Wagage, and Leah Brogan, 53 CT. REV. 116 (2017).

A team of researchers led by Professor Kirk Heilbrun reviewed each of the major risk-assessment tools in use in court proceedings, discussing the strengths and limitations of each as well as the extent to which expert opinion guided by some structured judgment process might compare in usefulness to the scored instruments. They also provided recommended best practices for the use of risk assessments in court.

Special Issue on Eyewitness Evidence, 48 CT. REV. 1 (2012).

This special issue focused on social-science research on eyewitness evidence and how that information might be used by judges, including in jury instructions.

Why Judges Must Insist on Electronically Preserved Recordings of Child Interviews, by Stephen J. Ceci and Maggie Bruck, 37(2) CT. REV. 10 (2000).

Shortly after publication of their award-winning book, *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony*, professors Stephen Ceci and Maggie Bruck explained how interviews with children differ from ones with adults in ways that can lead to error when the children's statements are merely recounted by others. They concluded: "If courts are interested in historical accuracy, there is simply no sub-

stitute for a tape that can be played to verify . . . the details of the discussion that took place . . ."

PUBLIC OPINION OF THE COURTS

On Public Trust and Confidence: Does Experience with the Courts Promote or Diminish It?, by David Rottman, 35(4) CT. REV. 14 (1998).

Looking at opinion research over an extended period, National Center for State Courts researcher David Rottman concluded that contact with the courts seemed "to have either a neutral or moderately positive impact on how people rate the state courts," a change from 20 years before. He also concluded that "the public responds positively to efforts courts make to be more accessible [and] more sensitive to the perception of fairness in court decisions."

Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges, by David B. Rottman and Alan J. Tomkins, 36(3) CT. REV. 24 (1999).

Researchers David Rottman and Alan Tomkins reviewed public-opinion surveys about state courts from 1978 through 1998. They explored differences in perception among racial and ethnic groups and concluded, "Judges can make a difference in how they and their courts are perceived."

Speak to Values: How to Promote the Courts and Blunt Attacks on the Judiciary, by John Russonello, 41(2) CT. REV. 10 (2004).

Public-opinion researcher John Russonello reported on what the public most wanted from its courts and how that information should form judicial responses to attacks.

Special Issue on Public Trust and Confidence in the Courts, 36(3) CT. REV. 1 (1999).

For two days in May 1999, 500 attendees representing the federal and state judiciary, the bar, the media, and the public met for two days and participated in a National Conference on Public Trust and Confidence in Washington, D.C. *Court Review* provided the only comprehensive coverage of the conference, publishing transcripts of key portions, including speeches from Chief Justice William H. Rehnquist, Justice Sandra Day O'Connor, and New York Governor Mario Cuomo. Panel-discussion transcripts focused on public opinion of the courts, critical issues affecting trust in the courts, and strategies for improving the level of public trust.

Note: For volumes 35 through 42, each of the four issues in each volume of Court Review was separately paginated (starting at 1 for each issue). From volume 43 forward, each volume has been consecutively paginated throughout the volume. For clarity in the citations to volumes 35 through 42, the issue is also noted. So the citation 39(3) CT. REV. 14 is to the third issue in volume 39.

Keeping Up with Neurolaw: What to Know and Where to Look

Francis X. Shen

It is hard to know exactly what the future holds for law and neuroscience. But it is a fair bet that the future will look different, perhaps markedly so, than the neoworld of today. How can one keep up with this change? In this brief essay, I provide a series of resources for those interested in expanding their knowledge of fundamental law and neuroscience issues, as well as keeping up to date on cutting-edge innovations.

A useful starting point for orienting to neurolaw is Bill Gates's observation on technological change: "People often overestimate what will happen in the next two years and underestimate what will happen in ten." Gates suggests the importance of both a short-term and long-term view. In the short-term, it seems unlikely that legislators, advocates, or judges will produce a paradigm shift in law, or that any single neuroscience discovery will be game-changing. In the long-term, however, the possibilities (as discussed by the many commentators in this issue) are numerous and potent. The informed consumer and producer of neurolaw should be sensitive to both of these time horizons.

The practical reality of legal and judicial practice is that knowledge is typically and rightly driven by case-specific needs. The resources that follow provide general orientation, allowing navigation toward more specific information of greatest relevance for a specific case or query.

