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Court Review

Volume 54, Issue 3

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION
Volume 54, Issue 3 2018

EDITOR'S NOTE

In this issue, the third of the year, we feature a survey of the civil cases decided in the last term by the Supreme Court. Professor Todd Pettys, the H. Blair and Joan V. White Chair in Civil Litigation at the University of Iowa College of Law, has managed to make this review both admirably thorough and entertaining, capturing a sense of the Court as a whole along with the variety of views presented by the individual justices. As usual, the most colorful language comes in the dissents and concurrences, where each justice is free to speak her or his mind. The next issue will summarize the criminal cases decided by the Court.

Judge Wayne Gorman of the Provincial Court of Newfoundland and Labrador offers, as usual, a look at an aspect of Canadian jurisprudence. In this issue, he takes on the difficult and ever-evolving problem of how the legal system handles evidence obtained by law enforcement in violation of constitutional rights. I hope that this essay provides both a useful refresher for our Canadian readers and, for our readers in the United States, a fascinating and thought-provoking look at a parallel system of addressing this important question.

The article on judicial education by William Brunson of the National Judicial College sets forth a number of ideas and perspectives—gleaned from a symposium involving some of the most distinguished people involved in such efforts—on how we can do a better job educating ourselves. I recommend that any judges involved in such efforts keep the article at hand and refer back to it when they next plan to make a presentation to their fellow judges.

The article by Professor Donna Shestowsky, from my alma mater, the University of California, Davis, School of Law, focuses on an important but neglected piece of the civil litigation process: making sure that parties are aware of programs providing mediation and other forms of alternative dispute resolution. I hope that her data and ideas will inspire judges to consider increasing their efforts on both an individual and an institutional basis to make sure that people know about this valuable alternative to trials and hearings.

Finally, we have another expertly crafted crossword from Judge Victor Fleming to give your minds a break and a few thoughts on resources to explore.
—Devin Odell



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 146 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 the Pueblo County Courthouse in Pueblo, Colorado. Listed on the National Register of Historic Places, it was built from 1908 to 1912. Photo by Mary Watkins.

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President's Column

Robert J. Torres, Jr.

Warmest Greetings colleagues and *Court Review* readers!

It is my honor to serve as president of the American Judges Association and to infuse it with my signature energy and look forward to an eventful year. We were certainly off to an ideal start, with Kaua'i, Hawaii serving as the venue for our 2018 Annual Educational Conference. I am sure you all enjoyed the action-packed schedule of events, magnificent scenery, and the spirit of *Aloha* that Hawai'i and her people extended to us during our stay. We will aspire to expand the AJA fellowship and to provide relevant learning opportunities for our members throughout the year.

Someone once advised that the difference between a good speaker and a poor speaker is a comfortable nap. Well, we left no chance for a nap in Kaua'i! The annual conference featured outstanding speakers who delivered a world-class event reflective of AJA's high standards of excellence and commitment to judicial education.

The conference theme, *Ke Ala Pono* – Path to Justice, focused on delivering a program that delved into issues affecting the delivery of justice, with applicability and interest to judges from all spectrums. Besides Dean Erwin Chemerinsky's annual conference update on the United States Supreme Court, we were privileged to hear from the Hon. Mark E. Recktenwald, Chief Justice, Supreme Court of Hawai'i, and the Hon. Randal G. B. Valenciano, Chief Judge, Fifth Circuit Court, Kaua'i.

Faculty from the University of Hawai'i at Manoa, William S. Richardson School of Law, covered important legal issues for those of us living in multicultural societies. Professor Seth Stoughton's plenary session on police-worn body cameras helped us to better understand the technology's potential benefits, limitations, and policy and legal implications.

I would be remiss if I did not extend kudos to my Education co-chair, the Hon. Catherine Carlson, for her dedication, perseverance, and attention to detail in planning the conference.

The attraction and value of attending our annual educational conferences was evidenced by the significant number of attendees, including nearly fifty judges from the Philippine Judges Association. I wish to thank the Court Administrator of the Philippine Judiciary, the Hon. Jose "Midas" Marquez, for facilitating and approving their attendance. By bringing together judges from many different jurisdictions, we increase the value of AJA membership by providing a vast network of international and national judicial peers with whom we may collaborate and form friendships for years to come.

An added benefit of the conference was a traditional-style luau fundraiser organized by the American Judges Foundation and led by AJF President and AJA President-elect Hon. Pete Sferrazza. Attendees of the luau enjoyed a delicious Hawaiian

feast, which included Kalua pig wrapped in *ti* leaves and cooked to perfection in an earthen *imu* oven. Attendees were lulled by the soothing sounds of Hawaiian music and treated to performances from Hawai'i, Tahiti, Samoa, and *Aotearoa* (New Zealand). AJF is a 501(c)(3) nonprofit entity, formed to promote judicial and civic education. The successful fundraiser supports AJF's important work and its continued financial contributions to worthwhile projects.

I wish to thank the Hon. Catherine Shaffer for her leadership during that past year as AJA President. I could not take on this monumental task of serving as your incoming president without her assistance. My appreciation extends equally to other AJA stalwarts — the Hon. Russel Otter, Hon. Kevin

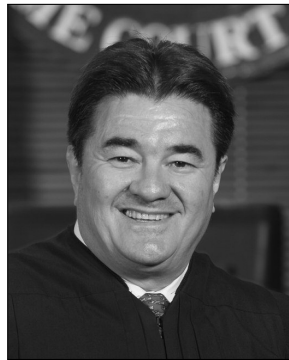
Burke, Hon. John Conery, Hon. Mary Celeste, Hon. Steve Leben, Hon. Elizabeth Hines, Hon. Elliot Zide, and Hon. Yvette Alexander. Thank you all for your insight and continued collaboration. Two rising stars, the Hon. Gayle Williams-Byers and Hon. Veronica Alicea-Galvin, also deserve much recognition and thanks for making AJA more accessible to members via social media.

As we continue the AJA mission of Making Better Judges®, I join the AJA Executive Committee and Board of Governors as they strive to enhance the value of AJA membership. Together

we'll work to advance diversity in our organization by collaborating with other national court-oriented organizations. With this objective, the 2019 midyear conference April 11-13 in Savannah, Georgia will include a cooperative session with the National Judicial College on procedural fairness. Furthermore, the 2019 annual education conference we've scheduled in September in Chicago at the iconic Drake Hotel will be a joint conference with the Supreme Court of Illinois Judicial College.

The AJA has provided top-quality educational conferences, scholarships to the National Judicial College, and other valuable benefits to its members. Membership also includes quarterly issues of *Court Review*. I extend sincere gratitude to our editors, the Hon. Julie Kunce Field, Hon. Devin Odell, Hon. David Prince, and Professor Eve Brank for their selfless dedication to ensuring the journal remains relevant for the AJA with research-based articles, essays, book reviews, and interviews on topics relevant to judges and the judicial system.

This year, we can further raise the bar for the AJA by implementing technology to bolster membership, revitalize committees, and connect with members unable to attend the educational conferences. With a little more effort and ingenuity, we can promote our standard of excellence and be **The Voice of the Judiciary®**. I believe the best way to succeed in this world is to act on the advice you give others. On that note, I thank you for your confidence and invite you join our objective to walk our AJA talk this year!



The Admission and Exclusion of Unconstitutionally Obtained Evidence in Canada

Wayne K. Gorman

In *Collins v. Virginia*, 138 S. Ct. 1663, 1675 (2018), Justice Thomas suggested in a concurring opinion that the “assumption that state courts must apply the federal exclusionary rule is legally dubious.” In Canada, evidence obtained in violation of our Constitution can only be excluded if a court concludes that its admission “would bring the administration of justice into disrepute.” This applies in every criminal case in Canada. This test is mandated by section 24(2) of the *Canadian Charter of Rights and Freedoms, Constitution Act, 1982*, which states:

Where, in proceedings under subsection (1), a court concludes 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.¹

In this column, I intend to trace the evolution of the Supreme Court of Canada’s consideration of this provision and the admission and exclusion of unconstitutionally obtained evidence in Canada.² As will be seen, it involves the Supreme Court of Canada issuing a reversal of a long series of judgments it had proffered in this area. But, let us start before the *Charter* was enacted.³

PRE-CHARTER

Prior to the inclusion of the *Canadian Charter of Rights and*

Freedoms as part of the Constitution of Canada on April 17th, 1982, the exclusion of evidence in criminal matters was governed in this country by the common law. The common law was not favourable to such exclusion. With limited exceptions (such as the confessions rule) evidence was admissible if it was relevant. The manner in which it was obtained being generally irrelevant. Thus, in *R. v. Wray*, [1971] S.C.R. 272, the Supreme Court of Canada held that there “is no judicial discretion permitting the exclusion of relevant evidence, on the ground of unfairness to the accused. Judicial discretion in this field is a concept which involves great uncertainty of application. The task of a judge in the conduct of a trial is to apply the law and to admit all evidence that is logically probative unless it is ruled out by some exclusionary rule. If this course is followed, an accused person has had a fair trial” (at pages 273 to 274).

All of this changed with the inclusion of the *Charter* in Canada’s constitution.

POST-CHARTER

The Supreme Court of Canada’s first fulsome consideration of section 24(2) of the *Charter* commenced with Ms. Ruby Collins being grabbed by the neck by a police officer. After the officer did so, he noticed that Ms. Collins had something in her hand. It turned out to be heroin. It was argued that the actions of the police officer violated Ms. Collins’s right pursuant to section 8 of the *Charter* to be free from “unreasonable search or seizure.” In the Supreme Court of Canada, the primary issue became whether the heroin was admissible at Ms. Collins’s trial.⁴

Footnotes

1. Note, however, that evidence can in limited circumstances also be excluded in Canada under section 24(1) of the *Charter*, which allows a court to issue a “remedy” that the court “considers just and appropriate.” In *R. v. Bjelland*, [2009] 2 S.C.R. 651, at paragraph 19, the Supreme Court of Canada indicated that while the “exclusion of evidence will normally be a remedy under s. 24(2), it cannot be ruled out as a remedy under s. 24(1). However, such a remedy will only be available in those cases where a less intrusive remedy cannot be fashioned to safeguard the fairness of the trial process and the integrity of the justice system.”
2. In *R. v. Mack*, [2014] 3 S.C.R. 3, the Supreme Court of Canada considered the words “obtained in a manner” in section 24(2) and held that a “causal relationship is not required to support a finding that evidence was obtained in a manner that violated the *Charter*, but the nature and extent of the causal relationship remains an important factor for the trial judge’s consideration” (at

paragraph 42).

3. For a comparison of the approaches taken by the Supreme Courts of Canada and the Supreme Court of the United States to the exclusion of evidence as a remedy for constitutional infringement, see Donald Stuart, *Canadian and United States Supreme Courts: Rowing in Opposite Directions on Exclusion of Unconstitutionally Obtained Evidence* (2009), 70 C.R. (6th) 62. Interestingly, in *Director of Public Prosecutions v. J.C.* [2015] IESC 31, the Supreme Court of Ireland suggested that the United States, “which at one stage had the most far-reaching exclusionary rule, has long since abandoned an absolute or near absolute exclusionary rule” (at paragraph 74).
4. In an earlier case (*R. v. Therens*, [1985] 1 S.C.R. 613), the Supreme Court had ruled that blood-alcohol analysis evidence was inadmissible pursuant to section 24(2) of the *Charter* as a result of the accused’s right to contact counsel having been infringed. However, in excluding the evidence, the Supreme Court indicated that

In *R. v. Collins*, [1987] 1 S.C.R. 265, the Supreme Court of Canada commenced its analysis of this issue by noting that the accused has the burden, on the standard of the balance of probabilities, to establish that admission of the evidence would bring the administration of justice into disrepute (see paragraph 30).

The Supreme Court set out a list of factors in *Collins*, which should be considered when applying section 24(2) of the *Charter*, and held that a trial judge must have “regard to all the circumstances” in determining whether evidence obtained in violation of the *Charter* should be admitted or excluded (at paragraph 43). It concluded that the evidence seized should have been excluded because it could not “accept that police officers take flying tackles at people and seize them by the throat when they do not have reasonable and probable grounds to believe that those people are either dangerous or handlers of drugs” (at paragraph 45).

Subsequently, in *R. v. Fliss*, [2002] 1 S.C.R. 535, the factors to be considered were summarized by the Supreme Court in the following manner (at paragraph 75):

1. Does the admission of the evidence affect the fairness of the trial?
2. How serious was the *Charter* breach?
3. What would be the effect of excluding the evidence on the repute of the administration of justice?

CONSCRIPTIVE VERSUS NON-CONSCRIPTIVE

In *R. v. Stillman*, [1997] 1 S.C.R. 607, the Supreme Court created a distinction for exclusion purposes based upon whether the evidence unconstitutionally obtained was conscriptive or non-conscriptive. The Court held in *Stillman* that “admission of evidence which falls into the non-conscriptive category will, as stated in *Collins*, rarely operate to render the trial unfair” (at paragraph 74). If the accused, however, was “compelled to participate in the creation or discovery of the evidence” then it will be considered to be “conscriptive evidence,” even if it is “real evidence” (at paragraph 75) and its admission will generally render the trial unfair. A few years later in *R. v. Law*, [2002] 1 S.C.R. 227, the Supreme Court confirmed this approach by suggesting that “it will be much easier

to exclude evidence if its admission would affect the fairness of the trial as opposed to condoning a serious constitutional violation” (at paragraph 33).

Thus, the Supreme Court started out with a general and vague test (a consideration of all of the circumstances). It then developed a test in which the nature of the evidence (conscriptive or non-conscriptive) became the crucial factor in determining admissibility. In *The Grant Trilogy and the Right Against Self-incrimination* (2009), 66 C.R. (6th) 97, Professor Hamish Stewart summarized the effect of these decisions in the following manner (at page 100):

“All of this changed with the issuance of . . . *R. v. Grant*.”

Evidence obtained in violation of the *Charter* is to be excluded under s. 24(2) where its admission would “bring the administration of justice into disrepute.” Under the *Collins/Stillman* approach, trial judges were to consider whether admission of evidence in the proceedings would make the trial unfair, whether the *Charter* violations were serious, and whether exclusion of evidence would have an adverse effect on the repute of the justice system. And, according to the controversial majority ruling in *Stillman*, exclusion under the first branch was virtually automatic if the evidence obtained was “conscriptive” (that is, self-incriminatory) or was derived from conscriptive evidence and was undiscoverable by constitutional methods.

All of this changed with the issuance of the Supreme Court’s decision in *In R. v. Grant*, [2009] 2 S.C.R. 353. The conscriptive versus non-conscriptive dichotomy was abandoned. Professor Stewart describes it as having been “swept away.”⁵

R. v. GRANT

In *Grant*, the Court indicated that the “existing jurisprudence” on exclusion of evidence obtained in violation of the *Charter* was “difficult to apply and may lead to unsatisfactory results... we find it our duty, given the difficulties that have been pointed out to us, to take a fresh look at the frameworks that have been developed” (at paragraph 3).⁶

The Supreme Court commenced its fresh look by indicating

“it would be most improvident for this Court to expatiate, in these early days of life with the *Charter* upon the meaning of the expression ‘administration of justice’ and particularly its outer limits. There will no doubt be, over the years to come, a gradual build-up in delineation and definition of the words used in the *Charter* in s. 24(2)” (at paragraph 12).

5. At page 100. Several Canadian Courts of Appeal have also concluded that the Supreme Court of Canada’s decision in *Grant* has cast doubt upon the continued validity of its pre-*Grant* jurisprudence as regards the application of section 24(2) of the *Charter*. In *R. v. Blake*, [2010] 251 C.C.C. (3d) 3 (Ont. C.A.), for instance, the Ontario Court of Appeal stated, at paragraph 21, that the Supreme Court of Canada in *Grant* “took a judicial wire brush to the 20 years of jurisprudential gloss that had built up around s. 24(2) and scrubbed down to the bare words of the section.” Sim-

ilarly, in *R. v. Ngai*, [2010] A.J. No. 96 (C.A.), it was held that *Grant* has “refocused the section 24(2) analysis and directed courts to balance the effect of admitting the evidence on society’s confidence in the judicial system” (at paragraph 33). In *R. v. Wong*, [2010] B.C.J. No. 557, the British Columbia Court of Appeal suggested that the “distinction between conscriptive and non-conscriptive evidence set out in *Stillman* is no longer as significant in analyzing admissibility. Reliability, which is often a hallmark of real evidence will always be a cogent consideration but will not be dispositive...” (at paragraph 15).

6. Professor Donald Stuart in *Welcome Flexibility and Better Criteria for Section 24(2)*, (2009), 66 C.R. (6th) 82, suggests that much “of the voluminous prior jurisprudence on section 24(2) will be of little moment” as a result of *Grant* (at page 82).

“The Supreme Court concluded . . . that there are ‘three avenues of inquiry.’”

that though the test set out in section 24(2) of the *Charter* is a “broad and imprecise” one (at paragraph 60), the “words of s. 24(2) capture its purpose: to maintain the good repute of the administration of justice” (at paragraph 67).⁷ Thus, the “focus

is not only long-term, but prospective. The fact of the *Charter* breach means damage has already been done to the administration of justice” (at paragraph 69). The Supreme Court also indicated that section 24(2) starts “from that proposition and seeks to ensure that evidence obtained through that breach does not do further damage to the repute of the justice system.... Finally, s. 24(2)’s focus is societal. Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns. The s. 24(2) focus is on the broad impact of admission of the evidence on the long-term repute of the justice system” (at paragraphs 69–70).⁸

THE NEW GRANT TEST

The Supreme Court concluded in *Grant* that there are “three avenues of inquiry” to which consideration must be given when applying section 24(2) of the *Charter*. At paragraph 71, these three avenues were described as follows:

- (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct);⁹
- (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little); and
- (3) society’s interest in the adjudication of the case on its merits.

It is interesting that the Supreme Court of Canada not only set out these criteria, but that for the first two they included a comment in brackets. It may be that the Court has added its own explanatory notes. If so, then it appears that the Court is encouraging trial judges to consider (1) that admitting evidence obtained by the police as a result of a serious violation of the *Charter* will suggest to the public that the Court condones such conduct and (2) that admitting such evidence when the violation has had a significant impact upon the right being protected will suggest that the protected right is of little consequence.

Though the first two avenues may appear interconnected they involve two separate and distinct avenues of analysis. In the first avenue the Court must take an objective approach (i.e., how serious was the *Charter* violation?), while in the second avenue a subjective approach must be adopted (i.e., what effect did the breach of the *Charter* have on the specific rights of the accused protected by the section in issue?).

In *R. v. Cole*, [2012] 3 S.C.R. 34, the Supreme Court of Canada considered its decision in *Grant* and indicated that evidence obtained unconstitutionally “should be excluded under section 24(2) if considering all of the circumstances, its admission would bring the administration of justice into disrepute. This determination requires a balancing assessment involving three broad inquiries: (1) the seriousness of the *Charter*-infringing state conduct; (2) the impact of the breach on the *Charter*-protected interests of the accused; and (3) society’s interest in the adjudication of the case on its merits” (at paragraph 81).

The Supreme Court of Canada also indicated in *Grant* that a trial judge’s role when considering a section 24(2) application involves balancing “the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute” (at paragraph 71). This might be described as the fourth and final stage of inquiry.

Having described the three-avenue approach created by *Grant*, let us start with the avenue involving the seriousness of the alleged *Charter* breach.

(1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct)

In *Grant*, the Supreme Court held, at paragraph 73, that this avenue requires a trial judge to evaluate “the seriousness of the state conduct that led to the breach.” The more severe or deliberate the conduct involved “the greater the need for the courts to dissociate themselves from that conduct, by excluding evidence linked to that conduct” (at paragraph 72).

In *R. v. Tsekouras*, 2017 ONCA 290, the Ontario Court of Appeal considered *Grant* and indicated that to “determine the seriousness of the infringement under this line of inquiry, a court must look to the interests engaged by the right infringed and examine the extent to which the violation actually impacted on those interests....An unreasonable search that intrudes upon an area in which an individual reasonably enjoys a high expectation of privacy or that demeans a person’s dignity is more seriousness than one that does not” (at paragraph 111).

7. In *R. v. Stanton*, [2010] B.C.J. No. 753, the British Columbia Court of Appeal indicated, at paragraph 52, that the “revised framework under *Grant* for the admissibility of evidence under s. 24(2) of the *Charter* recognizes that trial judges continue to have a broad discretion in determining whether evidence obtained in breach of a *Charter* right will nevertheless be admitted, but the exercise of that discretion is to be informed and guided by the words of s. 24(2).”

8. Similarly in *Marwood v. Commissioner of Police*, [2016] NZSC 139, the Supreme Court of New Zealand noted that when exclusion of evidence is sought in New Zealand, the “proper assessment to be made [is] whether the breach of the *New Zealand Bill of Rights Act*

necessitated exclusion of evidence.” The Supreme Court indicated that the answer to this question “turns, principally, on assessment of the seriousness of the breach of the *New Zealand Bill of Rights Act* and the extent to which it is proper for the court to be co-opted into countenancing it. It cannot be sufficient answer that the ends justify the admission (as is suggested) without further consideration of the nature of the breach” (at paragraph 64).

9. In *R. v. Morelli*, [2010] 1 S.C.R. 253, at paragraph 102, the Supreme Court indicated that the “repute of the administration of justice is jeopardized by judicial indifference to unacceptable police conduct.”

In *R. v. Kiene*, [2015] A.J. No. 1159 (C.A.), the Alberta Court of Appeal summarized the test enunciated in *Grant* as regards section 24(2) of the *Charter* by indicating that “the goal is to preserve public confidence in the rule of law and its processes” (at paragraph 34):

The *Grant* test for exclusion of evidence asks whether a reasonable person, informed of all relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute: para 68. Exclusion of the evidence is not a punishment of those involved; the goal is to preserve public confidence in the rule of law and its processes: para 73. The court must balance the seriousness of the *Charter*-infringing conduct, the impact of the breach upon the appellant, and society’s interest in the adjudication of the case on the merits.

(2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little)

In relation to this avenue, the Supreme Court indicated in *Grant*, at paragraph 76, that trial judges must concentrate on “the seriousness of the impact of the *Charter* breach on the *Charter*-protected interests of the accused.” This requires an evaluation “of the extent to which the breach actually undermined the interests protected by the right infringed” and the “degree to which the violation impacted on those interests.”

In *R. v. Côté*, [2011] 3 S.C.R. 215, the Supreme Court considered the second line of inquiry and held that it “deals with the seriousness of the impact of the *Charter* violation on the *Charter*-protected interests of the accused. The impact may range from that resulting from a minor technical breach to that following a profoundly intrusive violation. The more serious the impact on the accused’s constitutional rights, the more the admission of the evidence is likely to bring the administration of justice into disrepute” (at paragraph 47).