PUBLISHED RESOURCES FOR THE REFERENCE SHELF

With a Law and Neuroscience bibliography that now includes more than 1,000 entries, there is no lack of reading material in neurolaw. The bibliography is online, sortable, and searchable at www.lawneuro.org/bibliography.php. There are many specific topics covered in the bibliography, and general references include:

- OWEN D. JONES, JEFFREY D. SCHALL & FRANCIS X. SHEN, *LAW AND NEUROSCIENCE* (2014). This is the first comprehensive in law and neuroscience, and it provides over 800 pages of hard copy in 21 chapters, with additional online materials and over 1,000 links. It is the single largest compendium of neurolaw materials. An overview, and sample chapter, are available online at <http://www.sagepub.com/lawneuro>.
- HENRY GREELY & ANTHONY WAGNER, *Reference Guide to Neuroscience*, in *FEDERAL JUDICIAL COLLEGE REFERENCE MANUAL ON SCIENTIFIC EVIDENCE* (3d ed. 2012). This chapter by Greely and Wagner is an excellent, concise introduction to the field.
- A PRIMER ON CRIMINAL LAW AND NEUROSCIENCE (Stephen J. Morse & Adina L. Rokhsides eds., 2013). This edited volume

presents an all-star roster of scientists and legal thinkers on core issues in criminal law and cognitive neuroscience.

- OWEN D. JONES, JOSHUA W. BUCKHOLZ, JEFFREY D. SCHALL & RENE MAROIS, *Brain Imaging for Legal Thinkers: A Guide for the Perplexed*, 2009 *STON. TUL. L. REV.* 5 (2009). This is a great introduction for the legal community to neuroimaging generally, and fMRI specifically.

ONLINE RESOURCES

The easiest way to keep up to date on neurolaw is to visit regularly or subscribe to updates from websites dedicated to law and neuroscience. These sites include the following:

- www.lawneuro.org, hosted by The MacArthur Foundation Research Network on Law and Neuroscience, provides excellent introductory materials on neurolaw, links to conferences, a bibliography, and a blog with notable news from around the neuroscience community. On the site you can subscribe to Neurolaw News at lawneuro.org/listserve.php. Neurolaw News is a free service devoted to regularly circulating news of developments in scholarship, courts, and conferences in the field of neurolaw.
- koller.typepad.com is the *Neuroethics & Law Blog*, maintained by law professor Adam Kolber. It features weekly dispatches from the Johns Hopkins Program in Ethics and Brain Sciences and guest bloggers on relevant neuroscience topics.
- Neuroethics* (print ed., hosted by the University of Pennsylvania Center for Neuroscience Research Network (CSRN)) law events, highlights news of interest, and promotes awareness of neuroscience in society.
- cbn.bwh.harvard.edu, the home of the Massachusetts General Hospital Center for Law, Brain & Behavior, features news, events, and commentary on neuroscience and law.
- www.ssrn.com/link/Law-Neuroscience.html links to the *Law and Neuroscience eJournal*, featuring recent neurolaw works uploaded to the Social Science Research Network (SSRN).
- dana.org features the work of the Dana Foundation, which supports and disseminates research on the brain and the implications of brain research for society and law.

Footnotes
1. BILL GATES, *THE ROAD AHEAD* 316 (1996).

2. Available online at http://www.wup.edu/upetbook.php?record_id=1310&steps=747.

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Court Review Author Submission Guidelines

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 the 2,000 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 should be made by email. Please send them to Editors@CourtReview.org. Submissions will be acknowledged by email. Notice of acceptance, rejection, or requests for changes will be sent following review.

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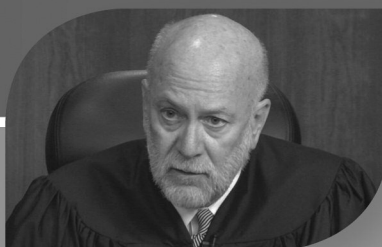
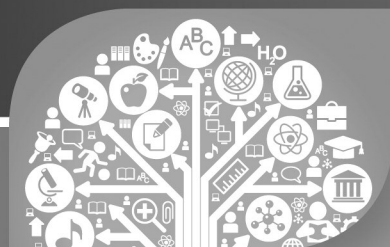
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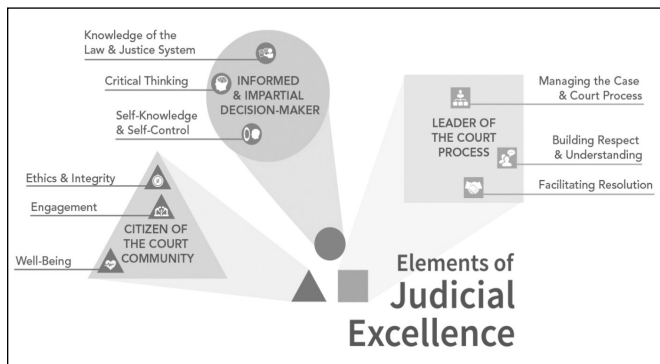