More recently in *R. v. Paterson*, [2017] 1 S.C.R. 202, the Supreme Court noted that the “second inquiry under the s. 24(2) analysis focusses on whether the admission of the evidence would bring the administration of justice into disrepute from the standpoint of society’s interest in respect for *Charter* rights. This entails considering the degree to which a *Charter* infringement undermined the *Charter*-protected interest” (at paragraph 42).

In *R. v. Morelli*, [2010] 1 S.C.R. 253, the Supreme Court of Canada had held, at paragraph 104, that the “intrusiveness of the search is of particular importance” in applying the second avenue of analysis when a breach of section 8 of the *Charter* has occurred (the right to be free from unreasonable searches

or seizures). In *Morelli*, the unlawful search involved the accused person’s home and personal computer. The Court stated, at paragraph 105, that “it is difficult to imagine a more intrusive invasion of privacy than the search of one’s home and personal computer.” In contrast, in *R. v. Harrison*, [2009] 2 S.C.R. 494, at paragraph 30, the Court indicated that “motorists have a lower expectation of privacy in their vehicles than they do in their homes. As participants in a highly regulated activity, they know that they may be stopped for reasons pertaining to highway safety In these respects, the intrusion on liberty and privacy represented by the detention is less severe than it would be in the case of a pedestrian. Further, nothing in the encounter was demeaning to the dignity of the appellant.”

In *R. v. Stanton* (2010), 254 C.C.C. (3d) 421, the second avenue of inquiry was summarized by the British Columbia Court of Appeal in the following manner (at paragraph 54):

The impact of a *Charter* breach may range from fleeting and technical to the profoundly intrusive. The more serious the impact on an accused’s protected interests, the greater the risk that admission of the evidence may signal to the public that *Charter* rights are of little actual avail to the citizen (para. 76). An unreasonable search contrary to s. 8 may impact on the protected interests of privacy, and more broadly, human dignity. An unreasonable search that intrudes on an area in which the individual enjoys a high expectation of privacy, or that demeans his or her dignity, is more serious than one that does not (para. 78).

(3) society’s interest in the adjudication of the case on its merits

In relation to this criterion, the Supreme Court suggested in *Grant*, at paragraph 79, that Canadian society “generally expects that a criminal allegation will be adjudicated on its merits.” Thus, the third avenue of inquiry requires a trial judge to ask him- or herself “whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion?” The Court held that the reliability of the evidence “is an important factor in this line of inquiry” because the exclusion of reliable evidence can render a trial “unfair from the public perspective, thus bringing the administration of justice into disrepute” (at paragraph 81). Ultimately, trial judges must face the question as to “whether the vindication of the specific *Charter* violation through the exclusion of evidence extracts too great a toll on the truth-seeking goal of the criminal trial” (at paragraph 82).¹⁰

“An unreasonable search . . . may impact . . . on human dignity.”

10. Similarly, in *Hudson v. Michigan*, 547 U.S. 586 (2006), the Supreme Court of the United States noted, at paragraph 4, that the “exclusionary rule” can generate “substantial social costs” and constitute a “‘costly toll’ upon truth seeking and law enforcement objectives.” The same point was made by the Supreme Court of Ireland in *Director of Public Prosecutions v. J.C.* [2015] IESC 31, in

which it indicated that “many courts have recognised, where cogent and compelling evidence of guilt is found but not admitted on the basis of trivial technical breach, the administration of justice far from being served, may be brought into disrepute” (at paragraph 97).

"The seriousness of the offence . . . has the potential to cut both ways."

A number of years later, in *Cole*, at paragraph 95, the Supreme Court held that "the considerations under this third inquiry must not be permitted to overwhelm the s. 24(2) analysis....They are nonetheless entitled to appropriate weight and, in the circumstances of this case,

they clearly weigh against exclusion of the evidence." In *Côté*, the Court held that the "reliability of the evidence and its importance to the prosecution's case are key factors" (at paragraph 47). The Supreme Court of Canada also indicated in *Côté* that "excluding highly reliable evidence may more negatively affect the truth-seeking function of the criminal law process where the effect is to 'gut' the prosecution's case" (at paragraph 47).

More recently in *Paterson*, the Supreme Court indicated, at paragraph 51, that the third avenue of inquiry "entails considering the reliability of the evidence and its importance to the Crown's case." The Court also indicated in *Paterson* that it is "important not to allow the third *Grant* 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" (at paragraph 56).

In *Stanton*, at paragraph 56, the British Columbia Court of Appeal indicated that "the importance of the evidence to the prosecution's case is another factor that may be considered ... the exclusion of highly reliable evidence may impact more negatively on the repute of the administration of justice where the remedy effectively guts the prosecution."

In *R. v. Beaulieu*, [2010] 1 S.C.R. 248, the trial judge, in a pre-*Grant* decision, had found a violation of section 8 of the *Charter*, but ruled that the evidence in issue (a gun) was admissible. In upholding this conclusion, the Supreme Court touched on the three factors referred to in *Grant* by stating (at paragraph 8):

As noted above, the trial judge's conclusions as to the seriousness of the breach were central to this case, and they remain equally relevant under the *Grant* approach. As for the impact of the breach, the trial judge took into account Mr. Beaulieu's reduced privacy interest in his car and the limited scope and invasiveness of the search. With regard to society's interest in adjudication on the merits, she concluded that the evidence was crucial to the Crown's case. It is also uncontested that a gun is reliable evidence.

THE SERIOUSNESS OF THE OFFENCE

The seriousness of the offence committed is a factor for consideration though it was held in *Grant* that it "has the poten-

tial to cut both ways." The Supreme Court indicated, at paragraph 84, that "while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high."¹¹

More recently, in *R. v. Marakah*, 2017 S.C.C. 59, after concluding that the police had seized text messages in contravention of the *Charter*, the Supreme Court concluded that the evidence should be excluded pursuant to section 24(2) of the *Charter*. In reaching this conclusion, the Supreme Court referred to its decision in *Grant* and indicated that "while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious" it is "important not to allow... society's interest in adjudicating a case on its merits to trump all other considerations" (at paragraph 72).

BODILY EVIDENCE (BLOOD, DNA, ETC.)

The Court held in *Grant* that "the approach to admissibility of bodily evidence under s. 24(2) that asks simply whether the evidence was conscripted should be replaced by a flexible test based on all the circumstances, as the wording of s. 24(2) requires. As for other types of evidence, admissibility should be determined by inquiring into the effect admission may have on the repute of the justice system, having regard to the seriousness of the police conduct, the impact of the *Charter* breach on the protected interests of the accused, and the value of a trial on the merits" (at paragraph 107).

DERIVATIVE EVIDENCE

In relation to derivative evidence (defined in *Grant* as physical evidence obtained, for instance, as a result of an unconstitutionally obtained statement), the Court held that to "determine whether the admission of derivative evidence would bring the administration of justice into disrepute under s. 24(2), courts must pursue the usual three lines of inquiry outlined in these reasons, taking into account the self-incriminatory origin of the evidence in an improperly obtained statement as well as its status as real evidence" (at paragraph 123). However, the Court also held that discoverability "retains a useful role, however, in assessing the actual impact of the breach on the protected interests of the accused. It allows the court to assess the strength of the causal connection between the *Charter*-infringing self-incrimination and the resultant evidence. The more likely it is that the evidence would have been obtained even without the statement, the lesser the impact of the breach on the accused's underlying interest against self-incrimination" (at paragraph 122). Finally, on this point the Court held that a judge "should refuse to admit evidence where there is reason to believe the police deliberately abused their power to obtain a statement which might lead them to such evidence. Where derivative evidence is obtained by way of a deliberate or flagrant *Charter* breach, its admission would

11. In *Wong*, the British Columbia Court of Appeal, at paragraph 18, indicated that though the seriousness of the crime, "while still a relevant consideration, is perhaps of a lesser weight in the analytical exercise now to be performed under s. 24(2)." It has been

held that in some cases the seriousness of the offence will be a "neutral" factor (see *R. v. Martin* (2010), 361 N.B.R. (2d) 251 (C.A.), at paragraph 96).

bring the administration of justice into further disrepute and the evidence should be excluded” (at paragraph 128).

In *Utah v. Strieff*, No. 14–1373 (2016), the Supreme Court of the United States also considered the admissibility of derivative evidence (found after an unlawful motor vehicle stop). It concluded that the evidence was admissible because “the unlawful stop was sufficiently attenuated by the preexisting arrest warrant” (at page 8):

Applying these factors, we hold that the evidence discovered on Strieff’s person was admissible because the unlawful stop was sufficiently attenuated by the preexisting arrest warrant. Although the illegal stop was close in time to Strieff’s arrest, that consideration is outweighed by two factors supporting the State. The outstanding arrest warrant for Strieff’s arrest is a critical intervening circumstance that is wholly independent of the illegal stop. The discovery of that warrant broke the causal chain between the unconstitutional stop and the discovery of evidence by compelling Officer Fackrell to arrest Strieff. And, it is especially significant that there is no evidence that Officer Fackrell’s illegal stop reflected flagrantly unlawful police misconduct.¹²

THE FINAL STEP: THE BALANCING

In *Grant*, the Supreme Court directed trial judges to assess section 24(2) applications by making the inquiries referred to under the three avenues (described by the Court as a “decision tree”) and then “determine whether, on balance, the admission of the evidence obtained by *Charter* breach would bring the administration of justice into disrepute” (at paragraph 85). Similarly, in *R. v. Nolet*, [2010] 1 S.C.R. 851, at paragraph 54, the Supreme Court indicated that the “task for courts remains one of achieving a balance between individual and societal interests with a view to determining whether the administration of justice would be brought into disrepute by admission of the evidence.”

As we have seen, the Supreme Court of Canada has created a broad societal test in its analysis of section 24(2) of the *Charter*, which requires a consideration of the long term. Thus, in *R. v. Taylor*, [2014] 2 S.C.R. 495, the Supreme Court indicated, at paragraph 37, that when “faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on the public’s confidence in the justice system, having regard to ‘the seriousness of the *Charter*-infringing state conduct, the impact of the breach on the *Charter*-protected interests of the accused, and the societal interest in an adjudication on the merits.”

In *Morelli*, the Supreme Court said, at paragraph 108, that in balancing the considerations set out in *Grant*, trial judges are required “to bear in mind the long-term and prospective repute of the administration of justice, focussing less on the

particular case than on the impact over time of admitting the evidence obtained by infringement of the constitutionally protected rights of the accused.” At paragraph 86 of *Grant*, the final step in the required analysis was succinctly summarized by the Supreme Court of Canada in the following manner:

“No overarching rule governs how the balance is to be struck.”
***Grant*.”**

In all cases, it is the task of the trial judge to weigh the various indications. No overarching rule governs how the balance is to be struck. Mathematical precision is obviously not possible. However, the preceding analysis creates a decision tree, albeit more flexible than the *Stillman* self-incrimination test. We believe this to be required by the words of s. 24(2).

In *R. v. Fan*, 2017 B.C.C.A. 99, it was indicated that a section 24(2) analysis requires that the evidence “on each line of inquiry is weighed and all the circumstances are considered in determining whether admission of the impugned evidence would bring the administration of justice into disrepute. No one consideration is permitted consistently to trump or overwhelm the others. In all cases, the court must assess the effect of admission or exclusion on the long-term repute of the justice system and ensure that it is not damaged any further by the breach” (at paragraph 68).

In *R. v. Tsekouras* (2017), 353 C.C.C. (3d) 349 (Ont. C.A.), it was noted that these “lines of inquiry under *Grant* involve fact-finding and the assignment of weight to various interests often at odds with each other. There is no overarching principle that mandates how this balance is to be achieved” (at paragraph 106).

THE RESULT IN GRANT

In *Grant*, the Supreme Court concluded that the accused had been arbitrarily detained in violation of section 9 of the *Charter* because the police did not have lawful grounds to detain the accused. In addition, the Court also concluded that the police violated section 10(b) of the *Charter* by failing to advise the accused that he had the right to “contact counsel without delay.” As a result, it was necessary for the Court to determine whether the evidence obtained (a gun obtained as a result of a statement made by the accused to the police in contravention of the *Charter*) should be excluded or admitted. The Supreme Court concluded that the gun should be admitted.

The Supreme Court held that “the police conduct was not egregious. The impact of the *Charter* breach on the accused’s protected interests was significant, although not at the most serious end of the scale. Finally, the value of the evidence is considerable.... Unlike the situation in *R. v. Harrison*, [2009] 2 S.C.R.

12. The latter words would be very familiar to Canadian judges and lawyers. In *R. v. Fearon*, [2014] 3 S.C.R. 621, for instance, the Supreme Court, in holding that evidence obtained in that case in violation of the *Charter* was admissible, noted that there was not “even a whiff of the sort of indifference on the part of the police

to the suspect’s rights that requires a court to disassociate itself from that conduct” (at paragraph 95). In *R. v. Culotta*, 2018 ONCA 665, the Ontario Court of Appeal suggested that “[g]ood faith honest errors by the police represent less serious *Charter* infringements” (at paragraph 67).

“[T]he third step . . . requires a consideration of the truth seeking function of the trial process.”

494, the police officers here were operating in circumstances of considerable legal uncertainty. In our view, this tips the balance in favour of admission, suggesting that the repute of the justice system would not suffer from allowing the gun to be admitted in evidence against the appellant” (at paragraph 140).¹³

SYSTEMIC BREACHES OF THE CHARTER

The Supreme Court of Canada most recent consideration of section 24(2) of the *Charter* came in *R. v. G.T.D.*, 2018 S.C.C. 7. At issue in this case was whether evidence should be excluded based upon the Edmonton Police Service’s use of a standard caution form of warning to arrested individuals, which had the effect of violating their right to contact counsel pursuant to section 10(b) of the *Charter*.

The majority’s decision has been interpreted as indicating that in assessing the seriousness of a breach of the *Charter* a court’s analysis should not be limited to a consideration of the arresting officer’s behavior individually, but should also include a pattern of institutional errors, which may have led to the breach (see *R. v. Ippak*, 2018 NUCA 3, at paragraphs 43 and 97). However, this appears somewhat overstated. The majority decision by the Supreme Court on this point consists entirely of the following brief comments (at paragraph 3):

The next issue is whether this breach warrants the exclusion of G.T.D.’s statement under s. 24(2) of the *Charter*. A majority of the Court is of the view that it does, and relies substantially on the reasons of Justice Veldhuis at the Court of Appeal. As she noted at para. 83 of her reasons, the Crown had ample opportunity to call further evidence about Edmonton Police Service training or policy, but chose not to do so. The majority would therefore allow the appeal and order a new trial.

CONCLUSION

In *Grant* the Supreme Court dramatically changed the approach it initially created in relation to whether unconstitutionally obtained evidence should be excluded or admitted. Subsequently, its formulation in *Grant* has been the subject of

significant consideration and commentary. Thus the question: Where are we in Canada as regards the admission or exclusion of unconstitutionally obtained evidence? I would proffer the following as a summary of the principles set out in *Grant* and its subsequent consideration by the Supreme Court of Canada:

1. *Grant* should be seen as a dramatic reformulation of the test applicable to section 24(2) *Charter* analysis.¹⁴
2. In considering and applying section 24(2) of the *Charter* a trial judge must apply and utilize the three avenues set out in *Grant*:
 - (i) the first step, “the seriousness of the *Charter*-infringing state conduct,” focuses on the actions of the police. The first step involves placing the breach of the *Charter* along a continuum of misconduct. The more significant or deliberate the conduct involved, the more likely the evidence will be excluded. A flagrant disregard for the *Charter* by the police will be seen as being very different than a breach in which the police believe they are acting in accordance with the law;
 - (ii) the second step, “the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little),” involves a consideration of the the impact of the *Charter* breach on the *Charter*-protected interests of the accused. This requires an evaluation of the degree to which the *Charter* violation impacted on the interests sought to be protected by the *Charter*. The intrusiveness of the breach is of particular importance in this step of the analysis. Thus, a distinction between searches involving residences and vehicles has been made; and
 - (iii) the third step, “society’s interest in the adjudication of the case on its merits,” requires a consideration of the importance of the truth-seeking function of the trial process. In this regard, the reliability of the evidence in issue becomes a crucial factor.

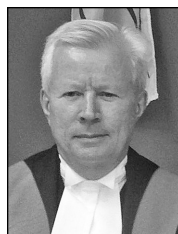
13. In *Harrison*, among the factors that led the Supreme Court of Canada to conclude that the evidence obtained after a violation of the *Charter* should have been excluded was its finding that the “police conduct in stopping and searching the appellant’s vehicle without any semblance of reasonable grounds was reprehensible, and was aggravated by the officer’s misleading testimony in court” (at paragraph 35).

14. In *Trends for Exclusion of Evidence in 2012*, (2013) 1 C.R. (7th) 74, Ariane Asselin conducted an empirical survey of decisions rendered in 2012, which applied section 24(2) of the *Charter*. She concluded as follows (at page 74):

This survey shows that there continues to be a high rate of

exclusion by trial judges for unconstitutionally obtained evidence comparable to earlier surveys conducted in the wake of *Grant*. Particularly noteworthy are the rates of exclusion for specific types of evidence. The survey identifies a high level of exclusion for bodily evidence, including breath samples, and a lower rate of exclusion for testimonial evidence. Moreover, with respect to non-bodily physical evidence, the survey shows that the rate of exclusion for drugs is 20% higher than for guns. These results are surprising given the Supreme Court of Canada’s (SCC) comments in *Grant* about how exclusion could operate in relation to different types of evidence and its anticipation that certain patterns would emerge. The findings of this survey signal that the emerging patterns at the trial court level are perhaps not the ones intended by the SCC.

3. Once these three factors have been applied and considered, the final step involves a balancing of the effect admission of the unconstitutionally obtained evidence would have on the repute of the administration of justice versus the effect that excluding the evidence would have on the repute of the administration of justice. It appears that the key to the last step in the analysis is balancing the seriousness of the violation against the importance and reliability of the evidence.



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Judges' Journal. Judge Gorman's work has been widely published. Comments or suggestions to Judge Gorman may be sent to wgorman@provincial.court.nl.ca.



AMERICAN JUDGES ASSOCIATION: PROCEDURAL FAIRNESS INTERVIEWS

The American Judges Association (AJA) conducted interviews about procedural fairness with nine national leaders on issues involving judges and the courts. The interviews, done by Kansas Court of Appeals Judge and past AJA president Steve Leben, cover the elements of procedural fairness for courts and judges, how judges can improve fairness skills, and how the public reacts to courts and judges. The interviews were done in August 2014; job titles are shown as of the date of the interviews.

Visit <http://proceduralfairnessguide.org/interviews/> to watch the interviews.

From ALJs to Wedding Cakes:

Civil Cases in the Supreme Court's October 2017 Term

Todd E. Pettys

On the final day of the Supreme Court's October 2017 Term, Justice Anthony Kennedy announced his retirement, capping what already had been a historic year at 1 First Street Northeast. Justice Kennedy's final year on the Court yielded a large number of broadly significant rulings in civil cases on matters concerning administrative agencies, executive power, religious freedom, voter-registration lists, employer-employee arbitration, public-sector unions, and states' power to require out-of-state sellers to collect sales taxes, to name only a few. There is much to discuss, so off we go.

ADMINISTRATIVE LAW

In a case that had been closely followed in administrative-law circles, the Court held in *Lucia v. SEC*¹ that the Securities and Exchange Commission's administrative-law judges are "Officers of the United States" who must be appointed through one of the means authorized by the Constitution's Appointments Clause. The SEC's practice had been to allow its staff members to select the agency's ALJs. When one of those ALJs—Judge Cameron Elliot—presided over the agency's administrative proceeding against Raymond Lucia and issued stiff sanctions against him, Lucia objected that the proceeding was invalid because Judge Elliot had been appointed in an unconstitutional manner. The SEC and the D.C. Circuit rejected that argument, but the Supreme Court reversed and ordered that Lucia be given a new hearing before a properly appointed ALJ.²

The Appointments Clause limits the means by which "Officers of the United States" may be appointed. As a general rule, all officers must be nominated by the President and confirmed by the Senate, but Congress can elect to "vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."³ Are the SEC's ALJs "Officers" within the meaning of that clause, or are they mere employees about whose hiring the Appointments Clause says nothing? The weightiest factor favoring the latter conclusion was the fact that all of the ALJs' rulings may be reviewed by the Commissioners—either at the request of a party or upon the initiative of the Commissioners themselves—and

thus there is a significant degree to which the Commissioners supervise the ALJs' work. But only Justices Ginsburg and Sotomayor were persuaded by that argument.⁴ Led by Justice Kagan and relying heavily upon its 1991 ruling in *Freytag v. Commissioner*⁵—a case concerning the status of the United States Tax Court's "special trial judges"—the Court concluded that the SEC's ALJs are officers. Their positions are "continuing" rather than "temporary" in nature,⁶ Justice Kagan explained, and they wield "significant authority,"⁷ including (among other things) the power to administer oaths, make evidentiary rulings, manage the conduct of parties and their attorneys, and impose sanctions for disobeying discovery orders. Just as importantly, they issue decisions that—unless the Commissioners intervene—become the agency's final word on the parties' claims and defenses. Because they are thus officers (of the "inferior" variety), the Court concluded, they may be appointed by the Commissioners themselves (as the collective head of the department) but cannot be appointed by the SEC's staff.⁸

The Court's ruling raises an important question concerning the reach of its 2010 holding in *Free Enterprise Fund v. Public Company Accounting Oversight Board*.⁹ In that case, the Court held that—lest the President's ability to faithfully execute federal law be thwarted—Congress cannot give officers job security in the form of two or more layers of good-cause protection from direct or indirect presidential removal. In *Free Enterprise Fund* itself, the SEC's Commissioners were (and today remain) officers who statutorily are subject to removal by the President only for cause, and so the members of the SEC's Public Company Accounting Oversight Board—officers who work under the Commissioners' supervision—could not also be given good-cause protection from removal. So where does that leave the SEC's ALJs, who now enjoy "Officer" status? Current federal law says they can be removed by the Merit Systems Protection Board but only for good cause, and the members of the MSPB themselves may be removed (by the President) only for good cause. Putting together *Lucia* and *Free Enterprise Fund*, are the job-security protections currently enjoyed by the SEC's ALJs unconstitutional? Justice Breyer flagged that issue in a separate opinion—just as he flagged it when dissenting in *Free*

Footnotes

1. 138 S. Ct. 2044 (2018).
2. The Court also held that the ALJ who presides over Lucia's case on remand cannot be Judge Elliot, even if he has now been properly appointed. Justices Breyer, Ginsburg, and Sotomayor disagreed.
3. U.S. CONST. art. II, § 2, cl. 2.
4. Justice Breyer would have held that allowing the SEC's staff to appoint the agency's ALJs violated the Administrative Procedure Act.
5. 501 U.S. 868 (1991).
6. *Lucia*, 138 S. Ct. at 2051 (quoting *United States v. Germaine*, 99 U.S. 508, 511-12 (1879)).
7. *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per

curiam)).

8. Joined by Justice Gorsuch, Justice Thomas would have vastly broadened the group of federal workers who are officers and thus must be appointed by one of the means specified in the Appointments Clause. Drawing from his perception of the Founders' likely understanding of the term "Officers," he argued that the term includes "all federal civil officials who perform an ongoing, statutory duty—no matter how important or significant the duty," including the likes of "recordkeepers, clerks, and waiters (individuals who watched goods land at a customhouse)." *Id.* at 2057 (Thomas, J., concurring).
9. 561 U.S. 477 (2010).

Enterprise Fund—but Justice Kagan’s majority declined the Government’s invitation to address it.

In a pair of cases addressing the U.S. Patent and Trademark Office’s congressionally authorized “inter partes review” program, the justices sparred over important issues of administrative law. Implemented in 2012, the PTO’s program allows private parties to file a petition asking the PTO to reexamine a previously issued patent. If the PTO’s director concludes that a patent challenger is likely to prevail on one or more of its claims, the director is authorized to launch inter partes review. Through that process, the patent challenger and patent holder litigate the merits of the challenged patent, and the PTO’s Patent Trial and Appeal Board issues a final decision, canceling, confirming, or amending the challenged patent as it sees fit, subject to the Federal Circuit’s appellate review.

In *Oil States Energy Services, LLC v. Greene’s Energy Group*,¹⁰ the Court ruled 7-2 that the legislation authorizing the Patent Trial and Appeal Board to revoke patents does not violate Article III’s vesting of the judicial power in courts staffed by politically insulated judges. Particularly noteworthy is the conflict between two of the Court’s most conservative members—Justice Thomas, who wrote for the majority, and Justice Gorsuch (joined by Chief Justice Roberts), who dissented. Justice Thomas emphasized that the Court’s “precedents have given Congress significant latitude to assign adjudication of public rights to entities other than Article III courts,”¹¹ and “[i]nter partes review falls squarely within the public-rights doctrine.”¹² Justice Thomas reinforced the majority’s conclusion with the claim that, at the time of the founding, the English law of patents authorized the Executive—acting through the Privy Council—to revoke patents. For Justice Gorsuch in dissent, the details of the public-rights doctrine were irrelevant. The Constitution authorizes only Article III courts to adjudicate matters that England’s common-law courts would have handled in 1789, he argued, and—on his view of the historical record—“only courts could hear patent challenges in England at the time of the founding.”¹³

Leading a 5-4 Court that divided along familiar lines, Justice Gorsuch wrote for the majority in *SAS Institute Inc. v. Iancu*.¹⁴ The issue in that case was whether, when launching the inter partes review process, the PTO’s director is statutorily authorized to narrow the proceedings to focus on some (rather than all) of the patent challengers’ claims. The PTO had concluded that the director did possess this authority, but the Court held that Congress had unambiguously directed to the contrary. For Justice Breyer and the three other dissenters, the statutory language was ambiguous and the PTO’s interpretation of the statute was reasonable, so deference to the agency’s interpretation was appropriate under *Chevron U.S.A. Inc. v. Natural*

*Resources Defense Council, Inc.*¹⁵

Justice Gorsuch’s reply on behalf of the majority will give little comfort to proponents of *Chevron* deference and its role in today’s administrative state: “[W]hether *Chevron* should remain is a question we may leave for another day.”¹⁶ In fact, skepticism about *Chevron* emerged as a theme as the Term proceeded. In his opinion for a 5-4 majority in *Epic Systems Corp. v. Lewis*¹⁷ (discussed below under the “Arbitration” heading), Justice Gorsuch similarly noted that “[n]o party to these cases has asked us to reconsider *Chevron* deference.”¹⁸ In a concurring opinion filed in a subsequent case concerning the removal of nonpermanent residents, Justice Kennedy even more explicitly urged litigants—and ultimately the Court—to give *Chevron* a second look. He said that he was “troubl[ed]” by lower courts’ frequent “reflexive deference” to agencies’ statutory interpretations, and that “more troubling still” is courts’ deference to agencies on statutory questions concerning the agencies’ own authority.¹⁹ Justice Kennedy wrote that the Court should reexamine *Chevron* “in an appropriate case,” to ensure that the prevailing rules of statutory interpretation “accord with constitutional separation-of-powers principles and the function and province of the Judiciary.”²⁰

“Justice Kennedy wrote that the Court should reexamine *Chevron* ‘in an appropriate case[.]’”

ALIEN TORT STATUTE

Adopted as part of the Judiciary Act of 1789, the Alien Tort Statute declares, in full: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”²¹ In *Jesner v. Arab Bank, PLC*,²² roughly 6,000 foreign nationals sought to rely upon the ATS when suing Arab Bank in a federal district court. They alleged that, with the aid of its New York branch, the bank had helped finance terrorist attacks on the plaintiffs and their families in the Middle East. In a 5-4 ruling, the Court held that—until Congress says otherwise—“foreign corporations may not be defendants in suits brought under the ATS.”²³ A ruling to the contrary, Justice Kennedy wrote for the majority, would raise complex foreign-policy issues and would not further the original purpose of the ATS, which was to provide “foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable.”²⁴ In a lengthy dissent joined by Justices Ginsburg, Breyer, and Kagan, Justice Sotomayor argued that “[n]othing about the corporate form in

10. 138 S. Ct. 1365 (2018).

11. *Id.* at 1373.

12. *Id.*

13. *Id.* at 1381 (Gorsuch, J., dissenting).

14. 138 S. Ct. 1348 (2018).

15. 467 U.S. 837 (1984).

16. *SAS Institute*, 138 S. Ct. at 1358.

17. 138 S. Ct. 1612 (2018).

18. *Id.* at 1629.

19. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).

20. *Id.* at 2121 (Kennedy, J., concurring).

21. 28 U.S.C. § 1350.

22. 138 S. Ct. 1386 (2018).

23. *Id.* at 1407.

24. *Id.* at 1406.

"Justice Thomas expressed qualms about the Court's severability precedents[.]"

itself raises foreign-policy concerns that require the Court, as a matter of common-law discretion, to immunize all foreign corporations from liability under the ATS, regardless of the specific law-of-nations violations alleged."²⁵

ANTI-COMMANDEERING DOCTRINE

In *Murphy v. NCAA*,²⁶ the Court held 7-2 that Congress's Professional and Amateur Sports Protection Act ran afoul of the anti-commandeering doctrine. In that legislation, Congress had taken steps to curb gambling on amateur and professional sports. Rather than make sports gambling a federal crime, however, Congress declared that *states* could not "authorize" gambling on "competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games."²⁷ The financial and political burden of ensuring that sports gambling did not occur, in other words, would rest primarily on state governments.

Relying heavily upon its rulings in 1992's *New York v. United States*²⁸ and 1997's *Printz v. United States*,²⁹ the Court held that "[a] more direct affront to state sovereignty is not easy to imagine."³⁰ The statute, Justice Alito wrote for the majority, "unequivocally dictates what a state legislature may and may not do. . . . It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals."³¹ If Congress wishes to ban gambling on sports, the Court concluded, it must do so directly. Finding the commandeering provision not severable from the rest of the legislation, the Court struck down the entire Act.

In a concurring opinion, Justice Thomas expressed qualms about the Court's severability precedents insofar as they require judges to speculate about what legislators would have preferred in counterfactual scenarios. By virtue of her having filed a dissent, we know that Justice Ginsburg—joined by Justice Sotomayor—did not embrace the Court's reasoning on the anti-commandeering issue. Rather than say anything on that subject, however, she focused all of her attention on attacking the majority's conclusion that the entire Act had to fall. On this issue of severability, Justice Breyer aligned himself with the dissent.

ARBITRATION

In *Epic Systems Corp. v. Lewis*,³² the Court handed down a major 5-4 ruling concerning arbitration and employer-

employee agreements. The case concerned contracts in which employees had agreed to use individualized arbitration—rather than class or collective actions—to resolve any disagreements that arose between them and their employers. When employees filed class and collective actions alleging they were owed overtime pay, the employers sought to compel individualized arbitration pursuant to the prior agreements. The employees argued that those agreements were unenforceable. Pointing out that the Federal Arbitration Act's saving clause allows courts to declare arbitration agreements void "upon such grounds as exist at law or in equity for the revocation of any contract,"³³ the employees insisted their contracts' arbitration provisions violated their right under the National Labor Relations Act "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection."³⁴

The Court rejected the employees' argument. Writing for the five-member majority, Justice Gorsuch first emphasized that the FAA's saving clause explicitly refers only to grounds that can render "any" contract unenforceable. That is a reference, he explained, to such things as fraud and unconscionability, rather than to legal grounds that apply only to particular kinds of agreements. Turning to the employees' argument that the NLRA's protection of "other concerted activities" supersedes the FAA in any event, the Court disagreed. Group litigation akin to today's class and collective actions was rare when Congress enacted the NLRA in 1935, Justice Gorsuch said, and the text of the statute provides no clear evidence that Congress had such litigation devices in mind.

Justice Ginsburg emphatically dissented, arguing that the majority had disregarded Congress's effort to protect employees' ability to find "strength in numbers."³⁵ "Congressional correction of the Court's elevation of the FAA over workers' rights to act in concert," she wrote, "is urgently in order."³⁶

CONTRACTS CLAUSE AND DIVORCE

Like twenty-five other states, Minnesota has enacted legislation declaring that—unless a court says otherwise in a divorce decree—a divorce automatically revokes a person's designation of his or her former spouse as the beneficiary of a life insurance policy. The legislation permits the insured individual to retain the former spouse as the beneficiary, however, by sending the insurance company a notification to that effect. Suppose the insured fails to send any such notice. Does the state's default rule violate the Contracts Clause³⁷ if the insured's contract was formed prior to the legislation's enactment?

In *Sveen v. Melin*³⁸—a case pitting a former wife against two children who had been named as a policy's contingent beneficiaries—the Court held 8-1 that Minnesota's law is constitu-

25. *Id.* at 1419 (Sotomayor, J., dissenting).

26. 138 S. Ct. 1461 (2018).

27. 28 U.S.C. § 3702(1).

28. 505 U.S. 144 (1992).

29. 521 U.S. 898 (1997).

30. *Murphy*, 138 S. Ct. at 1478.

31. *Id.*

32. 138 S. Ct. 1612 (2018).

33. 9 U.S.C. § 2.

34. 29 U.S.C. § 157 (emphasis added).

35. *Epic Systems*, 138 S. Ct. at 1633 (Ginsburg, J., dissenting).

36. *Id.* (Ginsburg, J., dissenting).

37. See U.S. CONST. art. I, § 10, cl. 1 ("No state shall . . . pass any . . . Law impairing the Obligation of Contracts . . .").

38. 138 S. Ct. 1815 (2018).

tionally permissible. Writing for the majority, Justice Kagan found that “Minnesota’s revocation-on-divorce statute does not substantially impair pre-existing contractual arrangements.”³⁹ She explained:

First, the statute is designed to reflect a policyholder’s intent—and so to support, rather than impair, the contractual scheme. Second, the law is unlikely to disturb any policyholder’s expectations because it does no more than a divorce court could always have done. And third, the statute supplies a mere default rule, which the policyholder can undo in a moment.⁴⁰

Justice Gorsuch dissented, questioning whether the Court’s analytic framework for Contracts Clause cases is consistent “with the Constitution’s original public meaning,”⁴¹ and arguing that changing a life insurance policy’s beneficiary designation amounts to a substantial and unreasonable impairment of a contract. Minnesota’s law, he concluded, “cannot survive an encounter with even the breeziest of Contracts Clause tests.”⁴²

ELECTIONS⁴³

Throughout much of the Term, there was widespread anticipation that the justices would shed significant new light on whether the Constitution gives the judiciary a prominent role in policing partisan gerrymandering. It was not to be. Much (though not all⁴⁴) of the attention was focused on *Gill v. Whitford*,⁴⁵ a case concerning Wisconsin Republicans’ adoption of district lines that, in 2012, enabled them to win 60 of the State Assembly’s 99 seats with just 48.6 percent of the statewide vote and that, in 2014, enabled them to win 63 of the State Assembly’s 99 seats with 52 percent of the statewide vote. A dozen Democratic voters in the state challenged the map, arguing that, by making it harder for Democrats than Republicans to convert votes into victories, the legislature had violated the plaintiffs’ rights of association and equal protection. The three-member district court ruled in favor of the plaintiffs and enjoined the state from using the map in future elections, but the verdict did not hold. The justices unanimously concluded that the plaintiffs had failed to demonstrate the individualized harm necessary to establish standing under Article III.

Writing for the Court, Chief Justice Roberts explained that, although the plaintiffs had included a First Amendment association claim in their complaint, they proceeded to litigate their case almost entirely upon a theory of vote dilution. Specifically,

the plaintiffs focused on proving that, on a statewide basis, Democrats had suffered a loss in voting power because they had been both “packed” and “cracked” into legislative districts. That is, the plaintiffs sought to prove that Wisconsin Democrats had (in some instances) been crammed into districts where their numbers were far greater than necessary to elect a Democratic candidate and had (in other instances) been scattered among districts in which their low numbers would make it exceedingly difficult to elect a candidate of their choosing. In advancing those claims at trial, the plaintiffs emphasized what they believed Republican legislators had done to Democratic voters on a statewide basis; the plaintiffs never sought to prove that *they themselves* had been packed or cracked in their own individual districts and that redrawing the boundaries of *all* of the state’s legislative districts was necessary to remedy those individual harms. Rather than dismiss the case outright for lack of jurisdiction, however, the Court remanded with instructions to allow the plaintiffs to try to produce the evidence necessary to establish standing.⁴⁶

Joined by Justices Ginsburg, Breyer, and Sotomayor, Justice Kagan filed a concurring opinion aimed at training a flashlight on the legal path that lies ahead. She suggested that it should not be difficult on remand for the plaintiffs to produce sufficient evidence of individualized harm, she appeared to encourage the plaintiffs to develop their First Amendment association claim, and she argued that today’s technology-empowered partisan gerrymandering produces democracy-degrading harms that only courts can effectively remedy. In his opinion for the Court, Chief Justice Roberts explicitly declined to take a position on whether partisan-gerrymandering claims are justiciable.

The Court divided 5-4 along familiar lines in two of the Term’s election-law cases. The first—*Husted v. A. Philip Randolph Institute*⁴⁷—concerned one of the ways in which Ohio (together with a handful of other states) purports to maintain an accurate list of individuals who are eligible to vote because they continue to reside in the voting districts for which they are registered.⁴⁸ Under the program in question, Ohio first identifies registered voters who, over a two-year period, failed to vote or engage in any other voter activity (such as signing a petition). The state then sends each of those individuals a notice alerting them that their voter registration will be canceled unless they either (1) return a preaddressed, postage-prepaid

“Justice Kagan . . . train[ed] a flashlight on the legal path that lies ahead.”

39. *Id.* at 1822.

40. *Id.*

41. *Id.* at 1827 (Gorsuch, J., dissenting).

42. *Id.* at 1831 (Gorsuch, J., dissenting).

43. I discuss *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018)—a case concerning political apparel at polling places—under the “Speech” heading, below.

44. The Court also handed down a ruling in *Benisek v. Lamone*, 138 S. Ct. 1942 (2018), a case concerning Maryland’s use of a districting map that allegedly was drawn to retaliate against Republican voters in the state’s Sixth Congressional District. In a per curiam ruling, the justices unanimously concluded that the balance of equi-

ties and the public interest weighed in support of the district court’s refusal to issue a preliminary injunction barring Maryland from using that map in the 2018 congressional elections.

45. 138 S. Ct. 1916 (2018).

46. Joined by Justice Gorsuch, Justice Thomas refused to join this part of the Court’s opinion. In these two justices’ view, the Court should have dismissed the plaintiffs’ claims altogether.

47. 138 S. Ct. 1833 (2018).

48. The litigated program is not Ohio’s sole means of purporting to keep its list of eligible voters up to date. The state also relies upon change-of-address data supplied by the U.S. Postal Service.

“[A] majority of the Court concluded that Ohio’s program is permissible.”

card confirming that they continue to reside in the district where they are registered or (2) vote in at least one election during the following four years. The battle in *Husted* was about whether this program violates federal statutory law.

At the heart of the dispute were two provisions of the National Voter Registration Act of 1993. The first—referred to by the Court as “subsection (d)” —says that a state cannot remove a person from its voting rolls unless one of two things has happened: (1) the person confirms in writing that he or she has moved out of the district where he or she is registered to vote or (2) the person (a) fails to return a preaddressed, postage-prepaid card in response to a mailed notice that the voter’s registration will be canceled if he or she does not vote during the period covered by the following two federal general elections and then (b) does indeed fail to cast a ballot during that four-year period. As described thus far, Ohio’s program appears unassailably compliant with the NVRA’s requirements. But the NVRA contains a second provision—the “Failure-to-Vote Clause”—that complicates matters. It declares that, while a state may rely upon the list-pruning procedures specified in subsection (d), a state cannot remove a person from its voting rolls “by reason of the person’s failure to vote.”⁴⁹ Does Ohio violate this provision when it uses a person’s failure to vote as the sole basis for triggering the notification process and four-year clock authorized by subsection (d)?

Led by Justice Alito, a majority of the Court concluded that Ohio’s program is permissible. Justice Alito reasoned that the Failure-to-Vote Clause prohibits a state from relying *solely* upon a person’s nonvoting as a basis for removing him or her from the state’s list of authorized voters. For that interpretation, Justice Alito relied heavily upon the Help America Vote Act of 2002, in which Congress clarified that “registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.”⁵⁰ Ohio had not relied “*solely*” upon individuals’ failure to vote, the Court found—it had also relied upon individuals’ failure to respond to mailings alerting them that their voter registrations were in peril. The majority concluded that Ohio had thus met Congress’s standards.

Joined in dissent by Justices Ginsburg, Sotomayor,⁵¹ and Kagan, Justice Breyer argued that Congress had barred states from using a person’s failure to vote as the sole basis for launching a process that may culminate in his or her removal from the voting rolls. He further contended that Ohio’s pro-

gram was unreasonable—and thus violated another provision of the NVRA⁵²—because the number of registered voters who fail to respond to their written notifications vastly exceeds the number of voters whom statistics indicate likely did, in fact, move to a different state or voting district.

Justice Alito wrote for an identically composed five-member majority in *Abbott v. Perez*,⁵³ a case concerning congressional and state districting maps that Texas’s Republican-led legislature adopted in 2013. The next few sentences will give readers a taste of the complexity that awaits them in the full opinion. The Texas legislature adopted the contested maps in 2013, amidst litigation concerning maps that it had previously adopted in 2011. With only a few modifications, the 2013 maps—which the state deployed for the 2014 and 2016 elections—were the same maps that a three-member federal district court produced on an interim basis for the 2012 elections during the litigation over the 2011 maps. In the 2017 ruling that precipitated the Supreme Court’s decision in *Abbott*, the district court held that the reason the legislature in 2013 adopted the district court’s 2012 maps was because it believed those maps would discriminate against racial-minority voters in some of the same ways that, in the court’s judgment, the legislature had illegally intended back when it drew the 2011 maps. Wholly apart from that finding of unlawful discriminatory intent, the district court further held that three districts diluted the strength of Latino voters in violation of Section 2 of the Voting Rights Act and that a fourth district—House District 90—was an impermissible racial gerrymander.

The Supreme Court agreed that House District 90 had been illegally drawn along racial lines, but reversed the district court in all other respects. A preliminary issue on which the nine justices narrowly divided was whether the Court had jurisdiction in the first place. Under 28 U.S.C. § 1253, the Court has mandatory appellate jurisdiction to review any issuance or denial of an injunction by a three-member federal district court. The complicating factor here arose from the fact that the district court never explicitly granted injunctive relief. What *did* happen is that the court announced that the state’s 2013 maps were illegal and needed to be fixed; it gave the state three days to tell the court whether the Texas legislature would take steps to remedy the problems; Texas’s governor declared that the state would not be taking any action; and the district court scheduled hearings to discuss what should happen next. Rather than participate in the remedy-focused hearings that the district court had scheduled, Texas appealed to the Supreme Court. Did Section 1253 give the Court jurisdiction to hear the case?

A majority of the Court concluded that it did. The district court’s orders had the “practical effect” of an injunction,⁵⁴ Jus-

49. 52 U.S.C. § 20507(b)(2).

50. 52 U.S.C. § 21083(a)(4)(A).

51. In a separate dissenting opinion, Justice Sotomayor accused the majority of “ignor[ing] the history of voter suppression against which the NVRA was enacted and uphold[ing] a program that appears to further the very disenfranchisement of minority and low-income voters that Congress set out to eradicate.” *Husted*, 138 S. Ct. at 1865 (Sotomayor, J., dissenting).

52. See 52 U.S.C. § 20507(a)(4) (directing each state to “conduct a general program that makes a *reasonable* effort to remove the names of ineligible voters from the official lists of eligible voters”) (emphasis added).

53. 138 S. Ct. 2305 (2018).

54. *Id.* at 2319 (quoting *Carson v. American Brands, Inc.*, 450 U.S. 79, 83 (1981)).

tice Alito wrote, and this is all that Section 1253 requires. For Justice Sotomayor and her colleagues in dissent, the majority's handling of the jurisdictional question was far too permissive and signaled the majority's willingness to "go[] out of its way" to uphold racially discriminatory maps.⁵⁵

On the merits, the majority held that the district court impermissibly shifted the burden of proof to the state, requiring it to demonstrate that, when it adopted the state's current maps in 2013, it had abandoned the racially discriminatory objectives that, in the district court's judgment, animated the legislature's prior adoption of the 2011 maps. The dissent insisted that the district court had kept the burden of proof on the maps' challengers, and argued that the majority had failed to give proper deference to the district court's factual findings concerning the 2013 legislature's motivations. The justices disagreed just as sharply on whether the district court had properly found that three of the districts violated Section 2 of the Voting Rights Act by diluting Latino voters' strength. The justices found agreement only with respect to House District 90, one of the rare districts that the legislature in 2013 had not simply copied from the district court's own 2012 work. Texas conceded that race was the predominant factor for drawing House District 90's boundaries, but argued that Section 2 necessitated the state's race-conscious actions. None of the justices was persuaded by that argument.⁵⁶

EXECUTIVE POWER

After promising on the campaign trail to curb the influx of Muslims into the United States, and after litigating an initial executive order that some concluded was aimed at fulfilling that promise, President Trump issued the presidential proclamation at issue in *Trump v. Hawaii*.⁵⁷ The president issued that proclamation after several federal agencies worked together at his request to identify countries that—by virtue of their documentation systems, links to terrorist groups, and other factors—fail to provide adequate assurance that their nationals traveling to the United States would not pose a security threat upon their arrival. The president's proclamation imposes substantial travel restrictions on foreign nationals from Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen. The order provides various waivers and exemptions, and also provides for a reassessment of those countries' status every 180 days. Together with U.S. citizens and lawful permanent residents who have family members in the targeted nations, the State of Hawaii challenged the proclamation, arguing that it

exceeds the president's powers under the Immigration and Nationality Act and violates the First Amendment's Establishment Clause. Ruling in favor of the plaintiffs, the district court issued a nationwide injunction barring the president from implementing the proclamation, and the Ninth Circuit affirmed.