NEW PUBLICATIONS

JENNIFER K. ELEK, DAVID B. ROTTMAN, SHELLEY SPACEK MILLER, AND LYDIA HAMBLIN, *ELEMENTS OF JUDICIAL EXCELLENCE: A FRAMEWORK TO SUPPORT THE PROFESSIONAL DEVELOPMENT OF STATE COURT TRIAL JUDGES* (34 pp.) (2017).

<http://www.ncsc.org/judicialexcellence>

The National Center for State Courts has a new publication for state trial judges on how to develop excellence in nine key areas. *The Elements of Judicial Excellence* grew out of an intensive consultation process with the Illinois courts. Illinois judges identified their best judges—and National Center staff did extensive interviews with 103 of those judges to get a preliminary list of the characteristics associated with judicial excellence and then to identify the quali-



ties potentially amenable to development. Researchers further refined their data and conclusions with focus groups and a survey.

The resulting framework is broader than knowledge of the law and court rules. Top judges also identified the need to have broader knowledge about the court community, stakeholder agencies, and other resources that can contribute to better problem solving or decision making. Participants also said that procedural-fairness skills and the ability to handle the emotions encountered while judging should be developed.

The framework of areas for judicial development has nine elements:

1. **Ethics & Integrity:** Understands the ethical challenges faced by judges and how to properly address them to uphold the actual and perceived integrity of the judiciary.
2. **Engagement:** Engages in the work of the assignment and supports colleagues in executing the mission of the court. Embraces performance feedback and seeks out opportunities for professional development.
3. **Well-Being:** Engages in self-care practices to manage stress and maintain physical and psychological health.
4. **Knowledge of the Law & Justice System:** Understands the legal and operational matters relevant to the assignment. Builds knowledge from relevant disciplines and understands their implications in daily work.
5. **Critical Thinking:** Uses analytical and problem-solving skills to evaluate the available information and take the best action possible in a timely manner.
6. **Self-Knowledge & Self-Control:** Understands how one's personal perspective, values, preferences, mental state, and way of thinking can impact decision-making and others' perceptions of fairness. Develops and applies strategies to manage emotions and address biases in judgment and behavior.
7. **Managing the Case & Court Process:** Directs docket and courtroom operations by planning and coordinating schedules, managing case processing timelines, and facilitating information exchange between parties in a case, court staff, and other stakeholders.
8. **Building Respect & Understanding:** Interacts effectively with all those who work in or appear before the court in a manner conducive to a fair process and just outcomes. Listens attentively to others and provides clear and effective communication to ensure a shared understanding of the issues in the case, court processes, and decisions.

9. **Facilitating Resolution:** Engages with parties and stakeholders to build consensus on matters that will allow for forward case progress and a focus on reaching a resolution.

For each of those areas, the *Elements of Judicial Excellence* provides a summary of the advice given by the respected judges who were interviewed, examples of what respected judges do in each area, and relevant resources.



FOR YOUR IPHONE OR IPAD

BRYAN A. GARNER, *GARNER'S MODERN ENGLISH USAGE* (4th ed. 2016). The App Store (\$24.95).

For iPhone and iPad users, you now can have the best modern book on English usage at hand at all times. That's because the full text of the 1,100-page Oxford University Press book is now available as an iPhone or iPad app. The grammar nerd in you wants it. The writer in you needs it.

The book's 8,000 entries cover word usage, punctuation, pronunciation, and writing. Is it pled or pleaded? (Answer: pleaded is preferred but pled has recently gained ground in American English.) How is fulsome properly used? (Answer: the traditional meaning is "abundant to excess" but incorrect usage as "very full" has become common.) Do good writers really care about when to use that and when to use which? (Answer: yes!)

Garner includes lots of writing advice within the book. An entry on "Sentence Length," for example, gives the average sentence length for leading publications. Garner then advises that varying the length of your sentences is important too. And the book has a linguistic glossary that's probably the most complete one available for grammatical, rhetorical, and other language-related terms.

The app contains all of the book's content—plus quizzes you can take. They include links to the applicable entry for each missed question.