Splitting 5-4 along familiar lines, the Court reversed.⁵⁸ Writing for the majority, Chief Justice Roberts concluded that, so far as statutory authority is concerned, the president's proclamation falls squarely within the power that Congress conferred in 8 U.S.C. § 1182(f). That statute declares that,

"The majority acknowledged the President's anti-Muslim statements[.]"

[w]henver the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation . . . suspend the entry of all aliens or any class of aliens . . . or impose on the entry of aliens any restrictions he may deem to be appropriate.

Chief Justice Roberts wrote that this statutory provision "exudes deference to the President in every clause" and that the proclamation "falls well within this comprehensive delegation."⁵⁹

With respect to the Establishment Clause, the majority acknowledged the President's anti-Muslim statements and hinted that those statements were not consistent with the nation's historic commitment to religious freedom.⁶⁰ When it comes to evaluating a president's decisions about whom to exclude from the country for national-security reasons, however, the majority said that the judiciary should apply nothing more searching than rational-basis review. The Court then upheld the president's proclamation, finding that it can reasonably be understood as a measure aimed at preventing the entry of foreign nationals who cannot be adequately vetted for security risks. The majority placed particular weight on the proclamation's content, the multi-agency review on which the president purported to rely, the fact that the proclamation leaves much of the world's Muslim population free to travel to the United States, and the fact that the president has targeted countries that Congress and prior administrations have deemed problematic.

55. *Id.* at 2335 (Sotomayor, J., dissenting).

56. Joined by Justice Gorsuch, Justice Thomas filed a one-paragraph concurring opinion, arguing that Section 2 of the Voting Rights Act does not even apply to redistricting, and that compliance with Section 2 thus "cannot provide a basis for invalidating any district, and it cannot provide a justification for the racial gerrymander in House District 90." *Id.* at 2335 (Thomas, J., concurring).

57. 138 S. Ct. 2392 (2018).

58. The majority declined to say whether it approved of the nationwide scope of the injunction that the district court had issued. In a concurring opinion, Justice Thomas questioned district courts' power to issue nationwide injunctions, observed that district

courts are issuing such injunctions with increasing frequency, and urged the Court to consider the issue in a future case.

59. *Trump*, 138 S. Ct. at 2408.

60. In a concurring opinion, Justice Kennedy made the point more unambiguously. Even when government officials act beyond the reach of judicial scrutiny or intervention, Justice Kennedy wrote, they should honor their oath to uphold the Constitution by honoring "its meaning and its promise." To send the appropriate message to "[a]n anxious world," he wrote, "[i]t is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs." *Id.* at 2424 (Kennedy, J., concurring).

“Justice Thomas . . . argue[ed] that Phillips’s . . . wedding cakes amounted to protected expression.”

Justice Breyer dissented, joined by Justice Kagan, arguing that there is evidence indicating that, although the proclamation might be valid on its face, it is not being applied as written. They invited the district court to explore that possibility on remand. If pressed to rule on the proclamation without any further litigation, however, these

justices said that the evidence of anti-Muslim bias is sufficient to render the proclamation unconstitutional. Joined by Justice Ginsburg, Justice Sotomayor argued the Establishment Clause point at greater length, insisting that—based on a long list of statements made by President Trump both before and after taking office—“a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus.”⁶¹ Justice Sotomayor also appeared to worry that the Court itself was manifesting anti-Muslim bias by looking closely at government actors’ past statements to root out anti-Christian bias in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*⁶² (discussed under the “Religion” heading, below) but by refusing to make any significant evidentiary use of President Trump’s anti-Muslim statements. Justice Sotomayor also warned that the majority’s ruling bore “stark parallels” to *Korematsu v. United States*,⁶³ in which the Court infamously upheld President Franklin D. Roosevelt’s order authorizing the military to place thousands of Japanese-Americans in internment camps during World War II.⁶⁴ On behalf of the majority, Chief Justice Roberts replied that “it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission.”⁶⁵

FAIR LABOR STANDARDS ACT

Suppose you take your car to a dealership for servicing. A service advisor greets you, listens while you describe the automotive problems you’ve been experiencing, recommends a particular course of action, and telephones you if the mechanic spots any unforeseen problems while doing the work. Is your service advisor “primarily engaged in . . . servicing automobiles” within the meaning of the Fair Labor Standards Act, and thus exempt from that statute’s overtime-pay requirement? The Court answered that question in the affirmative in *Encino Motorcars, LLC v. Navarro*.⁶⁶ Writing for the 5-4 majority, Justice Thomas reasoned that “[s]ervice advisors are integral to the servicing process,”⁶⁷ there is no good reason to continue the practice of construing the FLSA’s exemptions narrowly, and

the legislative history’s silence on the question of service advisors’ status is insignificant. Writing for the dissent, Justice Ginsburg argued that, because service advisors do not themselves typically perform repairs, they fall outside the exemption and thus are entitled to overtime pay under the statute. By refusing to construe the servicing exemption narrowly, Justice Ginsburg charged, the majority disregarded “more than half a century of our precedent,” “without even acknowledging that it [was doing so].”⁶⁸

RELIGION⁶⁹

In one of the Term’s most widely discussed cases, the justices ruled 7-2 in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*⁷⁰ that Colorado officials had violated the First Amendment free-exercise rights of a Christian baker who refused to produce a custom-made wedding cake for a same-sex couple. The Colorado Civil Rights Commission determined that the baker, Jack Phillips, had violated the Colorado Anti-Discrimination Act, which forbids discrimination on grounds of sexual orientation (among other traits) in places of public accommodation.

Writing for the majority, Justice Kennedy observed that, as a general matter, “religious and philosophical objections . . . do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable law.”⁷¹ Were the rule otherwise, Justice Kennedy explained, “a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.”⁷²

But in this particular instance, Justice Kennedy wrote, Colorado officials manifested “a clear and impermissible hostility toward the sincere religious beliefs that motivated [Phillips’s] objection.”⁷³ During public hearings on Phillips’s case, for example, a member of the Colorado Civil Rights Commission had indicated that Phillips’s religious objections amounted to “one of the most despicable pieces of rhetoric.”⁷⁴ Moreover, in at least three instances, the commission had ruled that bakers could refuse to make cakes conveying messages of disapproval of same-sex marriage, and the manner in which the commission handled those cases differed in noteworthy ways from the manner in which it handled Phillips’s case. Putting all of those evidentiary pieces together, the Court concluded that the commission had violated “the First Amendment’s guarantee that our laws be applied in a manner that is neutral toward religion.”⁷⁵

61. *Id.* at 2433 (Sotomayor, J., dissenting).

62. 138 S. Ct. 1719 (2018).

63. 323 U.S. 214 (1944).

64. *Trump*, 138 S. Ct. at 2447 (Sotomayor, J., dissenting).

65. 65 *Id.* at 2423.

66. 138 S. Ct. 1134 (2018).

67. *Id.* at 1140.

68. *Id.* at 1148 n.7 (Ginsburg, J., dissenting).

69. I discuss *Trump v. Hawaii*, 138 S. Ct. 2392 (2018)—a case partially

concerning an Establishment Clause challenge to the President’s so-called “travel ban”—under the “Executive Power” heading, above.

70. 138 S. Ct. 1719 (2018).

71. *Id.* at 1727.

72. *Id.*

73. *Id.* at 1729.

74. *Id.*

75. *Id.* at 1732.

Joined by Justice Gorsuch, Justice Thomas wrote a separate opinion concurring in part and concurring in the judgment, arguing that Phillips's custom-made wedding cakes amounted to protected expression and that Colorado could restrict that expression only if its reasons for doing so were sufficient to satisfy strict scrutiny. (The majority declined to reach Phillips's free-speech claim.) Joined by Justice Sotomayor, Justice Ginsburg dissented, finding insufficient evidence of hostility toward Phillips's religion. Justice Ginsburg's dissent prompted Justice Gorsuch (joined by Justice Alito) to respond with a concurrence aimed at underscoring the evidence of impermissible hostility.

SEPARATION OF POWERS

Two years ago, the Justices all agreed that Congress could not enact a statute declaring that, in the pending hypothetical case of *Smith v. Jones*, "Smith wins."⁷⁶ In 2018's *Patchak v. Zinke*,⁷⁷ however, the justices sharply divided on whether that is what Congress had done in a lawsuit involving the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians ("the Band") in southwestern Michigan. In 2009, the Secretary of the Interior took a 147-acre tract of land known as the Bradley Property into trust for the benefit of the Band so that the Band could build a casino there. At the same time those events were occurring, a nearby landowner—David Patchak—was pursuing federal litigation challenging the legality of the Secretary's actions. In 2012, the Supreme Court rejected the Secretary's defense of sovereign immunity and held that Patchak's lawsuit could proceed.⁷⁸ Congress then enacted a statute ratifying the Secretary's actions and declaring that "an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the [Bradley Property] shall not be filed or maintained in a Federal court and shall be promptly dismissed."⁷⁹ Was that an unconstitutional declaration of "Smith wins"?

No, concluded a plurality formed by Justices Thomas, Breyer, Alito, and Kagan. Writing for that group, Justice Thomas explained that the key question was whether Congress had purported to compel a result in a particular lawsuit under old law (impermissible) or whether Congress had changed the law and thereby influenced the outcome in a pending lawsuit (permissible). The plurality determined that Congress had done the latter:

[The statute] changes the law. Specifically, it strips federal courts of jurisdiction over actions "relating to" the Bradley Property. Before the Gun Lake Act, federal courts had jurisdiction to hear these actions. See 28 U.S.C. § 1331. Now they do not. This kind of legal

change is well within Congress's authority and does not violate Article III.⁸⁰

Joined by Justices Kennedy and Gorsuch in dissent, Chief Justice Roberts wasn't buying it. Never before, he argued, had Congress "gone so far as to target a single party for adverse treatment and direct the precise disposition of his pending case."⁸¹ The Chief Justice wrote:

"[Justice Kagan] accused [the majority] of 'weaponizing the First Amendment[.]'"

Does the plurality really believe that there is a material difference between a law stating "The court lacks jurisdiction over Jones's pending suit against Smith" and one stating "In the case of *Smith v. Jones*, Smith wins"? In both instances, Congress has resolved the specific case in Smith's favor.⁸²

Joined by Justice Sotomayor, Justice Ginsburg opted to avoid the "Smith wins" issue altogether. All that Congress had done here, Justice Ginsburg reasoned, was reassert the federal government's sovereign immunity in any action concerning the Bradley Property. Justice Sotomayor wrote separately to say that she would join the dissent on the "Smith wins" question, were it not for the strength of Justice Ginsburg's reasoning on sovereign immunity. With their two votes added to those in the plurality, the Band emerged from the lawsuit victorious.

SPEECH

If points were given to each ruling based on the degree to which its outcome was important, predictable, and likely to produce a 5-4 split along familiar ideological lines, the prize this year would likely go to *Janus v. AFSCME*,⁸³ handed down on the Term's final day. In 2012 and 2014,⁸⁴ the Court's Republican appointees signaled that they had serious constitutional doubts about *Abood v. Detroit Board of Education*.⁸⁵ In that landmark 1977 ruling, the Court held that the First Amendment permits a public-sector union and the governmental employer with which it contracts to require employees within a union-represented bargaining unit to pay the union "agency fees," even if those employees have refused to become union members. "Agency fees" are fees calculated to cover an employee's share of the costs the union incurs in collective bargaining and related activities. Shortly after Justice Scalia's death, the eight-member Court divided 4-4 in a case that asked whether *Abood* should be retained or overruled.⁸⁶ With Justice Gorsuch now holding the Court's ninth seat, the 5-4 *Janus* Court explicitly overruled

76. *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1323 n.17 (2016); *id.* at 1326; *id.* at 1334-35 (Roberts, C.J., dissenting).

77. 138 S. Ct. 897 (2018).

78. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012).

79. *Gun Lake Trust Land Reaffirmation Act*, Pub. L. No. 113-179, 128 Stat. 1913 (2014).

80. *Match-E-Be-Nash-She-Wish Band*, 138 S. Ct. at 905.

81. *Id.* at 917 (Roberts, C.J., dissenting).

82. *Id.* at 920 (Roberts, C.J., dissenting).

83. 138 S. Ct. 2448 (2018).

84. See *Harris v. Quinn*, 134 S. Ct. 2618 (2014); *Knox v. SEIU*, 567 U.S. 298 (2012).

85. 431 U.S. 209 (1977).

86. *Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 1083 (2016) (per curiam).

“[Justice Thomas] drew at least a loose parallel [with] actions taken by Mao Zedong[.]”

Abood, holding that agency-fee requirements violate the First Amendment rights of public employees who are not union members and do not wish to subsidize the union’s speech.

Justice Alito wrote for the majority. “Forcing free and independent individuals to

endorse ideas they find objectionable is always demeaning,” he said, and “[c]ompelling a person to *subsidize* the speech of other private speakers” is no less troubling.⁸⁷ Pointing out that the federal government and twenty-eight states ban agency fees, Justice Alito found that imposing such fees is not necessary to create functional workplaces and successful employer-employee relations. Nor is the government’s interest in preventing free-riding by non-members on the backs of dues-paying union members sufficiently compelling to justify forcing non-members to subsidize speech they find objectionable.⁸⁸ With respect to the analytic framework launched in *Pickering v. Board of Education*⁸⁹ for evaluating public employees’ freedom of speech, Justice Alito found that *Pickering* is a bad fit for determining the scope of the government’s power to compel large numbers of its employees to speak. Even if the Court did apply *Pickering* here, he wrote, unions would lose. The positions that unions take in collective bargaining on wages, health insurance, and the like concern matters of great public significance, and there is no governmental interest sufficiently weighty to justify requiring employees to subsidize the union’s speech on those subjects. Turning to *stare decisis*, the Court said that the doctrine “applies with perhaps least force of all to decisions that wrongly denied First Amendment rights.”⁹⁰ In the eyes of the majority, neither reliance interests nor any other factor weighed heavily in favor of retaining the *Abood* framework.

Justice Kagan wrote the principal dissent, joined by Justices Ginsburg, Breyer, and Sotomayor. She argued that, consistent with *Pickering* and other cases, “the *Abood* regime was a paradigmatic example of how the government can regulate speech in its capacity as an employer.”⁹¹ “But the worse part of today’s opinion,” she wrote, “is where the majority subverts all known principles of *stare decisis*,”⁹² overturning *Abood* for no better reason than that the justices in the majority “wanted to.”⁹³ She accused those justices of “weaponizing the First Amendment,”⁹⁴ using it to declare winners and losers in economic and social matters that should be left to the democratic process.

The justices found somewhat greater unity in *Minnesota Voters Alliance v. Mansky*.⁹⁵ Led by Chief Justice Roberts, the 7-2 Court struck down Minnesota’s wide-ranging ban on political apparel in polling places on Election Day. Finding that polling places are nonpublic forums, where speech restrictions need merely be viewpoint-neutral and reasonable, the Court did not entirely close the door to speech restrictions in those locations. The Chief Justice emphasized that “we see no basis for rejecting Minnesota’s determination that some forms of advocacy should be excluded from the polling place, to set it aside as an island of calm in which voters can peacefully contemplate their choices.”⁹⁶ The problem with Minnesota’s law concerned the First Amendment’s reasonableness requirement. In the eyes of the majority, the state had failed “to articulate some sensible basis for distinguishing what may come in from what must stay out.”⁹⁷ The state had argued that the ban extended only to messages concerning matters on which candidates or parties had taken positions, but the Court found that “[a] rule whose fair enforcement requires an election judge to maintain a mental index of the platforms and positions of every candidate and party on the ballot is not reasonable.”⁹⁸ The state ran into further trouble with the Court at oral argument when handling the justices’ hypotheticals. The state’s attorneys argued, for example, that a shirt bearing the text of the Second Amendment would be barred, while a shirt bearing the text of the First Amendment would be permitted. The Court concluded that Minnesota’s law swept too broadly and left election officials with too much unguided discretion.⁹⁹

In the Term’s other major ruling on speech—*National Institute of Family & Life Advocates v. Becerra*¹⁰⁰—the 5-4 Court weighed in against a California law requiring that notices of specified types be posted in pro-life clinics providing pregnancy-related services. The law requires licensed clinics to post notices alerting clients that the state provides free or low-cost family-planning services—including abortions—and to post a phone number that clients can call for further information about those services. The law requires *unlicensed* clinics to post a notice alerting clients that the clinics’ personnel are not licensed to provide medical services. The Ninth Circuit denied clinics’ request for preliminary injunctive relief against both requirements, finding that the First Amendment gives California significant latitude to regulate “professional speech” and that the clinics are unlikely to succeed on the merits at trial. The Supreme Court, however, reversed.

Writing for the five-member majority, Justice Thomas

87. *Janus*, 138 S. Ct. at 2464.

88. Labor’s only victory in *Janus* came in the majority’s apparent concession that a union can require non-members to pay for representation that the union gives them in grievance proceedings.

89. 391 U.S. 563 (1968).

90. *Janus*, 138 S. Ct. at 2478.

91. *Id.* at 2487 (Kagan, J., dissenting).

92. *Id.* at 2497 (Kagan, J., dissenting).

93. *Id.* at 2501 (Kagan, J., dissenting).

94. *Id.* (Kagan, J., dissenting).

95. 138 S. Ct. 1876 (2018).

96. *Id.* at 1887 (internal quotation marks omitted).

97. *Id.* at 1888.

98. *Id.* at 1889.

99. Joined by Justice Breyer in dissent, Justice Sotomayor argued that the Court should have certified the case to the Minnesota Supreme Court for a definitive construction of the challenged statute. The majority rejected that suggestion, finding (among other things) that the state had raised the possibility of certification “very late in the day” and that neither the state nor the dissent had “suggested a viable alternative construction that the Minnesota Supreme Court might adopt instead.” *Id.* at 1891 n.7.

100. 138 S. Ct. 2361 (2018).

turned first to the law concerning licensed clinics. California's requirement is content-based, he explained, because it alters the content of what the clinics are required to tell their clients. He then said there is no historical basis for the Ninth Circuit's (and some other lower courts') finding that content-based regulations of professional speech merit something less demanding than strict scrutiny. The closest the Court has come to that view, Justice Thomas wrote, is in rulings applying a more permissive form of review to "laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech'" regarding the services they provide and in rulings allowing states to "regulate professional conduct, even though that conduct incidentally involves speech."¹⁰¹ The Court found that neither of those lines of precedent was applicable here. In a remarkable passage, Justice Thomas drew at least a loose parallel between California's requirement and actions taken by Mao Zedong, the Soviets, the Nazis, and Nicolae Ceausescu. Even if intermediate scrutiny were applied, the Court concluded, the notice requirement could not meet it because, if the state's aim is to inform low-income women about state-sponsored services, the requirement is vastly under-inclusive. With respect to the notice requirement imposed on unlicensed clinics, the Court held both that the state has not yet identified any real, non-hypothetical need that the requirement meets and that the law is unduly burdensome.

Joined by Justices Ginsburg, Sotomayor, and Kagan in dissent, Justice Breyer argued that (among other things) the Court's ruling threatens to imperil a vast range of state laws requiring speech of various kinds; that the majority undermined the evenhanded rule of law by striking down a statute requiring a notice about abortion services while not satisfactory distinguishing laws requiring a notice about adoption services; and that the majority was insufficiently deferential to the state's conclusion that clients of unlicensed clinics should be alerted on-site that the personnel at those clinics are not licensed to provide medical care.

SUPPLEMENTAL JURISDICTION

When a federal district court has original jurisdiction over a given claim, the supplemental jurisdiction statute—28 U.S.C. § 1367—authorizes the court also to take jurisdiction over state claims that form part of "the same case or controversy."¹⁰² If a court subsequently dismisses the claim over which it initially had original jurisdiction, it typically will also dismiss any additional claims that it had swept in. When that occurs, the claimant might naturally wish to file his or her trailing claims in state court. But what if the state's statute of limitations for those claims expired during the federal proceedings? Congress anticipated that problem in Section 1367(d):

The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action

that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

"[T]he Court did not entirely close the door to speech restrictions in [polling places]."

In *Artis v. District of Columbia*,¹⁰³

Stephanie Artis sought to take advantage of that tolling provision. She had sued the District of Columbia in federal court for employment discrimination, asserting a claim under federal law as well as claims under D.C. law.¹⁰⁴ At the time Artis filed her suit, nearly two years remained in the limitations period for her D.C. claims. Two and a half years later, the federal district court granted the District's motion for summary judgment on the federal claim and declined to retain jurisdiction over Artis's remaining claims. Artis filed the non-federal claims in the D.C. Superior Court 59 days later. Were those claims now time-barred?

Dividing 5-4, the Court held that the claims were timely filed. All of the justices agreed that there were two possible ways to read Section 1367's tolling provision. On the "stop the clock" reading, the clock on D.C.'s limitations period entirely stopped during the federal proceedings, such that Artis had roughly two years to file her D.C. claims after the federal district court dismissed them. On the "grace period" reading, the clock on D.C.'s limitations period continued to run, but Section 1367(d) ensured that, if that clock had counted down to zero by the time her D.C. claims were dismissed, Artis would have at least 30 days to file those claims in an appropriate court. Led by Justice Ginsburg, a majority of the Court adopted the "stop the clock" interpretation, finding that, in all other legislation in which Congress has used the word "toll," it has meant "'suspended,' or 'paused,' or 'stopped.'"¹⁰⁵ Writing for the dissent, Justice Gorsuch argued that the Court's ruling "ensures that traditional state law judgments about the appropriate lifespan of state law claims will be routinely displaced—and displaced in favor of nothing more than a fortuity (the time a claim sits in federal court) that bears no rational relationship to any federal interest."¹⁰⁶

TAXES

For the past half century, the Dormant Commerce Clause rule under *National Bellas Hess, Inc. v. Department of Revenue of Illinois*¹⁰⁷—as reaffirmed in *Quill Corp. v. North Dakota*¹⁰⁸—was that a state could not require a seller to collect sales taxes on goods and services sold to residents of that state unless the seller had a physical presence there. In this Term's *South Dakota v. Wayfair*,¹⁰⁹ the justices all agreed that *Bellas Hess* was wrongly decided. What divided them 5-4 was whether the Court should do anything about it.

101. *Id.* at 2366.

102. 28 U.S.C. § 1367(a).

103. 138 S. Ct. 594 (2018).

104. Section 1367(e) instructs federal courts to treat D.C. law like state law.

105. *Artis*, 138 S. Ct. at 602-03.

106. *Id.* at 617 (Gorsuch, J., dissenting).

107. 386 U.S. 753 (1967).

108. 504 U.S. 298 (1992).

109. 138 S. Ct. 2080 (2018).

Led by Justice Kennedy, a majority of the Court concluded that it should. The case concerned South Dakota's effort to require out-of-state sellers to collect sales taxes for goods and services sold within the state if they annually did business exceeding \$100,000 in South Dakota or engaged in at least 200 separate transactions there. The state sought to compel three large online retailers to collect sales taxes pursuant to the new legislation, even though they did not maintain physical presences within the state. Citing *Bellas Hess* and *Quill*, the courts below ruled in favor of the online retailers. Justice Kennedy and his colleagues in the majority concluded, however, that *Bellas Hess* and *Quill* should be overturned.

The Court reasoned that (among other things) the physical-presence requirement makes no sense in an era in which so many economic transactions are conducted over the Internet, "is a poor proxy for the compliance costs faced by companies that do business in multiple States,"¹¹⁰ incentivizes sellers to avoid establishing stores or other potentially desirable presences in multiple states, and amounts to "an extraordinary imposition by the Judiciary on States' authority to collect taxes and perform critical public functions."¹¹¹ Justice Kennedy acknowledged that Congress has long had the authority to reject the physical-presence requirement and that the Court should be reluctant to overturn its own precedents, but he concluded that "[i]t is inconsistent with the Court's proper role to ask Congress to address a false constitutional premise of this Court's own creation."¹¹² The Court said that the lower courts could determine on remand whether any other Commerce Clause principle invalidates South Dakota's tax law, but the Court also indicated that South Dakota has gone a long way toward successfully avoiding any discrimination or undue-burden concerns. It has done so by exempting out-of-state sellers that do only minimal business in the state, by declaring that the tax law will not be applied retroactively, and by adopting the Streamlined Sales and Use Tax Agreement (legislation that, in a variety of ways, aims to simplify the adopting state's sales tax system and thereby reduce the compliance burden).

Joined by Justices Breyer, Sotomayor, and Kagan in dissent, Chief Justice Roberts argued that the Court should have left it to Congress to respond to any problems created by *Bellas Hess*'s physical-presence requirement. Chief Justice Roberts noted that most of the nation's largest online retailers already collect sales taxes on behalf of the states in which they make sales. Forcing the rest of them to do so, he argued, carries pros and cons that Congress is best equipped to evaluate.

OTHER NOTABLE RULINGS

In *Cyan, Inc. v. Beaver County Employees Retirement Fund*,¹¹³ the Court held that the Securities Litigation Uniform Standards Act of 1998 does not take away state courts' power to adjudicate class actions brought entirely under the Securities Act of

1933. The Court further held that SLUSA does not allow defendants to remove such class actions from state to federal court.

The Court held in *China Agritech, Inc. v. Resh*¹¹⁴ that, when a district court refuses to certify a proposed class, "a putative class member [may not], in lieu of promptly joining an existing suit or promptly filing an individual action, commence a class action anew beyond the time allowed by the applicable statute of limitations."¹¹⁵

In *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.*,¹¹⁶ the Court held that, when trying to determine a question of foreign law, a federal district court is not rigidly required to accept as dispositive an official statement submitted by that foreign nation's government. Rather, a district court may consider such things as "the statement's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions."¹¹⁷

In *Ohio v. American Express Company*,¹¹⁸ the 5-4 Court rejected an antitrust challenge to American Express's use of contractual provisions barring merchants from steering their customers away from using their American Express cards.

LOOKING AHEAD

One can find a continually updated list of cases slated for the October 2018 Term on the "Merits Cases" page at SCOTUSblog.com. At the time of this writing, perhaps the most broadly significant civil cases on the Court's docket involve disputes about whether small public employers are bound by the Age Discrimination in Employment Act's requirements,¹¹⁹ whether the Court should overrule precedent allowing one state to be sued in another state's courts without its consent,¹²⁰ and whether property owners should continue to be required to exhaust their state remedies before filing a Fifth Amendment takings claim.¹²¹ Given the unfailing ability of human interaction to produce legal disputes of great import to the rest of us, that list will surely grow.



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110. *Id.* at 2093.

111. *Id.* at 2095.

112. *Id.* at 2096.

113. 138 S. Ct. 1061 (2018).

114. 138 S. Ct. 1800 (2018).

115. *Id.* at 1804.

116. 138 S. Ct. 1865 (2018).

117. *Id.* at 1873-74.

118. 138 S. Ct. 2274 (2018).

119. *Mount Lemon Fire District v. Guido*, No. 17-587.

120. *Franchise Tax Board of California v. Hyatt*, No. 17-1299.

121. *Knick v. Township of Scott, Pennsylvania*, No. 17-647.



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Transforming 21st Century Education

William J. Brunson

The National Judicial College (NJC) gathered the foremost judicial education experts to discuss how the judicial education field can best educate U.S. trial court judges at every stage in their careers. Some judges enter the judicial profession with no specialized education or training about the judicial role. Yet, society asks these professionals to make often life-changing decisions during their first days on the job. During the 2.5-day *Transforming 21st Century Judicial Education* symposium held at NJC in Reno, Nevada, the experts provided suggestions, engaged in debates, and offered resources.

During the symposium, the participants agreed that a number of paradoxes exist. For instance, core competencies have been established for court administrators and judicial educators, but no U.S. entity has ever drafted core competencies for judges. As a result, most U.S. judicial education efforts aren't based upon any type of guiding curricula. Rather, most state judicial education organizations use committees of judges, who are not professional educators, to select the educational topics for their annual conferences.

Judge Andre Davis (ret.), a fourth circuit court of appeals judge and now Baltimore's city solicitor, commented that "our current judicial education model needs to step into the 21st Century. No good reason exists for the sporadic nature of judicial education." Diane Cowdrey, an experienced judicial branch educator from California, commented that many educational programs around the country would benefit from a curriculum-based approach to education. "How do we know that the judge presiding over a case has the educational background and experience to hear the case? When most states provide one-hour sessions on a variety of subject matters, most judges lack the in-depth knowledge that our increasingly complex society demands."

Maureen Conner, professor emerita at Michigan State Uni-

versity, former judicial educator for Michigan and Illinois, and former director for the Judicial Education Reference, Information and Technical Transfer (JERITT) Project and the MSU Judicial Administration Program, noted that "[m]ost judicial education in the country relies on the venerable lecture. The vast majority of presenters don't have any background or knowledge about adult education philosophy and practice, which dramatically and negatively impacts knowledge and skills retention."

The Symposium participants identified the educational needs of all levels of judges, from the judge who has just been elected or appointed to the experienced judge. The hope is that this information will assist judicial education efforts across the country. The participants also highlighted what would help the judicial education field to progress. Judge Madeleine Landrieu (ret.), a former Louisiana Court of Appeals judge and now the dean at Loyola University College of Law, stated, "The judicial education field is at a cross-roads. In its infancy, judges participated in courses that continuing legal education providers designed for lawyers. No courses existed to teach judges about the intricacies of decision making, judicial writing, effective communication skills, and the myriad of skills that judges must exercise each day on the bench, in their chambers, and in the community. Today, while these important courses exist, no systematic method exists for ensuring that all judges have access to the individualized learning that they need."

This *Transforming 21st Century Judicial Education Report* provides suggestions for further research in three primary areas. First, the judicial education field needs data regarding who the new judges are (e.g., age, gender, racial identity, previous experience, etc.). American University published a study in 2004 that gathered and analyzed this data. However, making educational decisions using 14-year-old data is fraught with peril.

ACKNOWLEDGMENTS:

Judge William Dressel (ret.), president emeritus and a former trial judge in Colorado for 22 years, and I moderated the 2.5-day *Transforming 21st Century Judicial Education* symposium. NJC chose the participants because of their relevant background and experience in educating judges in the United States. The participants were as follows: Hon. Efrain Alvarado (NY); Dr. Jan Bouch (VT); William Brunson, Esq. (NV) (moderator); Hon. Eileen Burlison (CT); Hon. Thomas E. Cheffins (AR); Hon. Charles Cloud (ret.) (VA) (Cherokee Nation); Dr. Maureen Conner (MI); Dr. Diane Cowdrey (CA); Hon. Charles Daniels (NM); Hon. Amy Davenport (VT); Hon. Andre Davis (ret.) (MD); Hon. William Dressel (ret.) (HI) (moderator); Claudia Fernandes, M.P.A. (CA); Christine Folsom, Esq. (WA) (Choctaw Nation); Irene Hart, Esq. (NV); Hon. Toni Higginbotham (LA); Hon. Candace Hissong (OR); John Holcomb, Esq. (FL); Hon. Gregory Holiday (MI); Hon. Peggy Fulton Hora (ret.) (CA); Hon. William Kelly

(MI); Natalie Knowlton, J.D. (CO); Peter Koelling, Esq. (NL); Professor Phyllis Williams Kotey (FL); Hon. Kathleen Kroll (FL); Hon. Madeleine Landrieu (ret.) (LA); Hon. Denise Langford-Morris (MI); Jennifer Leal (CA) (Washoe Tribe); Hon. Patricia Lenzi (CA) (St. Regis Mohawk); Melody Luetkehans, Esq. (NV); Martha Martin, J.D. (FL); John Newell, J.D. (NM); Michele Oken (CA); Kimberly Papillon, J.D. (CA); Hon. G. William Rice (OK) (United Keetoowah Band of Cherokee Indians); Hon. Margaret Ross (WA); Hon. Daniel Ryan (ret.), Ph.D. (MI); Joseph Sawyer (NV); Jeffrey Schrade (AZ); Hon. Miriam Shearing (ret.) (NV); Hon. V. Lee Sinclair Jr. (ret.) (OH); Hon. Steve Smith (TX); Marty Sullivan (AR); Hon. Ann Timmer (AZ); Hon. Jack Weil (VA); Kathryn Yetter, J.D. (NV); Dr. Gordon Zimmerman (NV); and Dr. Isaiah Zimmerman (VA).

I could not have written this publication without the insights, knowledge, and shared discussions of these well-respected individuals. Any errors or omissions are solely mine.

Second, the judicial education field needs a definition of the core competencies of judges. From this work, judicial education entities can develop curriculum-based judicial education. As one Symposium commentator said, using a curriculum-based approach will ensure that judicial education entities avoid using a “flavor-of-the-day” approach to education.

Third, the JERITT Project collected and evaluated trends in judicial education from 1989 to 2003. Since 2003, no entity has done that work. As a result, no good data exist for what the states are doing with regard to judicial education. That information will assist users in defining gaps in providing judicial education.

This report addresses the funding of state and national judicial education, how to identify and support judicial education faculty, online learning, and resources for judges and judicial educators. Next, the report explores how we currently educate judges and also potential innovations, which may help improve judicial education. The report discusses the debate as to whether having mandatory judicial education is a benefit and suggests the possibility of allowing judges to take sabbaticals to implement justice improvement projects or write articles. Finally, the report describes a novel approach for pursuing court improvement projects that will benefit both judges and their court systems.

FUNDING OF NATIONAL AND STATE JUDICIAL EDUCATION

Judicial education budgets are subject to the fluctuations of state budgets. “Though the national economy is in its seventh year of recovery from the Great Recession, many states are still facing major funding gaps that have locked legislatures in protracted battles with governors. In some states, lawmakers have gone into overtime with unresolved budgets, special sessions and threats of widespread government layoffs. Only 25 states have passed budgets, according to the National Association of State Budget Officers, which tracks legislative activity.”¹ These budget gaps generally result in fewer opportunities for national judicial education. They may also result in restricted programming for in-state courses such as annual conferences and specialized topics.

To provide educational opportunities when funding is more restricted, many states are utilizing online learning, primarily webcasting, to provide additional educational opportunities for judges and court staff.

Two primary sources of scholarships for judges to attend national judicial education courses come from the State Justice Institute (SJI) and the U.S. Department of Justice, Bureau of Justice Assistance (BJA). In 2015, SJI’s funding totaled \$5,121,000.² Of that amount, SJI allocated approximately \$175,000 to its Education Support Program, which amounted to approximately 3.4% of its funding. Conversely, BJA doesn’t

make an annual allocation to annual judicial education. Rather, from 2011 to 2015, BJA allowed NJC to allocate \$514,000 of a total grant amount of \$1.2 million to scholarships, or approximately 43%. Today, BJA doesn’t allocate any funds for scholarships.

With these minor federal amounts devoted to national judicial education, judges generally seek funding from their states or localities. A very small percentage pays for education out of their own resources.

FACULTY IDENTIFICATION AND SUPPORT

The Symposium participants suggested that identification of excellent faculty members is a continuing struggle for all judicial education entities. One potential risk in choosing faculty members, especially for national providers, is choosing judges or other professionals who are not respected in their own states. This situation can be alleviated by ensuring that state judicial educators (SJE) or chief/presiding judges are consulted before making faculty selections. Judicial educators can also identify faculty by noticing new judges who participate in courses and who evidence a passion for education and knowledge. The educators can then provide support and encouragement for a future teaching assignment. Other potential instructors can be found in online courses where the SJE identifies learners who perform particularly well. Most judicial educators make every effort to diversify their faculties, which will only improve upon the overall education experiences because more points of view are represented.

Once faculty members have been identified, they need to know what their responsibilities are. In other words, SJE have to be clear in setting expectations for faculty. They should stress that teaching adults is a labor-intensive process and a serious commitment. Unless faculty members are willing to put in adequate preparation time, they should not accept a teaching position. Next, SJE should make it clear that faculty members are expected to keep participants’ minds active by using interactive teaching methods (e.g., quizzes, case studies, debates, learning games, etc.). They should create learning environments where their students have the ability to express their knowledge and experience. However, the use of interactivity should not give faculty members a license to neglect preparation because they simply host a large discussion group. This can result in a session where the presenter and students simply share ignorance. SJE should ensure their faculty members have access to adult education information. Faculty should know that the best predictor of learning outcomes is teacher behavior; it even trumps learner motivation. A presenter who evidences excitement and passion for the subject matter will ensure greater retention than the instructor who is obviously unexcited about the subject matter. If the instructor is uninterested in the subject matter, how can he or she expect the students to be interested?

Footnotes

1. Julie Bosman, *States Confront Wide Budget Gaps Even After Years of Recovery*, N.Y. TIMES, June 8, 2015 at A1, available at <https://www.nytimes.com/2015/06/08/us/states-confront-wide-budget-gaps-even-after-years-of-recovery.html>.

2. *Update on FY 2016 Appropriations*, ST. JUST. INST., <http://www.sji.gov/update-on-fy-2016-appropriations/> (last visited Sept. 6, 2018).

In some cases, judges don't want to teach, but they want to be involved in the education process. In that case, state judicial educators can employ those individuals as resource persons who can assist with the development of lesson plans and the overall curriculum. Anyone who has a passion for education should be able to assist in some way. Recognition of both roles is highly important, so all feel honored for their roles in education. Another possibility is to provide faculty development such as NJC's course *Designing and Presenting Programs Effectively*.³ This course is helpful for any judicial educator who wants to improve his or her teaching ability.

Most state judicial education programs don't have the staff resources to provide individual support to their faculty. Larger states and national providers may have more of an opportunity to provide support in developing PowerPoint presentations or lesson plans. Because the judiciary and topics are constantly in flux, SJE's and national providers must continually vet new faculty and keep their faculty rosters up-to-date. SJE's also can pair new faculty with experienced teachers (i.e., set up faculty mentoring) to assist new faculty members. SJE's should share the results of any needs assessments with faculty members, so they know why their topics are needed. Similarly, evaluations can be fruitful instruments for providing helpful suggestions to faculty over time.

Removing or working with poorly performing faculty is a dilemma that all judicial education entities must confront. This process can be especially difficult in a state where the poor performing faculty member is chair of the education committee or otherwise wields power over those attempting to make beneficial changes to educational programming.

The most recent *Issues and Trends in Judicial Education* noted that judges comprise 95% of all faculty.⁴ As judges, they are extremely busy, full-time employees, so how can they find the time to prepare for their teaching assignments? Some are quite skillful at managing their cases with high settlement rates, which leaves them time to prepare and teach. Others don't hesitate to work on evenings and weekends because they truly enjoy creating and delivering presentations. Still others seek administrative leave when their states allow for it. As more states embark on online learning, they will find those efforts can be even more demanding than face-to-face education.

To support volunteer faculty, SJE's should find ways to reward them for their efforts because they aren't being paid monetarily. SJE's should find ways to recognize the faculty for their efforts with regular positive reinforcement in public, preferably in the presence of their peers. Another possibility is to provide them with continuing legal education (CLE) or continuing judicial education (CJE) credit for their efforts. This would be true whether they serve as curriculum developers, faculty, or facilitators.

SJE's will need to work with their bar CLE/CJE entities to accomplish the granting of CLE/CJE. SJE's should also consider providing small token gifts to the faculty. Anything that will make faculty members feel "special" will work.

ONLINE LEARNING

Online learning in judicial education has become much more common in recent years. For instance, in 2017, The National Judicial College educated 3,800 participants utilizing the internet. As a comparison, the NJC educated 6,639 participants in face-to-face courses. Accordingly, the NJC educated more than 36% of its participants via online learning, which dwarfs the NJC's early years in online learning. The states of California, Florida, Hawaii, Idaho, Indiana, Iowa, Missouri, Minnesota, New Mexico, New York, North Dakota, Ohio, Utah, Virginia, and Washington also use online learning opportunities to supplement their educational offerings.⁵ Most of the states are utilizing synchronous web conferences (e.g., Adobe Connect, Cisco WebEx, Citrix GoToWebinar, and Zoom) as their primary online learning platforms, although more and more states are experimenting with learning management systems. SJE's have reported using the following systems: Bridge, Canvas, Cornerstone, SumTotal Growth Edition, TraCorp, and Ziiva.

Likewise, some states and national providers are experimenting with blended models of education, which feature face-to-face classes along with synchronous and asynchronous educational opportunities. Some Symposium participants complained participants often won't participate in online learning that precedes or follows a face-to-face course because of fear of technology, lack of knowledge about using technology, scheduling difficulties, apathy, and concern that online learning isn't worthwhile, among other reasons.

Despite these concerns, research has shown that blended learning is superior to face-to-face education or online learning alone. The United States Department of Education found evidence that blended learning (blending synchronous and asynchronous modalities, or blending the face-to-face classroom with synchronous and/or asynchronous modalities) is more effective than face-to-face or online learning by themselves. The meta-study is "the result of a meta-analysis involving research published from 1996 to July 2008, in which [the U.S. Department of Education] sifted through more than 1,100 empirical studies of online learning, 46 of which provided sufficient data to compute or estimate 51 independent effect sizes," according to the report.⁶ Likewise, Babson Survey Research Group reported in February 2015, "[t]he percent of academic leaders rating the learning outcomes in online education as the same or superior to those in the face-to-face instruction grew from

3. *Designing & Presenting Programs Effectively: A Faculty Development Workshop*, NAT'L JUD. C., <http://www.judges.org/faculty-development-workshop-1510/>.

4. CATHARINE M. WHITE & MAUREEN E. CONNER, JUDICIAL EDUC. REFERENCE, INFO. AND TECHNICAL TRANSFER PROJECT, ISSUES AND TRENDS IN JUDICIAL BRANCH EDUCATION 139 (2005).

5. Interview with Joseph Sawyer (Aug. 14, 2018) (As the online learning director for the NJC, Mr. Sawyer has been cataloguing

the use of online learning by each state). Please note this list may not be exhaustive.

6. U.S. DEP'T EDUC., OFF. PLAN., EVALUATION, AND POL'Y DEV., EVALUATION EVIDENCE-BASED PRACTICES IN ONLINE LEARNING: A META-ANALYSIS AND REVIEW OF ONLINE LEARNING STUDIES (2010), available at <https://www2.ed.gov/rschstat/eval/tech/evidence-based-practices/finalreport.pdf>; see also Samuel Riffell & Duncan Sibley, *Using Web-Based Instruction to Improve Large Undergraduate Biol-*

57.2% in 2003 to 77.0% in 2012.”⁷ In the same study, the authors reported, “[t]he proportion of academic leaders who believe the learning outcomes for online education are inferior to those of face-to-face instruction remained the same as last year at 25.9%.”⁸ Perhaps more importantly, the study showed “[t]he proportion of academic leaders who report that online learning is critical to their institution’s long term strategy has grown from 48.8% to 70.8% this year.”⁹

While there are very few blended learning courses offered nationally as of 2018, more U.S. judicial education organizations will begin implementing the blended approach as their constituencies join the bench with online learning experience. Many judges still don’t participate in the pre- or post-course learning opportunities, only participating in the face-to-face portion of courses. The Symposium participants noted a potential method of motivating the participants to attend the *entire* course. Rather than referring to learning events as pre- or post-course, it’s important to define those events as “part of the course.” For instance, a course may include one webcast before the face-to-face event, one three-day face-to-face event, and two webcasts after the face-to-face event. These five events constitute the course. Additionally, it may be fruitful to ask the judges to “pledge” that they will complete the *entire* course (including the webcasts and face-to-face event).

RESOURCES FOR JUDGES AND JUDICIAL EDUCATORS

During the Symposium, the participants identified a number of potential resources that would be helpful for judges. For instance, it would be helpful for a court system to provide new judges with a list of judges and their expertise, so the new judges have someone to contact when they have cases outside their comfort zones. Likewise, SJs could benefit from the use of event apps for their annual conferences. The apps can provide the agenda, sponsor and presenter rosters, presenter biographies, facility layout, things to do in the conference location, and local weather.

The National Center for State Courts (NCSC) has a library of more than 100 topics that judges can access.¹⁰ The categories include access and fairness, courthouse facilities, civil, criminal, court management, problem-solving courts, and technology,

among many others.¹¹ NCSC also acquired the American Judicature Society’s Center for Judicial Ethics. If judges need information on court technology innovations, the best objective source of information is NCSC. It features an excellent blog curated by James McMillan and John Matthias located here: <https://court-techbulletin.blogspot.com/p/links-and-resources.html>.

The National Council for Juvenile and Family Court Judges has an extensive resource library that contains best practices for family and juvenile judges to rule on child abuse and neglect, domestic violence, juvenile justice, and substance abuse, among many other types of cases.¹²

Likewise, the NJC has resources for judges including information about capital cases, commercial driver’s licensing laws, mental competency, and sentencing sex offenders, among others.¹³

For judicial educators, the primary resource is the National Association of State Judicial Educators (NASJE). NASJE’s website features a newsletter with recent articles discussing how judicial educators can lead through education, how they can make changes to their educational systems in a tough economy, and how they can educate about diversity, fairness, and access.¹⁴ The site also showcases resources such as access and fairness, curriculum designs, essential readings, tech corner, a link to *Thiagi Gameblog* (a resources for using learning games in education), and a link to *Judicial Balance*, among others.¹⁵

NEEDED RESEARCH AND DEVELOPMENT

The Symposium participants identified a number of areas where more information would be helpful. For instance, no up-to-date data exist regarding the composition of the U.S. judiciary (e.g., age, gender, racial identity, previous experience, etc.). American University published the last study in 2004, partially utilizing data provided by the *American Bench*, a resource that suggests it has data for more than “20,000 judges in all levels of federal, state and local courts.”¹⁶ However, according to the National Center for State Courts, there are approximately 28,558 trial and appellate judges in the U.S.¹⁷ Consequently, the composition of the judiciary isn’t fully available from that resource. The data from the National Center for State Courts indicate there are 27,179 trial judges, and 1,379 appellate judges.¹⁸ The majority of the states didn’t complete

- ogy Courses: *An Evaluation of a Hybrid Course Format*, 44 COMPUTERS & EDUC. 217 (2005) (finding that online assignments were just as effective, if not more so, than traditional lectures; and classroom-based active-learning exercises were more effective when coupled with online assignments. Instructors of large lecture courses could improve the learning environment by adopting hybrid course formats).
7. I. ELAINE ALLEN & JEFF SEAMAN, GRADE LEVEL: TRACKING ONLINE EDUCATION IN THE UNITED STATES 5 (Feb. 2015) (The Babson Survey Research Group focuses on higher, graduate, and post-graduate education). The research shows that online learning is effective in general.
 8. *Id.*
 9. *Id.*
 10. *Information and Resources*, NAT’L CTR. ST. CTS., <http://www.ncsc.org/information-and-resources.aspx> (last visited Aug. 10, 2018).
 11. *Browse by Category*, NAT’L CTR. ST. CTS.,

<https://www.ncsc.org/Information-and-Resources/Browse-by-Category.aspx> (last visited Aug. 10, 2018).

12. *Resource Library*, NAT’L COUNCIL JUV. AND FAM. CT. JUDGES, <http://www.ncjfcj.org/resource-library> (last visited Aug. 10, 2018).
13. *Resources*, NAT’L JUD. C., <http://www.judges.org/resources/> (last visited Aug. 10, 2018).
14. *News*, NAT’L ASS’N. ST. JUD. EDUCATORS, <http://nasje.org/category/news/> (last visited Aug. 10, 2018).
15. NAT’L ASS’N. ST. JUD. EDUCATORS, <http://nasje.org/> (last visited Aug. 10, 2018).
16. *The American Bench*, FORSTER-LONG, LLC, <https://www.forster-long.com/americanbench> (last visited Aug. 10, 2018) (advertisement for an annual biographical reference guide to American judges and courts).
17. *Number of Trial Court Judges*, NAT’L CTR. ST. CTS., <http://tinyurl.com/number-trial-ct-judges> (last visited Aug. 10, 2018).
18. *Id.*

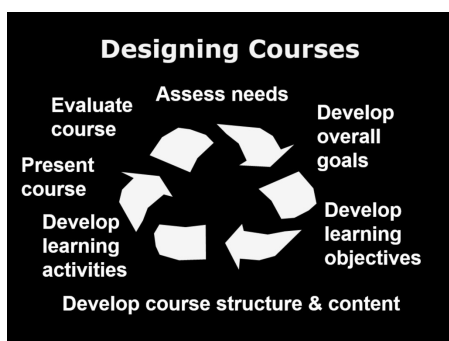
the surveys that the National Center for State Courts utilized in its attempt to identify judges' race and their ethnicity, and no questions were asked about previous experience before joining the bench.¹⁹

Likewise, the Symposium participants noted that no information exists about the core competencies of judges. While this was true at the time of the Symposium, NCSC produced a report in December 2017. The *Elements of Judicial Excellence* framework project provides a "systematic exploration of what state trial court judges think it takes to be a 'good judge' and the general types of knowledge, skills, abilities, and other characteristics they say are important to judicial excellence." The resource can be found at <https://tinyurl.com/Judicial-Excellence>.

From 1991 to 2003, John Hudzik wrote the first issue and then Maureen Conner wrote later *Issues and Trends in Judicial Education*, a biennial publication, which researched, catalogued, and analyzed how each state educated its judiciary. The research assessed the personnel, budget and finances, programs and services, and organization and governance structures of seven national and as many state judicial branch education organizations that would participate. This information was extremely helpful for defining the judicial education efforts of each state. It not only highlighted the content of the courses, but also how the courses were presented (e.g., defining methods of instruction). No resource currently exists that provides this research about the ongoing efforts of national and state judicial education entities.

EDUCATING JUDGES

During the Symposium, the participants discussed not only the content of what judges need to know, but also how to effectively provide that education and training. To ensure successful judicial education and training, judicial educators must use state-of-the-art adult education philosophies and practices. From performing needs assessments to evaluating courses for their effectiveness, judicial educators must examine every part of their work to ensure they are using best practices. Figure One shows the model for creating judicial education programming.



In honoring adult education practice, judicial educators first should conduct a needs assessment. The educational need is the gap or discrepancy between the existing level of knowledge or skills and the desired level of knowledge or skill. Depending

upon the course being designed, needs assessment contributors should include future participants and faculty members and may include law enforcement, litigants, jurors, witnesses, court watchers, treatment providers, probation officers, medical treatment professionals, and public agencies (e.g., child care and support, energy assistance, housing, transportation, food, financial help, medical, educational and vocational training), among others. Symposium participants debated whether members of the public should serve in this role. Again, the answer is largely dependent upon the type of education and training that the state judicial education organization is developing.

Next, the judicial educator should develop the overall goals for the course. The goals can answer the following questions: (1) why are we developing the course?; (2) what are the faculty's goals?; and (3) what are the participants' goals? The goals are usually greater than the course time will allow.

To focus the course, the judicial educator must define learning objectives that are achievable in the amount of time devoted to each topic. Learning objectives are learner-centered, measurable or observable, and clear. They define what the participants will be able to do after the session that they weren't able to do before the session. Learning objectives answer the question of "what's in it for me?" (the learner). The Symposium participants noted that all judges, especially new ones, need an understanding of why they're doing what they're doing. A good educational design will provide those answers.

Once the judicial educator has defined the learning objectives, he or she can begin to develop the overall course structure and content. Sequencing of topics happens at this stage. The judicial education professional needs to define how long the breaks are, whether there is a presenter at lunch, and other aspects of the course. Is it advisable to show a movie after lunch? Indeed, what should you serve at lunch to ensure better student attention? What factor does temperature or room comfort play in learner retention? One very experienced judicial educator told a story of how he felt his job was to ensure that the courses and presenters were all exceptional. It was not his job to be concerned about logistical matters such as lunches, temperature, hotel rooms, etc. A senior appellate judge kindly explained to him that without those logistical arrangements being held in high regard, the learners will remember more about the cold chicken and the stifling room than they did about the intricacies of the subject matter that they were learning. In short, a judicial educator needs to concern herself with the entire experience of the learners, not just the content.

While learning objectives define *what* the participants will be able to do differently, learning activities are *how* the instructor will assist the participants in achieving those objectives. Types of learning activities include mini-lectures, brainstorming, debates, case studies, large and small group discussions, learning games, role plays, self-assessments (i.e., quizzes), videos, and writing exercises, among others.²⁰

Symposium participants discussed the importance of using a variety of learning activities. For example, an instructor

19. *Id.*

20. WILLIAM J. BRUNSON, BEST PRACTICES FOR USING LEARNING ACTIVI-

TIES (Apr. 2018) (checklist on file at the National Judicial College).

could engage the participants in a mock bail hearing to ascertain whether they have grasped the purposes of bail. Likewise, Symposium participants recommended video recording a two-hour trial and building in pauses with questions to answer for the judicial participants. The students would define how they would respond to different factual scenarios. For new judges, this may be the first time that they see the courtroom from the position of an arbiter, rather than as an advocate.

Some Symposium participants recommended the use of “retreats” to reinvigorate judges who are very experienced and/or utilizing those judges as mentors/coaches. Interactive learning activities or experiential learning opportunities (ELOs) have the potential to change the paradigm of judicial education if done well. NJC utilizes a variety of ELOs in its offerings. For instance, the NJC offers a course in Ashland, Oregon, in conjunction with the Oregon Shakespeare Festival. In that course, participants attend the plays and discuss the ethical dilemmas posed within the plays as those dilemmas relate to the judiciary.²¹ Further, the judicial participants read books to spark in-depth discussions and analyses of ethical behavior and justice.²² Likewise, NJC’s course *When Justice Fails: Threats to the Independence of the Judiciary* asks participants to tour the Holocaust Museum in Washington, D.C. to help them decipher why the judiciary failed to uphold Germany’s laws in Nazi Germany.²³ The participants compare that failure to modern-day failures of justice.

Quizzes and tests also can improve retention. Many judicial educators inappropriately believe their learners dislike self-assessments or quizzes. Through its evaluation instruments, NJC has found that the participants don’t necessarily dislike assessments if they are *truly* self-assessments (only to be used by the learners to self-assess their own knowledge) and not used by instructors to measure the participant’s success. In other words, if the educator removes the consequences of a poor performance, the quiz doesn’t result in displeasure or antipathy. Researchers found that testing improves retention rates and that “[r]epeated retrieval induced through testing (and not repeated encoding during additional study) produces large positive effects on long-term retention.”²⁴ Quizzes and tests can be objective or subjective, the latter usually requiring the participant to draft responses in essays.

Another type of assessment involves personal identification or definition such as the *Implicit Association Test*. It “measures attitudes and beliefs that people may be unwilling or unable to report.”²⁵ The test is especially important for judges because it may show they have implicit biases or attitudes that they don’t know about. “For example, [a judge] may believe that women and men should be equally associated with science, but [her] automatic associations could show that [she] (like many others) associate men with science more than [she] associate[s]

women with science.”²⁶ Symposium participants suggested bias education is extremely important. However, at least one participant cautioned that identifying the course as a bias or diversity course will change attitudes and hamper learning. A better title is the *Neuroscience of Decision Making*. Some participants suggested it’s important to test biases before the course to identify the baseline. Next, the presenters would work with the participants on dismantling biases. Finally, the organizers would then test participant biases again to ascertain if there has been improvement.

After the instructors present the course, the judicial educator evaluates the course using an evaluation instrument. The evaluation instrument should assess whether the learning objectives have been met in addition to assessing whether the instructors were effective, clear, and enthusiastic; whether the presenters’ methods of presentation held the participants’ interest; whether the presenters managed class time well; and whether the instructional materials were beneficial in learning the topic. The Symposium participants discussed the best ways to obtain good data on what participants knew before and after the content provided. They debated about whether it’s a good practice to pre- and post-test participants to define whether measurable learning occurred. Some grant agencies, such as the U.S. Department of Justice, Bureau of Justice Assistance, now require such testing to establish that measurable learning indeed occurred. Symposium participants noted that other forms of measurement include the observation of performance rather than cognitive testing. The National Judicial College uses this approach in its faculty development workshops where the faculty members assess the teaching skills of the participants on the last day of the workshop. Retention of information is always relevant in determining the success of an educational event.

In assessing educational programs, The National Judicial College utilizes Kirkpatrick’s Model of Evaluation. The model has four levels:

Level 1: Reactions: Did the participants like the program? Was the material relevant to their work? Use written instruments and/or the provider may utilize focus groups. A level-one evaluation should not just include reactions toward the overall program (e.g., did you like the program?). It should also include measurement of the participants’ reactions or attitudes toward specific components of the program, such as the instructor’s mastery of the topic, learning objectives, the chosen topics, the presentation style, audiovisuals, etc. NJC recommends that (1) program attorneys evaluate directly after the course; (2) instruments use both close-ended items (rating scales) and open-ended questions; and (3) rate whether the course met the overall learning objectives.

21. *Ethical Issues in the Law*, NAT’L JUD. C., <http://www.judges.org/2018courses> (last visited Aug. 20, 2018).

22. *Id.*

23. *When Justice Fails*, NAT’L JUD. C., <http://www.judges.org/when-justice-fails-threats-to-the-independence-of-the-judiciary-2017/> (last visited Aug. 20, 2018).

24. Jeffrey D. Karpicke & Henry L. Roediger III, *The Critical Importance of Retrieval for Learning*, 319 *SCIENCE* 966, 968 (Feb. 15, 2008).

25. PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/> (last visited Aug. 20, 2018).

26. *Id.*

Level 2: Learning: Have the participants learned new skills, gained knowledge, or changed attitudes? The goal of a level-two evaluation is to determine what the participants learned during the course. Learning outcomes can include changes in knowledge, skills, or attitudes. Some courses will emphasize knowledge, some will emphasize skills, some will emphasize attitudes, and some will emphasize multiple learning outcomes. Educators use objective and subjective tests or quizzes to assess learning, and performance tests or asking participants to present subject matters. In addition to tests or quizzes, “it is also possible to use writing samples, performances, speeches, and other class-appropriate assessments”²⁷ such as individual presentations. Educators can measure attitudes with survey instruments (responding with Likert scale—strongly agree, agree, neutral, disagree, or strongly disagree) and open-ended questions.

Level 3: Transfer: Are the newly acquired skills, knowledge, or attitudes being used in the everyday environments of the participants? In a level-three evaluation, the judicial educator is assessing whether the participants changed their on-the-job-behaviors as a result of their participation in courses. If a behavior change does not occur, the judicial educator may want to determine why. In simple terms, a level-three evaluation measures whether the course had a positive effect on participants’ job performance. Educators can measure using a post-course evaluation (e.g., 3 to 6 months after the course) to assess what work behavior, if any, the learner has changed because of the course. Some educators may even utilize court watchers to assess whether the participants are using their new skills in the courtroom. Others may survey presiding judges, subordinates, lawyers, litigants, jurors, and other court users to ascertain whether the judge has applied any new techniques.

Level 4: Results: Has the education resulted in increased court efficiency, improved access, decreased costs, increased perceptions of fairness, reduced frequency of problems, etc.? Research institutions generally conduct this type of long-term study, which is empirical in nature. Control groups are generally required for validity. Unfortunately, it is difficult to isolate the effect of the training course because there are usually many additional causal variables operating on the level four outcome variables (i.e., the educational event is just one of many potential causes).

IMPROVING RETENTION RATES

The Symposium participants noted the following methods of improving retention rates:

- Video record judicial presentations so student judges can review them. Research shows that repetition improves information retention.

- Offer more hands-on work right away to ensure student judges have the opportunity to experience the information, reflect upon it, theorize broader application, and apply the information to certain situations, so they can make efficient decisions.
- Provide opportunities for small-group discussions and work (i.e., providing participants with problems to solve).
- Utilize team-based learning to encourage additional verbal processing by learners.
- Use checklists for complex subject matters to ensure all necessary items are addressed.

Another method for improving retention was flipping the classroom.

FLIPPING THE CLASSROOM (THE KHAN ACADEMY APPROACH)

Many Symposium participants expressed excitement about the prospect of flipping the classroom (Khan Academy approach), whereby participants watch lectures via recorded videos and use classroom time (face-to-face time) for application of principles. The Khan Academy uses technology to track student progress. Using a virtual dashboard, teachers can quickly decipher which students are excelling, succeeding, and falling behind. With this information they can assist struggling students and use top students to help educate those who are struggling. “Everyone in the room is working at their own level and pushing themselves forward at their own pace. By providing lesson scaffolds in various ways, I am able to make sure that all of my students, regardless of their *individualized learning plan* goals . . . are working on grade-level standards.”²⁸

Conversely, many Symposium participants argued that flipping the classroom will be difficult, if not impossible, especially considering the audiences at annual conferences. They reasoned that judges are reluctant or unwilling to work, before the face-to-face courses or conferences (i.e., unwilling to do homework). Without repeated prompting, the judges are not likely to do the homework.

INDIVIDUALIZED LEARNING PLANS OR INDIVIDUAL EDUCATION PLANS (IEPS)

Symposium participants also addressed the importance of creating or facilitating the creation of individualized learning plans or individual education plans (IEPs) for judges. The participants expressed interest in having judges complete self-assessment instruments in which the judges would define their own strengths and weaknesses. The participants thought it would be beneficial for a person to be designated to review the individualized education plan with the judge in a confidential manner. Some thought that mentors/coaches could serve in that role. Others believed that state judicial educators could review those plans with the judges, or they could organize an appropriate pairing with a mentor/coach.

27. Ludmila Praslova, *Adaptation of Kirkpatrick’s Four Level Model of Training Criteria to Assessment of Learning Outcomes and Program Evaluation in Higher Education*, 22 EDUC. ASSESSMENT EVALUATION & ACCOUNTABILITY 215, 220 (July 2010).

28. Khan Academy Teacher Published in Education Week, KHAN ACAD., <http://schools.khanacademy.org/post/89390190303/khan-academy-teacher-published-in-education-week> (last visited Aug. 20, 2018) (teacher testimonial) (emphasis added).

States have varied resources for brand new judges. Some judges have access to a tremendous number of resources. Others don't have access to much. Nevertheless, if a national instrument was created, it would help all states address the varied educational needs of their judges. Some of the Symposium participants expressed that it would be a best practice to assign new judges to a limited jurisdiction first (if possible) so they can transition into their new roles with greater ease. The IEP would provide more detailed information about best assignments for easing judges, whether experienced or not, into their new roles.

MENTORING AND COACHING

The majority of Symposium participants supported the idea of using mentors/coaches to assist judges, especially new ones. A number of judicial education entities utilize mentoring to supplement their judicial education efforts. For example, Florida has had a formal mentoring program for judges since 1991.²⁹ In that program, the courts pair newly elected and appointed trial court judges with more experienced members of the judiciary.³⁰ The purpose of the program is to “make the transition from the bar to the bench as seamless as possible.”³¹ It provides judges with access to critical information, court resources, and one-to-one guidance for judges immediately upon their taking the bench.³² In New York, they utilize judicial hearing officers (JHO), who are retired judges, as mentors. The JHOs worked without pay when the JHO program was suspended for monetary reasons. In Maryland, new trial judges are assigned to a mentoring program. “The purpose of the New Trial Judge Mentoring Program . . . is to assist New Trial Judges in the transition from attorney to judge and provide support to the New Trial Judges prior to and following the mandatory New Trial Judges’ Judicial Education Program.”³³

Dr. Maureen Conner and William Anderson identify the elements of mentoring as follows:

- 1) [M]entoring is a professional work-related relationship, 2) between an older more experienced member of a profession or organization, and 3) a lesser-experienced newcomer, 4) where the senior member offers advice and guidance designed to enhance the newcomer's skill development and socialization within the profession or organization.³⁴

One likely result of mentoring is to provide collegial support to new judges, so they can alleviate the stress of the new role.³⁵

A smaller number of states also utilize coaching to improve judicial performance. For instance, Massachusetts instituted

TABLE 1		
FOCUS	MENTORING	COACHING
Definition and Focus	A more informal association focused on building a two-way, mutually beneficial relationship for long-term career movement.	A more formal structured association focused on improvements in behavior and performance to resolve present work issues or handle specific aspects of the job.
Role	Talking with a person who has identified his needs before entering into a mentoring relationship. The emphasis is on active listening, providing information, making suggestions, and establishing connections.	Talking to a person, identifying what he needs, and developing an action plan. The emphasis is on instruction, assessing, and monitoring.
Approach	This is a self-directed modus operandi whereby participants have choices. This approach can begin with a self-matching process and continue throughout the relationship using a committed timeline to determine how often and where individuals will meet, identify goals, and so forth.	A structured modus operandi is more frequently used whereby participants are working within a narrower perspective; their agenda is more specific, shorter in duration, and oriented toward certain results. Usually a coach is assigned to an employee.
Tools	The most important tool is the Mentoring Agreement—developed, completed, and signed by both participants. This document formalizes commitment to the mentoring relationship. Items include individual goals, learning content, a meeting schedule, and communication methods.	Depending on the individual situation, various assessment instruments can be used such as skills-training activities and teaching evaluations. A contract can be issued regarding the problem to be resolved or skills to be learned.

29. See *Mentoring*, FLORIDA CTS., <http://www.flcourts.org/publications-reports-stats/judiciary-education/mentoring.shtml> (last visited Aug. 20, 2018).

30. *Id.*

31. *Id.*

32. *Id.*

33. *In the Court of Appeals of Maryland Administrative Order on Orientation and Mentoring for New Trial Judges*, MARYLAND CTS., <https://mdcourts.gov/sites/default/files/admin-orders/>

20160825orientationmentoringnewtrialjudges.pdf (last visited Aug. 20, 2018).

34. MAUREEN E. CONNER & WILLIAM A. ANDERSON, JUDICIAL EDUC. REFERENCE, INFO. AND TECHNICAL TRANSFER PROJECT, *MENTORING IN THE JUDICIARY* 5 (2d ed. 2005), available at <http://cj.msu.edu/assets/JERITT-Monograph-2-Mentoring-in-the-Judiciary.pdf>.

35. See Celeste Bremer, *Reducing Judicial Stress Through Mentoring*, 87 JUDICATURE 244, 245 (Mar.-Apr. 2004).

the J2J Program, which is a collaborative, judge-to-judge peer-mentor coaching program.³⁶ While mentoring and coaching have many similar characteristics, they also have differences as outlined in Table 1.³⁷

Working with the judicial education division in Massachusetts, Jan and Steve Bouch designed the coaching/mentoring program to build and grow the individual capacity of judges to provide justice.³⁸ J2J assists in “transitioning newly-appointed judges to the bench and integrating them into the judicial system, acts as a resource to address performance issues, and is an ongoing network of care and support for judges throughout their careers.”³⁹ The program provided structure for inculcating a mentoring and coaching culture. To attract talented mentors and coaches, the founders provided a great deal of positive reinforcement and made it an honor to be selected as a mentor and coach. They selected *respected* retired judges as the mentors/coaches. They also provided education and training on how to successfully perform as mentors/coaches. Finally, they gave new judges (the protégés) the ability to choose their mentors/coaches because an improper pairing will result in disassociation.

At the outset of the relationship, mentors/coaches contacted new judges by email to welcome and let them know they can contact them any time for questions. The coaches also had access to standardized information about what to expect when transitioning to the bench (logistics, family issues, etc.). In some cases, J2J supplied subject-matter expert mentors/coaches to assist new judges with regard to specialized topics.

For marketing a coaching or mentoring program, Symposium participants suggested that if the state establishes a mentoring or coaching program as something elite, then people will want to do it. They also opined that many retired judges want to feel useful and participating in a mentoring or coaching program can give them that opportunity. Some courts have used something as simple as a special pin, which identifies the judge as one of the elite few that is available to mentor new judges. The pin evidences that the judge has this “elite” status.

In the medical field, some hospitals are experimenting with Project ECHO. Project ECHO is a lifelong learning and guided-practice model to assist in educating medical professionals and increase workforce capacity to provide best-practice specialty care and reduce health disparities.⁴⁰ The ECHO model is a hub-and-spoke knowledge-sharing network, led by expert teams (the hub) who use multi-point videoconferencing to conduct clinics with community providers (the spokes).⁴¹ Project ECHO solves two significant issues. First, it provides spe-

cialist advice because there aren’t enough specialists, especially in rural and underserved communities.⁴² Second, ECHO trains primary care clinicians to provide specialty care services themselves where necessary.⁴³ The specialists provide mentoring and feedback to primary care clinicians, who become part of a learning community.⁴⁴

In the judicial arena, judges with particularly difficult cases could reach out to fellow judges who have specialized expertise with the type of case in issue. The judicial educators’ role would be to provide linkages between “judicial specialists” and the judges who need that expertise. A possible technological approach would be the use of a listserv to discuss particularly difficult cases. Another approach would be to utilize old cases to present problems to learner judges. How would you resolve the case? Some state ethics rules may require the judge who receives assistance to disclose the consultation, depending upon how and when it occurs.

Some Symposium participants recommended the use of shadowing. In this process, new judges would sit with experienced judges on the bench. The new judge would observe what the experienced judge does. Judicial educators could also educate experienced judges about how to debrief these shadowing sessions, so the new judge has an opportunity to process the information more fully. Alternatively, experienced judges can shadow or watch new judges as they conduct hearings to provide advice. Obviously, some issues require instantaneous decisions, so new judges will make mistakes as part of the learning process. However, there is a potential technological solution: The senior or experienced judge could have an iPad or tablet to transmit thoughts privately to the new judge. (NOTE: This approach may have ethical implications depending upon the jurisdiction.)

USE OF KNOWLEDGE NETWORKS

To help in the design of judicial branch education, a summit participant suggested the creation of knowledge networks. *Knowledge networks* are “collections of individuals and teams who come together across organizational, spatial and disciplinary boundaries to invent and share a body of knowledge. The focus of such networks is usually on developing, distributing and applying knowledge.”⁴⁵ In the context of judicial education, a potential network could include judges of all types and levels, attorneys, and court staff. Depending upon the nature of the education, other knowledge network contributors could include law enforcement, litigants, jurors, witnesses, court watchers, treatment providers, probation officers, medical treatment professionals, and public agencies (e.g., child care and support, energy assistance, housing, transportation, food,

36. COMMW. MASS., SUP. JUD. CT., ANNUAL REPORT ON THE STATE OF THE MASSACHUSETTS COURT SYSTEM FY2013 4 (2014), available at <http://archives.lib.state.ma.us/handle/2452/208607>.

37. Annabelle Reitman & Sylvia Benatti, *Mentoring Versus Coaching: What’s the Difference?*, ASS’N FOR TALENT DEV. (Aug. 20, 2018), <https://www.td.org/insights/mentoring-versus-coaching-whats-the-difference> (last visited on Dec. 4, 2015).

38. See JUST. COACHING CENTER, <https://justicecoachingcenter.com/> (last visited Aug. 20, 2018).

39. COMMW. OF MASS., SUP. JUD. CT., *supra* note 36.

40. *Project ECHO*, U.N.M. SCH. OF MED., <https://echo.unm.edu/> (last visited Dec. 7, 2015).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. Katrina Pugh & Laurence Prusak, *Designing Effective Knowledge*

financial help, medical, educational and vocational training), among others.

EMPATHY FOR JUDGES

A symposium participant advocated teaching pain empathy to judges. Because many criminal defendants are responding to the pain of depression, drug withdrawal, abusive relationships, and other difficult life circumstances, judges should use empathy in their decision making. In this way, they can fashion the most appropriate sentence. Professor Rebecca Lee defines empathy as follows:

[T]he action of taking the perspective of another by conceptually placing oneself in another's position—to better understand what the other person is thinking and feeling. Empathy encourages both cognitive and emotional understanding of others with different experiences, identities, and worldviews. It entails attempting to better understand all sides to a dispute, with care taken to understand the side with less power and less similarity vis-à-vis the adjudicator, to ensure that all sides are given full consideration. Empathy matters for judging because judges must expressly and consciously take into account the full positions of the parties, from where the parties stand, to avoid making unconscious and biased judgments.⁴⁶

Professor Lee suggests that empathy is especially important in cases where the judges “are differently situated from the parties in terms of life opportunities and societal expectations.”⁴⁷

For example, if a criminal defendant faces the prospect of a jail sentence for the first time, it is a frightening proposition. That potential sentence causes tremendous anguish. However, if the defendant is a “frequent flier” (that is, he or she has been incarcerated on a number of occasions), the prospect of jail time doesn’t cause anguish because (1) the offender has learned to cope, and (2) the offender may have friends in jail.

Critics of this viewpoint suggest that empathetic judging is emotional and irrational judging, which will lead to favoritism for one side or another.⁴⁸ However, Professor Lee argues that “empathizing is necessary to deal with any unconscious bias that a judge may hold against the litigant she least identifies with.”⁴⁹ To maintain objectivity in adjudicating cases, judges must empathize with the parties to fully consider their views.⁵⁰

Teaching empathy is possible. In a research study involving resident physicians, researchers asked patients to rate physi-

cian empathy before they had been trained.⁵¹ The researchers educated half of the residents using a series of three training modules about the neurobiology and physiology of empathy and emotions.⁵² The other half received the usual residency training. Patients rated the trained residents significantly higher on providing compassionate care.⁵³ Most people believe empathy is an inborn trait that cannot be learned, but the researchers found that empathy can, in fact, be taught:

Residents learned to sit down, make meaningful eye contact, and listen better. Trained physicians also maintained professionalism and compassion even when patients were demanding or using manipulative tactics. They became more aware of the underlying vulnerability of their patients’ surface behaviors and more able to manage their own emotions.⁵⁴

Education for judges on empathy is likewise possible.

MOTIVATING ATTENDANCE AT EDUCATIONAL EVENTS

Symposium participants discussed the best ways to attract attendance at educational events, especially for those states where attendance is voluntary. They agreed that improving in-state educational events by utilizing adult education best practices was the best way to encourage attendance because learning is much more enjoyable. Some Symposium participants recommended allowing participants to “test-out” of courses, thereby ensuring they were only taking those courses that would be beneficial for them.

Symposium participants also encouraged judicial education organizations to award certificates for the mastery of subject matters. This would create an incentive-based system that would motivate many learners. In this model, state judicial educators would develop curricula that would take multiple years of annual conferences to complete with emphasis on different disciplines (e.g., criminal, civil, family, etc.), especially in those states where judges are assigned to specialized dockets as opposed to being general jurisdiction.⁵⁵ It’s possible that the state bar could provide incentives such as scholarships to attend national courses in support of the specialized discipline. Another motivator may be to encourage the judge to teach the subject matter that he or she has mastered. For those judges in elected states, the judge could potentially announce the attainment of the certification, which would likely assist in reelection.

For those suffering from burnout (which can result from

Networks, MITSLOAN, Fall 2013, available at <https://sloanreview.mit.edu/article/designing-effective-knowledge-networks/>.

46. Rebecca K. Lee, *Judging Judges: Empathy as the Litmus Test for Impartiality*, 82 U. CIN. L. REV. 145, 205 (2014) [hereinafter *Judging Judges*]. See also Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944 (2012); and Emily Jane Goodman, *The Importance of Judicial Empathy*, THE NATION (Aug. 5, 2013), <https://www.thenation.com/article/importance-judicial-empathy> (last visited on Aug. 20, 2018).

47. *Judging Judges*, *supra* note 46, at 205.

48. *Id.* at 147.

49. *Id.* at 149.

50. *Id.* at 148.

51. Helen Riess, *Can Empathy Be Taught?*, MEDSCAPE (Feb. 1, 2013), available at <https://www.medscape.com/viewarticle/778463>.

52. *Id.* at 1.

53. *Id.* at 2.

54. *Id.*

55. Some Symposium participants advocated the use of breakout sessions at annual conferences devoted to the different experience levels of judges (e.g., new, mid-career, and seasoned judges). Because of the resources necessary to accomplish this and because of audience size issues, only relatively large jurisdictions can accomplish this.

boredom due to years of experience, from judicial stress, or from vicarious trauma), some Symposium participants recommended the offering of esoteric classes and topics to reinvigorate those judges. Some examples at the national level include *Today's Justice: The Historical Basis of American Law*, *Judicial Philosophy and American Law*, *Ethical Issues in the Law: A Novel Approach*, *When Justice Fails: Threats to the independence of the Judiciary*, and *Current Issues in the Law*. Each of these National Judicial College courses allows judges to reexamine or get in touch with why they became judges in the first place. They are also offered in locations that are conducive to a more retreat-like experience.

CREATING A "CULTURE OF LEARNING"

Symposium participants suggested that judicial education providers would benefit from the creation of a "culture of learning." Private industry provides an excellent definition of a *learning culture*. It is a "set of organizational values, conventions, processes, and practices that encourage individuals – and the organization as a whole – to increase knowledge, competence, and performance."⁵⁶ In courts, not only do judges need education throughout their careers, but all court staff require education as well. Most state judicial education offices provide education and training for judges and court staff and are excellent at inculcating learning cultures.

Another way to describe a learning culture is to suggest the importance of lifelong learning. All professionals, especially judges, will only grow and provide excellent service to the justice system if they engage in lifelong learning. As academician Peter Jarvis writes, "learning underlies our humanity: humans learn because we are consciously alive and that our learning is not only cognitive but all that makes us human beings which is added to our bare animal existence is learned. In this sense, learning must be *life long*."⁵⁷

In a learning culture, Symposium participants commented that widening the knowledge field is important for all judges. That is, judges should not only be concerned with topics such as evidence, courtroom procedures, updates to statutory and case law, etc., they should also seek out education that addresses economics, history, medicine, sociology, psychology, and more esoteric topics that may not have immediate applicability. While new judges are most likely to appreciate information from judges, more experienced judges (e.g., intermediate to experienced judges) are more likely to want to receive education from other professionals because they have mastered the basic knowledge of the profession. Professionals who have taught at the National Judicial College include accountants, court administrators, law professors, lawyers, journalists, physicians, psychologists, psychiatrists, researchers, treatment providers, university professors, among other disciplines.

OPTIMUM CLASS LENGTH FOR RETAINING LEARNERS' ATTENTION

Symposium participants discussed methods of improving in-state educational events: Some judicial educators are reviewing their education practice of providing longer sessions (e.g., 1.5 to 2 hours) instead of one-hour sessions. Many SJE's utilize a format of 90-minute sessions, not because of improved attention, but because of the financial inability to provide refreshments during the breaks. Conversely, some SJE's recommend one hour maximum for sessions because of attention-span issues. Further, some report that their learners who are generally in their 50s or older report that more breaks are needed for physical reasons.

No researchers have conducted empirical studies to determine the best lengths of courses for older learners. Indeed, the vast majority of studies about learning and retention involve learners who are 18 to 22 years old (i.e., college age) or younger. Researchers in a study of college students reviewed the preferences of students between three class formats (i.e., 1 hour/three times a week, 1.5 hours/twice a week, or 3 hours/one time a week).⁵⁸ The researchers wanted to know which format was optimal "in terms of student (a) perspectives, (b) grades, and (c) evaluations of instructor performance."⁵⁹ They found that regardless of major, students preferred the twice a week, 1.5-hour format. "Student performance in the [three-hour] class format was the lowest, and student performance in the [one-hour] class format was found to be slightly better."⁶⁰

While researchers may be able to replicate this study for older learners, it's not likely they will find a measurable difference in retention rates between 1 and 1.5 hours of instruction. It's more likely that the *method* of instruction (e.g., using a variety of learning activities in addition to lecture) will be more significant than the amount of time in class.

DISCUSSIONS ABOUT CURRENT POLICIES AND PRACTICES

Symposium participants recommended that judicial educators engage participants in discussions about how judicial policies and practices in the judiciary can be improved. In other words, how can those in the judiciary improve case outcomes, fairness, perceptions of fairness, etc.? They also suggested the use of a problem-centric approach. Some Symposium participants recommended weaving ethics, bias, access to justice, and fairness issues into every topic taught. Also, one of the participants stated there are some subjects that require metacognition. The *Oxford English Dictionary* defines metacognition as "[a]wareness and understanding of one's own thought processes."⁶¹

56. *Seven Steps to Building a High-Impact Learning Culture*, ORACLE, <http://www.oracle.com/us/chro-docs/june-2013-chro-deck4-1961622.pdf> (last visited Aug. 20, 2018).

57. PETER JARVIS, *DEMOCRACY, LIFELONG LEARNING AND THE LEARNING SOCIETY: ACTIVE CITIZENSHIP IN A LATE MODERN AGE* 3 (2008) (emphasis added).

58. James Reardon, Janice Payan, Chip Miller & Joe Alexander, *Optimal Class Length in Marketing Undergraduate Classes: An Exami-*

nation of Preference, Instructor Evaluations, and Student Performance, 30 J. MARKETING EDUC. 12, 19 (Apr. 2008).

59. *Id.* at 12.

60. *Id.* at 19.

61. *Metacognition*, *Oxford English Dictionary*, <https://en.oxforddictionaries.com/definition/metacognition> (last visited Aug. 20, 2018).

The participant suggested that utilizing procedural fairness techniques would be considered a form of metacognition. Quoting psychology Professor Tom Tyler, Judges Kevin Burke and Steven Leben suggest four basic expectations that encompass procedural fairness:

1. **Voice:** the ability to participate in the case by expressing their viewpoint;
2. **Neutrality:** consistently applied legal principles, unbiased decision makers, and a “transparency” about how decisions are made;
3. **Respectful treatment:** individuals are treated with dignity and their rights are obviously protected;
4. **Trustworthy authorities:** authorities are benevolent, caring, and sincerely trying to help the litigants; this trust is garnered by listening to individuals and by explaining or justifying decisions that address the litigants’ needs.⁶²

The National Judicial College, for example, added procedural fairness as a topic in its two-week *General Jurisdiction*, a course for judges with zero to three years of experience. Likewise, the NJC includes the subject matter in its self-study, online course for judges who have been appointed or elected to the bench but not have yet taken the bench. Procedural fairness is a bedrock of the NJC’s judicial education programming for new judges.

SHOULD WE HAVE MANDATORY JUDICIAL EDUCATION?

The Symposium participants could not reach consensus on whether education and training for judges should be mandatory. Some believe mandatory education doesn’t really impact the 8 to 10% of judges who are educationally apathetic or have retired in place. Apathy makes education impossible. Further, no evidence exists that mandatory education improves outcomes or that it makes better judges. Mandatory education fills the room with a percentage of detractors who will lessen the experience for all.

Conversely, some believe having those judges participate is important even if they may be disruptive to the educational process. The apathetic judges can’t help but to gain something by the experience, even though the judges may deny it. From a public perception standpoint, the public deserves judges who are lifelong learners. Likewise, mandatory judicial education improves the public perception of the courts because the public feels it’s getting judges who continue to educate themselves. If there was no requirement that we pay taxes, would we? Nevertheless, we all know that paying taxes makes for a better society. Likewise, we should require judicial education because it makes the majority better. They argue the judges who most

need the education don’t come to it. If they continue to participate, they can’t help but be improved in the process.

A similar question involves mandating an *area* of judicial education such as ethics or fairness education. Many judges believe they have expertise in ethics and fairness education, so they don’t need it. However, they may be subject to the Dunning–Kruger effect. It holds that “poor performers are often not in a position to recognize the depths of their deficits, no matter how honestly, impartially, or eagerly they strive for accurate self-assessments.”⁶³ Requiring the education would alleviate the effect.

A Symposium participant postulated that how judges are treated may be part of the problem if education is not mandated. That is, no one has the ability to require judges (who truly need education) to go to judicial courses if it’s not mandated by statute or rule.

Conversely, one participant, who opposed mandating education, felt it would be possible to educate brand new judges about the importance of lifelong education so long as the new judges received that message within six months of appointment or election. Another thought that if supreme court justices improved their attitudes toward education or increased their attendance at educational events, it would improve the perceptions of lower-level court judges toward judicial education. Consequently, mandating education would not be necessary. Still another thought that if apathetic judges are part of the planning process, buy-in from those judges would be greater for attendance.

JUSTICE SYSTEM IMPROVEMENT PROJECTS

Researchers have defined occupational burnout as the “physical and emotional stress stemming from occupational factors.”⁶⁴ Burnout “may negatively affect a judge’s ability to consider relevant evidence.” Symposium participants noted that many judges experience burnout after years on the bench. “Anxiety stemming from occupational responsibilities can be remedied by an occasional break from work. Even an extra day off to engage in a favorite hobby can help a judge come back to the bench refreshed and relaxed. Longer-term sabbaticals should also be encouraged from time to time to allow judges to get away for a few weeks or months.”⁶⁵

In an effort to ensure state judiciaries don’t lose experienced jurists, the participants recommended a number of potential solutions. First, they suggested that the judge should be allowed to leave the work of day-to-day judging to engage in the development of a project that will improve the system in some way. Alternatively, the judge could write an article to impart gained wisdom.

Symposium participants felt freeing the judge for a period of time from the day-to-day work would be possible without legislative authority. To ensure the public’s support of the oppor-

62. Kevin Burke and Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 COURT REV. 4, 6 (2007–08) (citing TOM R. TYLER, WHY PEOPLE OBEY THE LAW 22–23 (2006)).

63. Oliver J. Sheldon, Daniel R. Ames & David Dunning, *Emotionally Unskilled, Unaware, and Uninterested in Learning More: Reactions to Feedback about Deficits in Emotional Intelligence*, 99 J. APPLIED

PSYCHOL. 125, 126 (2014).

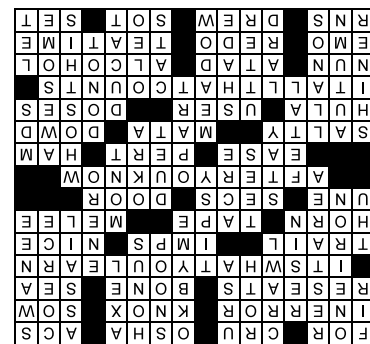
64. Jared Chamberlain & Monica K. Miller, *Evidence of Secondary Traumatic Stress, Safety Concerns, and Burnout Among a Homogeneous Group of Judges in a Single Jurisdiction*, 37 J. AM. ACAD. PSYCHIATRY LAW 214 (2009).

65. *Id.* at 221.



received a bachelor's degree from the University of Nevada, Reno and Juris Doctor from Willamette University College of Law. While in law school, he worked as an associate editor on the Willamette Law Review. He served as the National Association of State Judicial Educators' president in 2004-2005 and continues his involvement in the association. He is co-author and co-editor of numerous curricula and publications, including "Judicial Education: A Brief History, Trends, and Opportunities" (2016); "The National Judicial College's Approach to Distance Learning: Towards a Model of Best Practice" (2015); "Human Trafficking: What Judges Need to Know" (2013); "Immigration Consequences of Criminal 'Convictions'" (2010); "Resource Guide for Managing Complex Litigation" (2010); and "Presiding over a Capital Case: a Benchbook for Judges" (2009). He has educated faculty both nationally and internationally on adult education principles and practice (also known as train-the-trainer) and curriculum development. Mr. Brunson joined the faculty of The National Judicial College in 1997.

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The American Judges Association, with the assistance of Futures Without Violence, and the National Center for State Courts, is proud to provide this high quality, web-based, comprehensive domestic violence education for judges. Using adult-learning instruction tools and interactive exercises, separate training modules on key issues allow new and experienced judges to learn at their own pace from leading national experts they might not otherwise have the time, opportunity or funding to see. The AJA offers this timely, engaging and convenient resource at no cost to judges who want to apply this state of the art learning to make our communities safer.

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The checklist below can be found on <http://www.judicialfamilyinstitute.org>. The checklist suggests some ways to be thoughtful about your security, and the security of your family.

For further information about keeping yourself and your family members safe at home and online, see: <http://www.judicialfamilyinstitute.org/Topics-and-Programs/Security.aspx>.

Personal Security To-Do List

- ☐ Stay out of condition white-be situationally aware
- ☐ Communicate to staff, loved ones
- ☐ Report ANYTHING suspicious
- ☐ Demand feedback
- ☐ Lose the parochial thinking
- ☐ Listen to intuition and act upon it



- ☐ Manage social media accounts
- ☐ Practice what-if scenarios
- ☐ Change travel and personal routines
- ☐ Opt-out of online info
- ☐ Use a private mailbox
- ☐ Restrict chambers access (be mindful of pics)
- ☐ Don't start the dignity domino
- ☐ Remove personally identifiable info from social media
- ☐ Park in secured/anonymous locations
- ☐ Increase lighting around home
- ☐ Find the safe havens along travel routes
- ☐ Create a safe word (with family & staff)
- ☐ Install (and use) a home security system
- ☐ Fencing & gates
- ☐ Install an early warning system
- ☐ Get a dog
- ☐ Don't forget the milk and eggs

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Easing the Road to Civil Justice:

Improving Litigants' Awareness of ADR Options

Donna Shestowsky

In an overburdened justice system, litigants often wade through years of court proceedings and incur significant expenses as they seek civil justice. In many instances, alternative dispute resolution (ADR) procedures can offer litigants relief from the expense and waiting time associated with trial. In addition, compared to trials, ADR options often allow litigants to resolve their disputes in ways that better meet their objectives. For example, ADR permits litigants to set aside the rule of law in the interest of shared goals or industry norms. Further, court-sponsored ADR can increase the efficiency of the judicial system. When litigants are satisfied with their dispute resolution experience, they are more likely to voluntarily comply with the outcome.¹ This compliance can mean fewer breach-of-contract claims stemming from settlement agreements and fewer appeals. However, court ADR programs cannot realize these benefits if litigants are unaware of their existence. To assess litigant awareness of court ADR offerings, I conducted a survey study of litigants across three state courts. I review the rather sobering findings, and then discuss specific actions that courts and lawyers can take to improve litigants' awareness of such programs.

METHODOLOGY

My research team and I collected data from 336 litigants eligible for their court's mediation and arbitration programs to determine whether they were aware of these offerings. Litigants were surveyed by phone within three weeks of their cases being closed. Participants were selected from three state courts: the Third Judicial District Court, Salt Lake City, Utah; the Superior Court of California, County of Solano; and the Fourth Judicial District, Multnomah County, Oregon. These courts were chosen because they offer *both* mediation and non-binding arbitration (in addition to trial) for the same causes of action. Only cases eligible for both procedures were eligible for the study. The resulting sample includes litigants involved in a wide range of cases, including property, personal injury, contracts, and medical malpractice.

We asked litigants to rate their impression of their court ("On a scale from 1 to 9 where 1 = extremely negative, 9 = extremely positive, and 5 = right in the middle, neutral, what is your impression of the court where this case was filed?"). Litigants also listed the procedures that they or their lawyer had considered using for their case ("Before you started thinking about what procedure was best for your case, you or your lawyer probably thought about all the possible ways that could resolve your case. What are all the procedures you or your lawyer considered?"). In addition, we asked whether their court offered a mediation or arbitration program. We classified

responses as "yes," "no," or "don't know." For all participants, the correct response to both questions was "yes."

Using information collected from the surveys, we categorized litigants based on both representation status and repeat experience with litigation. Specifically, litigants were classified as (1) "represented" if they had a lawyer or were themselves a lawyer or "unrepresented" if they did not have a lawyer and were not themselves a lawyer, and (2) "repeat player" if they had been a plaintiff or defendant in a prior case or "first-time litigant" if they had no past experience as a party.

MAIN FINDINGS

The survey data revealed several novel and surprising results:

- Only about 25% of litigants were aware of their court's mediation program and only about 27% were aware of their court's arbitration program. See Figures 1 and 2.

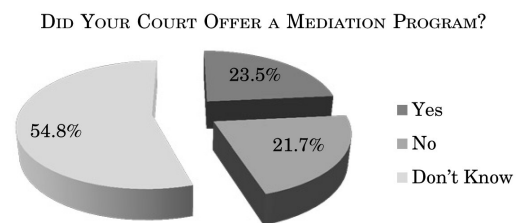


Figure 1. Litigant Awareness of Court-Sponsored Mediation
Note: N = 221.

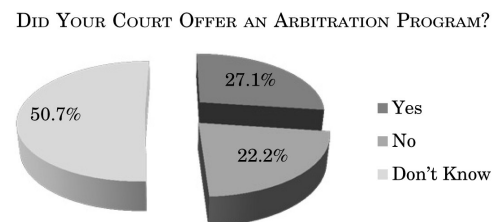


Figure 2. Litigant Awareness of Court-Sponsored Arbitration
Note: N = 221.

- Only 15% of participants identified both programs at their court.
- Represented litigants were no more likely than unrepresented parties to correctly identify their court's programs.
- Litigants who knew their court offered mediation were more likely to think highly of their court. However, this was not the case for arbitration.
- Compared to first-time litigants, repeat players were less likely to exhibit confusion about whether their court

Footnotes

1. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 82 (2d ed. 2006).

offered mediation (the ratio of “don’t know” to “yes” replies was 2.2 times higher among first-timers than among repeat players) and arbitration (the ratio was 2.53 higher among first-timers than among repeat players).

- Less than one-third of litigants reported that they or their lawyer had considered using mediation or arbitration. Negotiation was the most commonly contemplated procedure, followed by trial. The judicial settlement conference was the procedure least likely to be considered. Nearly 16% indicated that they had contemplated “other” courses of action, most typically filing a countersuit or bankruptcy.
- Litigants who knew their court offered mediation were not more likely to consider using mediation than those who thought it did not. In contrast, litigants who knew their court offered arbitration were 2.6 times more likely to consider using that procedure than those who were unaware of this possibility, suggesting that the court’s stamp of approval boosted the odds that litigants would consider arbitration.

Additional research should explore why litigants are unable to identify their courts’ ADR offerings. The level of unawareness we observed may be the result of litigants never learning about their courts’ programs. Research on memory offers another possible explanation: Litigants may have received material about their court’s ADR offerings but been unable to recall this information at the time of the survey, which they completed after the conclusion of their cases. Studies have shown that mere exposure to information is not enough to guarantee learning.² To learn and retain information, people often need to engage in a deep form of processing called “elaboration.” Elaboration involves associating new information with knowledge already recorded in long-term memory, thus incorporating the new information into a broader familiar narrative.³ If litigants heard about mediation or arbitration in passing and had superficial conversations (not tailored to their situation) about the procedures with their lawyers, the information may not have been committed to long-term memory.

IMPROVING LITIGANT AWARENESS OF COURT ADR

Regardless of the reasons for their lack of awareness, when litigants do not know their options, they cannot make informed decisions about how to resolve their disputes. Our findings suggest several ways that both courts and attorneys can better educate litigants about available procedures. The following sections outline several possibilities.

RECOMMENDATIONS FOR COURTS

1. Courts can institute rules that require attorneys to discuss ADR with their clients.⁴ Ideally, these rules would encourage lawyers to start these discussions early in the litigation process and revisit them at various points as a case develops. Because prior research suggests that rules requiring lawyers to discuss ADR with their clients are not always effective,⁵ courts should implement additional measures to ensure the enforcement of these rules. For example, they could require both attorneys *and* litigants to sign a disclosure form indicating that the attorney has reviewed both private and court-sponsored ADR options for the case. Some courts, such as the U.S. District Court for the Northern District of California, already do this. Courts could also impose penalties on attorneys who do not comply with the rules.
2. Courts can directly provide litigant education by giving litigants educational materials about their programs (and ADR in general), without expecting lawyers to act as intermediaries. Courts could reap benefits from this course of action: we found that litigants who were aware that their courts offered mediation had more favorable impressions of the court.
3. Courts can create attorney-staffed help desks to answer questions about ADR procedures.⁶
4. Courts can hold periodic in-person, judge-facilitated ADR informational meetings. Having authority figures such as judges hold these sessions may make litigants and lawyers more willing to fully consider the information.⁷
5. Courts should remind litigants about their ADR options at several points in time while their cases are pending. Psychological research suggests that reminders that are salient to the particular litigant are likely to be particularly effective education tools. For example, litigants might be more likely to remember information about ADR if they are reminded about their options after they lose a Motion for Summary Judgement.
6. Some courts already use exit surveys to assess litigant satisfaction with ADR procedures after litigants have used them. Courts should also survey parties who did not use these programs, to learn why. To the extent that litigants are aware of these programs but do not use them, courts should explore how they can make their programs more appealing and dismantle any institutional or systemic barriers. If courts discover (as we did) that many litigants are not aware of their programs, they should obtain feedback from litigants (and lawyers) to determine how to better advertise them.

Although these measures may seem like extra work for a

2. See JOHN R. ANDERSON, *LEARNING AND MEMORY: AN INTEGRATED APPROACH* 161-63; 204-10 (1st ed., 1995); DAVID G. MYERS, *PSYCHOLOGY* 345-46 (7th ed. 2004).

3. ANDERSON, *supra* note 2 at 204-10 (1995) (outlining how deep processing can be achieved by placing the material into context for the person trying to learn the material, relating it to material that the person already knows, and helping the person understand why the material is personally relevant).

4. Donna Shestowsky, *When Ignorance Is Not Bliss: An Empirical Study of Litigants’ Awareness of Court-Sponsored Alternative Dispute Reso-*

lution Programs, 22 HARV. NEGOT. L. REV. 224-225, 234-235 (2017).

5. See, e.g., Bobbi McAadoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. 473 (2002).

6. Jerome B. Simandle, *Enhancing Access to ADR for Unrepresented Litigants: Federal Court Programs Provide Models for Helping Pro Se Parties — and the Justice System*, DISP. RESOL. MAG., Spring 2016 at 7, 8.

7. Shestowsky, *supra* note 4, at 227.

system designed in part to lighten the workload of the courts, our research suggests notable benefits. First, these efforts might encourage litigants to consider using programs in which courts have already invested, which might ease overburdened court dockets. Second, such efforts may improve litigants' impressions of the court. Third, to the extent that, for some litigants, access to ADR is the only reasonable pathway to justice, improved awareness of these alternatives to trial is paramount. Although the changes I recommend for courts are important, attorneys also have a crucial role to play in increasing awareness of ADR procedures.

RECOMMENDATIONS FOR ATTORNEYS

1. Lawyers should be better educated about ADR. Roselle Wissler found that one major impediment to lawyer-client conversations about ADR is attorneys' lack of knowledge about such procedures.⁸ To rectify this situation, skills-based education focused on ADR procedures should be a mandatory part of law school, and attorneys should further hone their advocacy skills in ADR contexts through CLE programs.
2. Lawyers should receive training on how to counsel clients about ADR in ways that will facilitate the retention of information over time. To promote elaboration and memory recall, lawyers should emphasize how the advantages and disadvantages of ADR procedures relate to litigants' goals and values. Further, lawyers should ensure that clients know they have the power to participate in decisions regarding which dispute resolution procedure will be used (limited by any court rules and the need for consent from the other party).
3. Even if not required by local rules or the applicable rules of professional responsibility, attorneys should educate clients about ADR in every case that might include litigation. Lawyers should help them review their options *after* learning about their clients' priorities and values, to avoid inadvertently injecting their own priorities and values into the decision-making process.⁹ Ideally, lawyers would provide clients with detailed and personalized information on how ADR options would impact them. This suggestion is supported by analogy to medical studies showing that patients are more knowledgeable and more likely to make decisions consistent with their preferences, values, and goals when they use decision aids, such as interactive tools, to help them make treatment choices.¹⁰

CONCLUSION

Many courts, including the ones in this study, provide information about their ADR programs online. However, our results suggest that offering general education via the Internet is insufficient to ensure litigant awareness of court-sponsored ADR programs. Moreover, this method of providing information tends to disadvantage vulnerable populations that are less likely to have access to the Internet, including low-income individuals, those with disabilities, and the elderly.¹¹ Therefore, courts should consider playing a more active role in litigant education. Their efforts should involve requiring lawyers to educate their clients, but also incorporate practices that do not assume that lawyers will act as intermediaries. Such changes would benefit both unrepresented and represented parties.

In addition to implementing changes at the court level, more needs to be done regarding attorney education. Lawyers should be able to adequately educate their clients about ADR. Attorneys must have a concrete understanding of the advantages and disadvantages of specific procedures in a variety of contexts so they can effectively counsel clients, tailoring their advice to their client's goals and values. When litigants are adequately informed about their options and thus can have a meaningful influence on the trajectory of their dispute's resolution, courts should become more efficient and litigants should find the road to civil justice easier to travel.



Donna Shestowsky, J.D., Ph.D. is a Professor of Law, Martin Luther King Jr. Research Scholar, and Director of the Lawyering Skills Education Program at the University of California, Davis, School of Law. She is also Affiliated Faculty of the Department of Psychology at UC Davis. She can be reached at dshest@ucdavis.edu. This article was adapted from Donna Shestowsky, When

Ignorance Is Not Bliss: An Empirical Study of Litigants' Awareness of Court-Sponsored Alternative Dispute Resolution Programs, 22 HARV. NEGOT. L. REV. 189 (2017), available at <https://ssrn.com/abstract=2945706>. This material is based upon work supported by the National Science Foundation under Grant Number 0920995. Funding from the Norm Brand '75 & Nancy Spero ADR Research Fund also contributed to this article.

8. Roselle L. Wissler, *Barriers to Attorneys' Discussion and Use of ADR*, 19 OHIO STATE J. DISP. RESOL. 459, 480-81 (2004). Other barriers to lawyer-client discussions might be harder to mitigate. For example, lawyers might be more reluctant to discuss ADR when they overestimate a trial win, or underestimate the chances of early settlement, or face financial incentives to prolong discovery and head to trial. *Id.* at 466-67. See Nancy H. Rogers & Craig A. McEwan, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. DISP. RESOL. 831, 846-47 (1998); Roselle L. Wissler, *When Does Familiarity Breed Content? A Study of the Role of Different Forms of ADR Education and Experience in Attorneys' ADR Recommendations*, 2 PEPP. DISP. RESOL. L. J. 199, 208 (2002).
9. Donna Shestowsky, *Inside the Mind of the Client: An Analysis of Lit-*

igants' Decision Criteria for Choosing Procedures. CONFLICT RESOL. Q. 1-19 (2018). <https://doi.org/10.1002/crq.21228>.

10. Gil Siegal, Richard J. Bonnie & Paul S. Appelbaum, *Personalized Disclosure by Information-on-Demand: Attending to Patients' Needs in the Informed Consent Process*, 40 J. L. MED & ETHICS 359 (2012); Erica S. Spatz, Harlan M. Krumholz & Benjamin W. Moulton, *Prime Time for Shared Decision Making*, 317 (13) JAMA 1309, 1309-1310 (2017).
11. See Andrew Perrin & Maeve Duggan, *Americans' Internet Access: 2000-15*, PEW RES. CTR. 2-3 (June 26, 2015), http://pewinternet.org/files/2015/06/2015-06-26_internet-usage-across-demographics-discover_FINAL.pdf (last accessed Sept. 5, 2018).

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BRAIN CAPACITY by Judge Victor Fleming

Across

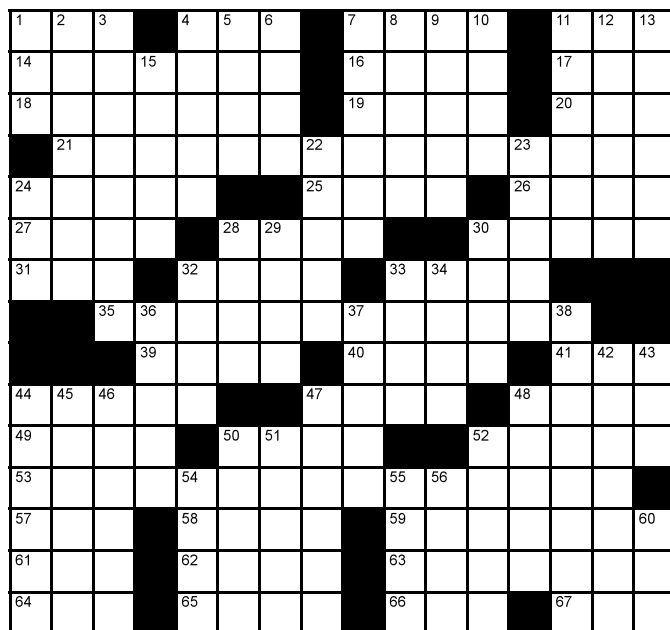
- 1 Planning to vote "yea" on
 4 Vineyard, in Caen
 7 Workers' safety org.
 11 Coolers in cars, briefly
 14 Wide of the mark
 16 Fort attacked by Goldfinger
 17 Do seedy work?
 18 Ushers to another row
 19 Rib, for one
 20 Word after Dead or Red
 21 Start of a quotation by John Wooden
 24 Have fewer points than
 25 Troublesome tykes
 26 French Riviera city
 27 Honker
 28 Sticky strip
 30 More than a scuffle
 31 One in 26-Across
 32 Clock ticks, for short
 33 Entrance feature
 35 Part 2 of the quotation
 39 Freedom from care
 40 Cheeky
 41 Sibling of Japheth and Shem
 44 Like teardrops
 47 ___ Hari
 48 Columnist Maureen
 49 Maui entertainment
 50 Manual reader, say
 52 B12 quantities
 53 End of the quotation
 57 Sister or mother, maybe
 58 Not much, but some

59 Hooch

- 61 Philips of comedy
 62 Change the wallpaper, perhaps
 63 4:00 p.m. in London, perhaps
 64 Hosp. workers
 65 Was in a no-win situation?
 66 One who's sloshed
 67 Soap opera workplace

Down

- 1 Christmas tree choice
 2 Golfer's cleek
 3 Tourist's stop
 4 Swimming stroke
 5 "Portnoy's Complaint" author
 6 Bear of the skies
 7 "No problem here"
 8 Jessica Fletcher, for one
 9 Wagner of baseball
 10 Jump on ice
 11 Attack with vigor
 12 Twist one's arm
 13 Al Jolson favorite
 15 Violin varnish
 22 Slightly sloshed
 23 First month, to Felipe
 24 Appointment book abbr.
 28 Titleist supporters
 29 Plot element?
 30 Wyo. neighbor
 32 Reprieve from the governor, say
 33 "Up Where We Belong," for one
 34 Creole vegetable
 36 Pre-natal
 37 Eye-teasing images



- 38 Query from one looking at a family album
 42 "Wow!"
 43 Hosp. workers
 44 Punch souvenir
 45 Leaves time?
 46 South American treeless plains
 47 Grassy field
 48 Start of a warning
 50 "That's ___ nonsense!"
 51 Window cover

- 52 Old gold coin
 54 Hog fat
 55 Musical based on a T.S. Eliot book
 56 Kitchen spread
 60 Permitted

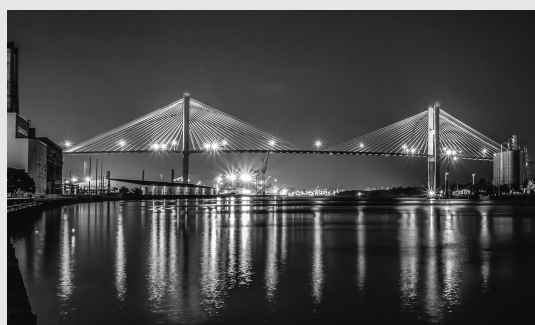
Vic Fleming is a district judge in Little Rock, Arkansas.

Answers are found on page 140.

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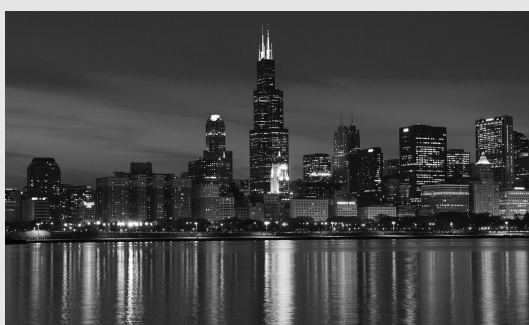
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The Resource Page



PUBLICATIONS

RAYMOND J. MCKOSKI, *JUDGES IN STREET CLOTHES: ACTING ETHICALLY OFF-THE-BENCH* (Fairleigh Dickinson University Press, 2017). 265 pp. (\$110). www.fdupress.org.

The ABA Model Code of Judicial Conduct fairly well defines ethical conduct while on the bench. This heavily footnoted book by retired Judge Raymond McKoski explores judicial ethics issues in a myriad of less clear off-the-bench activities. Some examples: Is it permissible for a judge to be the concession stand cashier at her child's basketball game? (pages 178-179, fns. 654-667). Does it violate the Code to meet with three Rotary Club members in chambers to discuss where to hold the Club's meetings next year? (page 70, footnotes 127-129). What is the important difference between using a courthouse phone to ask my spouse what groceries to pick up for dinner and using the same phone to ask what groceries to pick up for dinner if my law clerk joins us? (pages 198-200, fns. 783-796).

After 25 years on the Illinois bench, Judge McKoski (who now is an adjunct professor at John Marshall Law School) adds this volume to his law review and journal publications. Like his other works, this one is eminently readable. There are hundreds of examples of ethical conundrums in this well organized, rule-by-rule exposition of (sometimes conflicting) appellate cases, disciplinary decisions, and state and federal ethics advisory board opinions. A particularly interesting aspect of the book is how Professor McKoski traces the individual Rules from the original 1924 ABA Canons of Judicial Ethics through the 1972, 1990, and 2007 ABA Model Rules of Judicial conduct. Tracing the changes and the reasoning behind them is especially valuable in analyzing earlier ethics opinions, which may no longer apply in light of a subtly changed Rule.

The constitutional tension between First Amendment freedoms and govern-

ment restrictions on judges' activities is addressed all through the book. The early chapters identify state interests in restricting speech, association, and other off-the-bench conduct. The following chapters consider specific applications of individual rules and the constitutional justification for their limitations on judicial conduct. After immersing the reader in the details of each Rule and fact-intensive ethics rulings, the final chapter (pages 201-229, fns. 1-199) contains brave predictions about which Rules likely will withstand constitutional scrutiny.

TRENDS IN STATE COURTS 2018, National Center for State Courts, www.ncsc.org/trends.

This annual collection of articles provides a host of ideas and inspiration for state court judges. The lead article, New York State's Opioid Intervention Court by the Honorable Jane DiFiore, Chief Judge of the New York Court of Appeals, was particularly interesting and timely. In it, Judge Fiore outlines the process by which the Buffalo City Court takes addicts at risk of an overdose who consent to participation out of the jail and into treatment within 48 hours. In the first phase of the process, those who receive outpatient treatment or are released from inpatient treatment go through a 12-week stabilization and intensive monitoring process with daily testing. During this time, defense counsel and the prosecutor investigate the case and negotiate. Even if defendants do not progress to phase two, a drug court program, they benefit from participating in treatment and going through withdrawal in a safe, controlled manner. The program is made possible by an agreement from the District Attorney to suspend prosecution for those undergoing treatment. Started in May 1, 2017, the program currently handles 45 to 60 people at a time and is on its way to doubling its original goal of 200 participants per year. Only one person among the first 204 participants died from an overdose. The volume also includes a report from Florida about a new type of problem-solving court focusing on infants

and toddlers and on the court response to human trafficking, a discussion of "peacemaking programs," and a look at the evolving relationship between state courts and immigration authorities.



PODCASTS

Ear Hustle, Hosted and Produced by Nigel Poor and Earlonne Woods, www.earhustlesq.com.

This podcast, now in its third season, is hosted by an inmate at San Quentin State Prison in California, and a Bay Area visual artist. The voices of the inmates take the listener inside the prison with stories that are funny, brutally honest, and deeply human. This is a beautifully crafted podcast that has something to teach judges and anybody else who cares about our incarcerated citizens.

More Perfect, Hosted by Jad Abumrad <https://www.wnycstudios.org/shows/radiolabmoreperfect/>.

This podcast, a spinoff of the brilliant RadioLab, offers an in-depth look at the U.S. Supreme Court, uncovering the stories behind some of the Court's most famous decisions and taking a hard—and, at times, humorous—look at the way the Court works both internally and as the highest level of the third branch of the federal government. It has covered such topics as *Batson* (a fascinating tale), the Court's surprising early years, the death penalty, *Baker v. Carr*, the Commerce Clause, and interruptions during oral argument.

Criminal, Hosted by Phoebe Judge, <https://thisiscriminal.com>.

This podcast considers crime from every angle—historical, anthropological, sociological, medical—with top-notch writing and sound design. The stories range from famous crimes and unsolved mysteries to the nitty gritty of forensics and how trauma doctors handle shooting victims.